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

APRIL — MAY, 1916

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This is a Key-Numbered Volume

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

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

GENERAL ORDER IN BANKRUPTCY

SUPREME COURT OF THE UNITED STATES [1]

October Term, 1915.

It is ordered that General Order in Bankruptcy No. 21 be amended so as to read as follows:

XXI.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer; if the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending, the deposition may be made by some officer or agent of the corporation having knowledge of the facts. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

(Promulgated November 1, 1915.)

[1] For other orders, see 18 S. Ct. iii, 89 Fed. iii, 32 C. C. A. iii.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

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

SECOND CIRCUIT

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

THIRD CIRCUIT

Hon. MAHLON PITNEY, Circuit Justice.....Washington, D. C.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburg, Pa.
Hon. JOHN B. McPHERSON, Circuit Judge.....Philadelphia, Pa.
Hon. VICTOR B. WOOLLEY, Circuit Judge.....Wilmington, Del.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. JOHN RELLSTAB, District Judge, New Jersey.....Trenton, N. J.
Hon. THOS. G. HAIGHT, District Judge, New Jersey.....Jersey City, N. J.
Hon. J. WARREN DAVIS, District Judge, New Jersey[1].....Trenton, N. J.
Hon. J. WHITAKER THOMPSON, District Judge, E. D. Pennsylvania...Philadelphia, Pa.
Hon. OLIVER B. DICKINSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania.....Sunbury, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.
Hon. W. H. SEWARD THOMSON, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.

[1] Appointed May 15, 1916.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. MARTIN A. KNAPP, Circuit Judge.....Washington, D. C.
Hon. CHAS. A. WOODS, Circuit Judge.....Marion, S. C.
Hon. JOHN C. ROSE, District Judge, Maryland.....Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. D. S. C.....Charleston, S. C.
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Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
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FIFTH CIRCUIT

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

SIXTH CIRCUIT

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

SEVENTH CIRCUIT

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

[2] Died January 2, 1916.

Hon. SAMUEL ALSCHULER, Circuit Judge ..... Chicago, Ill.
Hon. EVAN A. EVANS, Circuit Judge[3] ..... Baraboo, Wis.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois ..... Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois ..... Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois ..... Urbana, Ill.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois ..... Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana ..... Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin ..... Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin ..... Madison, Wis.

EIGHTH CIRCUIT

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

NINTH CIRCUIT

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

[3] Appointed May 10, 1916.

[4] Appointed April 3, 1916.

CASES REPORTED

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

UNITED STATES v. OLIPHANT et al. (three cases).

OLIPHANT et al. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Third Circuit. February 15, 1916.)

Nos. 2029–2033.

1. CLERKS OF COURTS ⟸61—ACCOUNTING AS TO FEES—"EMOLUMENTS"—"SERVICE CONNECTED WITH THE CLERK'S OFFICE."

Rev. St. § 839 (Comp. St. 1913, § 1404), provides that no clerk of a District or Circuit Court shall be allowed to retain of the fees or emoluments of his office for his personal compensation a sum exceeding $3,500 a year. Section 833 (Comp. St. 1913, § 1394) requires every such clerk semiannually to make to the Attorney General a written return of all fees and emoluments of his office, and Act June 28, 1902, c. 1301, 32 Stat. 475 (Comp. St. 1913, § 1398), similarly provides, and further provides that "emoluments" shall be understood as including all amounts received in connection with certain matters and all other amounts received for "services in any way connected with the clerk's office." Section 918 (Comp. St. 1913, § 1544) authorizes Circuit and District Courts to make rules and orders to govern their procedure, and otherwise regulate their practice. Thereunder a Circuit Court adopted a rule requiring the record in suits in equity and on demurrers and rules to show cause to be printed under the supervision of the clerk, upon payment by the parties of the estimated cost, and providing that the costs for printing should be taxed against the losing party. *Held* that, where the clerk charged litigants for printing an amount in excess of the amount paid by him for the printing, the amount so received by him was for services connected in a way with the clerk's office, and should have been reported and paid to the government, as the rule had the force of law and demanded of the clerk a service in connection with that part of the court's business peculiarly related to his office.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. ⟸61.

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

2. CLERKS OF COURTS ⟸67—DUTIES—POWER OF COURT TO IMPOSE DUTIES.

Under Rev. St. § 918 (Comp. St. 1913, § 1544), authorizing District and Circuit Courts to make rules and orders to govern their procedure and regulate their own practice, a Circuit Court had power to require the clerk of such court to supervise the printing of the record in suits in equity and on demurrers and orders to show cause.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 101–108; Dec. Dig. ⟸67.]

3. CLERKS OF COURTS ⊂⊃61—ACCOUNTING AS TO FEES—ACTIONS TO RECOVER FEES.

Where the clerk of a Circuit Court charged litigants for having the record in equity cases and on demurrers and orders to show cause printed under his supervision an amount in excess of that paid by him for the printing, retaining the difference, and these printing transactions were privately conducted and nowhere appeared in the office records and reports to the Attorney General of the fees and emoluments of the clerk's office, the failure of the government for 17 years to discover such practice and to demand reports and payments of such emoluments did not preclude a recovery thereof, on the theory that there was an account stated between the clerk and the government.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. ⊂⊃61.]

4. CLERKS OF COURTS ⊂⊃61—ACCOUNTING AS TO FEES—ACTIONS TO RECOVER FEES.

Where the clerk of a Circuit Court failed to account to the government for fees collected for services in connection with certified transcripts of records transmitted to the Circuit Court of Appeals, and in the docket records of such cases entries were made showing that transcripts had been forwarded to the court, but failing to show that fees had been charged or collected therefor, and such accounts were examined and passed by the officials of the Department of Justice, the failure of the department to discover that the fees were being withheld did not amount to an approval of the clerk's retention of the fees or to an account stated, defeating a recovery of such fees by the government.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. ⊂⊃61.]

5. CLERKS OF COURTS ⊂⊃61—ACCOUNTING AS TO FEES.

Rev. St. § 828 (Comp. St. 1913, § 1383), prescribing the fees of clerks of the District and Circuit Courts, prescribes a fee of 10 cents a folio for making a copy of any entry or record. Sections 833, 839, and 844 (Comp. St. 1913, §§ 1394, 1404, 1414) require such clerks to make reports of the fees and emoluments of their office, and forbid the retention by them of an amount exceeding their salary. Under a rule of a Circuit Court requiring the records in equity cases and on demurrers and rules to show cause to be printed under the clerk's supervision, the clerk made a practice of procuring and retaining extra copies of the record as so printed and using one of them for the transcript of the record returned to the Circuit Court of Appeals, and claimed the right to retain the fees received from litigants for making such transcripts, on the theory that he owned the copies of the record used and could sell them and keep the proceeds. *Held*, that it was his duty to demand and collect fees at the rate prescribed by statute, and to report and pay such fees to the government.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. ⊂⊃61.]

6. CLERKS OF COURTS ⊂⊃52—FEES—STATUTORY PROVISIONS—"RETURN."

Rev. St. § 828 (Comp. St. 1913, § 1383), prescribing the fees of clerks of Circuit and District Courts, prescribes a fee of 15 cents a folio for entering any rule, etc., or making any record, certificate, return, or report, and a fee of 10 cents a folio for making a copy of any entry or record or any paper on file. Rule 14, par. 2, of the Circuit Court of Appeals for the Third Circuit (90 Fed. clv, 31 C. C. A. clv) requires the clerk of the court to which any writ of error may be directed or from which an appeal may be taken, upon payment or tender of the fees therefor, to make a return thereof by transmitting a true copy of the record, bill of exceptions, etc. *Held*, that the proper fee for a certified transcript of the record on appeal or writ of error is 10 cents a folio, since the acts for which the higher fee is prescribed are original acts, deriving their origin from no previous record, and requiring original thought and judgment to make it conform precisely to the things done or ordered, while the

originality, discretion, or judgment connected with the making of a certified transcript of the record is restricted to the selection of the parts of the record required by the rules to be transcribed, and responsibility in copying such parts is limited to accuracy, and, while the rule designates the transcript a "return," the return is to be made by transmitting a true copy of the record.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 78, 79; Dec. Dig. ⊂⊃52.

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

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

Three actions by the United States against Henry D. Oliphant and others. In the first two actions judgment was rendered for the government for an insufficient amount, and each party brings error. In the third action judgment was rendered for the defendants, and the United States brings error. Reversed, and new trials ordered.

J. Warren Davis, U. S. Atty., and Joseph L. Bodine, Asst. U. S. Atty., both of Trenton, N. J.

Alan Strong, of Philadelphia, Pa., for defendants.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The questions in these cases arose out of the failure of the clerk of the Circuit Court of the United States for the District of New Jersey to report and pay to the government certain moneys, which he had collected through a long term of years for work done in connection with printing records for use in the Circuit Court and transmitting records for use in the Circuit Court of Appeals. These questions raise two inquiries, first, whether the work done in connection with printing records was a service connected with the office of the clerk, the fees or emoluments for which were payable to the government; and second, whether the clerk's charges for certified transcripts were made at the rate prescribed by statute.

The conduct out of which grew these questions was this: The principal defendant was sub-clerk and deputy clerk of the Circuit Court of the United States for the District of New Jersey from 1875 to 1904, and was clerk of that court from 1904 to 1912, when the court was abolished. When he became clerk, he continued a practice, which, according to the testimony, had theretofore existed, if not with the approval, then with the acquiescence and knowledge of several judges. Under this practice he charged litigants for printed copies of records in equity cases, for use in the Circuit Court, at the rate of $1.50 a page, paid for printing the same at the rate of $1.00 a page, and kept the difference. He omitted to make office entries of such transactions, and failed to include them in his emolument accounts and in his periodical reports to the government. For certified transcripts of records transmitted to the appellate court of the circuit, the defendant clerk made charges at the rate of 10 cents a folio. He likewise omitted to include these fees in his office records and emolument accounts, (though

noting therein the issuance of the transcripts) failed to report them to the government, and retained them for his own use.

The conduct of the clerk with respect to these matters had its origin in a rule of the Circuit Court, first promulgated in 1893 and with few changes again promulgated in 1898. This rule is as follows:

"Rule for Printing.

"1. In *all suits in equity,* the record and all proceedings in the cause shall be printed *under the supervision of the Clerk,* before final hearing.

"2. *All pleadings on demurrer,* and the *state of the case on rules to show cause* at common law, shall be printed *under the supervision of the Clerk* before the argument, if the record thereof shall exceed thirty folios.

"3. *The Clerk shall cause an estimate* to be made of the *cost* of printing record, and shall notify the party complainant (or plaintiff) of the amount of the estimate for printing the said record and proceedings on his behalf, and the defendant of the amount for printing the record and proceedings on his behalf *and upon payment* of the amount *the Clerk shall cause the record to be printed.*

"4. Upon failure of either party to pay the amount estimated for printing, within a reasonable time, such proofs of the delinquent party will not be considered at the hearing, unless otherwise ordered by the Court.

"5. The amount of the *costs for printing* the record *shall be taxed* against the party against whom costs are given."

Three actions at law were instituted by the United States on the three bonds of the clerk. The defendant, Henry D. Oliphant, is the principal in each of the bonds; the other defendants are the sureties. The actions are conveniently referred to as first, second and third, having reference to the succession of the respective periods covered by the bonds. They were tried together, and, upon review, were heard together.

In the *first suit,* the government made two demands, covering the period of the first bond:

(a) For the moneys collected above the cost of printing records for use in the Circuit Court, representing fees or emoluments charged by the clerk for services rendered in supervising printing,—referred to throughout the case as "printing"; and

(b) For fees or emoluments collected by the clerk for services rendered in connection with certified transcripts of records of the Circuit Court, transmitted on appeal or writ of error to the United States Circuit Court of Appeals for the Third Circuit,—referred to throughout the case as "transcripts."

The defendant clerk admitted the acts upon which these claims were based, but justified them by his interpretation of the rule, and, as he claimed, by the contemporaneous interpretation given it by long continued practice and judicial and departmental acquiescence and approval.

The trial court submitted to the jury the question, whether the work done in supervising printing constituted services performed by the clerk in connection with the duties of his office or constituted something else, accompanying the submission with appropriate instructions that, if found to be services, the verdict should be for the government, and if not, then for the defendants.

Upon the claim for moneys collected for transcripts, the court

directed a verdict for the government for an amount based upon a charge of 10 cents a folio, stating, as a matter of law, that to be the rate prescribed by the statute for such a service.

The jury found that the work done in connection with "printing" did not constitute services, and returned a verdict for the government only for the moneys collected for "transcripts," which, together with interest, amounted to the sum of $6,224.56. Each party sued out a writ of error.

In the *second suit,* the government made two similar demands, covering another period, resulting in like rulings by the court, a like finding by the jury, and a verdict for the government for $3,582.90. Each party prosecuted a writ of error.

In the *third suit,* the government made but one demand. This related to fees collected for printing during the third period. Upon this demand the court submitted the same question as it submitted upon like demands in the other suits. The jury made a like finding and rendered a verdict for the defendants. In this case the government alone sued out a writ of error.

The questions raised upon the writs of error, prosecuted by both parties, are susceptible of the following general classification:

First: Whether the defendant clerk should account for and pay to the government the difference between the cost of printing records for use in the Circuit Court and the amount charged therefor.

Second: Whether the court should have submitted to the jury, or decided as a matter of law, the question whether the moneys received by the clerk for printing records for use in the Circuit Court, were for services connected with his office.

Third: Whether testimony showing the origin and continuance of the clerks' practice of obtaining printing at one price and charging for it at another, and retaining the difference, and showing the knowledge and acquiescence of judges and the department therein, was admissible in evidence.

Fourth: Whether the clerk should account for and pay to the government the moneys received for the printed transcripts of records sent on appeals and writs of error to the Circuit Court of Appeals, and, if so,

Fifth: Whether the court erred in directing the jury to find for the government for amounts based upon the rate of 10 cents per folio instead of upon the rate of 15 cents per folio.

Against the demands of the government, the defendants claimed an allowance of certain deductions for extra printing and expenditures incident to supervising the printing. These deductions were allowed by the trial judge in his instructions to the jury. Their allowance is not specifically assigned as error, though perhaps embraced in one general assignment, but as there is no exception to this feature of the charge or to the admission of testimony upon which it was based, there is before us no question of the court's error in allowing the deductions.

[1] For defense to the first demand, the defendants maintain, that the excess charges exacted by the defendant clerk for supervising

printing in obedience to the rule, might have been "private profit," "commission," "bonus," "salvage," "rake-off" or "graft," for which he might be liable to some one, but in no event was the work a service "connected with the clerk's office," for the emoluments of which is he liable to the government. This contention is based upon the ground that the office of clerk was statutory, that the statutes did not connect services of this character with the office, and that unless so connected by positive statutory enactment, the emoluments received therefor do not belong to the government. This requires a brief review of the statutes.

The office, of course, was statutory. The act establishing the circuit courts included and created the office of clerk of such courts. 1 Stat. pp. 74–75 (1789). The duties of a clerk of a circuit court were in a measure indicated but not wholly defined by legislation respecting the fees of clerks, exhaustive historical reviews of which may be found in United States v. Hill, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. Ed. 627, United States v. Hill, 123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275, and United States v. Mason, 218 U. S. 517, 31 Sup. Ct. 28, 54 L. Ed. 1113, only a portion of which need be repeated for the purpose of this discussion.

Under the acts of 1791 and 1792, 1 Stat. 217, 277, clerks were allowed to retain all fees and were not required to render an account of them to the government. The act of 1841, 5 Stat. 427, established the compensation of clerks at $4,500 a year above clerk hire and office expenses, and required them to pay the overplus into the public treasury. The act of 1842, 5 Stat. 483, directed clerks to make semiannual returns to the Secretary of the Treasury of all fees and emoluments of their office of "every name and character," and authorized them to retain from fees and emoluments, above office expenses and clerk hire, $3,500 a year as compensation, and required them to pay the residue into the treasury. Until the act of Feb. 26, 1853, 10 Stat. 161, the fees of clerks remained in substance as fixed by the acts of 1791 and 1792. The act of 1853 established the present fee bill, being sections 823 to 857 of the Revised Statutes (Comp. St. 1913, §§ 1375, 1463). Since the act of June 22, 1870, c. 150, creating the Department of Justice, the returns of clerks have been made to the Attorney General, and supervision of their accounts has been exercised by that officer.

At the time of the decision of the case of United States v. Hill, presently to be considered, two sections of the Revised Statutes read:

"Sec. 839. No clerk * * * shall be allowed * * * to retain of the fees and emoluments of his office * * * for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, * * * a sum exceeding $3,500 a year. * * *" Comp. St. 1913, § 1404.

"Sec. 833. Every * * * clerk * * * shall, on the first days of January and July, in each year, * * * make to the Attorney General * * * a written return for the half year ending on said days, respectively, of all fees and emoluments of his office of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year." Comp. St. 1913, § 1394.

In this state of the law, the case of the United States v. Hill, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. Ed. 627, was heard by the Supreme Court. In that case, the government had sued Hill, clerk of the District Court of the United States for the District of Massachusetts, for naturalization fees, which he had collected and had failed to report and pay to the government. Under a standing order of the court, the clerk was required to examine naturalization papers before presentation, in order to avoid delays incident to their improper preparation. For this service, the clerk charged a fee. The question was whether such a fee was an emolument of the clerk's office. The Supreme Court held, that the provision in section 823 of the Revised Statutes, taken from section 1 of the act of 1853, 10 Stat. 161, directing that fees of clerks shall be "taxed and allowed," applied prima facie to taxable fees and costs in ordinary suits and litigation between party and party, prosecuted in the court, and not to ex parte matters with respect to which no fees were specified by the fee bill; that the fee bill prescribed no fees in naturalization matters; that the services rendered in connection therewith were personal and not official, and the fees collected therefor were not required to be taxed and were not recoverable by the government. Of this character of service, it is contended, was the supervision of printing by the defendant clerk in the cases under consideration.

The ruling in United States v. Hill, supra, followed by United States v. McMillan, 165 U. S. 504, 17 Sup. Ct. 395, 41 L. Ed. 805, was based upon a distinction between services which may be performed by any one, and those which may be performed only by the clerk. The court held that the preliminary examination of naturalization papers for the convenience of the court and the dispatch of its business, was a service susceptible of being performed by any designated person, while services in connection with ordinary suits between party and party, prosecuted in the court, belong peculiarly to the clerk and could not be performed by another. The contention of the defendants is based upon the same distinction. In this connection, it may be well to note, that in drawing the distinction between services of the two classes, the Supreme Court recognized that litigation moving through the clerk's office is business peculiarly connected with that office, and that emoluments for services rendered in connection therewith must be taxed, returned and paid to the government.

After this decision, there arose a question whether fees paid by attorneys upon admission to practice were received for services in connection with the clerk's office. The Comptroller of the Treasury, having in mind the cases of United States v Hill. supra, and United States v. McMillan, supra, decided pari ratione that clerks were not bound to account for such fees.

With an evident intent to nullify these decisions, Congress, by Act of June 28, 1902, c. 1301, 32 Stat. 475 (Comp. Stat. 1913, § 1398), amended section 833 of the Revised Statute, which required of each clerk half yearly returns of all fees and emoluments of his office of "every name and character," by adding thereto the following:

"And the word 'emoluments' shall be understood as including all amounts received in connection with the admission of attorneys to practice in the courts, and all amounts received for services in naturalization proceedings, whether rendered as clerk, as commissioner, or in any other capacity, *and all other amounts received for services in any way connected with the clerk's office.*"

The obvious intent of Congress in employing the comprehensive language of this amendment was to limit the clerk's salary to $3,500 per year, and to compel a full and complete report of all emoluments received by him, so that the accounting officers of the government might permit him to retain the salary prescribed by law and prevent him retaining any more. Alexander v. United States, 43 Ct. Cl. 389. This was the state and the purpose of the law at the time of the appointment of the defendant clerk.

[2] The defendants maintain that the language of the amendment with respect to "services in any way connected with the clerk's office" did not connect anything with the office, certainly nothing new, but contemplated only what was or what might lawfully become connected with it, and left the principle of the law as it was before the amendment. The defendants also maintain that services connected with the clerk's office were only those prescribed by law, and as the office was statutory, its services and emoluments must have been prescribed by statute. They further maintain that the court, being without legislative function, was without power to impose a duty upon and demand a service of its clerk not prescribed by statute, and that when the court demanded of the clerk a service not expressly prescribed by statute, it simply exercised an ancient authority to call upon him, as it could call upon an attorney or any one else, to assist it in disposing of its business, for which fees might be allowed that were personal and therefore not payable to the government. United States v. Hill, supra. We are not inclined to yield to this contention nor to hold that all acts of the clerk for which he was responsible to the government must have been prescribed by statute, and that all acts of the clerk otherwise prescribed were not so connected with his office as to require him to report and pay his emoluments to the government. The contention as presented, squarely raises the question whether the court, by rule or order, may demand of its clerk a service in connection with the business of the court that is not specifically prescribed by statute, and whether the government is entitled to the emoluments for such a service, if rendered.

The rule of the Circuit Court providing for the printing of records in equity suits, pleadings on demurrer, and the state of the case on rules to show cause, and imposing upon its clerk the duty to supervise the same, was evidently made under authority of section 918 of the Revised Statutes (Comp. St. 1913, § 1544), which conferred upon the several circuit courts power to make rules and orders to govern their procedure and "otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." There is no question of the administrative power conferred by this statute, and there can be no serious question of the validity of the rule made thereunder. A rule

made under authority of law has the force of law. This rule prescribes three things, first, that the record in all suits in equity and the pleadings in certain other proceedings shall be printed; second, that the clerk shall supervise the printing; and third, that he shall estimate and tax the costs of printing. No one questions the power of the court to order the printing of records as a convenient or necessary incident to the prompt administration of justice, nor do we doubt that the statute which conferred upon the court power to make such an order, conferred upon it power to compel its execution. Power conferred upon a court to make rules and orders for the prompt administration of justice, carries by necessary implication the power to enforce them through the instrumentalities which are supplied the court in the person of its clerks or other officers. It would be a vain thing for a court to make an order if it did not have the power to enforce it, and when a court by its rule or order directs one of its officers to do a thing in connection with a matter which is purely a part of his official duties, the order of the court becomes the law which governs the officer.

What were some of the official duties of the clerk of the Circuit Court? The strictly official duties of a clerk of a court, which no one else performs, are those which pertain to litigation as it moves through his office toward the court. With respect to this class of work he is required to issue process, file pleadings, enter decrees and otherwise pursue the practice prescribed by the court with relation to suits in equity, pleadings on demurrer, and rules to show cause. That such services are connected with a clerk's office is beyond question. They constitute his principal and most important duties. In promulgating a rule that records in all equity suits should be printed, the court, in this instance, did nothing more than add an incident to litigation in equity suits, and in requiring the clerk to supervise the printing and tax the costs, it demanded of him a service in connection with that part of the court's business which was peculiarly related to his office. U. S. v. Hill, supra. Such a service demanded by lawful rule was a service prescribed by law. Fees and emoluments received therefor were in that "way" connected with the clerk's office, and whether prescribed by statute or fixed by the clerk or by the court, should have been reported and paid to the government.

[3] For further defense to the demand of the government for "printing" emoluments, the defendants rely upon an "account stated" between the clerk and the government. This defense is based upon the failure of the government, through seventeen years, to discover the clerks' practice and to demand reports and payments of the emoluments as they were received. This theory rather suggests the absence of an account stated than the presence of one. As the printing transactions of the clerks were privately conducted and appeared nowhere in their office records and reports, which were the things examined by the department, we are of opinion that the failure of the government to discover what the defendant clerk was concealing does not preclude recovery in these actions.

[4] To the demand of the government for "transcript" emoluments,

like defense is urged, supported in this instance, however, by evidence that in the docket records of cases that went to the appellate court, entries were made showing that transcripts had been forwarded to that court, but failing to show that fees had been charged or collected therefor. Such accounts had been examined and passed by the department officials, and although the notation of such an act without an accompanying notation of a fee collected therefor might reasonably have put the department on inquiry, nevertheless the failure of the department to discover that the fees were being withheld does not put the department in the legal position arising from an account stated, or in the position of approving the retention of emoluments which did not appear in the accounts.

The last contention of the defendants with respect to printing, is, that the thing for which the payments were made was not the clerk's service but was the "cost of printing." This contention is based upon the theory that the printing was a business transaction, involving a purchase and sale of printing by the clerk, in which, if a profit resulted to him, it "was only an increment or something arising out of it," that is, the clerk bought printing at wholesale and sold it at retail, and the difference was profit which belonged to him. This theory is supported by neither reason nor testimony. It is not disputed, even by evidence of the defendant clerk himself, that the amount charged over and above the cost of printing was for work performed by the clerk in supervising the printing pursuant to the rule. Such work constituted service of some kind and for some one. Because of the nature of the matters to which it related and because it was done for the court upon its order, we believe that it was a service connected with the office of the clerk, and that the trial judge should have so instructed the jury as a matter of law.

The two remaining questions are: Did the trial court err in directing a verdict for the government for moneys received by the clerk for transcripts of records of cases removed on appeal or by writ of error from the Circuit Court to the Circuit Court of Appeals; and if it did not, then did the court err in directing a verdict in favor of the government for an amount based upon the rate of 10 cents per folio instead of upon the rate of 15 cents per folio?

[5] The conduct of the defendant clerk, out of which arose these questions, is this: When the record of a case was printed for use in the Circuit Court, the clerk procured and retained extra copies. In the event of appeal or writ of error, he used one of them for the transcript of the record, which, with his certificate, he returned to this court in obedience to its rules. He conceived that as the printed copies had been paid for, though not with his money, they belonged to him, and being thus his property, he might sell them for any amount he chose and keep the proceeds. The fees or prices charged and received were calculated at the rate of 10 cents a folio, being the precise rate fixed by the statute (section 828, Revised Statutes [Comp. St. 1913, § 1383]) "for making a copy of any entry or record" of his office. He kept the fees. The trial court directed a verdict in favor of the government for the moneys so collected and retained.

Both parties charge error in this ruling. The defendants specify that the court erred in directing a verdict for the government for any amount, upon the claim that the printed copies of records, which constituted a portion of the certified transcripts, were the clerk's own property, and that in returning the same in response to an appeal or a writ of error, he was not rendering a service or collecting fees for which the government could claim report and payment; but maintain, however, that if this court should find otherwise, then, as against the contention of the government, the trial court did not err in directing the jury to base the amount of its verdict upon the rate of 10 cents per folio.

The government, on the other hand, charges error to the trial court in instructing the jury to base its calculation for the amount of the verdict upon the rate of 10 cents per folio instead of upon the rate of 15 cents per folio.

We are not inclined to seriously discuss the contention that the printed copies of records were the clerk's own property, for which he might charge what he chose and keep what he charged.

The rule under which the clerk acted in making up and returning certified transcripts of records, being rule 14, paragraph 2 of the Circuit Court of Appeals for the Third Circuit (90 Fed. clv, 31 C. C. A. clv), is as follows:

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

This is a valid rule, made under authority of law. It imposed upon the clerk an official duty, the performance of which was an official service. He was required to render the service, however, only "upon being paid or tendered his fees therefor." What were his fees for this service? Section 828 of the Revised Statutes prescribes the fees for this and other services of the clerk as follows:

"For entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio fifteen cents."

"For *a copy of* any entry or *record* or of any paper on file, for each folio, *ten cents*."

It is therefore certain that in rendering the service of making and returning a certified transcript of a record for use in an appellate court, the clerk rendered a service prescribed by the rule, and for that service was required by law to demand and collect fees at the rate prescribed by statute (section 828, Rev. Stat.), and to report the same and pay to the government so much thereof as exceeded his salary. 32 Stat. 475, Comp. Stat. 1913, § 1398; sections 833, 839 and 844, Rev. Stat., Comp. Stat. 1913, § 1404.

Without a present regard to whether the defendant clerk based his fees upon the proper rate, it is certain that he did not report and pay them to the government. For obvious reasons, therefore, the contention of the defendant that the court erred in directing a verdict for the government for any amount must fail.

[6] We are of the opinion that the contention of the government that the court erred in instructing the jury to base the amount of the verdict upon the rate of 10 cents per folio instead of upon the rate of 15 cents per folio, must also fail. We might dispose of this contention on the pleadings, but as it is squarely raised by specifications of error, we prefer to consider and decide it on its merits.

Whether the statutory fee for a certified transcript of a record is based upon the rate of 10 cents per folio or upon the rate of 15 cents per folio, had been a controverted question in the circuit courts of the United States since 1882, the decisions of which have not been in accord. We are not informed that the question has been considered by appellate courts.

In construing section 828 of the Revised Statutes, the Circuit Court of the United States for the Eastern District of Missouri, in Cavender v. Cavender, 10 Fed. 828, held that a transcript of a record on appeal or writ of error is only a copy of the record of the court from which the appeal is taken or to which the writ of error is directed, and being a copy, is to be charged for at the rate prescribed by the statute for a copy of a record, which is 10 cents per folio.

The Circuit Court of the United States for the Western District of North Carolina, in McIlwaine v. Ellington, 99 Fed. 133, held that a certified transcript is an original document which should be charged for at the rate of 15 cents per folio. This decision was based upon the word "return" as it appears in the rule of the Circuit Court of Appeals for the Fourth Circuit, 90 Fed. clv, 31 C. C. A. clv, and in the statute fixing fees. This rule (rule 14) is identical with the rule of this court, which requires the clerk to make a "return" of the writ of error or appeal by transmitting a true copy of the record, bill of exceptions, etc. The court considered that the copy thus transmitted, being denominated a "return," should be charged for at the rate prescribed by the statute for "any return," which is 15 cents a folio, holding that the "return" mentioned in the rule was the "return" meant by the statute.

In Mohrstadt v. Mutual Life Ins. Co., 107 Fed. 872, and 145 Fed. 751, the Circuit Court of the United States for the Eastern District of Missouri changed its position, and following McIlwaine v. Ellington, supra, held that the "return" by the clerk to an order that "the record and proceedings with all things concerning the same" be transmitted, is something more than a copy of what exists in the clerk's office, that as the compiling of such a "return" "requires the exercise of discretion and judgment," it is altogether a new thing "and becomes the original record" of the appellate court, for which the statute allows fees at the rate of 15 cents per folio.

In Thornton v. Insurance Cos. (C. C.) 125 Fed. 250, the Circuit Court of the United States for the Middle District of Pennsylvania, citing McIlwaine v. Ellington, ruled that the rate prescribed by the statute for a certified transcript is 15 cents per folio.

In view of these decisions, a construction of the statute is necessary, not merely for the decision of this case but for the guidance of clerks of the courts of this circuit.

It appears to us that a determination of this issue rests solely upon the question whether a certified transcript is an original record or a copy or transcription of an original record. The statute clearly prescribes a fee for the one and another fee for the other.

By the first paragraph quoted, the statute provides that "for entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond or making any order, certificate, return or report," a charge shall be made at the rate of 15 cents a folio.

The acts here contemplated are original in their nature. They are such and only such as occur and are required to be performed in the progress of the cause. They constitute the recorded entries of the court's doings and of the court's orders and judgments, both interlocutory and final. They are original acts in the sense of being the first of their character or in their order, and in the sense of deriving their origin from no previous record. They are original in the sense employed in several of the cases cited, in that they require original thought and judgment to make them conform precisely to the things done or ordered. They have to do with the building of a record, which must accurately and fully disclose the acts and rulings of the court upon the matter in controversy. They are, therefore, of a higher dignity and impose a greater responsibility in their performance than acts contemplated by the second paragraph quoted from the statute.

The second paragraph provides that "for *making a copy of any* (entry or) *record,* or any paper on file," the fee therefor shall be at the rate of 10 cents per folio.

This paragraph contemplates services of a lesser grade for which smaller fees are to be charged, based upon a lower rate prescribed. It contemplates copying something which is already written, and compiling the copies of something which already exists. Originality, discretion or judgment connected with such a service, if it be the making of a certified transcript of a record for use in an appellate court, is restricted to the selection of the parts of the record required by the rules to be transcribed, and responsibility in copying the same is limited to accuracy. That the clerk may be called upon to make such a copy is evidenced not only by the statute which prescribes a fee therefor, but by the rule of court which imposes the duty. True, the rule of the Circuit Court of Appeals for this Circuit, like a similar rule of the Circuit Court of Appeals for the Fourth Circuit, provides that in response to an appeal or writ of error, the clerk "shall make a *return* of the same." But the rule also defines the word "return" by showing how it shall be made, namely "*by* transmitting *a true copy* of (the) record." The record and a true copy of the record are different things. From the very nature of the difference, both cannot be originals. One must be the original and the other a copy or transcript of the original, as denoted by the name by which it is commonly known. The latter is the thing which by the rule of this court the clerk is required to "return" "upon being paid or tendered his fees therefor." It is obvious that the difference between originals and copies is recognized by the statute, and that by the statute different fees are prescribed for different services. We are of opinion that the fee prescribed by the

statute for compiling and returning a certified copy of a record for use on appeal or writ of error in this court, should be calculated at the rate of 10 cents per folio for the part copied or transcribed, and, of course, at the rate of 15 cents per folio for the certificate.

The trial court committed no error in directing a verdict for the government for moneys received for such services, based upon the rate of 10 cents per folio.

The judgments below are reversed and new trials ordered.

STEPHENSON v. ATLANTIC TERRA COTTA CO.

(Circuit Court of Appeals, Fourth Circuit. November 4, 1915.)

No. 1343.

1. CONTRACTS ⟸349, 353—ACTIONS FOR BREACH—EXCLUSION OF EVIDENCE—INSTRUCTIONS.
   The charge of the trial court in an action on contract, and its rulings in excluding testimony offered, considered, and *held* without error.
   [Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 93, 1096, 1781, 1784, 1788–1798, 1809, 1811–1814, 1817, 1818, 1829–1844; Dec. Dig. ⟸ 349, 353.]

2. TRIAL ⟸255—INSTRUCTIONS—FAILURE TO SUBMIT ALL THE ISSUES—WAIVER OF OBJECTION.
   The charge of a court is not subject to exception because it does not instruct the jury on a point in issue, where such instruction was not requested by either party.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627–641; Dec. Dig. ⟸255.]

3. TRIAL ⟸295—INSTRUCTIONS—CONSTRUCTION.
   Where a particular portion of a charge is excepted to, it must be construed in connection with the other parts of the same.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 707–717; Dec. Dig. ⟸295.]

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action at law by the Atlantic Terra Cotta Company against Samuel Stephenson. Judgment for plaintiff, and defendant brings error. Affirmed.

T. S. Clark, of Charleston, W. Va., for plaintiff in error.

Buckner Clay, of Charleston, W. Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an action of assumpsit, brought by the Atlantic Terra Cotta Company, a corporation of New York, against Samuel Stephenson, to recover the sum of $5,000 with interest, alleged to be due upon a contract. There was a trial before a jury, which resulted in a verdict and judgment in favor of

the defendant in error for the sum of $5,000, with interest from October 24, 1910, and costs. The case comes before us on a writ of error. The plaintiff in error will hereinafter be referred to as defendant, and the defendant in error as plaintiff; such being the respective positions occupied by the parties in the court below.

Many of the facts in this case are undisputed. In 1909 the defendant, Stephenson, and C. M. Alderson entered into a contract with the Moore Construction Company for the construction of a large office building in the city of Charleston. On November 22d of the same year the plaintiff, the Atlantic Terra Cotta Company, a corporation engaged in the manufacture and sale of terra cotta, having its principal office in the city of New York, entered into a contract with the Moore Construction Company for the manufacture and delivery of terra cotta for the building, according to the plans and specifications prepared by the architects. The contract provided for the delivery of the terra cotta f. o. b. plant, with freight allowed to Charleston. The contract price was $18,190, which was to be paid on or before the 20th of each and every month for material shipped during the preceding month to the amount of 85 per cent. of the value of the work; the final payment to be made within 30 days after the final shipment of the material. There were three other contracts for small amounts of additional material. These supplemental contracts brought the total price for all work and material up to $19,584.

The plaintiff began the manufacture of material immediately, and completed a considerable portion of it in the early spring; but shipment was delayed because the Moore Construction Company was not ready to receive it. Beginning with June 17, 1910, shipments were made from time to time by the plaintiff as the same were required. On October 17, 1910, the date of the agreement which forms the basis of this suit, there had been shipped material of the value of $14,530, being all the material but four carloads, of the value of $5,054. There had become due under the contract from month to month the sum of $9,418, and there would have been due on October 20th, three days later, the sum of $2,932.50. Up to this time the Construction Company had only paid $2,500, which was paid on September 8th, and had been allowed freight charges to the amount of $693.65.

There was considerable correspondence between the parties, and it developed from this correspondence that the failure of the Moore Construction Company to make the payments as they became due was due to the fact that the owners, Alderson and Stephenson, had defaulted in their payments to the Construction Company. Under date of September 19, 1910, C. M. Alderson wrote a letter to the plaintiff explaining the delay, and in this letter he says:

"Being one of the parties interested in the construction of the Alderson-Stephenson Building in this city, by the Moore Construction Company, I am advised that you have been urging the Moore Construction Company for remittances, and as a matter of fairness to that company I beg to say that the owners of the building have been delayed in making some of their payments to the Construction Company, and this delay has prevented the company from making prompt remittances to you."

The Moore Construction Company failed to make further payments, and on October 13th plaintiff sent the following night letter:

"In view of delay of owners in making payments to you, situation of your account is extremely unsatisfactory. Under present conditions we should have ordered payments and some detailed statement as to state of operation and assurance for future. Please reply by same."

Later a meeting was arranged between the plaintiff and the Moore Construction Company for October 17th, at Charleston, and W. H. Powell, president of the Terra Cotta Company, came to Charleston on that day and met W. E. Moore, president of the Construction Company, and the two together went to see the defendant, Stephenson. With reference to this meeting, Mr. Powell says:

"I met Mr. Moore, and went to lunch with him, and I told him we were very much dissatisfied with the condition of the account; that we did not propose to go ahead and send them any more terra cotta until we were paid for the terra cotta that had been delivered, payments for which were long overdue, and until we had satisfactory assurance as to payment for the terra cotta that was still to be delivered."

The result of the conference between the parties was that Mr. Moore gave Mr. Powell the check of his company for $5,000, dated October 22d; Messrs. Stephenson and Moore gave to Mr. Powell one of the series of notes owned by Stephenson, executed by the Carroll Hardwood Lumber Company, which was to be credited on account at its discount value, $4,833.34; and the defendant, Stephenson, agreed to have a check for $5,000 in the plaintiff's office the following Monday, being October 24th. It is contended by the plaintiff that, when all these payments were made, his company was to deliver to the Moore Construction Company the remaining four carloads of material.

The check of the Moore Construction Company was not paid when presented, but was protested and returned, and later, on October 27th, the bank at Charleston notified the plaintiff by wire that the check would be paid. It was paid about November 5th. The check of Stephenson was not sent when promised, so that on October 25th, the day after it was to be in New York, the plaintiff company wired Mr. Stephenson as follows:

"Check for five thousand not here as promised. Answer by wire."

The same day Mr. Stephenson wired:

"Mail check this evening; was a little disappointed."

This check was never sent, and it is upon Stephenson's agreement to pay this $5,000 and his failure to do so that this action was instituted.

After the plaintiff had been notified by the bank that on October 27th the check of the Moore Construction Company would be paid, if again presented, this company, by wire on October 26th, authorized the delivery by the railroad of the two carloads of material next in order, and these carloads were thereupon delivered to the Construction Company. It is also contended by the plaintiff that the remaining carloads were never delivered because of the failure of Stephen-

son to make payment of the $5,000 as promised, and the failure of the Construction Company to make any further payments on account. These cars were held pending negotiations between the parties until November 17th, when they were finally unloaded and stored; Stephenson and the Moore Construction Company having failed to pay the $5,000 promised by Stephenson, and the plaintiff being unwilling to make delivery until such payment was made. This material was eventually sold, and brought $150, and out of this storage charges of $75 were paid. The material having been manufactured especially for the Alderson-Stephenson building, it was of little value for anything else.

There remained due on the account of the Moore Construction Company a balance of $5,995.19. This amount was never collected. The Moore Construction Company became badly involved and on the 18th day of April, 1914, it was adjudged a bankrupt. After Stephenson's telegram of October 25th, that he would mail check that evening, the plaintiff did not hear from him again until November 10, 1910, when he wrote as follows:

"Atlantic Terra Cotta Company, 1170 Broadway, New York—Gentlemen: In re Terra Cotta for Alderson-Stephenson Building, Charleston. The Moore Construction Company advise me that you are withholding terra cotta needed for the completion of this building because I did not advance you $5,000 on the Moore Construction Company contract with you. In this connection I beg to say that when your Mr. Powell was here several weeks ago he stated to me that the terra cotta had all been shipped before he left New York and that it would be here in a day or so. Assuming that Mr. Powell's statement was correct, I was willing to advance $5,000, even though the Moore Construction Company did not then owe you such sum and Mr. Moore, president of the Construction Company, stated in the presence of your Mr. Powell and myself that such sum was not then due. Subsequently I learned that the terra cotta had not been shipped as represented, and I did not therefore send check mentioned in my wire. I shall allow the matter to take its course upon the contract between you and the Moore Construction Company.

"Very truly yours, Samuel Stephenson."

The plaintiff company replied by night letter on November 14th, emphatically denying this statement. On November 15th Mr. Stephenson wrote again. Among other things he said:

"In reply beg to confirm my statement that Mr. Powell, when here, stated to me that the terra cotta had all been shipped—not that one or two cars of it had been shipped, and that the balance would be shipped at a subsequent time. Your Mr. Powell also carefully concealed the important fact that the terra cotta which had been shipped was consigned to your order, and not to the order of the Moore Construction Company, as had been the case in the shipments prior thereto. In short, Mr. Powell misrepresented one important fact and concealed another equally as important."

These two letters, according to Mr. Stephenson's testimony, were not written by him, but his lawyer and associate in this enterprise, C. M. Alderson. The two points made by counsel for defendant, as shown in the letter written by Mr. Alderson, as quoted above, constitute two of the chief grounds of defense; the other being that Mr. Stephenson made no agreement with Mr. Powell that he would send the check for $5,000. In view of these contentions, the facts with reference to the shipment of the cars and arrival of the same are

important. Mr. Powell testified that he did not say that all the cars had been shipped before he left New York, but that he had ordered them all shipped. The last four carloads, being the material in question, were shipped as follows: One car on October 15th, two cars on October 17th, and one car on October 19th. Two of these cars arrived at Charleston October 27th, one on October 28th, and one on October 29th.

With reference to the claim of the defendant that he did not send the check because of the representation by Mr. Powell that all of the cars had been shipped before he left New York, and the concealment by Mr. Powell that these cars had been consigned to the order of the Terra Cotta Company, instead of to the Moore Construction Company, the following telegraphic correspondence is of importance. On October 21st the Moore Construction Company wired the Terra Cotta Company as follows:

"You are evidently mistaken about shipping rest of terra cotta no bill lading yet if you have shipped please wire car numbers."

To which the Terra Cotta Company replied by night letter on October 21st:

"Your telegram twentieth terra cotta Charleston office building shipped October fifteenth from Rocky Hill, New Jersey, Pennsylvania car eighteen two seventy-five October seventeenth Pennsylvania car forty-eight one thirty-two and Pennsylvania car forty-eight naught eighty-eight October nineteenth Pennsylvania car sixteen naught seventy-six."

On October 25th the Terra Cotta Company wired the Moore Construction Company as follows:

"Very much surprised to learn to-day that your check for five thousand was returned unpaid. You promised faithfully to have check for additional five thousand here Monday morning, which promise was not kept. We have shipped balance of order complete, consigned to ourselves, but car will not be released until this matter is straightened out in accordance with your promise. Answer by wire."

In answer to this the Construction Company wired on the same day as follows:

"Wire Kanawha Valley Bank hold check until twelve tomorrow it will be paid Stephenson has paid us nothing and you may hold terra cotta until assurance is made of payment as we expect to stop the job Thursday indefinitely unless assurance is made of future payments will explain about check at some future time."

Neither party asked for any special instruction, but each reserved the right to object to the charge as delivered by the court, and later on the defendant served an exception to the latter portion of the charge as set out in bill of exceptions No. 2. The charge of the court below is clear and concise, and, we think, fairly states the contentions of the parties.

The first assignment of error pertains to the action of the lower court in overruling defendant's demurrer to the declaration. We have carefully considered this matter, and, without discussing the same, will content ourselves by saying we think that this assignment is without merit.

[1] The second assignment of error is to the effect that the court was in error in sustaining plaintiff's objection to certain questions asked William H. Powell, the president of the Terra Cotta Company, which were intended to ascertain whether that company had filed a mechanics' lien against the Alderson-Stephenson building, and as to whether it had instituted suit to enforce such lien. While the record of that suit was offered as evidence in the curt below, it was, by stipulation, omitted from the record in this case. Counsel for defendant makes no contention as to this question in their brief; but, even if such contention had been made, this court could not have considered the same, in view of the fact that this particular evidence was omitted from the record, and is therefore not before us.

It is insisted by the third assignment of error that the court below erred in sustaining the plaintiff's objection as to the following question asked Mr. Stephenson by his attorneys:

"Q. Did you afterwards— Now, Mr. Stephenson, would you have agreed to pay that money if you had known that that terra cotta was not shipped?"

On the other hand, plaintiff insists that the court's action in refusing to admit this evidence was proper, in that the question left it with Stephenson to determine the materiality of the misrepresentation. In other words, it is contended that the party to a contract cannot determine for himself as to whether the misrepresentation relied upon as a defense is relevant and material. All facts and circumstances material to the question then before the court and jury, to wit, as to whether the defendant had contracted to pay the plaintiff the sum of $5,000, was subject to the determination of the court as to the relevancy and materiality of the same.

The defendant, among other things, asked Mr. Moore the following question:

"Q. Well, did you give any instruction to Mr. Stephenson in reference to sending that $5,000 afterwards?"

Counsel for defendant stated that it was their purpose to show by this question that the Moore Construction Company, by reason of the fact that the material was billed to the plaintiff, could not examine it, and that such examination as it was able to make disclosed the fact that the material was not suitable to go into the building, and that, therefore, it directed Stephenson not to send the check in question. The court, in sustaining the objection to this question, said:

"The objection I sustained was to the evidence with relation to direction by the company, of which this witness was president, to Mr. Stephenson. Of course, if you want to go into that defense to the merits of the account against the Moore Construction Company, I suppose that that might be done."

Thus it will be seen that the defendant was afforded an opportunity to go into the merits of the account upon which plaintiff relied, but did not do so. Therefore the only question which is before us is as to whether it was proper to show that the failure of the defendant to pay the amount of $5,000 was on account of the fact that Mr. Moore had instructed him not to pay the same. This of itself could not affect the controversy one way or another, inasmuch as any instruction that may have been given to Moore could not relieve Stephenson from the

obligation which he had undertaken when he agreed to send plaintiff the sum of $5,000.

The fifth assignment of error relates to the action of the court in sustaining plaintiff's objection to the following question and answer:

"Q. Do you know why they refused to make delivery to you? A. No, sir; I don't know exactly. I couldn't say exactly why they refused to make delivery to us, except their letters and telegrams indicate they wanted to force us to pay for all the terra cotta before we received it."

This action of the court in refusing to permit this testimony to be introduced was eminently proper. The witness stated that he did not know exactly, and could not say exactly, that the plaintiff refused to make delivery, and then he proceeds to testify as to what the letters and telegrams indicated. Testimony of this character is not admissible. The telegrams were in the possession of the defendant and speak for themselves. In other words, it was not proper for the witness to testify as to what he thought the letters and telegrams meant—that being a question which rested solely with the jury for its determination.

The sixth assignment of error challenges the correctness of the ruling of the court in sustaining plaintiff's objection to the following question asked Mr. Moore:

"I will ask you, Mr. Moore, if that terra cotta was billed to you as Mr. Powell told you, and as you relied upon, and at the time you told Mr. Stephenson to send him the $5,000 check?"

This question assumed facts to be true that were controverted to say the least of it, and for that reason the court very properly sustained the objection of the plaintiff. The witness was further questioned as follows:

"Q. Did Mr. Powell, when he was here, state to you that the terra cotta had been ordered shipped to you, all of it? A. He did. Q. Did you understand from that—the statement of Mr. Powell—that it had been shipped as all the other terra cotta before that time had been shipped? * * * Q. In what way did you understand, from your conversation with Mr. Powell, that this terra cotta had been shipped?"

It would have been competent for the witness to have testified as to any statement made by Mr. Powell, but it was solely within the province of the jury to determine what inference, if any, should be drawn therefrom. It was improper for the witness Moore to testify as to his understanding as to the meaning of the statement alleged to have been made by Powell.

The defendant excepted to the action of the court in excluding the following question and answer:

"Q. Did Mr. Powell say anything to you, or intimate in any way that the shipment that had been made of the last shipment, when he was here on October 17th, was made in any different way from the way that the terra cotta had been shipped prior to that time? A. He positively gave me the impression, or I had that impression, that it was shipped in the same way that all the other terra cotta was shipped."

The answer in this instance was immaterial from any viewpoint. As we have already stated, the witness could have testified as to what Powell said; but it was improper for him to testify as to any im-

pression he may have had as to the meaning of the language employed by Mr. Powell.

The seventh assignment of error pertains to the following portion of the court's charge to the jury:

"That is all I care to say to you, gentlemen. You may take the declaration and the evidence in this case, and determine from it whether or not Mr. Stephenson made this promise. If he did, the plaintiff here is entitled to a recovery of a judgment for the sum of $5,000, with interest from the time it should have been paid. The allegation in the declaration is that it was to be paid on or about October 24th. There is some evidence here with regard to that, that was before you, and I did not hear well enough to be able to undertake to tell you definitely what the date was. As I said, the question for you to determine is whether this promise was made under the circumstances alleged by the plaintiff, and that is the main question. If it was made, there was in these matters testified to consideration to support such promise, and you can find in accordance with your belief as to the facts."

The vital questions involved here are as to whether the plaintiff and defendant had entered into an agreement as contended by the plaintiff, and as to whether it was such an agreement as could be enforced. The learned judge who heard the case in the court below submitted the question to the jury as to whether such an agreement had been entered into between the parties, and he further very properly told the jury that, if they found that such an agreement was made between the parties, the delivery of the material for the purpose of completing the building was sufficient consideration to support the promise, provided the defendant made it.

However, counsel for defendant insists that the defendant was induced to enter into an agreement to send the plaintiff a check by the false and fraudulent representations of the plaintiff, and that the court erred in failing to instruct the jury as to that question. In other words, the defendant says:

"The court ignores entirely the defense, and places it before the jury as making a mere categorical denial to the plaintiff's charges."

The record in this case discloses the fact that the main defense was a denial that there was an enforceable agreement between the parties; that is to say, no contract was entered into between the parties by which defendant agreed to pay the plaintiff the sum of $5,000.

[2] As we have stated, it appears that the plaintiff and the defendant each reserved the right to object to the charge to the jury. If the defendant had relied upon any other defense than that of the general denial of the execution of the contract, such defense could have been presented by a proper prayer for instructions; but this, as we have stated, was not requested by the defendant. In the case of Texas & Pacific Railroad Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78, the Supreme Court said:

"The omission of the court to instruct the jury upon the subject of the plaintiff's contributory negligence is not open to exception, because the bill of exceptions does not show that the defendant requested any instruction upon that subject. In England, it is misdirection, and not nondirection, which is the subject of a bill of exceptions. Anderson v. Fitzgerald, 4 H. L. Cas. 484, 499. In this country, the rule is somewhat more liberal; and the not giving an instruction upon a point in issue may be excepted to, if one was requested,

but not otherwise. In a very early case, Chief Justice Marshall said: 'There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes cause for an exception.' Smith v. Carrington, 8 U. S. (4 Cranch) 62, 71, 2 L. Ed. 550, 553. As afterwards more fully stated by Mr. Justice Story, 'it is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party at the trial. It is sufficient for us that the court has given no erroneous directions. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point. If he does not, it is a waiver of it.' Pennock v. Dialogue, 27 U. S. (2 Pet.) 1, 15, 7 L. Ed. 327, 332. See also United States Exp. Co. v. Kountze, 75 U. S. (8 Wall.) 342, 353, 354, 19 L. Ed. 457, 461; Shutte v. Thompson, 82 U. S. (15 Wall.) 151, 164, 21 L. Ed. 123, 127. A request for instructions, being necessary to entitle the excepting party to avail himself of an omission to instruct, cannot be presumed, but must affirmatively appear in the bill of exceptions."

[3] It is well established that, where a particular portion of a charge is excepted to, it must be construed in connection with the other part of the same. In other words, an appellate court will not take a certain portion of the charge and make that a basis of error, but will take the charge in its entirety, and if, upon considering it as a whole, the law has been fairly stated as applying to the facts, the case will not be reversed. Therefore in this instance we must construe the preceding part of the charge in connection with that portion to which an exception is taken. The court below, in this instance, after explaining the nature of the case, said:

"Now, the facts with relation to that are for you to determine. They are controverted, but I want to instruct you that Mr. Stephenson's interest was such that the arrangement for the delivery of this material would be a good consideration for his promise. He was one of the two owners, he had the power of protecting himself in so far as his contractor was concerned, and the contractor was present and a party to the agreement, if it was made, and the consideration of receiving this material and going on with the building was of such a nature as to be good consideration for the promise, if he made it."

At the conclusion of the court's charge the following language was used:

"As I said, the question for you to determine is whether this promise was made under the circumstances alleged by the plaintiff, and that is the main question. If it was made, there was in these matters testified to consideration to support such promise, and you can find in accordance with your belief as to the facts."

It is manifest from the foregoing that it was the purpose of the court below to submit the entire case to the jury, and the fact that he used the language, "under the circumstances alleged by the plaintiff," is not sufficient to justify the contention that the court withheld from the jury any facts or circumstances relied upon by the defendant tending to show that Mr. Powell made misrepresentations and concealed material facts. This question was before the jury, and in the light of the evidence it was for the jury to determine as to whether the agreement was in accordance with the contentions of the plaintiff. However, if the court had simply said to the jury that the only question was as to whether an agreement was entered into between the

parties, as contended by the plaintiff, such instruction would have been proper, inasmuch as no other question remained for the decision of the jury.

We will say in passing that the claim of the defendant that he did not send the check because of the misrepresentation of Mr. Powell that all the cars were shipped before he left New York, and the alleged concealment by Mr. Powell of the fact that these cars had been consigned to the order of the plaintiff, instead of the Moore Construction Company, in view of the testimony offered in the court below, could not have been treated very seriously by the jury under the circumstances. On the 25th day of October, as we have stated, the plaintiff wired the Moore Construction Company that they were surprised to learn that the check for $5,000 had been returned unpaid. In this telegram it was also stated that they had shipped the balance of the order complete, consigned to themselves, but that the cars would not be released until the matter had been straightened out in accordance with the contract. In reply to this telegram the Construction Company wired the plaintiff to have the bank hold the check until noon the next day, when it would be paid by Stephenson, and also, among other things, saying that:

"Stephenson has paid us nothing and you may hold terra cotta until assurance is made of payment as we expect to stop the job Thursday indefinitely unless assurance is made of future payments will explain about check at some future time."

This clearly shows that on the 25th day of October the Moore Construction Company knew that the material had not been consigned to them, and notwithstanding that fact they wired the plaintiff that if the check was held by the bank until the next day it would be paid. Any objection to the payment of the check by Stephenson, or any direction that may have been given by the Moore Construction Company not to pay the same, upon the ground that the material was not consigned to the Construction Company, in view of this written evidence, must, from the very nature of things, have been an afterthought, and no doubt this is the view the court below had in regard to this phase of the case.

It is quite clear from the evidence in this case that it was the purpose of the Moore Construction Company, as well as the defendant, at the time the agreement which forms the basis of this suit was made, to secure a sufficient amount of material to complete the construction of the building of the defendant, and when the parties met it was but natural that the plaintiff should require the Construction Company to pay what was then due plaintiff, and under these circumstances it cannot reasonably be contended that while in this frame of mind the plaintiff would have made no provision to secure the payment for the material to be thereafter delivered.

No doubt it was the defendant who was most anxious to secure an adjustment of the matters then in controversy between the plaintiff and the Construction Company, in order that the building might be completed as speedily as possible, and it would certainly be unfair to require the plaintiff to deliver the material necessary for the com-

pletion of the building and at the same time permit the defendant to avoid the payment of the cost of the same.

A careful consideration of the contentions of the parties impels us to the conclusion that this case was fairly and impartially tried, and there is no substantial reason why the judgment of the lower court should be disturbed.

Therefore, for the reasons stated, the judgment of the lower court is affirmed.

THRUSH v. FULLHART.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1915.)

No. 1348.

1. LIMITATION OF ACTIONS ⟸199—QUESTIONS FOR JURY.

In an action for breach of promise of marriage, evidence as to whether the engagement was broken more than one year prior to the commencement of the action, or whether it continued until within the period of limitation, *held* to justify the refusal to direct a verdict in favor of defendant.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 727–730; Dec. Dig. ⟸199.]

2. APPEAL AND ERROR ⟸1002—REVIEW—QUESTIONS OF FACT.

In an action for breach of promise of marriage, where the evidence as to whether the action was barred by limitations was conflicting, and the jury found in favor of plaintiff upon a proper submission of this question, its finding was not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⟸1002.]

3. BREACH OF MARRIAGE PROMISE ⟸31—DAMAGES—EXCESSIVENESS.

Plaintiff, a young lady of many accomplishments and good character, became engaged to marry defendant, and the engagement continued for 17 years. Defendant induced plaintiff to borrow $50 from her sister, which he agreed to repay, but never did. Plaintiff loaned defendant money to buy books and for other purposes and gave him presents from time to time, and also lent or gave him a gold watch which he retained during the time of their engagement. Defendant was worth about $12,000. *Held*, that a verdict for $4,000 was justified by the evidence and would not be disturbed.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 47; Dec. Dig. ⟸31.]

4. BREACH OF MARRIAGE PROMISE ⟸26—DAMAGES RECOVERABLE.

In an action for breach of promise of marriage, where plaintiff had reasonable expectations of an advantageous settlement in life, she was entitled to recover damages therefor, and in addition thereto for pecuniary loss as well as compensation for her injured feelings, anxiety of mind, wounded pride, and mortification.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 38, 39; Dec. Dig. ⟸26.]

5. BREACH OF MARRIAGE PROMISE ⟸31—DAMAGES—PROVINCE OF JURY.

In an action for breach of promise of marriage, it would be impossible to fix a definite measure of damages, and the jury may consider all the facts and circumstances and exercise their discretion in determining the

amount of damages if their conduct is not marked by prejudice, passion, or corruption.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 47; Dec. Dig. ⊂⊃31.]

6. APPEAL AND ERROR ⊂⊃1015—REVIEW—AMOUNT OF DAMAGES.

Where a new trial is applied for on account of excessive damages and refused, the damages must be outrageously excessive, or a court of error will not interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876; Dec. Dig. ⊂⊃1015.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Martinsburg; Alston G. Dayton, Judge.

Action by Iva Lea Fullhart against William V. Thrush. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. MacDonald and F. C. Reynolds, both of Keyser, W. Va. (Forrest W. Brown, of Charlestown, W. Va., on the brief), for plaintiff in error.

Wm. H. Griffith, of Keyser, W. Va., and Roscoe A. Heavilin, of Marion, Ind., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an action for breach of promise of marriage commenced in the District Court of the United States for the Northern District of West Virginia by Iva Lea Fullhart, defendant in error (hereinafter referred to as plaintiff), against William V. Thrush, plaintiff in error (hereinafter referred to as defendant).

Suit was begun June 4, 1912, and the case was first tried before a jury in September, 1912, at which trial a verdict was rendered in favor of plaintiff for $5,000, and the case was brought to this court upon a writ of error. The judgment of the court below was reversed, and the opinion filed therein is to be found in 210 Fed. 1. The case was remanded to the lower court, and there a second trial was had which resulted in a verdict in favor of the plaintiff in the sum of $4,000, and the case comes here again on a writ of error.

The case was tried in the court below on the theory that the engagement or contract to marry was entered into by the parties in 1894, at Westerville, Ohio, where the parties were students at Otterbein University.

It is contended on behalf of the defendant that their engagement was broken by him in a letter written by him in the summer of 1907, and that therefore there was not sufficient legal evidence to show that the contract to marry was in existence within the statutory period during which the plaintiff could institute her cause of action. In other words, that the engagement having been broken in 1907, any cause of action that she may have had was barred by the statute of limitations.

On the other hand, it is insisted by counsel for plaintiff that the contract was not broken, and that, while the evidence shows that no

definite date was fixed for the marriage of the parties, their engagement was continuous, and extended over a period of about 17 years, and was in existence at the time of the institution of this action. We think it clearly appears from the evidence that, while no definite time was fixed for the marriage, they were to be married as soon as the defendant was able.

[1] While there are several assignments of error, the principal question to be determined is as to whether there was sufficient evidence offered by the plaintiff to sustain the verdict in her favor, and in order to determine this point we deem it necessary to refer briefly to some of the evidence relied upon by the plaintiff in the court below.

It appears that in 1895 the defendant either borrowed or was given the plaintiff's gold watch, which he retained in his possession until the 3d day of October, 1911, at which time it was returned to plaintiff by registered mail. Testimony shows that numerous letters passed between the parties, some of which were lost or destroyed, and some were mutilated and used by plaintiff in a sofa pillow. It also appears that there was a mutual exchange of gifts and post cards containing some declarations of love and some references to marriage.

Plaintiff testified that defendant agreed to keep her watch as a seal of their engagement, and that he was to retain it until their marriage. The fact that he kept plaintiff's watch in his possession from 1895 until the 3d day of October, 1911, is not controverted. Plaintiff also testified that the last time she had conversation with the defendant about the watch he stated that when he returned the watch he would marry her. Defendant in testifying as to this matter said:

"I expected to visit Miss Fullhart and return the watch to her if we never married."

The defendant in response to a question by counsel for plaintiff, among other things, testified as follows:

"Q. Now, Mr. Thrush, you testified that you told her that you expected to be married, and that you would marry her as soon as you completed your course at Lane Seminary, did you not? A. That was the understanding.

"Q. After that time and during all of these years that you corresponded with her, did you mention that to her in any of these letters that you wrote while you were on the farm, busy at hay harvest, and Christmas time, and all those times? A. That we would get married?

"Q. Answer the question. A. You mean, in any of these letters?

"Q. Yes, sir. Take them and sort them out and point them out to the jury.

"Q. Yes, in any of the letters that you wrote, did you tell her when you were going to marry her? A. No, sir.

"Q. Why didn't you tell her? A. Why didn't I set a time?

"Q. Yes. A. Because I wasn't ready to get married, and she understood my circumstances."

It appears from the testimony of defendant that he was not willing to fix a date for the marriage on account of the fact that his financial condition was not satisfactory. On the 7th day of August, 1904, defendant wrote plaintiff a letter in which, among other things, he said:

"Now, don't understand me that my people are opposed to you in particular, but they know we are very intimate and would like to get married, and they think I am not ready to get married yet. They are not opposed to you any more than they would be to any girl they know here that I ought to go with.

My father is old and has got the idea in his head I spend entirely too much money going to school it don't look at the satisfaction it is to me to have a good education by simply from dollars and cents. Now it would be impossible for me to start into anything like business without his help. I have been working here several years and have greatly reduced the amount I received for my schooling and father often speaks now of helping me into something when there is a good opening and he will if I don't cross him."

In the concluding paragraph of the letter, the defendant also says:

"Now, write me a good cheering letter, and be a good loving girl till I can see you. Good night, with all my love and best wishes."

Defendant also testified that he received a letter in August, 1911, from the plaintiff in which she said, "I want to know whether I am to be or not to be," and that he wrote her a short letter in reply. Plaintiff, among other things, testified that she received a letter in August, 1911, in reply to a letter which she had written defendant requesting him to advise her as to what was to prevent their marriage; that in response he said that the estate was not settled, and he could not marry until it was settled.

It was shown that defendant's father, who was a wealthy farmer, died on the 15th day of April, 1910, leaving a large estate; that the defendant and James A. Thrush, a brother, qualified as administrators of the estate. Shortly after defendant had qualified as one of the administrators, the defendant began to pay attention to Miss Mary E. Whip, but did not become engaged to her until about three months before they were married, to wit, during the month of August, 1911, which, according to the testimony, was about the time the defendant wrote the last letter to the plaintiff.

Defendant, in response to a question, among other things, testified as follows:

"Q. You may state whether or not the engagement was broken off. If so, when and under what circumstances? A. Yes, gentlemen, this engagement was broken off in the summer of 1907, by a letter written by me to this lady.

"Q. Now, Mr. Thrush, to what letter written by you was this letter of July 19, 1907, an answer? A. This letter of July 19, 1907, is not a direct answer to the letter that I wrote, but is a second letter that was written in explanation of what she had written. She wrote me two letters. The first one I have not got, but she accepted that as breaking off of the engagement in that letter, and this letter is simply written explaining. She said that she was afraid that I did not understand what she had written in the first letter. She did not mean that we would drop the correspondence, though we would never marry.

"Q. Do you know what become of the letter that was written just previous to this one and which was a direct answer to your letter? A. I suppose it was destroyed.

"Q. Have you searched for it? A. I have searched for it.

"Q. Have you been unable to find it? A. Yes, sir.

"Q. Tell the jury, as nearly as you can, what she said to you in that letter which you say was a direct reply to your letter breaking off the engagement? A. She agreed to the proposition that I then made, and I cannot state clearly what, if anything, she said about a continuance of the correspondence. But from this letter, I suppose, she made some reference to a further correspondence, just as friends. Just a friendship correspondence."

The plaintiff also denied that the defendant wrote her in 1907 or any other time that the engagement was broken, and that he would not marry her; that he had promised to visit her at Christmas, 1908,

and she offered in evidence a letter to corroborate this statement dated January 3, 1909, in which, among other things, defendant said:

"You would not know me as my hair is at least one-half gray. Sometime I will send you a sample. Expect I look as young as ever in my face. Am much stouter than when you use to see me. My weight runs about 160 to 165 lbs. Expect your weight about 60, do you not? I am very well in every way save an occasional attack of sick headache. The book you sent was received. Many thanks for same. Will repay the compliment in some substantial way in the future."

The closing sentence of this letter is in the following language:

"Well, I will close for this time. Hope you enjoyed Xmas, if I did not show up. Hope you are well."

It also appears that on March 25, 1909, the defendant sent a post card which was printed in a wreath of forget-me-nots, "To My Sweet Love." On March 25, 1909, defendant also wrote plaintiff a letter or post card in which, among other things, he said:

"I passed the 40th milestone of my existence not long since. Don't see any difference since I have become an old bachelor. Believe I am better looking than ever and you know I always was quite a beauty, at least some lady use to tell me so. * * * Why in the world don't Inez and her best get married and set some of her old friends a good example. It costs $2.00 in this state now for license besides clerical charges and that depends on the estimate the groom places on the bride."

The defendant testified that in his letter written during the summer of 1907 he stated positively that he did not intend to marry plaintiff, and, among other things, introduced a letter written by the plaintiff in July, 1907, from which he quoted certain statements as follows:

"We certainly need not deprive ourselves of the pleasure of corresponding, even though we never marry. I love to get your letters and will eliminate from my correspondence anything that pertains to love or matrimony. * * * How foolish it will be to deprive ourselves of this pleasure, just because we cannot get married. Maybe we can get more pleasure out of a life devoted to correspondence than we would out of matrimony. What I am interested in now is your friendship, which I am too glad to accept if that is all you have to give me. I will be satisfied with small favors."

It is contended on behalf of plaintiff that some of the statements contained in this letter, if taken alone, would tend to sustain the contention of the defendant. On the other hand, the expression "even though we never marry," to say the least of it, tends to corroborate the evidence of plaintiff to the effect that the contract of marriage had not at that time been terminated, and certainly shows that she thought there was a possibility of marriage in the future.

The plaintiff while on the witness stand, among other things, testified as follows in regard to this letter:

"Q. Was this letter written in answer to a letter from him? A. No, sir.

"Q. You received no letter from him, then, just prior to July 19, 1907, that this could be an answer to? A. This is not an answer to a letter from him.

"Q. Why did you say: 'We certainly need not deprive ourselves of the pleasure of correspondence even though we never marry?' 'I love to get your letters and will eliminate from my correspondence anything that pertains to love and matrimony and will only write a letter to a friend from a friend'? A. In order to answer that I will have to explain what the letter is.

"Q. I am not asking you to explain the letter. I am asking you why it was you wrote this letter, the letter speaks for itself. A. Well, prior to this letter I had received a letter from Mr. Thrush, and in that letter it was very discouraging, as all of his letters had been, that we couldn't get married now, that we would have to wait until he was in a position to get married, and that his father was very much opposed to his marrying, and that we must not do anything to cross his father in any way, because it would be worse for both of us if we did, and the only thing we could do was to wait until he was able to marry, and that is the substance of his letters, but is not word for word, but is the substance of it, so, in answer to that letter, I will say that the letter he wrote provoked me and I answered the letter in a rather provoked spirit. And I told him that I was tired of waiting and that our correspondence— We had better quit corresponding until he got over his blues, that his letters were all discouraging and maybe if he quit writing he would get over his blues, and that was the spirit of the letter I had wrote, but as for any word I wrote, I do not know, but that is the spirit of the letter that I wrote. I mailed that letter, but after I had written the letter, of course I repented of what I had said. I thought maybe I had said too much. So, I wrote this letter, as you have heard the letter read, and I told him I thought perhaps he did not understand my feelings about the matter, that I did not want to quit corresponding with him, so I wrote that letter, that was the spirit I had when I wrote the letter, that I did not want to quit corresponding, but wanted to continue our corresponding, that I did not see how I could get along without it. I think that answers your question.

"Q. You testified in this case on the former trial, didn't you? A. Yes, sir.

"Q. In your testimony then, did you not say that Mr. Thrush wrote to you, and that he was very much discouraged, and that his letters often were discouraging? 'A. He was very much discouraged, and he asked me if I thought I could live on the farm, that he was afraid probably I would not like farm life, and he did not say in this letter that he thought—He did not say in his letter the engagement was broken. He simply asked what I thought about —if I would like farm life, if I thought I could live on a farm, and if we thought we could marry. I think that is the substance of the letter.' A. I said that."

The plaintiff, in response to a question from the court, said:

"A. This promise was relied upon by me at all times from the time of the engagement until it was broken, which was November 1, 1911, when the watch returned, just a short time before Mr. Thrush was married."

In this connection, it should also be borne in mind that the defendant promised to visit her at Christmas, 1908. On the 3d day of January, 1909, the defendant wrote to plaintiff, as we have already stated, that he hoped she had enjoyed Christmas even though he did not show up. This is the letter in which he comments on his personal appearance, and acknowledges the receipt of a present which she had sent him. On the 3d of March of the same year defendant again writes to the plaintiff inclosing the post card in a wreath of forget-me-nots "To My Sweet Love." This conduct on the part of the defendant tends to corroborate the evidence of the plaintiff. In other words, if the evidence of the plaintiff is to be believed, and much of it is not controverted, this defendant entered into a contract of marriage with the plaintiff, and accepted her watch as a seal of the engagement, which he kept until the 3d day of October, 1911, and in addition to that he sent the post card and other communications indicating that he still loved the plaintiff and that it was his purpose to comply with the contract.

The character of the plaintiff, according to the record, is not assailed in any sense of the word. While at college she became engaged to the defendant, who was also a student, and contrary to the usual custom she was required by the defendant to place her watch in his custody as a seal of the vows they had taken. That she had implicit confidence in the honesty and integrity of the defendant is evidenced by her letters, as well as the loan which she secured for him from her sister and the presents which she sent him from time to time.

The evidence as to whether the contract had been broken in 1907 was conflicting, and was such that reasonable men might differ as to the inference to be drawn therefrom. Under these circumstances, we think the refusal of the court below to direct a verdict in favor of the defendant was eminently proper.

[2] Among other things, it is insisted on behalf of the defendant that the plaintiff's right of action is barred by the statute of limitations. The statutory bar in West Virginia is one year for an action for damages for breach of promise to marry. It is insisted that the evidence offered by plaintiff clearly shows that this action was commenced within one year from the time the cause of action accrued.

On the other hand, it is insisted by counsel for defendant that the plaintiff has failed to show that suit was commenced within a year from the time the contract was broken. This question was properly submitted, and the jury having found in favor of the plaintiff the same is not reviewable, inasmuch as the evidence bearing on this point is conflicting.

It is further insisted that the court below erred in granting instructions Nos. 1, 2, 3, 4, and 5, these being the same instructions that were granted by the court at the former trial. This court, in referring to these instructions, said:

"Without stating the various propositions submitted, or discussing the questions they severally present, it is sufficient to say that, in our judgment, none of these instructions involve substantial error. Even if they be regarded as favoring the plaintiff's contention, we are not persuaded, in view of the pleadings and evidence, that they were incorrect or unwarranted."

Instructions Nos. 6, 7, and 8 properly presented the law in view of the facts of this case. Therefore the assignments of error as to the court's action in respect to these instructions are without merit.

[3] It is also insisted that the verdict is clearly excessive. The evidence shows that plaintiff, a young lady of many accomplishments and good character, was induced by the promises and representations of defendant to believe that he would marry her, and acting in accordance therewith she practically gave the defendant 17 years of the best part of her life, during which time she was not in a position to consider a proposition to marry from any one else.

The evidence also shows that the defendant is worth about the sum of $12,000. He was engaged to the plaintiff for a period of 17 years. It further appears that defendant induced plaintiff to borrow from her sister the sum of $50, which he agreed to repay, but never did; that plaintiff loaned defendant money to buy books; and that he borrowed money from plaintiff, kept plaintiff's watch during the time

of their engagement, and accepted presents from plaintiff from time to time.

While the defendant would have been liable had he promptly terminated the engagement on his return home from school, perhaps the jury in its discretion would not have returned a verdict as large as the present one.

[4, 5] The evidence shows that the plaintiff had reasonable expectations of an advantageous settlement in life, and for such she would be entitled to recover damages, and in addition thereto for pecuniary loss, as well as compensation for injured feelings, anxiety of mind, wounded pride, and mortification in consequence of the treatment which she received at the hands of the defendant. It would be impossible in a case like the one at bar to fix a definite measure of damages. Therefore in a case of this character the jury may take into consideration all the facts and circumstances, and, if their conduct is not marked by prejudice, passion, or corruption, exercise their discretion in determining the amount which the plaintiff is entitled to recover.

[6] The rule applicable where it is sought to set a verdict aside for excessive damages is well stated in the case of Hoagland v. Moore, 2 Blackf. (Ind.) 167, in which the court, among other things, said:

"Where a new trial is applied for on account of excessive damages, and refused, the damages must be outrageously excessive, or a court of error will not interfere."

In view of the facts and circumstances of this case, we are of opinion that the verdict is justified by the evidence, and are therefore not inclined to disturb the same.

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

WM. FILENE'S SONS CO. v. WEED et al.

(Circuit Court of Appeals, First Circuit. December 9, 1915.)

No. 1101.

CORPORATIONS ⟸565—RECEIVERS—PROVABLE CLAIMS—CLAIMS ARISING UNDER COVENANTS OF LEASE.

A clause in a lease giving the lessor the right at his election to terminate the lease and re-enter on the bankruptcy or insolvency of the lessee, and also on such election to demand payment from the lessee of a sum based on the length of the unexpired term, and virtually the rental for such term, does not, where the election is exercised after the appointment of a receiver in insolvency for the lessee by a court of equity, make the lessor a creditor entitled to prove his claim against the estate, since by the terms of the covenant the claim had no existence until after the sequestration of the estate for the benefit of existing creditors by the appointment of the receiver and the subsequent election of the lessor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. ⟸565.]

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

Suit in equity by the Isaac McLean Sons Company against William S. Butler & Co., Incorporated. In the matter of the claim of the Wm. Filene's Sons Company. From an order disallowing such claim, on objections of Charles F. Weed and others, receivers, claimant appeals. Affirmed.

The following is the opinion of DODGE, District Judge:

The receivers filed a petition for instructions regarding this claim April 7, 1913, which was answered by the claimant company April 8, 1913. By an order entered December 15, 1913, the issues raised were referred to a special master, to hear the parties and their evidence and report thereon. The claim is also one of the disputed claims referred to the same special master by a like order also entered December 15, 1913.

Upon the special master's report, filed February 21, 1914, there has now been a hearing. He has found the facts upon which the questions to be decided depend, and there is substantially no dispute regarding his findings. The manner in which his report has presented the facts is so clear and satisfactory that little restatement will be needed, and I shall deal with them largely by reference to the numbered paragraphs of his report.

The claimant's rights are those which belong to it under the lease described in paragraph 2, made by it to the Butler Company May 29, 1912, of the five parcels of real estate which were together occupied and used by the Butler Company as a department store from September 3 to November 7, 1912. The claimant was tenant, not owner, of these parcels, and annexed copies of the leases under which it held them (see paragraph 1) form part of the report, as does its underlease to the Butler Company, whereon it bases its present claim. The term for which this underlease was to run expired, as to each parcel, with the expiration of the claimant's estate as tenant under the lease thereof to it. The leases to it have remained in force throughout, and are still in effect. The earliest date of expiration of any of them was December 30, 1917 (paragraph 2); the latest date is in 1921; so that when all the property and assets of the Butler Company passed into the hands of the receivers in this case by the decree of November 7, 1912, there was a long unexpired term under both leases in the case of each and all the leased properties.

The receivers having on December 5, 1912, declined to adopt the underlease (paragraph 5), the claimant entered and took possession by leave of court on December 9, 1912 (paragraph 6), thus terminating the underlease on that day. The claimant had received the rent due under it to November 1st. It has also been paid by the receivers for their use and occupation from November 7th to December 9th at the same rate. (See paragraph 5.) The receivers concede that the claimant is entitled to prove in these proceedings for rent from November 1st to the time of their appointment on November 7th at the monthly rent agreed in the underlease; also for water rates and insurance proportioned upon the same period—in all, $3,739.48. (Paragraph 8.) They deny that the claimant has any further provable claim.

The claimant contends that the provisions of the underlease quoted in paragraph 9 give to it the right to prove also for all that would have become payable to it, after its re-entry, according to the underlease, during the full term thereof, had there been no receivership or re-entry, less any rentals under new leases or the estimated rental value of premises not relet. I am here describing this part of the claim in general terms only. The items composing it, and its total amount, if calculated in the manner contended for, appear in paragraph 2 of the "summary" with which the report concludes, with references for detailed explanation of the more important items to prior paragraphs of the report.

So far as the claim for anything beyond the amount conceded as above is made up of rent or other payments required of the Butler Company by the underlease, and accruing or to accrue after the claimant's entry in December, 1912, it rests wholly on the Butler Company's covenants, expressed in those provisions of the lease quoted by the master and summarized below, to pay

the lessor, upon such re-entry, for or on account of such after-accruing installments.

These covenants were agreed in the lease to become effective in case the lease should be terminated by such re-entry, and the right so to re-enter was agreed to exist if the lessee should fail to perform. The same right was also agreed to exist if a receiver appointed should stay in over 90 days. The re-entry which has been made was upon a failure of performance caused by the appointment of a receiver; not upon the ground that the receivership had continued 90 days. Failure of performance having given the right to re-enter, and the right having been exercised so as to render the covenant effective, the terms of the covenant purported to give the lessor an election among alternative methods of payment. This election has been made by the presentation of the claim in the form reported by the master.

Whatever the effect of the receivership upon the Butler Company's executory contracts not contained in any lease, it effected no breach of any lease under which that company was tenant, nor did it terminate the company's estate in the premises leased. That it did is not contended in this case. Once it had resulted, however, in a failure of performance in respect to payment of rent, the receivers had lost the right to adopt this lease without the lessor's consent, because such failure gave the lessor a right to re-enter, and so terminate the lease. In re Roth & Appel, 181 Fed. 667, 671, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270. The receivers' election not to adopt, if after such failure, though it may have influenced the lessor as to the time when he would re-enter, seems to be without other bearing upon the question arising.

The order for presentation of claims in this case, under which proof of this claim was first presented to the receivers, was entered November 11, 1912, and it required all creditors to present their claims on or before January 1, 1913, "made up as of November 7, 1912," the date of the filing of the bill and of the receivers' appointment. There have been several extensions of the time thus limited by subsequent orders. The last extension expired December 12, 1913. Obviously there can be no claim as of November 7, 1912, for that which the claimant first got any right to demand on December 9, 1912.

According to the decision of the Circuit Court of Appeals for this circuit in Slocum v. Soliday, 183 Fed. 410, 106 C. C. A. 56, the covenants here relied on gave the lessor no claim provable in bankruptcy for lost rental accruing after its re-entry, had there been bankruptcy on November 7, 1912, instead of this receivership. The covenants relied on in that case were substantially like these, and no circumstances appear sufficient to distinguish the question which would have been here presented from that there decided. The lessor's re-entry was not until after the bankruptcy, and it was held that at the time of the bankruptcy there was only a "contingency that there might be a claim." The same was true here on November 7, 1912. Before December 9, 1912, no claim under the covenants had any existence. It was not merely uncertain as to the amount.

In equity proceedings like these, however, the allowable claims of creditors are not necessarily only those provable as of the date whereon the receivers were appointed. This may be conceded in view of the decision of the Circuit Court of Appeals for the Second Circuit in Penna., etc., Co. v. New York, etc., Co., 198 Fed. 721, 739, 740, 117 C. C. A. 503. Moreover, this claim is being dealt with, not only as presented under the order of November 11, 1912, but also as presented by the receivers' petition for instructions and the claimant's answer thereto. There can be no final order of distribution for some time to come. Although both as to existence and amount the claim was too contingent on November 7, 1912, for allowance as of that date, I must consider it allowable in these proceedings now, if it has since that date become allowable. So far as it will be possible to determine them at all, before final order of distribution, the contingencies which then affected it have now been determined. The lessor has re-entered, and has also made its election, by the claim presented, of the particular method, out of those provided for in the covenant, according to which the amount the lessee was to pay should be ascertained in case of such re-entry.

The decision last above cited affords no support for the contention that a claim for rent, accruing or to accrue after the receivership, under a lease which the receivers have declined to adopt, whether or not it has been terminated by the lessor's entry, is ordinarily a claim provable against the estate in proceedings like these. No such claim was allowed in that case, and as the opinion points out (198 Fed. 744, 117 C. C. A. 503) there is no analogy between a damage claim for breach of an uncompleted executory contract to furnish transportation services to the insolvent for 20 years (which was allowed), and a claim of damages for loss of unaccrued rent under an unexpired lease. A claim founded on the insolvent railroad's covenant, as lessee, to pay rentals and taxes thereafter to become due from the lessor railroad, was disallowed so far as it related to rentals or taxes becoming due after the lessee's receivers had given up the lease. These, it was held, were too uncertain for allowance; and it was said that "the rule which excludes a demand for future damages for nonpayment of rental excludes them." Page 760, "Crosstown Company's Appeal." See also In re Roth & Appel, 181 Fed. 667, 669, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270; Slocum v. Soliday, 183 Fed. 410, 411, 106 C. C. A. 56.

In the absence of express provisions such as those quoted by the master from this lease, no allowable claim for future payments under it would in any event have come into being upon or after the lessor's re-entry on December 9, 1912. The receivers would have been bound to pay for their use and occupation, but the lessor would have had no further rights against the estate. The question now to be decided is whether the lessee's express undertaking in the lease to make payments on account of such unaccrued rent in the event of such re-entry have given the lessor a claim which ought to be here allowed.

A difference between the parties regarding the interpretation of those terms of the lease which fix the payments to be made by the lessee while its tenancy continued is first to be considered. The somewhat unusual character of those terms is accounted for by the fact that the lessor, instead of being owner of the five parcels making up the premises, was itself tenant of each, and bound to pay rent, taxes, water rates, etc., therefor under each overlease. The Butler Company, according to its underlease, was to yield and pay "as rental" (1) the aggregate of the rentals, etc., due from this claimant under the five leases referred to, "together with" (2) $20,000 yearly, in equal monthly payments until the expiration of the last overlease at the end of February, 1921. There is no occasion to consider the provisions regulating the precise dates upon which installments of the "rental" thus composed were to fall due. The claimant contends the yearly payment of $20,000 is not to be treated as "rent" for the purposes of this case, but as a "bonus," payable in installments, and due, at all events, independently of any tenancy of the premises. The master admitted evidence, against objection, tending to show that both parties so understood the matter in their negotiations before the lease was signed. It does not seem to me that there is any such ambiguity in the terms of the lease as to make such evidence admissible. The whole amount to be paid by the tenant, though made up of both the above elements (1) and (2), is repeatedly referred to in the lease as "rental" or "rent and other payments," and the consequences of failure to meet installments of (2) when due were to be the same as in the case of (1). The substance of the bargain was that this claimant, controlling the five different parcels as a whole, let them for $20,000 a year more than the total annual payments which it had itself to make as tenant, requiring this much of the rent reserved to it by the underlease to be paid at all events. The fact that payments under (2) were not to abate upon certain contingencies mentioned which would abate payments under (1), I consider insufficient to require a different conclusion. My ruling is that the evidence admitted should have been excluded; but even if it is admissible, I do not think it sufficient to show a definite understanding between the parties at the time that the meaning of their agreement should be that for which the claimant now contends. The entire amount of the above payments required from the Butler Company will therefore be hereinafter regarded as rent.

The covenants by the lessee which afford the only basis for the lessor's present claim may be thus summarized:

Upon termination by re-entry, the lessee was to pay $20,000 for each year of the then unexpired term of the underlease on demand, less a discount of 5 per cent. (elsewhere agreed in the lease to be allowed in case the lessor should exercise a privilege reserved to cancel upon a like payment).

Also at the lessor's election, which he might make or change at pleasure, to pay either—

(*a*) As liquidated damages, sums equal to the rent and other payments called for by the lease at the times therein provided until February, 1921, less the proper proportion of what might have been paid as above on demand.

(*b*) Or, as damages, the difference between the rental value of the premises when the lessor should exercise its right to elect and the amount of rent and other payments so called for by the lease until February, 1921, less what might have been paid as above on demand.

(The lessor having elected to require payment under (*a*) to April 1, 1913, and under (*b*) from and after that date, a third method of payment which it had the option to elect, viz. (*c*) indemnity against loss of rent and other payments for the unexpired term, taking into account anything paid on demand as above, need not be further mentioned.)

The above covenants may be even more briefly summarized thus: The annual $20,000 payments to be made until 1921 were all to become immediately due and payable, subject to the discount of 5 per cent. Any difference between the rent reserved in the overleases for the whole unexpired term and the rental value of the premises at the time of re-entry was to be paid in addition.

The covenants in question conclude with the following clause:

"The amounts due the lessor from the lessee under the preceding clauses may be proven in bankruptcy, insolvency, or receivership proceedings, or against any assignee or trustee for the benefit of creditors."

It is, of course, obvious that, in bankruptcy, such an agreement as this, between the bankrupt and one creditor, could in no way assist the provability of the claim. Unless provable under the Bankruptcy Act, the bankrupt's consent thus given could not make it provable. It is no less clear that, in the distribution of an insolvent estate in equity, the court can give no effect to such an agreement. The other creditors, who, in bankruptcy, would have a statutory right to the disallowance of the claim, unless provable under the act, have here a right to its disallowance unless its own merits, entirely apart from the clause quoted, equitably entitle it to share upon an equal footing with the claims due other creditors interested in the distribution. This, indeed, the claimant is understood to concede.

That the remaining covenants above summarized, for acceleration of the payment of all future rental, etc., upon termination of the lessee's tenancy because of its default, would be valid as between the lessor and lessee alone, does not seem to be disputed; but it does not follow that, in equity, they are to be regarded as giving the lessor a right, equal in merit with the right of those creditors of the lessee whose claims were fixed liabilities absolutely owing when the court took control of the estate, or, if then contingent, were so only as to their existence, or only as to amount, to share in this distribution for the full amount of all the rent it might have got, had the lessee remained its tenant and continued to pay rent until 1921, less the stipulated credits, although it has taken back and is not to restore that estate in the premises whose enjoyment by the Butler Company was to furnish the entire consideration for such rent.

That no such claim could be allowed to share, were the distribution to be made in bankruptcy, has been already stated. The result that there is any such difference between the two systems of distribution, in the principles according to which the respective merits of competing claims are determined, as will justify the admission of the lessor's claim here because these proceedings are in equity, seems to me one which could only be adopted for convincing reasons, and I am unable to believe that such reasons exist.

The reasons which have been held to forbid the exclusion of claims in proceedings like these, if mature and certain when presented, because they were immature or uncertain in amount on the day when the proceedings were in-

stituted, and to require their allowance if they became mature or their amount certain within a time not involving delay in distribution, do not go far enough to require the allowance of a claim which, like this, had no existence on the date referred to, but has since come into existence through subsequent dealings wholly between the insolvent and the particular creditor, relating wholly to a leasehold interest forming no part of the estate to be distributed, and is dependent not only for its existence, but also as to the time at which it should come into existence and as to its amount, upon election by the creditor while these proceedings were pending. It is not sufficient for the allowance of such a claim to say that it is presented in time, and is not to be excluded because it was not certain at some arbitrary anterior date. It does not seem to me that it is such in its nature as to entitle it to rank with liabilities incurred prior to or concurrently with the receivership, whether then mature or immature, certain or contingent.

If it be said that the dealings referred to were in pursuance of express agreements made and publicly recorded before the institution of these proceedings—so far as these agreements expressly purported to make such a claim provable in case there should be proceedings like these, they are admittedly of no effect here. But the purpose, expressly declared in the clause referred to, of enabling the lessor, at his option, to make all the rent for the entire unexpired term due and provable at once in case of insolvency, is sufficiently obvious without it from the other agreements relied on; default on the lessor's part being far more likely to result from its future insolvency than from any other cause. A liability arising after insolvency out of agreements thus designed to give one creditor an advantage in case of insolvency, which, being for future rent under an unexpired lease, could not otherwise be claimed, I cannot regard as equitably allowable to the prejudice of creditors claiming upon liabilities not so arising. In bankruptcy, such an agreement has been regarded as "a way of contracting for a preference," and providing a mode of thwarting the provisions of the act. In re Merwin & Willoughby Co., 206 Fed. 116, 120.

The above objections to the provability of the claim in these proceedings are in no way avoided, so far as I can see, by the fact that, according to the agreements, the payments called for were to be made as "damages," or "liquidated damages." Notwithstanding the use of these terms, it remains none the less true that acceleration of all the future installments of rent under the lease, irrespective of any tenancy by the lessee, is what was in substance provided for. See Watson v. Merrill, 136 Fed. 359, 361, 69 C. C. A. 185, 69 L. R. A. 719; Bowditch v. Raymond, 146 Mass. 109, 115, 15 N. E. 285.

In view of the above considerations, my conclusion must be that no claim for the accelerated rentals under the agreements referred to is allowable.

That some elements of conjecture or speculation must of necessity enter into any determination, by estimate in advance, of rental values for terms extending so far into the future as these, seems obvious. I am further inclined to agree with the contention of the receivers that, particularly in regard to so much of the installments to be accelerated as above as was to make up the annual payments of $20,000 per year, the agreements relied on resemble in character agreements for a penalty or forfeiture on termination of the lease, rather than agreements for indemnity. Less an agreed discount, payment of the $20,000 per year to the end of the term was required at all events, even in case of reletting by the lessor for more than the overleases required it to pay as tenant. Further reasons are afforded by these considerations against the allowance of such a claim in any respect.

The claim presented by the creditor is allowed in the amount of $3,739.48, admitted as above stated, and is otherwise disallowed. The receivers fail to satisfy me that they are entitled to any set-off against the amount thus allowed on account of the taxes for 1912 paid by the Butler Company on November 1, 1912, according to paragraph 15 of the master's report.

The result reached renders it unnecessary to discuss any of the other questions raised by the report.

George R. Nutter, of Boston, Mass. (Jacob J. Kaplan and Brandeis, Dunbar & Nutter, all of Boston, Mass., on the brief), for appellant.

Frederick H. Nash, of Boston, Mass. (Charles F. Choate, Jr., of Boston, Mass., on the brief), for appellees.

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

BROWN, District Judge. We all agree that the judgment of the court below should be affirmed, though there is a difference of opinion as to the precise grounds upon which the affirmance should rest. A majority of the court agree with the reasoning of the court below, and adopt its opinion as the opinion of this court.

In view of the argument for the appellant, it may be useful to state certain reasons which seem to support the judgment of the District Court.

The nature of the covenant was explained in Slocum v. Soliday, 183 Fed. 410, 412, 106 C. C. A. 56. It has no operation, except from the time when the lessor entered upon the premises as provided therein. The recording of the lease, with the implied notice to other creditors of its terms, does not assist the appellant. On the contrary, it informed other creditors that, so long as the lease was in effect, either because the lessee had a right to prevent a cancellation, or because the lessor, though having the right to cancel, did not exercise it, any claim under the covenant for indemnity was nonexistent, and did not affect the lessee's solvency.

Other creditors could not have counted the appellant as a creditor for the purpose of showing that the lessee's debts exceeded its assets, or for instituting proceedings in bankruptcy or insolvency, and were entitled to give credit in reliance upon the fact that, so long as the relation of lessor and lessee continued, the lessor could be a creditor only for installments of rent as they fell due. They were also, in giving credit, entitled to rely, not only upon the fact that the claim had no existence, but upon the fact that a debt first arising after bankruptcy proceedings could not share with them in a distribution of assets, and that, so far as the covenant attempted to create a debt to which bankruptcy was a condition precedent, it contravened the bankruptcy laws and was wholly ineffective against them.

Courts of bankruptcy and of equity alike recognize the fundamental equity of equality between creditors, in the distribution of assets, which arises when assets have become insufficient to pay all in full. Both enforce this equity by assuming the control of assets and by stopping, from the time their aid is invoked, the creation of new debts to be paid out of assets. Credit upon the faith of assets is stopped by the filing of a bankruptcy petition or a petition in equity which seeks either primarily or in the alternative a pro rata distribution of assets.

The covenant for payment after bankruptcy or insolvency, upon which appellant now relies, was not, as is contended, entered into upon the faith of the lessee's assets. The lease may have been entered into with more or less consideration of solvency and reliance upon assets,

though insolvency was guarded against by reservation of a right to cancel, but the covenant for indemnity was no part of the lease proper, but a substitutional contract, to take effect, if ever, only after termination of the lease, and only after the realization of a loss. While there was a possibility of its application during the lessee's solvency, we are not in this case concerned with that aspect, but with the covenant as a provision intended to become effective after the lessor had canceled the lease, not for a voluntary breach during the lessee's solvency, but because of bankruptcy, insolvency, or a receivership.

In this aspect the lessor has in substance only a personal promise to pay after personal ability to pay is gone.

Persons doing business with a corporation trust it, not, as the appellant contends, upon the faith of its assets, but upon the faith of an excess of assets over its existing obligations. Knowledge of the amount of indebtedness is as important as knowledge of assets.

Persons were entitled to give credit to the lessee regardless of the mere possibility of a future debt, and if credit was given in ordinary course until their debts exceeded assets, this fact gave rise to an equitable right to distribution among them of the assets upon which they relied for payment, for the enforcement of which they might resort to the bankruptcy court or to a court of equity. This right, after it is once asserted by petition or bill, cannot be impaired or diminished by a debt which did not come into being until the assets were insufficient to pay those creditors who had contracted with the lessee upon the assumption of solvency.

As rent was paid up to the filing of the creditors' bill, the creditors were entitled to assert that no breach occurred by act of the lessee before they asserted their right to the assets. For a breach after this time the lessor must look to the personal responsibility of the lessee at the time of breach. The reason for the rule is the same in bankruptcy and in equity. The claim arises too late.

It is not true that the lessor has a claim for damages for a breach of contract for the entire term of the lease, for it terminated the lease and cut off the future term by its own election. The substitutional covenant, which takes effect after the relation of landlord and tenant is terminated, is what the former lessee has not performed, and upon this rests the appellant's claim. The former lessee has lost its control over its assets, since those creditors who trusted it on the faith of its assets, and with knowledge that the covenant had created no debt, have asserted their right to the assets.

Exactly what was contemplated as one condition precedent to the right of cancellation has happened; custody of the assets for the benefit of creditors who are, as the appellant is not, entitled to say:

"We trusted the lessee upon the assumption of solvency and ability to apply its assets in payment of our claims."

The covenant is inherently weak and insufficient to give a claim to share in assets, for it is a provision for a time when the assets of the lessee are gone from its hands. The lessor, however, still has all that it contracted for in this event—the personal obligation of the lessee.

In substance the covenant is one of indemnity or insurance—a covenant to indemnify the lessor against loss occasioned by the lessee's bankruptcy or insolvency. The lessee insures the lessor for the loss occasioned by the lessee's own inability to pay the agreed rent for the full period.

A claim based upon a promise to pay "after I have become a bankrupt or insolvent the loss occasioned by my bankruptcy" cannot be permitted to share equally with other claims merely on the ground that those who give credit on the faith of assets should be permitted to share in the pro rata distribution of those assets.

This ground upon which the appellant bases its argument for an equitable right to a share in the assets is, however, a good ground for preferring the claims of other creditors. As it is obvious that in framing the provision for bankruptcy or insolvency and for a cancellation of the lease the lessor did not rely upon the lessee's possession of assets to pay with at the time when the debt might arise, this is a sufficient reason for holding that the claim cannot compete equitably with the claims of ordinary creditors.

As a device for the creation of a debt which it is not expected that the lessee can pay, but which, as the lease in terms clearly indicates, is to be used in competition with other prior creditors in sharing assets —as a device to become a creditor ex post facto—it is wholly ineffective.

The claim was rightly disallowed, because the appellant did not become legally or equitably a creditor before other creditors had become entitled, both under the Bankruptcy Act and upon equitable principles to all the assets for pro rata distribution, and because the appellant did not rely upon the assets of the lessee for the performance of the covenant of indemnity, as appears by the covenant itself, which contemplates both the creation and payment of a debt after all the lessee's assets are required to pay prior creditors.

The decree of the District Court is affirmed, and the appellees recover their costs of appeal.

PUTNAM, Circuit Judge. I concur in the result. The District Court applied to this case the rule of Slocum v. Soliday, 183 Fed. 410, 412, 106 C. C. A. 56. I do not know whether the case is governed by this rule or not; but, in the absence of authorities otherwise, I feel bound by it. The application of this case cuts up all the further reasoning contained in this opinion of the court. Therefore I concur that the case is governed by Slocum v. Soliday, and decline to enter into further discussion.

ORINOCO IRON CO. v. METZEL.

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

No. 2837.

1. BANKRUPTCY ⊂=211—JURISDICTION OF COURTS OF BANKRUPTCY.
As to property within the custody of the bankruptcy court, its exclusive jurisdiction over the general administration of the bankrupt's estate carries with it exclusive authority to determine, not only the claims of creditors, but also adverse claims, whether by way of ownership or paramount liens.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. ⊂=211; Courts, Cent. Dig. § 1331.]

2. BANKRUPTCY ⊂=211—JURISDICTION OF COURTS OF BANKRUPTCY.
The rule which gives the bankruptcy court exclusive jurisdiction to determine claims to property in its custody is not limited to actual possession, but extends to constructive possession as well, including property held not only by, but for, the bankrupt.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. ⊂=211; Courts, Cent. Dig. § 1331.]

3. BANKRUPTCY ⊂=211—JURISDICTION OF COURTS OF BANKRUPTCY.
A concession by Venezuela passed by assignment to the O. Corporation, and was afterwards annulled by the Venezuelan government. The government of Venezuela agreed to pay $385,000, in eight annual payments, for the benefit of the O. Corporation and its predecessors, and two of such payments had been made, when the O. Corporation was adjudicated a bankrupt. Certain of the O. Corporation's predecessors assigned their claims to the indemnity fund to the O. Corporation, and it was agreed between its trustee in bankruptcy and another of such predecessors that all of the indemnity, except $75,000, should be paid to the trustee. The State Department gave notice to all claimants of this distribution, and thereafter the amount then payable to the trustee thereunder was paid by the United States Treasurer to the trustee. Subsequently a bill was filed in the Supreme Court of the District of Columbia to establish an equitable lien on the indemnity fund, and the Treasury officials were enjoined from delivering any warrant on the fund. This suit was subsequently settled. Subsequent to the distribution agreement, the O. Iron Company, which had a contract with one of the O. Corporation's predecessors for mining on the concession, filed a claim with the trustee in bankruptcy, and still later filed suit in the District of Columbia to establish a trust ex maleficio in the fund in its favor. The bankruptcy court enjoined it from prosecuting this suit and ordered it dismissed. The United States government recognized the right of the trustee in bankruptcy, and had refrained from paying installments because of the action of the courts of the District of Columbia. *Held*, that the bankruptcy court had exclusive jurisdiction over the fund and the claim thereto presented in the suit in equity, and properly granted such injunction.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. ⊂=211; Courts, Cent. Dig. § 1331.]

4. BANKRUPTCY ⊂=11—JURISDICTION OF COURTS OF BANKRUPTCY.
Generally speaking, the jurisdiction of courts of bankruptcy in the administration of bankrupt estates extends to all matters of bankruptcy without limitation, is co-extensive with the United States, and knows no state or district boundaries, though it may not enforce its process or orders outside the limits of its territorial jurisdiction.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. ⊂=11.]

5. BANKRUPTCY ⊂⊃212—JURISDICTION OF COURTS OF BANKRUPTCY.
A court of bankruptcy, in determining conflicting claims to property in its custody, acts essentially as a court of equity.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 236; Dec. Dig. ⊂⊃212; Courts, Cent. Dig. § 1331.]

6. BANKRUPTCY ⊂⊃20—JURISDICTION OF COURTS OF BANKRUPTCY.
Where the trustee in bankruptcy obtained an order from the bankruptcy court restraining the prosecution of a suit in another court, and thereafter the party enjoined moved to vacate such order, and the bankruptcy court denied such motion and entered a decree enjoining it from prosecuting such suit, it did not affect the jurisdiction of the bankruptcy court that the first restraining order was made without notice.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⊂⊃20; Courts, Cent. Dig. §§ 119, 1331.]

7. BANKRUPTCY ⊂⊃212—JURISDICTION OF COURTS OF BANKRUPTCY.
A bankruptcy court, having jurisdiction to determine conflicting claims to a fund, had jurisdiction to enjoin the prosecution of actions tending to interfere with the administration of such fund.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 236; Dec. Dig. ⊂⊃212; Courts, Cent. Dig. § 1331.]

8. BANKRUPTCY ⊂⊃328—CLAIMS—TIME FOR FILING.
A claim sent to a trustee in bankruptcy within one year after the adjudication was filed in time.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. ⊂⊃328.]

9. BANKRUPTCY ⊂⊃440—REVIEW OF PROCEEDINGS—APPEAL OR PETITION TO REVISE.
Where the bankruptcy court enjoined the prosecution of a suit to establish a trust in a fund over which it had exclusive jurisdiction, and the merits of the claim set up in such suit had not been decided, a petition to revise the order granting the injunction, and not an appeal therefrom, was the proper remedy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⊂⊃440.]

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

In the matter of the Orinoco Corporation, bankrupt. From an order obtained by Harry V. Metzel, trustee, restraining the Orinoco Iron Company from prosecuting a suit, and ordering it to dismiss the suit, the Orinoco Iron Company appeals and files a petition to revise. Appeal dismissed, and order affirmed.

William R. Harr and Edward S. Duvall, Jr., both of Washington, D. C., and Milner, Miller & Searl, of Portsmouth, Ohio, for petitioner and appellant.

W. S. Little, of Cincinnati, Ohio (T. B. Paxton, Jr., of Cincinnati, Ohio, of counsel), for respondent and appellee.

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

KNAPPEN, Circuit Judge. This review involves the validity of an order made by the court below, sitting in bankruptcy, upon the

petition of the trustee in bankruptcy of the Orinoco Corporation, enjoining the Orinoco Iron Company (hereafter called the Iron Company) from prosecuting a suit instituted by it in the Supreme Court of the District of Columbia, to enforce its alleged rights in the so-called Orinoco indemnity fund in the Treasury of the United States. The history of that fund is briefly this:

In the year 1883 the government of the republic of Venezuela gave to one Fitzgerald a 99-year lease of a large tract of land for mining and other purposes. This concession was afterwards assigned by Fitzgerald to the Manoa Company, Limited, by the latter to the Orinoco Company, by that company to the Orinoco Company, Limited, and by the last-named company to the Orinoco Corporation. In 1897 the Orinoco Company, Limited, made a contract with the Iron Company for mining on the concession. After the latter had operated to some extent the government of Venezuela declared a forfeiture of the contract, and caused the concession to be annulled, the Orinoco Company, Limited, to be ousted therefrom, and caused or permitted certain property used in operations upon the concession to be confiscated. Through the government of the United States the claims of the Orinoco Corporation and its three predecessors in interest (viz., the Manoa Company, Limited, the Orinoco Company, and the Orinoco Company, Limited), were presented to the government of Venezuela, with the result that that government, on September 9, 1909, made an agreement of settlement with the United States whereby Venezuela was to pay to the latter $385,000 in eight annual payments of $48,125 each, for the benefit of the Orinoco Corporation and its three predecessors, in satisfaction of all claims of those four corporations, including the alleged seizure and destruction of a certain steamer by the military forces of Venezuela.

The first payment under this settlement was made by Venezuela into the Treasury of the United States in September, 1909, and on January 13th following the Department of State gave notice to all persons interested of the fact of the payment, that the Department would take up as soon as possible the question of the distribution of the award to those prima facie entitled thereto, and that prima facie the four corporations named were entitled to be heard in deciding upon such disposition. The second payment under the settlement was made by Venezuela in September, 1910, and likewise paid into the Treasury of the United States. On December 20, 1910, the Orinoco Corporation was adjudicated bankrupt by the District Court below; and the Manoa Company, Limited, and the Orinoco Company having assigned to the Orinoco Corporation their claims to the indemnity fund, its distribution was by agreement between the receiver of the Orinoco Company, Limited, and the trustee in bankruptcy of the Orinoco Corporation (with the approval of the District Court below, in bankruptcy, in the case of the Orinoco Corporation, and of the Minnesota court having charge of the insolvency proceedings of the Orinoco Company, Limited), and other interested parties, so arranged as that the Orinoco Company, Limited, was to receive $75,000 and the remainder of the indemnity fund (after paying $8,000 to certain attorneys and deduct-

ing upwards of $6,000 on account of expenses incurred by the government of the United States in the settlement of the claims), was to be paid to the trustee in bankruptcy of the Orinoco Corporation. Notice of this disposition and distribution was given by the Department of State to all claimants June 20, 1911; and on July 27th following the United States Treasurer's warrant for $70,263.97 (the amount so payable to the trustee in bankruptcy on account of the installments thus far paid) was paid by the Treasurer, and was by the trustee distributed in the administration of the estate.

Meanwhile, on June 30, 1911, one Safford, claiming to be a stockholder and creditor of the Manoa Company, Limited, filed his bill in the Supreme Court of the District of Columbia, claiming an equitable lien upon the indemnity fund and asking a receivership over the installments already paid into the Treasury; and the trustee in bankruptcy of the Orinoco Corporation, having already received the Treasurer's warrant mentioned, was appointed receiver in the Safford case and enjoined from disposing of any of the funds, except by paying the same to himself as receiver; and the Secretary of the Treasury and the Treasurer of the United States were enjoined from delivering outside of the District of Columbia any warrant on the fund. Fitzgerald, who was made defendant by cross-bill, also set up an equitable lien to the fund, claiming that certain of the properties had been reconveyed to him by the Manoa Company, Limited, and excepted from subsequent conveyances. On December 14th following (1911), the Orinoco Iron Company sent to the trustee in bankruptcy of the Orinoco Corporation, at his office in Cincinnati, its claim against that corporation for $1,173,500, as the value of its lease from the Orinoco Company, Limited, plus alleged expenditures of the Iron Company in developing and exploiting the property, including money spent in defense of the title in the Venezuela litigation, alleging that the Orinoco Corporation had acquired all the assets and assumed all the liabilities of the limited company. Motion to expunge the claim was made by certain creditors, for the reason, among others, that the claim was not filed within a year. The motion and the claim are still pending.

On November 6, 1914, the District Court, in bankruptcy, authorized a settlement of the Safford and Fitzgerald litigation in the Supreme Court of the District of Columbia, upon the payment to those parties of the aggregate sum of $35,000. On November 13, 1914, the Iron Company filed an original bill in the Supreme Court of the District of Columbia against the Secretary of the Treasury, the Treasurer of the United States, the Orinoco Corporation, and others, asking that a trust ex maleficio in the fund be declared in its favor as against all adverse claimants; and on the next day an order was made restraining Safford, Fitzgerald, and the Orinoco Corporation and its predecessors in interest, including the representatives of the Orinoco corporation and the Orinoco Company, Limited (as well as other defendants), from interfering with the prosecution of the Iron Company's suit. On November 17th the injunction orders obtained by Safford and Fitzgerald against the Orinoco Corporation in the Safford suit were dissolved by the court; the settlement, however, seems not to have been yet carried out.

On November 17, 1914, the trustee in bankruptcy of the Orinoco Corporation obtained an order from the District Court below, in bankruptcy, restraining the prosecution of the Iron Company's suit in the District of Columbia. Judge Hollister, upon careful consideration, overruled the Iron Company's motion to vacate this restraining order, and entered decree enjoining the Iron Company, during the pendency of the bankruptcy proceedings, from prosecuting suit in the District of Columbia or any suit elsewhere against the trustee of the Orinoco Corporation, and from interfering with the action of the trustee in bankruptcy in receiving, and bringing into the bankruptcy court, the installments of the indemnity fund which he would otherwise receive through the United States Treasury, to await the bankruptcy court's adjudication of the rights of the respective parties. The Iron Company was also ordered to dismiss its suit in the District of Columbia as against the Secretary of the Treasury and the Treasurer of the United States and the Orinoco Corporation and its trustee. This is the decree sought to be reviewed.

The trustee in bankruptcy contends that the District Court for the Southern District of Ohio, sitting in bankruptcy, has exclusive jurisdiction to try and determine the claim asserted by the Iron Company under its bill in the Supreme Court of the District of Columbia. The correctness of this contention is here the ultimately decisive question. As the order adjudicating the Orinoco Corporation bankrupt has not been appealed from (and, indeed, was consented to), we must assume, in the absence of assignment of error or argument challenging the fact, that the District Court had jurisdiction to so adjudicate and to administer the bankrupt's estate generally.

[1] Passing for the present the question of extraterritorial jurisdiction, it is clear that as to property within the custody of the bankruptcy court its exclusive jurisdiction over the general administration of the bankrupt's estate (Acme Co. v. Beekman Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; In re Yaryan Naval Stores Co. [C. C. A. 6th Cir.] 214 Fed. 563, 565, 131 C. C. A. 15) carried with it exclusive authority to determine, not only the claims of creditors, but also adverse claims, whether by way of ownership or paramount liens (Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; Wabash Ry. Co. v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379; Murphy v. John Hofman Co., 211 U. S. 562, 568, 29 Sup. Ct. 154, 53 L. Ed. 327; Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Hebert v. Crawford, 228 U. S. 204, 208, 33 Sup. Ct. 484, 57 L. Ed. 800). The case is not within decisions such as Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, and In re Rohrer (C. C. A. 6th Cir.) 177 Fed. 381, 100 C. C. A. 613, where the court whose jurisdiction to enforce prior liens had attached previous to the bankruptcy was not interfered with; for here no such action was had before bankruptcy.

[2] Was the fund in question in the custody of the bankruptcy court? The rule which gives the bankruptcy court exclusive jurisdiction to determine claims to property in its custody is not limited to actual possession, but extends to constructive possession as well, in-

cluding property held not only by but for the bankrupt. Mueller v. Nugent, 184 U. S. 1, 14, 17, 22 Sup. Ct. 269, 46 L. Ed. 405; Whitney v. Wenman, supra, at pages 552, 553, of 198 U. S., 25 Sup. Ct. 778, 49 L. Ed. 1157; Lazarus v. Prentice, 234 U. S. 263, 266, 34 Sup. Ct. 851, 58 L. Ed. 1305; Thomas v. Woods (C. C. A. 8th Cir.) 173 Fed. 585, 590, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080; Clay v. Waters (C. C. A. 8th Cir.) 178 Fed. 385, 392, 101 C. C. A. 645; In re Schermerhorn (C. C. A. 8th Cir.) 145 Fed. 341, 342, 76 C. C. A. 215. And see O'Dell v. Boyden (C. C. A. 6th Cir.) 150 Fed. 731, 737, 80 C. C. A. 397, 10 Ann. Cas. 239. And we have held that a debt due the bankrupt's estate is so far constructively in the trustee's possession as to give the bankruptcy court jurisdiction to determine the rights of parties to it. In re Ransford, 194 Fed. 658, 664, 115 C. C. A. 560.

[3] The concrete question thus is whether at the time bankruptcy jurisdiction attached the fund in question was being actually held for the benefit of the Orinoco Corporation, and so passed into the constructive possession of the bankruptcy court. It seems clear that when bankruptcy occurred the fund, so far as here in question, was being held by the United States purely for the benefit of the bankrupt's estate. So far as the holding for the latter's benefit had not been made definite when bankruptcy occurred, it was made so later by virtue of the distribution agreement, which antedated even the Safford suit. The United States unequivocally recognized the right of the trustee in bankruptcy to the portion of the fund so set apart for it; it not only turned over to the trustee in bankruptcy the net amount of the proceeds of the first two installments, but has ever since been ready to turn over the net balance of the remaining installments; it has refrained from so doing only because of the action of the courts of the District of Columbia. The United States has never recognized the right of the Iron Company to participate in the fund; the fact that the Department of State considered the determination of claims to this fund outside its jurisdiction does not, in our opinion, alter the situation in this regard. The fund here in question was not, so far as the record suggests, being even claimed adversely by the Iron Company when bankruptcy occurred, except as it claimed as a creditor the right to a prior lien for its alleged debt. The Iron Company was in no way a party to the award which produced the fund, but, on the contrary, asserts in its bill that the arbitration and award were not authorized by it. Its lack of actual adverse claim when bankruptcy occurred is evidenced by its assertion in the bankruptcy court of its claim as creditor. Whether it thereby precluded itself from later asserting a wholly adverse claim we need not consider.

While the question is not free from difficulty, we think that, were the fund in question actually held in the Southern District of Ohio, it should properly be regarded as so far within the constructive custody of the bankruptcy court as to preclude jurisdiction by a state court of Ohio over a bill of the nature of that filed in the Supreme Court of the District of Columbia. The question is whether the fact that the fund was held in the Treasury of the United States alters the rule. No question of the right of the United States to the fund is

involved. The government makes no claim to it in whole or in part. It is merely a custodian and a trustee, recognizing (so far as concerns the fund involved here) that it holds only for the bankrupt's estate. The facts that the seat of government is in the District of Columbia, and that the general treasury of the United States is there situated, do not necessarily affect the issue; for "the United States, in their sovereign capacity, have no particular place of domicile, but possess, in contemplation of law, a ubiquity through the Union." Vaughan v. Northup, 15 Pet. 1, 6, 10 L. Ed. 639. And so it is settled that debts owing by the United States are not local assets at the seat of government only, so as to give jurisdiction to the courts of the District of Columbia, by way of administration of the estates of deceased persons with respect to such debts. Vaughan v. Northup, supra; Wyman v. Halstead, 109 U. S. 654, 3 Sup. Ct. 417, 27 L. Ed. 1068; Taylor v. Bemiss, 110 U. S. 42, 45, 3 Sup. Ct. 441, 28 L. Ed. 64; United States v. Borcherling, 185 U. S. 223, 235, 22 Sup. Ct. 607, 46 L. Ed. 884. We think it follows that the courts of the District of Columbia obtained no jurisdiction as against the District Court for the Southern District of Ohio, in bankruptcy, from the mere fact that the fund was in the Treasury of the United States.

We find nothing to the contrary of this view in Jones v. Rutherford, 26 App. Cas. D. C. 114, 121, relied upon by the Iron Company. That case is in our opinion readily distinguishable. There no question of rival administrations was presented; the question related only to the manual possession of "a draft drawn by the United States and ready to be delivered to the person lawfully entitled to its possession." The draft itself was held to be property and within the district. The instant case involves conflicting administrations and goes beyond the mere question of manual possession of a draft, which latter question is, at best, merely an incident of the broader question involved.

[4] Generally speaking, the jurisdiction of courts of bankruptcy in the administration of bankrupt estates extends "to all matters of bankruptcy without limitation. It is coextensive with the United States." It knows no state or district boundaries. Thomas v. Woods, supra, at page 590, of 173 Fed., 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080; Lathrop v. Drake, 91 U. S. 516, 517, 23 L. Ed. 414; Babbitt v. Dutcher, 216 U. S. 102, 109, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Staunton v. Wooden (C. C. A. 9th Cir.) 179 Fed. 61, 63, 102 C. C. A. 355. It may order the sale of land in another state, and without ancillary proceedings therein. Robertson v. Howard, 229 U. S. 254, 261, 33 Sup. Ct. 854, 57 L. Ed. 1174. True, the bankruptcy court may not enforce its process or its orders outside the limits of its territorial jurisdiction, that is to say, its jurisdiction must be exercised within its own district; but, having the proper parties before it, it can within its own district make necessary orders to protect its jurisdiction. And a court of bankruptcy in another jurisdiction could, if necessary, entertain ancillary proceedings for the recovery of property. Babbitt v. Dutcher, supra, at page 105, of 216 U. S., 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969. And see Elkus, Petitioner, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407.

[5] A court of bankruptcy, in determining conflicting claims to prop-

erty in its custody acts essentially as a court of equity; and we think the case presented is within the well-established rule that, where the necessary parties are before a court of equity, it is immaterial that the subject-matter of the controversy, whether real or personal property, is beyond the territorial jurisdiction of the court. In such case the power exists to compel a defendant to do all things necessary which he could do voluntarily to give full effect to the decree against him. Obedience to the decrees so made is enforced by means of process against the person. We cite in the margin a few of the many authorities asserting this jurisdiction.[1]

The Supreme Court of the District of Columbia had thus, in our opinion, no jurisdiction over the suit whose prosecution has been enjoined by the bankruptcy court, not only because the jurisdiction of the latter court had already attached, but because that jurisdiction, in the circumstances presented, is exclusive. The case of Lyttle v. Security Co., 43 App. Cas. D. C. 136, relied on by the Iron Company, is distinguishable. In that case a surety on the bond of a defaulting contractor for a government work filed a bill to enforce subrogation for the amount the surety had been compelled to pay in completing the contract. The claim to subrogation seems to have been asserted before, although the bill was not filed until after bankruptcy. The government does not appear to have recognized the right of the trustee in bankruptcy to the fund, and the trustee conceded the surety's claimed right to subrogation, but there was no surplus above the surety's claim. We think it clear also that the trustee in bankruptcy has taken no action amounting to a consent to the jurisdiction of the courts of the District of Columbia.

[6, 7] The order for injunction, which is the subject of this review, was made upon notice to the Iron Company, which was fully heard in opposition thereto. That the earlier restraining order was made without notice does not affect jurisdiction; and the bankruptcy court having jurisdiction to determine conflicting claims to the fund clearly had jurisdiction to enjoin the prosecution of actions forbidden by that jurisdiction, tending to interfere with the administration of the debtor's property in bankruptcy. In re Schermerhorn (C. C. A. 8th Cir.) 145 Fed. 341, 76 C. C. A. 215; Morehouse v. Powder Co. (C. C. A. 9th Cir.) 206 Fed. 24, 28, 124 C. C. A. 158.

It follows from what we have said that it was not necessary for the Iron Company (as it contends) to proceed in both jurisdictions for the protection of its rights. The contention that relief as against predecessor corporations cannot be afforded elsewhere than in the District of Columbia does not impress us. The Manoa Company, Limited, and the Orinoco Company have released their rights to the Orinoco Cor-

1 Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Muller v. Dows, 94 U. S. 444, 449, 24 L. Ed. 207; Phelps v. McDonald, 99 U. S. 298, 308, 25 L. Ed. 473; Philadelphia Co. v. Stimson, 223 U. S. 605, 622, 32 Sup. Ct. 340, 56 L. Ed. 570; Robertson v. Howard, supra; Fall v. Eastin, 215 U. S. 1, 8, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853; Louisville & Nashville Ry. Co. v. Western Union Tel. Co. (C. C. A. 6th Cir.) 207 Fed. 1, 6, 124 C. C. A. 573; O'Dell v. Boyden (C. C. A. 6th Cir.) 150 Fed. 731, 736, 80 C. C. A. 397, 10 Ann. Cas. 239.

poration, and so much of the fund as passed to the Orinoco Company, Limited, fell under the jurisdiction of a state court of Minnesota. But it should be enough to say that the decree complained of does not interfere with the assertion of rights against predecessor corporations. We think the order complained of does not deprive the Iron Company of its day in court, for the decree under review does not determine any adverse claims of the Iron Company, or do more than to retain jurisdiction in the bankruptcy court as against other courts.

[8] The bankruptcy court not only has jurisdiction over the Iron Company's claim as creditor, which we think clearly filed in time (Orcutt v. Green, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390; Bennett v. American Co. [C. C. A. 6th Cir.] 159 Fed. 624, 86 C. C. A. 614), including power to allow amendments of the claim in furtherance of justice (In re Hamilton Automobile Co. [C. C. A. 7th Cir.] 209 Fed. 596, 126 C. C. A. 418; In re Kessler [C. C. A. 2d Cir.] 184 Fed. 51, 107 C. C. A. 13; Bennett v. American Co., supra), but, as we have already said, has complete jurisdiction over the case presented by the bill in equity, assuming, for the purposes of this opinion, that such case differs in material and practical aspects from the case made by the claim for creditor's lien; and we must assume that the bankruptcy court will give the Iron Company due opportunity to be heard.

We expressly refrain from expression of opinion upon the merits either of the creditor's claim filed or of the subject-matter of the bill in equity, as well as upon the questions whether the bill asserts an adverse claim within the meaning of the applicable rules, and whether merely by filing its claim as creditor appellant submitted to the jurisdiction of the bankruptcy court over the subject-matter of its bill. Under the view we take of the case those questions are here immaterial. We have also omitted from the statement of the case matters which seemed to bear no immediate relation to the single issue with which we have to deal.

Of the complaint that the Iron Company has not been heard respecting the authority to settle the claims of Safford and Fitzgerald it seems sufficient to say that that matter is apparently not embraced within the order under review, and so is not concluded thereby. But to save any question the disposition we shall make will be expressly without prejudice to the right of the Iron Company to present to the bankruptcy court such application as it may be advised, for hearing and reconsideration in that regard.

[9] The case is here both on appeal and on petition to revise. We think the question of remedy is ruled by the holding of this court in O'Dell v. Boyden, supra, where petition to revise was held the proper remedy. We are disposed to think the fact that the merits of the Iron Company's claim have not been decided, but are reserved for future decision, distinguishes the case from Bothwell v. Fitzgerald (C. C. A. 9th Cir.) 219 Fed. 408, 413, 135 C. C. A. 212, and Thomas v. Woods, supra, at page 588, of 173 Fed., 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080, et seq.

The appeal is accordingly dismissed, and the petition to revise re-

tained. We think the criticisms upon the form and contents of the petition without force.

The order and decree of the District Court is affirmed, with costs.

BREEDEN v. BREEDEN et al.

(Circuit Court of Appeals, Fourth Circuit. December 20, 1915.)

No. 1380.

JUDGMENT ⇐828—CONCLUSIVENESS OF ADJUDICATION—TITLE TO LAND.

A decree of a state court involving title to a tract of land construed, and *held* a bar to a subsequent suit in a federal court between the same parties involving title to the same land and the same issues, all of which were either directly or inferentially determined by such decree.

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

Appeal from the District Court of the United States for the Western District of Virginia, at Harrisonburg; Henry Clay McDowell, Judge.

Suit in equity by Thomas J. Breeden against Philip J. Breeden and others. Decree for defendants, and complainant appeals. Affirmed.

John E. Roller, of Harrisonburg, Va., for appellant.

George N. Conrad, of Harrisonburg, Va. (Conrad & Conrad, of Harrisonburg, Va., on the brief), for appellees.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge. A bill was filed in the United States District Court for the Western District of Virginia by plaintiff against defendants, in which it is alleged that on the 23d day of May, 1844, James Breeden, Sr., and wife, conveyed to James A. Breeden, one of his sons, a tract of mountain land containing about 1,500 acres, in consideration of which James A. Breeden agreed to pay a debt for his father amounting to $25 and to support and maintain his father and mother during their respective lives; that on the 1st day of January, 1853, James A. Breeden sold and conveyed to Elias Breeden, his brother, a part of the original tract for the sum of $200; on the 5th day of September, 1853, he sold and conveyed to Richard Breeden, another brother, a tract of 25 acres, also a part of the original tract, for the sum of $20, making in all a sum much greater than that which he had advanced his father in the first instance.

It is further alleged that some time thereafter James A. Breeden went to one of the Western States, and, recognizing that the obligation was upon him to maintain and support his father and mother during their respective lives, entered into a contract in writing with Lucinda Breeden, his sister (attested by Richard Breeden and Job Breeden, two of his brothers), in which it was agreed that Lucinda should have the remainder of the tract, amounting to 1,175 acres, for the maintenance and support of the father and mother during their lives;

that Lucinda accepted the contract, and remained at the old place with her father and mother, and cared for and maintained them until their respective deaths, which occurred during the Civil War; that after the death of her parents she continued to live on this tract of land until 1876, at which time she sold the same to her son, Frank Breeden, with the agreement that he was to have her right to the land in consideration of her support and maintenance during her life; that Frank H. Breeden continued in possession of this land under such agreement until 1890, when he sold the same to complainant, Thomas J. Breeden, under a written contract; that complainant at once took possession of the land and continued in actual, exclusive, uninterrupted, notorious, and adverse possession thereof against all the world from that time until the bringing of this suit.

It is further alleged that in 1895 the plaintiff instituted a suit in the circuit court of Rockingham county against the heirs at law of James A. Breeden, deceased, to obtain title to said tract of land; that when the cause came on for hearing it was dismissed, upon the ground that the suit should have been brought in the circuit court of the county of Page, in the county where the land lies; that inasmuch as the final decree appeared on its face to be a simple decree of dismissal, without stating the grounds upon which it was dismissed, and might be used in the second suit upon a plea of res adjudicata, and to prevent such use, complainant sought a rehearing in that cause; that the second suit was brought in the circuit court of Page county, and thereafter removed to the circuit court of Frederick county, where it was decided—the court holding that it should be dismissed upon the ground that it was admitted in the bill that Lucinda Breeden had entered into possession as a vendee of James A. Breeden, deceased, and that under such circumstances there could be no such thing as title to the land in controversy by adverse possession "as set forth in the bill and exhibits."

It is insisted that the court failed to observe that there was a distinction between a vendee claiming by adverse possession against a vendor under a contract of purchase not fully completed by such vendee, and a vendee remaining in possession of the property after a full completion of the contract of purchase and the payment of the consideration agreed upon; that immediately after the delivery of this opinion and before the final decree was entered in the cause the complainant asked leave to file an amended bill of complaint, in which he sought leave of the court to omit from the averments made by him in the original bill all the allegations made as to adverse possession of the tract of land in controversy and the prayer for relief based upon the ground of adverse possession, and to pray that the court should decree a conveyance of the title to him upon the other averments contained in the bill, to wit:

"That Lucinda J. Breeden had purchased the tract of land from the said James A. Breeden; that she had completed the payment of the entire purchase money or consideration due from her, and was entitled to a decree conveying the land to her; and that your complainant, claiming under her, was entitled to the relief sought in the original bill upon these facts, if, indeed, he was not entitled to the same upon the averments and proofs as to adverse possession."

Thereupon, as part of the final decree in the cause, the court entered the following paragraph:

"After the decision of this case and the drafting of the decree as above, the complainant asked leave to file his second amended bill, which paper is marked 'A' and placed in the papers of this suit, to the filing of which the defendants objected, and for reasons stated in writing and filed with the record the court refused to permit the plaintiff to file his said amended bill, but the dismissal of the original and first amended bill, and the refusal of leave to file the second amended bill is without prejudice to complainant to assert at law or in equity in any form as he may be advised any right which by this decree is not expressly adjudicated. And this cause is now ordered to be placed among causes ended."

In the original bill in this cause it is alleged that Lucinda Breeden was entitled to a decree conveying to her the land upon the completion of her contract, and that complainant, claiming under her, is entitled to a conveyance of the legal title, which had been transferred by her to Frank H. Breeden, and by him to complainant; that complainant had remained in possession of the land in controversy since the year 1890; that, if it should be deemed by the court that there could be no adverse possession until there was a disseverance of the privity of title between the heirs of James A. Breeden, deceased, and Lucinda Breeden and those claiming under her, that claimant was in possession, holding adversely to the title of the heirs, and claiming the same adversely to them, which was brought home to them in the year 1892, and again in the year 1895, at the time he was about to bring his first suit in the county of Rockingham; and that upon that ground, as well as the first-named ground, he was entitled to a decree perpetuating and preserving the proofs of his possession, and enjoining and restraining the heirs of James A. Breeden, deceased, and one Mary R. Brown, claiming under James K. Breeden, one of the heirs, from asserting title to said tract of land in any court and appointing a special commissioner of the court to convey the naked legal title to him.

It is further stated that, owing to the fact that the defendants in the original bill were continually interfering with his tenants living upon the tract of land, and had sought to prevent the complainant from turning one of his tenants out of the property after he repudiated the title of his landlord, necessity had arisen for a restraining order against such interference by defendants, or any agent or representative of theirs from interfering, with the tenants of the complainant until the controversy over the tract of land has been settled by decree of the court, and thereupon filed the first amended supplemental bill for that purpose.

It is further insisted that on the 13th day of August, 1913, it became necessary to bring certain new parties before the court, some of the heirs of James A. Breeden having died intestate, leaving heirs to whom the title of the deceased parties in interest had descended, and they were brought before the court by a second amended and supplemental bill.

It is also stated that on the 23d day of August, 1913, the defendants filed their joint and several answers to the bill of complaint, in which

they set up the final decree of November 8, 1906, in the first-named suit, in the circuit court of Frederick county, and claimed that by reason of the proceedings and decree in that cause the claim of complainant was res adjudicata, and that said suit and decree was a complete bar to his claim.

The defendants further say that on the 30th day of August, 1913, the cause was heard by the court under a decree which had been entered on the 23d day of August, 1913, in which it was recited that:

"By consent of parties, it is ordered that this cause be submitted to the court for determination of the question whether or not such proceedings have already been had affecting the land in controversy in the state courts of Virginia as would constitute res adjudicata and bar the complainant from further prosecution of the claims set up in this cause."

The matter again came on for hearing on the 30th day of August, 1913, at which time the following decree was entered:

"This cause came on again this day to be heard, and the court being of opinion that plaintiff's cause of action is res adjudicata, it is adjudged, ordered, and decreed that this cause be dismissed, and that the defendants recover of the plaintiff their costs in this behalf expended."

Upon a motion to rehear the matter the court set aside the decree entered on the 30th day of August, 1913. It further appears that on the 1st day of July, 1914, complainant filed a fourth amended and supplemental bill, by which he sought a discovery from and a production by the defendants of a certain letter set forth in the fourth amended and supplemental bill, which he deemed to be of some importance for the protection of his interests, but the defendants made answer that neither they nor their counsel had any such letter in their possession.

The cause was heard upon the pleadings and proofs, and a final decree entered on the 16th day of January, 1915, as follows:

"It is adjudged, ordered, and decreed that the plaintiff's bill and his sundry amended and supplemental bills be and they are hereby dismissed, and that the defendants recover of the plaintiff their costs in this behalf expended. And nothing further appearing necessary to be done herein, it is further ordered that this cause be striken from the calendar of pending causes."

From the entry of this decree complainant took an appeal to this court.

The decree of the lower court, entered on the 30th day of August, 1913, setting aside the original decree, among other things, contains the following language:

"The defendants' claim of estoppel by reason of former adjudication be and it is hereby overruled, but without prejudice to their right to further assert and rely upon said defense, if plaintiff fail to prove that he has had, for at least 15 years prior to the institution of suit at bar and after notice thereof brought home to the then holders of title under James A. Breeden, adverse and continuous possession of the tract of land in controversy."

It was obviously the purpose of the court in setting aside the original decree to afford complainant an opportunity to establish the fact that he had had open, notorious, and adverse possession of these lands for more than 15 years next preceding the date of the institution of

this suit. In pursuance of this provision of the decree considerable evidence was introduced by the respective parties bearing upon this point, which was, no doubt, duly considered by the court, and while the record is silent as to the reasons which induced the court to dismiss the bill, it must be inferred that the action of the court was due to the failure of the complainant to show by a preponderance of the evidence that he had acquired title by adverse possession. We have carefully considered the evidence bearing upon this point, and feel that the court was amply justified in finding as a fact that complainant had not established title by adverse possession. The court having failed to find in favor of the complainant, it is but fair to assume that it adhered to the view it entertained at the time the original decree was entered by Judge Harrison, to wit: That such decree was res adjudicata, and therefore a bar to complainant's right of recovery in this suit. Therefore the question arises as to whether the court below erred as respects this point.

The defendants rely upon the plea of res adjudicata, and in support thereof insist that the questions now sought to be litigated were determined adversely to complainant in a suit instituted in the circuit court of Page county by complainant against these defendants, and finally transferred to the circuit court of Frederick county, where a decree was entered by Judge Harrison, and that not only all matters actually adjudicated at the hearing, but every point which properly belonged to the subject of litigation, or which the parties, exercising due diligence, might have brought forward at the time, are deemed to have been adjudicated in favor of defendants, and therefore the decree in that cause is a bar to the right of recovery in this suit.

The bill filed in the state court contained an averment that Lucinda Breeden entered into a contract of purchase from James A. Breeden under which Lucinda was to have these lands in consideration of the support of her father and mother during their respective lives, that during the lifetime of Lucinda Breeden she fully complied with the provisions of said contract, and that Lucinda Breeden sold her interest to Frank Breeden who in turn sold to complainant, and that he holds the same by virtue of the alleged contract which Lucinda Breeden had for the purchase of these lands.

The bill of complaint in that cause also contains an allegation to the effect that the complainant and those under whom he claims had been in the adverse possession of the lands in controversy for more than 15 years prior to the institution of such suit. At the time Judge Harrison entered the decree he filed a memorandum setting forth his reasons for refusing to grant the relief which complainant sought, which is in the following language:

"The courts of Virginia have always regarded the common-law forum as the proper tribunal to decide controversies relating to the title of land. It appears to me from a reading of the cases that only in clear cases calling for equitable interference or under the authority of some statute has equity assumed jurisdiction to try title. I am not prepared to say that the case of Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. Ed. 532, will not be followed. While I find no express decision in Virginia confirmatory, undoubtedly the tendency of several cases is that way. But the whole theory of

Sharon v. Tucker proceeds on the theory that there is virtually no dispute of fact, that no one with any substantial rights can call the jurisdiction in question, that the legal title has lost all life and stands simply as a menace to the true legal owner of the land, and that equity will give relief against such a cloud. I doubt, however, whether equity would extend relief, where the evidence is conflicting upon the facts of the case, and the conclusions to be reached involved in doubt and conjecture resulting from the determination of the credibility of witnesses, and the weight to be attached to their evidence.

"In the case under consideration the case which the complainant himself states does not seem to me to present a case of adverse possession under our Virginia decisions. His claim is that Lucinda Breeden entered into possession under a contract of purchase from James A. Breeden by which she was to have the land in consideration of the support of her father and mother during their lives, and that he holds by virtue of some transaction under her. In a number of cases of which it is only necessary to recite Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, it is laid down: 'Before adverse possession can arise between a vendor and his vendee, * * * where the vendor has retained the title and the statute * * * commences to run, the vendee must have dissevered the privity of title between them by the assertion of an adverse right, and openly and continuously disclaimed the title of his vendor, and such disclaimer be clearly brought home to the knowledge of the vendor.' In the numerous cases cited in the last-named decision it is held by the court that as between vendor and vendee there is privity of title, and the vendee holds in subordination of the vendor's legal title, and such possession cannot silently ripen into a title by adverse possession, no matter how great the lapse of time during which the possession may have continued. Clarke v. McClure, 10 Grat. (Va.) 305; Creigh v. Henson, 10 Grat. (Va.) 231; Nowlin v. Reynolds, 25 Grat. (Va.) 137; Creekmur v. Creekmur, 75 Va. 430; Whitlock v. Johnson, 87 Va. 323, 12 S. E. 614; Core v. Faupel, 24 W. Va. 238.

"There is not the slightest testimony in the case that there had been any disseverance of the privity between vendor and vendee, any disclaimer, or that knowledge of such adverse holding was brought home to the holder of the legal title. Such being the case under the claim as set forth by the complainant, it does not seem to me that there is any such adverse possession as equity would recognize as the basis of its jurisdiction. The testimony of complainant at most is very unsatisfactory. Lucinda gives her testimony at the same time the complainant gives his. He sets out the contract by which he holds the land. He gives an entirely different contract in his sworn bill and subsequent deposition. A statement is then produced from his mother Lucinda in which she denies the evidence she has previously given. Under the contract by which complainant claims the land, his title stands or falls by the character of the holding of Lucinda. She has never parted with any title, except verbally, and one feature of the verbal contract is that she is to be maintained on the land as long as she lives. So she has an interest in the property as to which her declaration is adverse. Letters are produced from complainant which are inconsistent with his present contention. For the last 10 or 15 years, almost up to the date of his alleged contract with his brother, the title has been in litigation or controversy, so that little weight can be attached to his claims or title. Nor do the tax receipts bear out the claim that the taxes have been paid continuously by Lucinda and those claiming under her. For a number of years from the death of James Breeden, Sr., they seem to have been paid by Elias Breeden, and have continuously been assessed in the name of James A. Breeden, in whom the legal title is, or his heirs. Even the alleged contract with his brother, at one time sworn to be verbal and to impose on complainant the burden of supporting his mother and for one pecuniary consideration, at another time sworn to be in writing and imposing upon the brother the burden of the mother's maintenance and for a different pecuniary consideration, even this contract professes to sell only the brother's right of possession and does not profess to sell the title to the land. On the whole it seems to me the evidence is not sufficient to sustain the bill. The only thing that can be shown is possession, and such possession is not hostile or at least on the complainant's own pretension is not hostile and therefore not adverse."

Thus it will be observed that there was an issue in that suit as to whether complainant had title by possession, and also as to whether complainant was the owner of the land through Lucinda as a purchaser. Even if this were not true, it clearly appears that the parties to that suit are now parties to this suit, and this suit relates to the same lands involved in that controversy. Such being the case, the decree in that suit applies to all matters which existed at the time of the entry of such decree, and which the complainant had an opportunity of bringing before the court. The Supreme Court of the United States in the case of Northern Pacific Railway Co. v. Slaght, 205 U. S. 127, 27 Sup. Ct. 442, 51 L. Ed. 738, in discussing this question said:

"In other words, plaintiff in error, as successor of the Spokane & Palouse Railway Company, again asserts title to the very property that was the subject of the other suit, the source of title only being different. If this may be done, how often may it be repeated? If defeated upon the new title, may plaintiff in error assert still another one, either in its predecessor or in itself, and repeat as often as it may vary its claim? The principle of res judicata and the cases enforcing and illustrating that principle declare otherwise."

In the case of Withers' Adm'r et al. v. Sims et al., 80 Va. 651, the court cites the following with approval:

"All those matters which were offered and received, or which might have been offered, to sustain the particular claim or demand litigated in the prior action, and those matters of defense which were presented or which might have been introduced under the issue to defeat such claim, are concluded by the judgment or decree in the former suit."

However, it is insisted by counsel for complainant that Judge Harrison's decree was erroneous and should be disregarded by this court. This court is without power to review the action of the state court in this instance, either by appeal or otherwise. If the decree in that court was erroneous, an appeal could have been taken to the Court of Appeals of Virginia, and complainant having failed to do so the questions therein determined are res adjudicata, and the same may be pleaded in bar of the right of recovery in any court in which it may again be sought to litigate such questions.

It is earnestly contended by counsel for complainant that the claim of the defendant is unconscionable. It is not within our province to pass upon this question, further than to say that we are of opinion that the legal effect of defendants' plea is such as to bar complainant's right of recovery.

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

CHARLES ROESCH & SONS CO. et al. v. MUMFORD.

(Circuit Court of Appeals, Third Circuit. February 28, 1916.)

No. 1993.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⟸44—VALIDITY.
Where an insolvent made an assignment under general law for the benefit of his creditors, not following the remedies prescribed by the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) or the general assignment act of the state of New Jersey (1 Comp. St. N. J. 1910, p. 114), such assignment is not binding on creditors until they assent thereto.
[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 173–197; Dec. Dig. ⟸44.]

2. CORPORATIONS ⟸399(1)—ACTS OF AGENTS—VALIDITY.
Where an agent of a corporation, acting within the scope of his apparent authority, accepted an assignment of a debtor made for the benefit of all creditors, the acceptance is binding on the corporation, under the principle that usual employment is evidence of the powers of an agent.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1605; Dec. Dig. ⟸399(1).]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⟸44—ACCEPTANCE—VALIDITY.
Where a corporate creditor, the insolvent debtor having assigned his property in trust for creditors, signed a power of attorney authorizing the trustee to dispose of such property, it cannot, seven months thereafter, retract its assent and attach the debtor's property, on the ground that other creditors had not assented to the trustee's conveyance, for they might thereafter assent, and the trustee become entitled to sell.
[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 173–197; Dec. Dig. ⟸44.]

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⟸342—ACCEPTANCE—EFFECT.
Though a debtor's assignment of his property in trust for the benefit of creditors was void, because not in accordance with statutory law, a creditor, having accepted the assignment, is precluded from thereafter questioning its validity.
[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 1042–1049; Dec. Dig. ⟸342.]

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⟸193—ATTACHMENT OF PROPERTY —TITLE.
Where a debtor assigned his property in trust for the benefit of creditors, the assignment being valid, legal title passed to the trustee, and creditors could not thereafter, in a proceeding against the debtor, attach the property,
[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 196, 594–601; Dec. Dig. ⟸193.]

6. BANKRUPTCY ⟸151—EFFECT ON ASSIGNMENT UNDER STATE LAWS—AUTHORITY OF TRUSTEE.
Where an insolvent debtor assigned his property in trust for the benefit of creditors, and later, difficulties arising over the assignment, filed a voluntary petition in bankruptcy, his trustee in bankruptcy had no greater rights to the property than the debtor, and so long as the trust for creditors was active, and the property could be disposed of by the trustee, the debtor's trustee in bankruptcy was not entitled thereto.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239; Dec. Dig. ⟸151.]

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

Bill by Elwin C. Mumford, trustee in bankruptcy of Clifton C. Shinn, against Charles Roesch & Sons Company and others. From a decree for complainant, defendants appeal. Affirmed.

Bourgeois & Coulomb, of Atlantic City, N. J., for appellants.
S. Cameron Hinkle, of Atlantic City, N. J., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The questions on this appeal relate to the validity of a deed of trust in the nature of an assignment for the benefit of creditors, and to the validity of a judgment recovered by one of the creditors after assenting to the assignment.

Clifton C. Shinn, while insolvent, conveyed to Isaac Bacharach, by bill of sale and deed bearing date June 23, 1906, all of his personal and real property, "in trust * * * to sell, convey or otherwise dispose of the same in such manner as the creditors of the said party of the first part, Clifton C. Shinn, may elect." By separate deed, the wife of Shinn conveyed to Bacharach, upon the same trust, her inchoate right of dower in the real property conveyed by her husband.

It is conceded that Shinn was hopelessly insolvent, and that in the assignment for the benefit of his creditors, there was neither fraud nor preference.

Upon delivering the deed, Shinn addressed letters to all of his creditors informing them of his insolvency and of the assignment of his property for their benefit. These were followed by letters from Bacharach, calling a creditors' meeting. At that meeting, the creditors appointed a committee to cooperate with Bacharach in administering the trust, one of the members of which was Charles Roesch, Jr., vice-president and the sole representative at its Atlantic City branch of Charles Roesch & Sons Company, a corporation engaged in selling meats and provisions, with its principal office in the City of Philadelphia. The Roesch Company was a substantial creditor of Shinn. Acting with the committee of creditors, Bacharach proceeded to sell the real estate. His action was arrested, however, by a question raised by a title guaranty company as to his power to dispose of the property under the limitations of the trust, without the concurrence of all of Shinn's creditors. This question very naturally arose out of the character of the conveyances of Shinn and his wife to Bacharach, which, though conveying title to Bacharach, conferred upon him no power of sale. Thereupon Bacharach endeavored to procure from all of Shinn's creditors power to sell the property, by obtaining their signatures to an instrument which is termed a power of attorney. This instrument bears date July 13, 1906, and purports to be signed by all of the creditors, though in fact three or four did not sign it. Among the signatures to this instrument is that of Charles Roesch and Sons Company, affixed by Charles Roesch, Jr., its vice-president.

After the Roesch Company had signed the power of attorney and while the signatures of other creditors were being procured, the Roesch Company endeavored to repudiate its signature and to withdraw its representative from the creditors' committee.

Seven months after signing the power of attorney, the Roesch Company instituted an action against Shinn by foreign attachment, attached as property of Shinn all the property he had conveyed to Bacharach, and ultimately recovered judgment for $3,629.06. This judgment was sold by the trustee of the Roesch Company, which in the meantime had gone into bankruptcy, and was purchased by George Roesch, its president. Upon execution the property attached was sold to Carl Roesch, a nephew of George Roesch, for the sum of $350, delivery of the deed being stayed by this proceeding.

Throughout the attachment proceedings, Bacharach, the trustee, found himself hindered in the disposition of the property by lack of power to sell under the deed and incomplete power to sell under the power of attorney, as well as by the menace of the attachment proceedings of the Roesch Company. Shinn, having become a resident of Pennsylvania, endeavored to extricate his trustee and the property from this predicament by filing a voluntary petition in bankruptcy in the District Court of the United States for the Middle District of Pennsylvania, considerably more than four months after the attachment was laid, conceiving that by this procedure the title to the property would vest in his trustee in bankruptcy and that the property could be sold by him. But this was not so simple as it seemed, because of Bacharach's antecedent title under the deed and the intervening attachment proceedings by the Roesch Company. Thereupon Elwin C. Mumford, trustee in bankruptcy for Shinn, appealed to the court below for help, by filing the bill in this case, wherein he attacked the attachment proceedings and the sale thereunder, and prayed that the attachment be annulled and the judgment vacated; and that Bacharach, Shinn's trustee under the deed, be decreed to transfer and convey to him, Shinn's trustee in bankruptcy, the property, real and personal, remaining in his hands. To this bill certain of the defendants made answer, that the assignment was void because it did not conform with the general assignment act of the State of New Jersey; that the assignment purported to be for the benefit of all creditors, and that all creditors had not conferred upon Bacharach the power to sell which the deed contemplated should be conferred by them; that the signature of the Roesch Company to the power of attorney was not binding upon it for the two reasons, that it was unauthorized and was affixed to a void instrument, and, therefore, it was free to pursue the remedy for the collection of its debt that it afterwards adopted.

The District Court entered a decree holding the attachment void and restraining the defendants from further proceedings thereunder, and ordering Bacharach, trustee under the deed, to convey to Mumford, trustee in bankruptcy, such of the property conveyed to him for the benefit of Shinn's creditors "as remains in his hands *after executing the trust* imposed under the deed to him as trustee." This is an appeal from that decree.

The questions involved are so related that it is difficult to present and discuss them separately. The underlying question is whether the property attached belonged to Shinn or Bacharach, trustee, at the time of the attachment. This question is controlled by another, which re-

lates to the conduct of the Roesch Company, the plaintiff in the attachment proceeding, in accepting the benefit of the assignment and waiving its right to an action at law. And finally, the relief to be granted depends upon which of the two trustees holds the superior title. In view of this situation, it appears to us, the first question calling for decision relates to the validity and legal effect of the conveyance by Shinn to Bacharach.

[1] This conveyance grew out of Shinn's insolvency and was suggested by his anxiety to conserve his property for the benefit of all his creditors. For some reason he did not choose to pursue the course provided by the Federal Bankruptcy Act or the one open to him under the General Assignment Act of the State of New Jersey (1 Comp. St. 1910, p. 114). If he had adopted either of these courses, the rights of all creditors would have been fixed by law. As he pursued another, its acceptance by his creditors in substitution for the remedies they already had, of course, had to be obtained. This was contemplated even by the instrument itself. Until the creditors accepted the assignment, each was free to pursue his own remedy with respect to the collection of the debt due him. If the assignment by Shinn constituted an act of bankruptcy, the requisite creditors in number and amount could have instituted proceedings against him in bankruptcy or each could have pursued his own remedy by an action at law. For a period of time these remedies were open to the Roesch Company, not because the course pursued by Shinn was void in that it did not conform to procedures prescribed by federal and state statutes, but because it was voidable so far as it affected an individual creditor who had not given his assent to it.

[2] While this was the state of the case, the Roesch Company did not avail itself of its rights and proceed against Shinn or his property for the recovery of the debt in any of the ways open to it. But this situation was changed, at least in so far as it concerned the Roesch Company, by the conduct of that company. The conduct of the Roesch Company was held to amount to an acquiescence in and an acceptance of the trust created by Shinn in part for its benefit. The legal effect of that conduct was the principal matter controverted in the court below and was the thing that controlled the decision of the court. It is quite unnecessary to review the testimony upon which the court based its decision that the Roesch Company, by its signature and by its acts, accepted the trust under the assignment and waived its rights to proceed at law for the collection of its debt. With this decision we are in entire accord. We therefore feel that it is sufficient for the purposes of this case merely to indicate the trend of the testimony in that particular.

Charles Roesch was vice-president of the Roesch Company and was the sole manager of its meat and provision business at Atlantic City, which he was permitted by the corporation to conduct in his own way both with respect to selling goods and extending credits. In the course of this business, Shinn's debt to the Roesch Company was incurred, and after Shinn's assignment, Charles Roesch actively and energetically co-operated with Bacharach, the trustee, in the disposition of the

assets of the insolvent estate, both individually and as a member of a committee appointed for that purpose. When a title guaranty company demanded a power of attorney signed by all of the creditors of Shinn, conferring upon Bacharach power of sale, Charles Roesch subscribed to that instrument the name of his corporation. Trouble of a personal nature arose between George Roesch and a relative of Shinn, resulting in an attempt by the Roesch Company to repudiate what Charles Roesch, its vice-president, had done. While there was no evidence that Charles Roesch was authorized by resolution of the Board of Directors of the Roesch Company to sign its corporate name to the power of attorney, the conduct of the corporation and its officers with respect to the whole transaction was such as to bring it within the general principle of the law of agency, that usual employment is evidence of the powers of an agent for whose acts, when performed within the authority so apparently conferred, the principal is responsible.

This doctrine, with its qualifications and limitations, has been applied to corporations, and in its application, it has been held that an officer of a corporation may, by acts of its directors or managers,

"be invested with capacity to bind the company by his acts beyond those powers which are inherent in his office; as where, in the general course of the company's business, the directors or managers have permitted an officer to assume the control and direction of its affairs, and have held him out to the public as its general agent, his authority to act for the company in a particular transaction may be implied from the manner in which he has been permitted by the directors or managers to transact its business." Fifth Ward Savings Bank v. First National Bank, 48 N. J. Law, 513, 7 Atl. 318; Stokes v. New Jersey Pottery Co., 46 N. J. Law, 237, 242; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; Commercial Insurance Co. v. Union Mutual, 19 How. 318, 15 L. Ed. 636; Mining Co. v. Anglo-California Bank, 104 U. S. 192, 26 L. Ed. 707; Blake v. Domestic Mfg. Co., 64 N. J. Eq. 481, 38 Atl. 241.

[3] It is urged that the power of attorney signed by the Roesch Company lacked the signatures of the requisite number of creditors to confer upon Bacharach a valid power of sale. This is unimportant to the present discussion, because we are not concerned with the validity of the power of attorney or whether it conferred upon Bacharach a power of sale. If invalid now, it may become valid later. We are concerned only with the legal effect of the act of the Roesch Company in signing it. The failure of several creditors to sign the power of attorney affected only the legal sufficiency of that instrument as a grant of a power of sale, a question that has not been and conceivably may never be raised here. But the failure of several creditors to sign that instrument does not relieve those who signed it from the legal effect of their acts in other respects. The legal act intended by the Roesch Company in signing the power of attorney was to confer upon the trustee a power of sale. The legal act accomplished by its signature was an acceptance by the Roesch Company of the assignment made for its benefit. The act of the Roesch Company in signing the power of attorney was the exercise of a power conferred upon it by the trust, hence the legal effect of that act was the acceptance of the trust under which that power was exercised. Having accepted the trust, we are asked to decide whether the Roesch Com-

pany was free, seven months thereafter, to attach for its exclusive benefit the property which had been conveyed for the benefit of all. This raises the question whether by acceptance, the Roesch Company waived the right, which under the law it theretofore had, independently to pursue its own remedy for the recovery of its debt.

[4] This question relates more to the legal effect of the acceptance than to the legal character of the assignment. It has been urged that the assignment was void because it did not conform to the general assignment act of New Jersey, and therefore the acceptance of a void thing was itself a nullity. We are not impressed by this contention, because we are not satisfied that the assignment was void, or that it does not embody such a trust, which, if accepted by all of the creditors, would be enforced by a court of equity. At most the assignment was voidable. Though at first voidable, the assignment was made valid as to the Roesch Company by its acceptance. Though the Roesch Company had at first the right to treat the assignment as void, it waived that right by accepting it, and is now precluded to deny its validity. The principle of waiver, as applied to void or voidable transactions, is no stranger to the law, and is invoked when a party accepts rather than avoids a situation not imposed upon him by law. The illustrations are numerous.

A bond that was void (if executed under constraint) because of non-conformity with the statute under which it was drawn, was held valid if

"it is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligor." United States v. Hodson, 77 U. S. (10 Wall.) 395, 404, 409, 19 L. Ed. 937.

In a case against stockholders of a corporation, it appeared that the act of incorporation imposed upon the stockholders individual liability for the payment of its debts upon dissolution; that in compliance with an act of the Legislature, the corporation assigned its property for the benefit of its creditors; and that the act under which the assignment was made, declared that upon such an assignment, stockholders are relieved from personal liability. It further appeared that the creditor plaintiff had participated in the assignment and had received dividends therefrom. It was held that, though the act under which the assignment was made was unconstitutional and void as to creditors whose demands existed previous to the passage of the act, nevertheless those creditors who came in, acquiesced in the assignment and accepted dividends thereunder, were estopped and deprived of the right of calling upon the stockholders individually for the payment of the residue of their debts not paid under the assignment. Van Hook v. Whitlock, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246.

It was early held that a state bankruptcy law which discharged the bankrupt from all liability for his debts is void as to non-resident creditors, as impairing the obligation of contracts, and that a discharge under such a law is not a good plea in bar of an action brought upon

such a contract. Sturges v. Crowninshield, 17 U. S. (4 Wheat.) 122, 4 L. Ed. 529; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606. Such a discharge under the bankruptcy law of Louisiana was pleaded in an action instituted by a creditor resident in Kentucky. The plea disclosed, however, that the non-resident creditor had participated in the bankruptcy proceeding of the debtor and had received and accepted one dividend. The court recognized the rule in Sturges v. Crowninshield, and Ogden v. Saunders, but held, that when the creditor voluntarily made himself party to a proceeding which as to him was void, he abandoned his extra-territorial immunity from the operation of the bankruptcy law of Louisiana, and waived his right to hold his contract unimpaired and to sue upon it. Clay v. Smith, 28 U. S. (3 Pet.) 411, 7 L. Ed. 723.

A discharge under the law of Scotland was set up against a debt contracted in England, which was conceded to be no bar, but the plea averred that the plaintiff appeared in the court in Scotland and opposed the discharge of the defendant, which was relied on as evidence of his consent to be bound by that law. That conclusion from the premises was denied by the court; but it was conceded, that if he had taken the benefit of the law by coming in and receiving a distributive share of the property, it would have been otherwise. His assent would have bound him. Phillips v. Allan, 8 Barn. & C. 477.

Where a debtor in failing circumstances had obtained from his principal creditor a promise to compose his debt if a like composition could be obtained from other creditors, and the principal creditor thereafter sued for the whole debt, it was held that the promise upon which was founded the original debt had

"become superseded by a new contract, founded on the consideration of the defendant's prior indebtedness; in which contract other persons have become interested, and which has been executed by them to such an extent that it cannot now be rescinded by the plaintiffs. The former contract is annulled, and the plaintiff's sole remedy is on the new contract, substituted in its stead." Browne v. Stackpole, 9 N. H. 478.

The principle controlling these cases, in our opinion, is applicable with equal force to the case under consideration, and controls our judgment that in waiving its rights under a voidable assignment and in accepting the provisions thereof by acts which induced other creditors to accept them, the Roesch Company could not treat the assignment and its own acts as nullities and profit by an action at law subsequently instituted for the recovery of its debt.

[5] Another theory of the case may be referred to briefly, which, if tenable, would prevent the attachment of the Roesch Company from having effect. On its face the deed from Shinn purported to transfer to Bacharach his entire legal title, and in that event no title remained in Shinn which the Roesch Company could attach. It is true, that the legal title was conveyed in trust, but unless the trust was void, the transfer of the title would continue to be effective, and nothing would remain in Shinn at the time of the attachment. It is doubtful whether the validity of the trust can be determined in this proceeding; for, while the trust has not yet been made effective because it has not

yet been completely executed, there seems to be no reason why the unassenting creditors of Shinn may not still accept it, and it would then become wholly effective. Until, therefore, the validity of the trust be directly attacked, it is at least a debatable proposition, whether the face of Shinn's deed to Bacharach should not prevail, and if it should, the attachment would be of no avail.

[6] The remaining question relates to the character of the relief asked by the bill. Mumford, Shinn's trustee in bankruptcy, prays that Bacharach, Shinn's trustee by deed, be decreed to convey and deliver to him all property received from Shinn not distributed under the trust. This raises a question whether the trustee under the deed or the trustee in bankruptcy holds the legal title to the property, and if in different ways both hold title, then which title is superior?

The title of Shinn's trustee in bankruptcy is no greater than was Shinn's title when the trustee was appointed. When Shinn by deed conveyed his property to Bacharach, he divested himself of all title. That deed and the trust created by it are unquestionably valid as between Shinn and Bacharach. So long as the trust is active and the property conveyed is applicable to it, Shinn, and therefore his trustee in bankruptcy, are without interest in the property; but should the trust cease or the property exceed its requirements, the property unused or assets unexpended would revert to Shinn, and, by operation of the bankruptcy law, would vest in his trustee in bankruptcy. This contingent interest is the only title of the complainant, trustee in bankruptcy, which we discern, and because of it, we approve the propriety of the decree of the court below in directing Bacharach, trustee, to transfer and convey to Mumford, trustee in bankruptcy, such property, real and personal, "as remains in his hands *after executing the trust* imposed under the decree to him as trustee."

The decree below is affirmed.

COLEMAN et al. v. TEPEL.

(Circuit Court of Appeals, Third Circuit. March 2, 1916.)

No. 2069.

1. CORPORATIONS ⟸376—POWERS—PURCHASE OF OWN STOCK.

When an insolvent corporation purchases its own stock, or where the effect of such a purchase is to render it insolvent, the transaction is void as to creditors in those jurisdictions which uphold the right of a corporation, in the absence of statutory prohibition, to expend its capital in good faith for the purchase of its own stock, as well as in those jurisdictions which hold such a purchase to be inherently illegal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. ⟸376.]

2. CORPORATIONS ⟸569—POWERS—PURCHASE OF OWN STOCK.

In a suit to set aside a mortgage, evidence *held* to show that, when a corporation purchased 180 of its 255 shares of stock and gave a mortgage on its plant for the indebtedness thereby created, it was thereby rendered insolvent, whether solvent or insolvent prior to the transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1916; Dec. Dig. ⟸569.]

3. EVIDENCE ⊂=113(13)—ADMISSIONS—VALUE OF PROPERTY—COMPROMISE OF INSURANCE CLAIM.

The amount of insurance placed upon property is no evidence of its value; but the amount paid and accepted pursuant to an insurance adjustment is some evidence of the value of the property destroyed, when the amount paid is less than the face of the policies.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 279; Dec. Dig. ⊂=113(13).]

4. CORPORATIONS ⊂=542(1)—POWERS—PURCHASE OF OWN STOCK.

Where a corporation was rendered insolvent by purchasing its own stock and giving a mortgage for the indebtedness thereby created, the transaction was void as to subsequent as well as prior creditors, though there was no fraudulent intent, since, when a stockholder, with the knowledge he has, or with that with which he is charged concerning the corporation's financial condition, engages in a transaction depleting for his advantage the corporate assets below the subscribed capital or existing liabilities, and becomes a party to the solvent appearance of a business intended to be continued, he is bound by his act both to existing and future creditors, when the result is the insolvency of the corporation and injury to creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154, 2159; Dec. Dig. ⊂=542(1).]

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

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. From a decree in favor of plaintiff (229 Fed. 300), defendants appeal. Affirmed.

Wm. Russell Deemer and N. M. Edwards, both of Williamsport, Pa., for appellants.

Mortimer C. Rhone and A. R. Jackson, both of Williamsport, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The questions in this case relate to the validity of a purchase by a corporation of its own shares of stock. The theory upon which the case was argued involved a general consideration of the broad subject of corporate capital, the purposes for which it is employed and held, and the rights of creditors and stockholders therein. An excursion into this general subject was deemed necessary, because it was thought that some phases of the case are controlled by laws of Pennsylvania, with respect to which, we are informed, there is neither statutory nor judicial expression. As we view the case, many of the questions so elaborately argued and seriously considered are subordinate to what we deem to be the controlling questions. These relate to the solvency of the corporation at the time it purchased the stock, and to the insolvency of the corporation as a consequence of the purchase. These questions we believe may be decided upon general principles of law applicable in Pennsylvania as elsewhere, thereby leaving the courts of Pennsylvania unembarrassed by our decision when they are called upon to declare the law of Pennsyl-

vania upon such questions, as, whether the capital of a corporation is a trust fund for the benefit of creditors; whether capital, as distinguished from surplus, may be employed by a corporation, when solvent, to purchase its stock and reduce its capitalization; whether in determining solvency, capital is to be computed as a liability; and whether capital stock is a property consideration that will support a valid corporate obligation, within the meaning of Article 16, Section 7, of the Constitution of Pennsylvania.

The undisputed facts out of which arose this controversy are these: John Coleman owned and operated in Lycoming County and State of Pennsylvania a small plant for the manufacture of boxes. In view of its size and the amount of capital invested, the business was prosperous, yielding annual net profits of about $6,000. R. C. Hartman and C. H. McLaughlin, young men in Coleman's employ, desired to purchase the business. After negotiations, it was sold to the West Branch Box and Lumber Company, a corporation organized by them, for the sum of $30,000.

Capital stock to the amount of $25,500 was subscribed, for which 255 shares, at the par value of $100, were issued, as follows: John Coleman, 50 shares; D. J. Bright, 50 shares; William F. Campbell, 10 shares; R. C. Hartman, 50 shares; C. H. McLaughlin, 15 shares; E. W. Cole, 5 shares; John C. Lush, 25 shares; John J. Coleman, 50 shares.

The first five, in the order named, were elected directors. John Coleman was elected president.

The subscribers paid for their shares in cash, excepting Campbell, who gave his note for $400. Before beginning business, the corporation borrowed from the local Board of Trade $10,000, secured by a first mortgage on the plant. With its cash capital and with a portion of the money borrowed, the corporation paid John Coleman the purchase price of $30,000. With its entire capital and $4,500 of borrowed money invested in its plant, the corporation began business on February 1, 1911, and excepting for profits earned, it thereafter conducted business entirely upon credit.

The business for the fiscal year 1911 was good, yielding a net profit of about $6,000, out of which a six per cent. dividend was paid. The balance remained in the business. The profits for the fiscal year 1912 were a little uncertain, it being testified that they were between $5,000 and $7,000, but as the corporation had expended about $7,500 for improvements during the two years, no money was available for dividends.

Hartman and McLaughlin were the active directors in the conduct of the business. Their policy of installing new machinery, contracting working capital, extending bills payable, as well as the inability of the corporation to reduce its loans and to pay a dividend for the year 1912, caused dissatisfaction among certain stockholders. Upon the disclosure of the condition of the business at the annual meeting in January, 1913, John Coleman and Bright, stockholders and directors, and John J. Coleman, Cole and Lush, stockholders, expressed a desire to sell their stock and get out of the business. The three remaining di-

rectors and stockholders, Campbell, Hartman and McLaughlin, were willing but were financially unable to make the purchase. After many conferences extending through the months of February, March and April, 1913, it was agreed that the corporation should purchase the stock of John Coleman, John J. Coleman, Cole and Bright, aggregating 155 shares, and in consideration therefor should deliver to John J. Coleman, trustee for himself and the others, its second mortgage for $15,500 secured by $12,000 fire insurance. When this agreement was reached, John Coleman resigned from the presidency of the corporation and he and Bright resigned from the board of directors on May 1, 1913, and on May 5, 1913, the transaction was completed by the remaining directors. Lush apparently conducted his own negotiation for the sale of his stock, which was consummated a few days later by the delivery of the corporation's judgment note for $2,500 in return for his 25 shares. The mortgage and the judgment were duly recorded.

The effect of these transactions was to increase the indebtedness of the corporation $18,000 and to diminish its outstanding stock to $7,500. The financial condition of the corporation for the periods preceding and succeeding the transaction will presently be considered. The plant burned on February 13, 1914, resulting in a total loss. It was insured for $22,500, $10,500 of which was held as security on the mortgage to the Board of Trade, and $12,000 as security on the mortgage to Coleman, trustee. After a dispute between the mortgagees and the insurance companies, an adjustment was effected by which the Board of Trade received $8,238 and Coleman, trustee, was awarded $9,915. Pending the insurance adjustment, the corporation was adjudged bankrupt. Its trustee obtained an order from the court below restraining the payment of the insurance money to Coleman, trustee. The money was afterwards paid into the registry of the court. Thereupon the trustee in bankruptcy filed the bill in this case under section 70e of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1913, § 9654]), to avoid the transaction of the purchase of stock and to annul the mortgage given therefor, thereby raising the question whether the fund in court is payable to the trustee in bankruptcy or to the trustee under the mortgage.

In his view of the case, the learned trial judge did not find it necessary to consider or decide the question of the corporation's insolvency either at the time of the stock purchase or as a consequence of it. In finding for the complainant, he held that the bond and mortgage given by the corporation in the purchase of its own stock were void, because they created a fictitious increase of the corporation's indebtedness and were not based upon a property consideration within the meaning of Article 16, Section 7, of the Constitution of the State of Pennsylvania, which provides:

"No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increases of stock or indebtedness shall be void."

We prefer to leave to the courts of Pennsylvania the interpretation of this constitutional provision, and to decide this case upon other

principles. Our inquiry will be directed to the solvency of the corporation at the time it purchased its stock, and to the effect of that purchase upon its solvency. In thus considering the case, we feel that we can eliminate many questions submitted to us for decision which do not properly arise from the facts.

Two inconsistent doctrines have obtained currency as to the legality of a purchase by a corporation of its own stock; one, that it is inherently illegal, the other, that it is legal save under circumstances producing injury.

The doctrine that it is inherently illegal prevails in England, and to a limited extent in this country. A. & W. B. & C. A. v. Smith, 141 Wis. 377, 382, 123 N. W. 106, 32 L. R. A. (N. S) 137, 135 Am. St. Rep. 42; In re Clark, 40 Am. L. Reg. (N. S.) 398, 424. It rests upon the theory that the capital of a corporation is a trust fund for the payment of corporate indebtedness, Columbian Bank's Estate, 147 Pa. 422, 436, 23 Atl. 625, 626, 628; Hamor v. Taylor-Rice E. Co. (C. C.) 84 Fed. 393; Upton v. Tribilcock, 91 U. S. 45, 47, 23 L. Ed. 203; Sanger v. Upton, 91 U. S. 56, 60, 23 L. Ed. 220; Crandall v. Lincoln, 52 Conn. 73, 94, 52 Am. Rep. 560; that the reduction of its capital by the purchase of its stock is ultra vires, Hamor v. Taylor-Rice E. Co., supra; Maryland Trust Co. v. Bank, 102 Md. 608, 63 Atl. 70; Farrington v. Tennessee, 95 U. S. 679, 686, 24 L. Ed. 558; Central Transp. Co. v. P. P. C. Co., 139 U. S. 24, 481, 11 Sup. Ct. 478, 35 L. Ed. 55; and that such a purchase is a fraud upon creditors in that it diverts corporate assets from creditors to persons who have no claim upon them, Hall v. A. T. & I. Co., 143 Ala. 464, 39 South. 285, 291; Lowe v. Pioneer I. Co. (C. C.) 70 Fed. 646; Cook on Corporations, §§ 311, 312.

The doctrine that the purchase of stock by a corporation is legal save under circumstances producing injury, is based upon the theory that capital is not a trust fund; that a solvent corporation may employ its capital in the purchase of its own stock, when not prohibited by law, so long as it acts in good faith. A. & W. B. & C. A. v. Smith, 141 Wis. 377, 382, 123 N. W. 106, 32 L. R. A. (N. S.) 137, 135 Am. St. Rep. 42, and cases cited; First National Bank v. Salem C. F. M. Co. (C. C.) 39 Fed. 89, 96, and cases cited; In re Smith Lumber Co. (D. C.) 132 Fed. 618; Dupee v. Water Power Co., 114 Mass. 37; Cook on Corporations, §§ 311, 312.

[1] Upon which of the two theories rests the law of the State of Pennsylvania with respect to the right of a solvent corporation to employ its capital in the purchase of its own stock is not necessary for us to determine in this case, for whatever may be the theory of the law of Pennsylvania in that regard, it is certain that in Pennsylvania, as elsewhere, when an insolvent corporation purchases its own stock, Columbian Bank's Estate, 147 Pa. 422, 436, 437, 23 Atl. 625, 626, 628; Hamor v. Taylor-Rice E. Co. (C. C.) 84 Fed. 392; A. & W. B. & C. A. v. Smith, supra; or where the effect of such a purchase is to render it insolvent, the transaction is void as to creditors. A. & W. B. & C. A. v. Smith, supra; German Saving Bank v. Wulfekuhler, 19 Kan. 60; Butler P. Co. v. Robbins, 151 Ill. 588, 38 N. E.

153; Currier v. Lebanon S. Co., 56 N. H. 262; Alexander v. Relfe, 74 Mo. 495; Augsburg L. & I. Co. v. Pepper, 95 Va. 92, 27 S. E. 807; Hall v. Terminal I. Co., 143 Ala. 464, 39 South. 285, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363; In re Smith Lumber Co. (D. C.) 132 Fed. 620, 13 Am. Bankr. R. 123, 125; Clapp v. Peterson, 104 Ill. 26; National Bank v. Burch, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331; Buck v. Ross, 68 Conn. 29, 35 Atl. 763, 57 Am. St. Rep. 60; Cook on Corporations, § 311.

In those jurisdictions which hold that a solvent corporation is without power to purchase its own stock, it necessarily follows for the same and other reasons, that the purchase of stock by an insolvent corporation is illegal. In the jurisdictions which uphold the right of a corporation, in the absence of statutory prohibition, to expend its capital in good faith for the purchase of its own stock, the courts have most definitely held to and rigidly enforced the collateral principle that a corporation cannot make such a purchase when it results in fraud upon the rights of creditors.

[2] With this general statement of the law, let us inquire whether the West Branch Box and Lumber Company was solvent when it purchased from Coleman and his associates its own stock, and, if solvent, whether it was rendered insolvent by that purchase.

The testimony upon this subject was mainly given by those who had been stockholders and directors of the corporation, and in one way or another had been parties to the transaction. In many of its features, the testimony is irreconcilable, and being based upon recollection and opinion rather than upon records, presents difficulties.

The first act of the corporation was to purchase the business and the plant from Coleman for $30,000. As the subscribed capital was not equal to the purchase price, the corporation borrowed $10,000 from the local Board of Trade, securing the same by a first mortgage. With something over $4,500 of the money borrowed and with its entire subscribed capital of $25,500, it paid for the business and plant. If stock be included as a liability, the corporaiton was insolvent when it began business, as its liabilities exceeded its assets by about $5,500. If stock be not so included, then the company relied solely upon borrowed money for working capital, and was in financial peril at its very start. Its working capital was quite inadequate. It therefore made purchases and borrowed money upon the credit of John Coleman, and upon credit alone obtained funds with which it did business until it made earnings.

At or before the annual meeting in January, 1913, all the stockholders had a statement of the business for the fiscal year 1912, which indicated that no dividend would be paid. Certainly on February 1, 1913, they knew that the corporation was financially unable to pay its mortgage debt to the Board of Trade, which had been reduced to $7,000; that it was unable to pay its notes upon which Coleman and others were endorsers, amounting to about $14,700, or to discharge its accounts payable amounting to about $4,100, without encumbering or selling its plant. They also knew that the corporation was endeavoring to secure from the Board of Trade, and afterwards suc-

ceeded in obtaining, a return of the $3,000 which it had paid on account of the principal of the mortgage.

In this condition of the corporation's finances, John Coleman, John J. Coleman, Bright, Cole and Lush became dissatisfied, and after negotiations between them and the three remaining stockholders and directors, their stock was purchased and the mortgage and judgment given as previously stated. Aside from knowledge of the corporation's condition on February 1, 1913, all the parties to the stock transaction knew that on May 5, 1913, when the stock was purchased and the mortgage delivered, the liabilities of the corporation had grown, and exceeded its liabilities of February 1, 1913, by about $7,800. Recognizing the corporation's inability to pay its outstanding obligations, the stockholders, including those who were about to retire, made an agreement with the corporation for the extension of the loans and the renewal of the notes upon which they were endorsers, covering a long term of years, indicating at that time not only an insufficient amount of working capital, but a total financial inability to pay its current debts. Between May 5, 1913, and October following, the financial condition of the company grew worse, until in the latter month it had exhausted its available resources. The $5,000 of accounts receivable shown on May 5, 1913, had been consumed. The business was ended by fire in February, 1914.

Being thoroughly familiar with the financial condition of the corporation, we are satisfied that in proposing an exchange of stock for the corporation's obligation, Coleman and his associates attempted to protect themselves against threatened, if not impending, disaster.

Notwithstanding the general decline of the corporation's business, begun several months before and continuing after the stock purchase transaction, the corporation was not insolvent if we accept as correct the figures given by its officers covering the different periods of its existence. But the company's alleged solvency is based upon figures, some of which, upon their face, cannot be accepted. The assets with respect to accounts and bills receivable, cash, lumber, finished and unfinished products, and liabilities with respect to accounts and bills payable and mortgage indebtedness, must be accepted as given. The difficulty, however, arises out of the valuation placed upon the plant, which includes land, buildings of all kinds, and machinery.

It was testified that in negotiating for Coleman's business, the purchasers estimated the value of the plant at $30,500, that the price paid for the whole business, including the plant, was $30,000, and that no allowance was made in the purchase price for the acquisition of the business as a going concern. The defendants therefore maintain that at the time of the purchase on February 1, 1911, the plant was worth at least $30,000. In view of the fact that Coleman sold a business that was paying him $6,000 a year, we do not believe that he disposed of it at the value of the physical property. Therefore, the plant must have been worth something less than $30,000.

On February 1, 1913, the corporation submitted a statement of its affairs to the Board of Trade in its endeavor to secure a return of the $3,000 it had paid on account of its mortgage. In that statement the

plant was included at $37,032. This sum just about represents the original value of the plant as estimated by the purchasers, plus the improvements that had been put upon it during two years, without charging off anything for depreciation. At the trial, officers of the corporation who made the statement to the Board of Trade on February 1, 1913, estimating the value of the plant at $37,032, placed its value on May 5, 1913, three months thereafter, at $43,600. Others testified that it was worth $51,000. These differences reflect simply the opinions of different witnesses and are not based on values of additions or improvements. They are inflations.

[3] The amount of insurance placed upon a plant is no evidence of its value, but the amount of money paid and accepted pursuant to an insurance adjustment is some evidence of the value of the property destroyed, when the amount paid is less than the face of the policies. The plant was insured for $22,500, and the insurance adjustment amounted to something over $18,000. One of the appraisers for the fire loss was McLaughlin, who estimated upon and reported the value of the property at the time of its purchase by the corporation.

It would add nothing to this opinion to repeat the calculations by which we have arrived at our conclusion. It is sufficient to say that by deflating the estimated value of the plant from $51,000, $43,000 and $37,000 to something approximating its value, as indicated by its original cost with the added costs of improvements, and as indicated by the amount received from insurance as an acceptable adjustment of the value of the property destroyed, we find that on May 5, 1913, before the delivery of the Coleman mortgage and the Lush judgment, the corporation was solvent, if we exclude its stock from its liabilities, and that it was insolvent if we include its stock as a liability. It is not necessary for us to determine in this case, whether, in ascertaining solvency under the law of Pennsylvania, stock should be included as a liability, for we find that immediately after the delivery of the Coleman mortgage and the Lush judgment, by which the stock was reduced to $7,500 and the general liabilities increased from $33,700 to $51,700, the corporation was insolvent whether the stock liability be included in or excluded from the calculation, and therefore whether the company was or was not solvent on May 5, 1913, when it gave the mortgage to Coleman and the judgment to Lush, it was made insolvent by those transactions.

[4] It has been urged that if the transaction is void it is void only as to existing creditors and not as to those with whom the corporation subsequently incurred obligations, upon the ground, that to avoid a transfer of property in fraud of future creditors, there must be present actual intent to defraud. Sommermeyr v. Schwartz, 89 Wis. 66, 71, 61 N. W. 311; Case v. Phelps, 39 N. Y. 164. With this principle evidently in mind, there was controversy at the trial as to whether certain debts were created prior or subsequent to the stock purchase. Unquestionably many debts created prior to the transaction were proved in bankruptcy. Others were subsequently incurred. We are inclined to hold, upon the reasoning of well considered authorities, that the void character of such a transaction as to future creditors does not

depend upon fraudulent intent, and that when a stockholder, with the knowledge he has or with that with which he is charged concerning the financial condition of the corporation, engages in a transaction which results in a depletion for his advantage of corporate assets below the subscribed capital or below existing liabilities, as the law may be, and becomes a party to the solvent appearance of a business that is intended to be continued, he is bound by his act both to existing and future creditors, when its direct object or immediate consequence is the insolvency of the corporation and injury to creditors. A. & W. B. & C. A. v. Smith, supra; Maryland Trust Co. v. National Bank, supra; Hamor v. Taylor-Rice E. Co., supra.

The decree below is affirmed.

WALLIS, Asst. Com'r of Immigration, v. UNITED STATES ex rel. NG SAM et al.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1916. Rehearing Denied March 27, 1916.)

No. 2693.

1. ALIENS ⇐32—DEPORTATION PROCEEDINGS—EVIDENCE.

Four persons of Chinese birth or descent boarded a train at a small village within 100 miles of the Canadian border, with no reasonable explanation of their presence there, though they denied acquaintance with each other. Three claimed to have been born in the United States, and all claimed to have lived in this country all or the greater part of their lives; but none of them had any acquaintance with any part of the United States, and the only one who could speak English at all spoke it slightly and imperfectly. There was found in their possession certain Chinese and Canadian marked clothing and money, certain Canadian addresses, with directions to call there, a letter in Chinese, reciting their attempted entry from Canada and their arrest, and asking help, and $5 in paper money, pinned to the railroad ticket of each one, with a note attached containing the words "Please keep the change." The only two who admitted ever having been in Canada claimed to have merely passed through Canada on a return trip from China, and none of them claimed to have had any residence or domicile in Canada, or to have paid the head tax to the Canadian government necessary to their legally remaining there, and none of them had papers showing their right to be in Canada. *Held*, that evidence of these facts warranted the Secretary of Labor in finding that they were aliens of the excluded class and entered the country in violation of law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇐32.]

2. ALIENS ⇐32—DEPORTATION PROCEEDINGS—EVIDENCE.

Under Immigration Act Feb. 20, 1907, c. 1134, § 35, 34 Stat. 908 (Comp. St. 1913, § 4284), providing that the deportation of aliens arrested within the United States after entry and found to be illegally therein shall be to the trans-Atlantic or trans-Pacific ports from which they embarked for the United States, or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory, the evidence warranted the deportation of such persons to China, rather than Canada, though it was the government's claim that they entered the country from Canada.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇐32.]

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3. ALIENS ⟸32—DEPORTATION—COUNTRY TO WHICH ALIENS SHOULD BE DEPORTED.

Where Chinese persons, claimed by the government to have entered the United States from Canada in violation of law, denied any previous residence, or even presence, in Canada, they were in no position to insist that they should be deported to Canada, rather than to China.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.]

4. ALIENS ⟸32—DEPORTATION—COUNTRY TO WHICH ALIENS SHOULD BE DEPORTED.

Where four Chinese persons, who boarded a train at a small village near the Canadian border, were apparently attempting to accomplish a joint unlawful entry into the country, the effect of evidence as to the possession by one of them of Chinese clothing and money was not limited to that one, in determining the country to which they should be deported.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.]

5. ALIENS ⟸32—DEPORTATION PROCEEDINGS—REVIEW BY COURTS.

Where aliens, sought to be deported as having entered the country unlawfully, were given a fair hearing, and there was evidence to support the findings of the Secretary of Labor, the courts were not concerned with the weight to be given the evidence.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Habeas corpus by the United States, on the relation of Ng Sam, Yee Ngau, Ng Tin, and Ng Sing, against Joseph H. Wallis, Assistant Commissioner of Immigration at the port of New Orleans, to obtain the release of the named Chinese persons, from deportation warrants in proceedings under the Immigration Act of 1907, as amended. From the orders of the District Court for the Eastern District of Louisiana, making the writs of habeas corpus absolute and discharging the relators, defendant appeals. Reversed and remanded, with directions.

Jos. W. Montgomery, Asst. U. S. Atty., of New Orleans, La., for appellant.

B. B. Howard, of New Orleans, La., and Robert M. Moore, of New York City, for appellees.

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

GRUBB, District Judge. The right of the appellant to detain the relators, under deportation warrants issued by the Secretary of Labor, is questioned by the writs. It was conceded by counsel for the relators, in this court but not in the court below, that there was evidence submitted to the Secretary of Labor, in the case of each of the relators, which tended to support his finding that the relators were aliens, who had entered this country from Canada without inspection and in violation of the thirty-sixth section of the Immigration Act of February 20, 1907, as amended by Act March 26, 1910, c. 128, 36 Stat. 264, and of the Chinese Exclusion Laws, which, in view of the conclusive effect to be given such findings, where a fair hearing has been accord-

ed the alien, and where there has been no manifest abuse of discretion upon the part of the Secretary of Labor, would support the findings of the Secretary in the instant case, when assailed collaterally upon habeas corpus.

The insistence of counsel for the relators is that the relators, though subject to deportation under proper warrants to Canada, were not legally detained under warrants for their deportation to China. Section 35 of the act of 1907 (Comp. St. 1913, § 4284), is relied upon by the appellant to sustain the deportation of relators to China. It is as follows:

"That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

[1, 2] The contention of the appellant is that the evidence submitted to the Secretary justified the inference found by him that the relators embarked from some port in China for Canada or for the United States by way of Canada. The contention of the relators is that no evidence was submitted to the Secretary, which would support a finding that the relators had embarked from China for Canada or for the United States by way of Canada, and that the warrants directing the deportation of relators to China were without the support of evidence that China was the country from whence they came, and for that reason reviewable upon habeas corpus.

Assuming, without deciding, as was done by the Supreme Court, that that part of the deportation order which determines the destination of the alien is open to inquiry upon habeas corpus (Lewis v. Frick, 233 U. S. 291–304, 34 Sup. Ct. 488, 58 L. Ed. 967), we proceed to consider the respective contentions of the parties.

The evidence submitted to the Secretary of Labor was the testimony of each of the relators upon the hearing, the documents and articles found in their possession when arrested, and the hearsay result of certain inquiries of the immigration inspector addressed to the railroad employés of the railroad upon which the relators were traveling when arrested. We will discard the hearsay statements, and confine our consideration to the admissions of the relators and to the documents and articles found on them when arrested. The latter consisted of certain Chinese and Canadian marked clothing and money; certain Canadian addresses, with directions to call at the named address; a letter in Chinese, reciting their attempted entry from Canada and their arrest, and asking help; and $5 in paper money, pinned to the railroad ticket of each of the relators, with the note attached containing the words "Please keep the change." The four relators, while denying acquaintance, boarded the same train at Port Kent, a small village in New York, less than 100 miles from the Canadian border, and without a reasonable explanation to account for their joint presence there, or how or from what place they arrived there, either singly or in company. Though three claimed to have been born in the United States, and all claimed to have lived in this country all or the greater part of their lives, no one of them had any acquaintance with any part of the

United States, and but one could speak English at all, and he but slightly and imperfectly. That they came to Port Kent and took the train there separately and without concert, and from places in the United States strange to them, but where they had resided for many years, and without the intervention of persons, more familiar with the surroundings and manner of travel, overtaxes the credulity of the least suspicious. The inference that they came to Port Kent and boarded the train, upon which they were subsequently arrested, in company and with the assistance of more competent persons, and in an endeavor to enter the United States by evading inspection, is irresistible. The inference is just as conclusive, from their attempted evasion of the provisions of the Immigration Act, that they could not have successfully encountered the inspectors at the border, and were not entitled to enter the United States. Counsel for the relators contend that, if so much is to be conceded, it shows only that the relators were seeking to make an unlawful entry into this country from Canada, and that no fair inference can be indulged therefrom that the relators had originally embarked from China, and that the latter inference was essential to the detention of relators under the deportation warrant.

The contention of relators is that the only legal evidence presented to the Secretary was their own statements, and possibly what was taken from their persons when they were arrested; that if their statements were credited, they were entitled to entry, and if discredited as to the place of their nativity and residence, because of the suspicious circumstances of their presence in Port Kent, their statements would not justify an inference that they came from a country more remote than Canada into this country, nor would the articles found in their possession. Three of the relators testified that they were born in the United States, and one admitted birth in China. All claimed to have lived in this country, except when on short visits to China, since they were children. Three denied having been either in Canada or China for more than three years before the time of their arrest, and the fourth denied absence from this country for more than a year from the time of his arrest. The two who admitted a previous presence in Canada asserted that they landed at Vancouver on a return trip from China, and merely passed through Canada on their way back to this country. No one of them claimed to have had a residence or domicile in Canada just prior to their entry into this country, but, on the contrary, asserted a continuous residence in the United States, dating back therefrom for periods varying from a year to a lifetime. No one of them claimed to have paid the head tax to the Canadian government, necessary to their legally remaining there. No one of them had papers showing their right to be either in this country or in Canada. It is said that their being Mongols is no evidence of birth in China, and a fortiori of their debarkation from China to Canada or the United States; that, if their story of birth and residence in this country is untrue, its untruth leaves the record merely negative as to their place of birth and debarkation to the United States, and without support that it was China.

[3] The record, however, does contain convincing evidence that they entered this country recently before their arrest and from Canada.

They each denied upon the hearing a previous residence or even presence in Canada. They are therefore not in a position now to assert that their entry into this country was from Canada, where they had had theretofore a domicile, and insist on their right to be returned there, in the face of their denial upon the hearing that Canada was the country from whence they came to this country.

[4] It might be that, if the record contained only the statement of the relators that they were born and had lived in the United States all their lives, the argument that, even if such statements were discredited, it would leave the record with no proof of their actual place of nativity or debarkation, might prevail. In this case the record further shows that relators were discovered and apprehended under circumstances satisfactorily showing that they had recently crossed the Canadian border in an attempt to evade the immigration authorities, which itself was an implied confession that they had no legal right of entry into this country. Upon their arrest, they denied having been in Canada, but asserted continued residence in the United States, and admitted not having complied with the Canadian requirements as to residence therein. The falsity of such denial, as shown by the surrounding circumstances and the articles of Canadian make found on them, should not avail to prove for them a legal residence in Canada, but rather the fact that they were using that country, not as a legitimate domicile, but the more easily to accomplish their unlawful entry into this country from China. Their established recent presence in Canada, taken in connection with their false denial of such presence, when arrested in the attempt to enter without inspection, is sufficient warrant for the inference that Canada was not the country from which they started on their illegal undertaking, and that it was not the country of which they were natives or citizens. The Chinese clothing and money found on one of them but corroborates the inference, and, as the four were undoubtedly attempting to accomplish a joint unlawful entry, the effect of this evidence is not to be limited to the one upon whom the articles were discovered.

[5] We think the evidence submitted to the Secretary of Labor tended to establish that all of the relators were aliens of the excluded class, that they entered this country in violation of the provisions of the Immigration and Chinese Exclusion Laws, and that they embarked from a port in China for Canada, or by way of Canada, with the United States as their ultimate destination. With the weight to be given the evidence we are not concerned, since the relators were given a fair hearing and the Secretary is not shown to have manifestly abused his discretion in arriving at his findings.

In the case of Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967, the Supreme Court disregarded the story of the alien as unreasonable, and also disregarded the contention that, laying it aside, there was nothing left in the record on which to predicate an illegal entry, and deduced the fact of intercourse from the alien's admission, while discarding his statement of a previous marriage, and by doing so arrived at the immorality of the intercourse. The court said (page 299 of 233 U. S., page 491 of 34 Sup. Ct. [58 L. Ed. 967]):

"The story is extraordinary. How it happened that the alleged wife, who had known him as Prezysuskier in Warsaw, was able through the good offices of an entire stranger to identify him as Lewis, in Detroit, more than six years later, was not explained. The alleged husband's readiness to accept her is equally suspicious. There were other circumstances tending to discredit the story of the marriage. And if that story fell, the inference of unlawful purpose was irresistible. * * * But, without regard to them [certain omitted exhibits] enough appears to show that he [the Secretary of Labor] was fully justified in concluding as a matter of fact that the whole story of marriage in Warsaw was a fabrication, and that in truth Lewis went from Detroit to Windsor upon information from which he inferred that the woman was an alien and a prostitute, willing to accompany him to Detroit for an immoral purpose, and that he brought her to Detroit for that purpose. This being so, and there being no contention that the hearing was not fairly conducted, the finding of the Secretary upon the question of fact is binding upon the courts."

The court further said in that case (page 302 of 233 U. S., page 492 of 34 Sup. Ct. [58 L. Ed. 967]):

"The final contention is that petitioner should have been deported to Canada, whence he came upon the occasion of his unlawful entry into this country, rather than to Russia, the land of his birth, from which he came six years earlier. * * * But, at least, section 35 indicates a legislative intent that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports, if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country. * * * The theory of the act, as expressed in section 2, is that the undesirables ought to be excluded at the seaport or at the frontier; but sections 20, 21, and 35 recognize that this is not always practicable. Of course, if petitioner's attempt to bring a woman into the country for an immoral purpose had been discovered in time, he might have been physically excluded from entry at Detroit upon his return from Windsor. In that event he would naturally have remained upon Canadian soil. But since his offense was not discovered in time to permit of his physical exclusion, so that he becomes subject to the provisions for deportation, his destination ought not to be controlled by the factitious circumstance that he went into Canada to procure the prostitute. And, upon the whole, it seems to us that the act reasonably admits of his being returned to the land of his nativity, that being in fact 'the country whence he came' when he first entered the United States."

In the case of United States v. Ruiz, 203 Fed. 441, 121 C. C. A. 551, decided by us, the alien was a naturalized citizen of the republic of Panama, from which country he entered the United States. The order of deportation directed his return to Spain, the land of his nativity, and we held that he should have been deported to the republic of Panama, from which he came, and of which he was a citizen. There is no inconsistency between that case and our present ruling. Nor is the case of United States v. Sisson, 206 Fed. 450, 124 C. C. A. 356, decided by the Circuit Court of Appeals for the Second Circuit, necessarily in conflict with our decision in this case. The holding in that case was that in the absence of all evidence from the record as to the land of the alien's citizenship or departure, except that he was a Chinese person, there could be no inference drawn that he was a citizen of and had embarked from China. We have found other evidence, tending to show those facts, in the record submitted in this case.

The case of Lee Sim v. United States, 218 Fed. 432, 134 C. C. A. 232, decided subsequently by the same court, supports our conclusion. In that case, though the entry was, as in this case, from Canada, the

deportation was to China, because the court found that there was evidence before the Secretary, in the admissions of the alien, that he had embarked from China for a Canadian port, with the ultimate purpose of reaching the United States. In this case, while there was no express admission by any of the aliens to like effect, their conduct constituted an implied admission, which was also corroborated by what was found on their persons at the time of arrest. The difference relates to the persuasiveness, and not to the existence, of the evidence in the record, and so presented a question for the Secretary, and not for the court.

The court below, without the benefit of the concession made by counsel for the relators in this court, and of the recent opinions quoted from, came to a different conclusion. The orders making the writs absolute and discharging the relators will be reversed, and the cause remanded, with directions to dismiss the writs, at the costs of the relators.

WALLIS, Asst. Com'r of Immigration, v. FEI NEI et al.

KEN SEW v. WALLIS, Asst. Com'r of Immigration.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1916. Rehearing Denied March 27, 1916.)

No. 2745.

Appeal and Cross-Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Habeas corpus by the United States, on the relation of Fei Nei and Chung (or Chang) Jung and of Ken Sew, against Joseph H. Wallis, assistant commissioner of immigration at the port of New Orleans, to obtain the release of the relators from deportation warrants in proceedings under Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, 36 Stat. 264. From the orders of the District Court for the Eastern District of Louisiana, making the writs in the cases of Fei Nei and Chung (or Chang) Jung absolute and discharging the relators, respondent appeals, with cross-appeal by the relator Ken Sew from an order of the District Court of the United States for the Eastern District of Louisiana, discharging the writ. Orders discharging relators reversed, and cases remanded, and order on cross-appeal affirmed.

Jos. W. Montgomery, Asst. U. S. Atty., of New Orleans, La., for appellant and cross-appellee.

B. B. Howard, of New Orleans, La., and Robt. M. Moore, of New York City, for appellees and cross-appellant.

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

GRUBB, District Judge. These appeals are not to be distinguished in their facts or the applicable law from the case of Wallis, Assistant Commissioner of Immigration, v. United States, on relation of Ng Sam and others, 230 Fed. 71, — C. C. A. —, just decided, and are governed by the ruling in that case.

The orders of the District Court involved in the direct appeals, making the writs absolute and discharging the relators, Fei Nei and Chung (or Chang) Jung, are reversed, and the cases remanded to the District Court, with directions to discharge the writs at relators' costs, and the order involved in the cross-appeal of Ken Sew will be affirmed.

COLORADO YULE MARBLE CO. v. COLLINS.

(Circuit Court of Appeals, Eighth Circuit. December 1, 1915.)

No. 4226.

1. CONTRACTS ⟸329—ANTICIPATORY BREACH—RIGHT OF ACTION FOR LOSS OF PROFITS.

Where one party to a contract clearly and unequivocally renounces the same, either when it is wholly executory or after part performance, a cause of action for loss of profits arises at once in favor of the other party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1511, 1585–1588; Dec. Dig. ⟸329.]

2. COURTS ⟸366(1), 372(1)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.

The federal courts accept the interpretation put by the courts of a state upon its own Constitution and statutes, but do not follow such courts as to the common law or questions of general jurisprudence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 967, 979; Dec. Dig. ⟸366(1), 372(1).]

3. CONTRACTS ⟸313(2)—ANTICIPATORY BREACH—ACTS CONSTITUTING RENUNCIATION—QUESTION FOR JURY.

Plaintiff contracted to do certain building work for defendant, agreeing to commence at once and prosecute the work to completion with all possible dispatch, and to furnish a sufficiency of labor and skilled mechanics when it was possible to proceed, and defendant agreed to make payments on monthly estimates. During the second month of the work plaintiff was notified to stop, as a reorganization of defendant company was contemplated. Estimates were given, but no payments were made on account of the work done. *Held*, that whether such notice to stop work indefinitely constituted an absolute and unequivocal renunciation of the contract, such as to entitle plaintiff to maintain an action at once for the breach, was a question for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. ⟸313(2).]

4. TRIAL ⟸266—INSTRUCTING JURY—STATEMENT THAT INSTRUCTION IS GIVEN BY REQUEST.

A statement by a judge to the jury that an instruction was given by request is not error, and especially where he added that he thought the instruction a fair statement of the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 664–667; Dec. Dig. ⟸266.]

5. APPEAL AND ERROR ⟸760(1)—REVIEW—QUESTIONS CONSIDERED.

When a plaintiff in error fails to point out in the argument the page of the transcript on which an error appears, such error will not ordinarily be considered by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. ⟸760(1).]

Adams, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Nebraska; Page Morris, Judge.

Action at law by George J. S. Collins against the Colorado Yule Marble Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Francis A. Brogan, of Omaha, Neb., for plaintiff in error.

Arthur R. Wells, of Omaha, Neb. (John F. Stout and Halleck F. Rose, both of Omaha, Neb., on the brief), for defendant in error.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SMITH, Circuit Judge. The plaintiff in error, the Colorado Yule Marble Company, hereafter called the defendant, is a corporation organized under the laws of Colorado. The Nebraska Mausoleum Company, of Omaha, Neb., had let to the Colorado Yule Marble Company as architects, marble dealers, etc., a contract to erect a 600-crypt mausoleum with chapel at West Lawn Cemetery at Omaha. The Colorado Yule Marble Company sublet a portion of the contract to the defendant in error, George J. S. Collins, hereafter called the plaintiff, for $40,000. The latter contract was in writing, and contained, among others, the following stipulations:

"The said Collins hereby agrees to commence the work at once and prosecute the same to complete finish to the entire satisfaction of the said C. Y. M. Co. with all possible dispatch and under the direction of the superintendent in charge, and to furnish a full sufficiency of labor and skilled mechanics at all times when it is possible to proceed. The said Collins further agrees that all materials used shall be the best quality of their respective kinds, that all work performed shall be executed in the most skillful and workmanlike manner, and the said Collins further covenants and agrees that the bond furnished in amount $20,000 shall be security for the satisfactory performance and fulfillment of the contract. * * * Payments to be made monthly upon estimates by the aforesaid superintendent of the said C. Y. M. Co., provided, however, that all work up to the estimated and claimed amount is satisfactory to the said C. Y. M. Co."

The contract was signed August 24, 1912. That was Saturday. No bond was ever given as provided in the contract, except as hereafter explained, but on Monday, August 26, 1912, Mr. Collins commenced work under the contract and worked steadily until October 7, 1912. On Saturday, October 5th, Mr. Savage, an agent of the defendant, told Mr. Collins to quit work; that they were trying to reorganize both the Mausoleum Company and the Marble Company. Mr. Collins said they were then in the middle of one of the bays, and he thought it advisable to finish that work before he stopped, and the completion of that took until Monday, October 7th. Up to that time the total work done was of the value of $1,085.37, which was covered by two certificates of the superintendent of the Marble Company, the first for $835.37 and the second for the balance. No part of these estimates has ever been paid. On November 25, 1912, plaintiff commenced suit in the district court of Douglas county, Neb. His petition was in two counts. In the first he sought to recover $1,085.38. In the second he sought to recover $6,000 for profits he would have made if allowed to go on with the work, and if the same was paid for under the contract. On the same day he secured an attachment, which was served by garnishing several parties. Upon application of defendant the case was removed to the United States District Court for Nebraska, and there defendant answered. The case was tried to a jury, who found for plaintiff in the sum of $7,172.10, and judgment

was rendered therefor. Thereupon the defendant sued out a writ of error to this court.

In its argument the Marble Company says:

"In its assignment of errors (page 85), on bringing this case to this court for review, the Marble Company relies upon the following propositions, which are indicated and preserved in various ways in the record:

"I. The action was prematurely brought for the recovery of the total profits on the contract, for the reason that the evidence wholly fails to show a total, anticipatory breach of the contract, such as would justify the bringing of such an action.

"II. Before the plaintiff could bring an action for such total breach, it would be necessary for him to have tendered full performance on his part, including the giving of the bond, which, on his own showing, had been only temporarily waived, but not entirely eliminated from the agreement.

"III. The plaintiff, having suspended work at the request of the defendant for the purpose of enabling some difficulties to be adjusted, could not thereafter put the defendant in default as for a breach of the contract, without giving notice that unless he was permitted to resume the work he would treat his prevention as a breach.

"IV. Error in the giving of instructions, even on the theory of the trial court. These will be pointed out in detail."

[1] As bearing upon the first three of these points it should be borne in mind that this was a partially executed contract, and a number of the authorities agree that there is a difference between contracts wholly executory and those executed in whole or in part. But in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, the Supreme Court after a most exhaustive consideration of both English and American authorities held substantially that there was no difference between purely executory and partly executed contracts, and that where one party to a contract clearly and positively renounced his contract before any part of it was executed a cause of action for the loss of profits accrued at once to the other party. That opinion is quite conclusive, so far as it goes, upon this court, as it was upon the District Court.

In Elliott on Contracts it is said:

"Sec. 2028. *Renunciation — Anticipatory Breach — Controlling American Rule.*—The American courts, with almost practical unanimity, adopt the rule of the English courts and hold that an unqualified and positive refusal to perform a contract before performance is due may be regarded as a complete breach of the contract, where the renunciation goes to the whole contract, and the injured party may bring his action at once."

This is supported in a note by a vast number of authorities. There has been some confusion on this subject by reason of the use of the term "rescission" in connection therewith. If there be a complete rescission of a partially executed contract there is no cause of action on the contract, but the only remedy of the party who has not been in default is a suit upon a quantum meruit. But the confusion between a breach of contract and a mutual rescission results in a confusion as to the remedy.

[2] It is true that in section 2029 of Elliott on Contracts it is said that Massachusetts, North Dakota, Maine, and Nebraska have in varying measure dissented from the English and American doctrine, and it is also true that this contract was a Nebraska contract and was there

to be performed. But this can be of no controlling weight with us. This was a case not arising under the statutes of Nebraska, but under the common law and the rules of general jurisprudence. The federal courts accept the interpretation put by the courts of a state upon its own Constitution and statutes, but do not follow it as to the common law or general jurisprudence. Baltimore & Ohio Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Gardner v. Michigan Central Railroad Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; Chicago, Milwaukee & St. Paul Ry. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688. If the defendant wanted the benefit of the exceptional rule adopted in Nebraska, its remedy was to not remove the case from the state court, where it was pending, to the federal court, where it now is.

[3] The first question to be determined in this case in the District Court was whether the defendant renounced the contract before this suit was brought by positive, distinct, unequivocal, unconditional, and absolute conduct. Here it must be borne in mind that the question is not, did the defendant so renounce the enterprise? but, did it so renounce the contract? The defendant cites Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984. But that case simply held that, if what it was claimed was a renunciation was not of the positive, distinct, unequivocal, unconditional, and absolute character necessary to constitute a renunciation in law, no action would lie.

In this case the plaintiff had agreed to commence the work at once and prosecute the same to completion with all possible dispatch, and to furnish a full sufficiency of labor and skilled mechanics at all times when it was possible to proceed. The company agreed to make payments monthly. No payment was made on October 1st and November 1st, and no definite assurance seems to have been given when these payments were to be made, but on October 5th the defendant ordered the plaintiff to violate the provisions of the contract that he would prosecute the work to completion with all possible dispatch. With his force organized and at work, it was a violation of the most important part of the contract, ordering him to cease work for an indefinite time. He did as asked, and then brought suit. Manifestly it was for the jury to say whether this was a positive, distinct, unequivocal, unconditional, and absolute renunciation of the contract, such as to amount to a renunciation in law, and the only question is whether the case was submitted under proper instructions to the jury.

Defendant complains of the failure to give a bond as provided in the contract. In his reply the plaintiff says the giving of the bond was waived. The evidence shows that plaintiff with reasonable promptness applied for a surety bond to agents of a surety company. They investigated the financial standing of the Mausoleum Company and the defendant, and this resulted in delay, and no bond was in fact signed until after this suit was brought, and that was for the purpose of securing the performance of a proposed substituted contract. The contract in question was signed by defendant, by C. J. Field, who acted substantially in all matters as the defendant's general manager. Mr. L. M. Savage and Maj. C. F. Cramer were representatives of the de-

fendant, conducting its Omaha office. The plaintiff testified that he mentioned the subject in the office, in the presence of Mr. Savage and Maj. Cramer; that—

"I told Mr. Savage and Maj. Cramer that the bonding company had looked up their financial resources, and was not satisfied with them, and they told me to go ahead without a bond, both Maj. Cramer and Mr. Savage. This was a week or so after the contract had been commenced."

He also testified to a subsequent conversation with Mr. Field, in which the latter said that:

"He knew the bond hadn't been given, and that they were not making any kicks about it at all."

It is true that the defendant's witnesses testified that the waiver, if any, was simply temporary; but it is clear that this was a question for the jury, and the question of whether there was a temporary or permanent waiver of the bond was submitted by the court to the jury, and no sound criticism of the instruction on that subject is made or argued.

[4] We have already indicated that we regard the evidence sufficient to go to the jury on the question of whether the defendant by positive, distinct, unequivocal, unconditional acts renounced the contract with the plaintiff. The court told the jury:

"If in this case the defendant failed to pay the amount already due under this contract, and directed the plaintiff to quit work (now up to that point I do not suppose there will be any contention that the evidence shows anything else; in other words, that the defendant had failed to pay the amount already due under the contract, and had directed the plaintiff to quit work, so you will not have to bother much about that), and if thereafter—now listen to this—if thereafter its conduct showed (you have had testimony here as to what was done between these parties) that it could not make the payments required by the contract unless the Mausoleum Company paid it, and that, without reference to whether or not the plaintiff gave the bond required of him by the contract, it did not intend that the plaintiff should continue the work unless the Mausoleum Company should be reorganized and put in condition to make its payments to the defendant, so that the defendant could make its payments as provided by the contract to the plaintiff, and if at that time (I mean by that up to the time of the bringing of this suit) the Mausoleum Company was not in such condition, and there was no reasonable certainty that it could within a reasonable time be put in such condition (as I have said before, this contractor could not be required to wait for an indefinite period, for a period about which there would be no certainty of its termination, or whether that period would ever be terminated)— Let me read that over again: And if at that time, that is, up to the time of the bringing of this suit, as shown by the negotiations and conduct of these parties, the Mausoleum Company was not in such condition, and there was no reasonable certainty that it could within a reasonable time be put in such condition, and if the plaintiff, Mr. Collins here, was ready, able, and willing to completely perform his part of the contract, then I think you would be justified in finding that the plaintiff was, without fault on his part, wrongfully prevented by defendant from performing the contract, or that the conduct of the defendant excused him for his nonperformance, and that he had a right to regard the contract as broken, and to immediately sue for damages for a breach of contract. And I have already stated to you what would be the measure of those damages; the amount already earned—no dispute about that—and in addition the loss of profits, whatever they might have been, not, however, in this case, over $6,000. It is true that these proofs might indicate a greater profit on the contract if the plaintiff had been allowed to complete it, greater than

$6,000; but they have claimed only that much in their petition, and you cannot find for any more, although, if you believe that the amount of profit was really less, you can find for less. Although I don't know of any proof, certainly none has been offered by the defendant here in regard to that—no proof except that produced by the plaintiff.

"Now let us go over that again and see what you have got to find. If the defendant failed to pay the amount already due under the contract (I don't suppose there is any doubt about that), and directed the plaintiff to quit work (I don't suppose there is any doubt about that; now we come to that part about which there may be some question, but I am not expressing any opinion on that subject), and if thereafter its conduct (that is, the defendant's conduct) showed that it could not make the payments required by the contract, that it could not make them itself, and that, without reference to whether or not the plaintiff gave the bond required by him under the contract (in other words, if their conduct was such—if the defendant's conduct was such—as to show that it was not defendant's intention to rely upon the giving of the bond), and that it did not intend that the plaintiff should continue the work unless the Mausoleum Company should be reorganized and put in condition to make its payments to the defendant, so that the defendant could make its payments as provided by the contract to the plaintiff, and if at that time (that is, up to the time of the bringing of this suit) this Mausoleum Company was not in such condition (that is, in condition to make its payments to the defendant, so that then it could make its payments to the plaintiff), and there was no reasonable certainty that it could within a reasonable time be put in such condition, and if the plaintiff was ready, able, and willing to completely perform his part of the contract. Now those are the things that you must find in favor of the plaintiff before you can find a verdict for the loss of profits on this contract, and upon these questions the burden of proof is upon the plaintiff. This plaintiff must satisfy you of the existence of these conditions by a fair preponderance of the testimony. And what we mean by a fair preponderance of the testimony is the fairly greater weight of the testimony; that is, the weight of the testimony must be in favor of the plaintiff on the question. I think you would be justified—if you found all these facts in favor of the plaintiff, you would be justified—in finding that the plaintiff was without fault on his part wrongfully prevented by defendant from performing the contract, or that the conduct of the defendant excused him for his nonperformance, and that he had the right to regard the contract as broken and to immediately sue for the damages for breach of it.

"Now, I have been asked to give an instruction here that if the work under the contract was suspended by mutual consent, or by the acquiescence and consent of the plaintiff, to enable satisfactory arrangements to be made to provide payment of payments due to plaintiff as work progressed, then it became the duty of the plaintiff to notify defendant that he would no longer consent to a suspension for that purpose, before he would be entitled to commence suit for the entire profits under his contract. I think that is a fair statement of the law. In other words, if the plaintiff had consented, either by word or conduct, as shown by this testimony, or acquiesced in that suspension to enable this arrangement to be made, why then, before he could declare a full breach of this contract, he must notify the parties. But if without such consent or acquiescence the conditions existed which I have enumerated here in the former instructions which I gave you, I think you would be justified in finding that he had been prevented from performing this contract, or that the defendant's conduct was such as excused him for this nonperformance, and then he could bring suit at once and recover his damages. * * *

"Juror Brugger: I don't exactly understand your last instruction as to notice to be given by plaintiff.

"The Court: Well, I said, if the words or conduct of this plaintiff here indicated that he consented to or acquiesced in the suspension of that work for the reasons assigned by the defendant, then before he could bring this action he should give notice that he no longer consented. If he didn't so acquiesce or consent, but simply stopped work because they told him to, did not

either by conduct or by words acquiesce or consent to this suspension, but simply was obeying their directions, you understand, and if the conditions existed which I have enumerated, and he was ready and willing and able at all times to perform this contract, why then the consequences would result from those conditions which I have indicated. Does that answer your question?

"Juror Brugger: Then the commencing of the action is not considered as notice?

"The Court: No; he would have to give that notice beforehand. And remember, there must be an acquiescence or consent positively—acquiescence or consent by word or conduct in the suspension of that work, you understand, and a consent that they should go on and make these negotiations. Unless he did that, why then these other conditions are the ones which would give him the right of action."

The court did not state who asked the charge as to notice; but, assuming that its contents indicated it was the defendant, it complains that the court weakened this part of the charge by saying, "Now, I have been asked to give an instruction," etc.; but the court immediately added, "I think that is a fair statement of the law." There is ordinarily no objection to the court stating that a particular instruction is given at the request of the plaintiff or the defendant, and where, as here, he stated that that was a fair statement of the law, there is certainly no room for just criticism.

[5] Complaint is made that interest was allowed on the whole sum of $1,085.37 from October 7th. It is claimed the contract provided for 15 per cent. of the money being retained until the completion of the contract, and that interest would be allowed upon this 15 per cent. for a little less than six months erroneously under this instruction. This would involve an error of a little less than 60 cents. We have read the contract, and find no provision for retaining 15 per cent., and plaintiff in error has failed to point out where the provision is in the contract. In Illinois Cent. R. Co. v. Nelson, 212 Fed. 69, 128 C. C. A. 525, and the cases there cited, we held that, when a plaintiff in error failed to point out in the argument the page of the transcript on which an error appeared, such error would not ordinarily be considered by this court.

There is no error apparent, and the judgment is affirmed.

ADAMS, Circuit Judge, dissents.

N. L. CARPENTER & CO. et al. v. LYBRAND.

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

No. 1384.

1. BANKRUPTCY ⟸91—INSOLVENCY—SURPLUS OF ASSETS OVER LIABILITIES.
Where it appeared, from the books of an alleged bankrupt and from a statement introduced by him, that his assets were far in excess of his liabilities, the District Court was justified in refusing to find that he was insolvent.

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

2. BANKRUPTCY ⊂⊃60—"ACT OF BANKRUPTCY"—ASSIGNMENT FOR CREDITORS.
Where, though an embarrassed debtor, pursuant to a scheme agreed upon at a meeting of his creditors, executed a deed of trust, conveying all of his property, except a house and lot, to a trustee, such deed of trust was delivered to an attorney in escrow, to be delivered only in the event that all of the creditors should consent to the agreement, the execution of such deed was not an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. ⊂⊃60.

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

3. BANKRUPTCY ⊂⊃91—ACTS OF BANKRUPTCY—ASSIGNMENT FOR CREDITORS.
Where it was shown that the creditors of such debtor had been receiving payments on their debts, pursuant to the agreement entered into at the creditors' meeting, and that all the creditors would be paid in full within 90 days, it sufficiently appeared that it was not the debtor's purpose, in executing the deed of trust, to hinder, delay, or prevent his creditors from collecting their debts.

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

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia, in Bankruptcy; Henry A. Middleton Smith, Judge.

Proceeding by N. L. Carpenter & Co. and others to have J. W. Lybrand adjudicated a bankrupt. From a judgment dismissing the petition, the petitioning creditors appeal. Affirmed.

J. W. Vincent, of Hampton, S. C. (Joseph E. Johnson, of Warsaw, N. C., and E. A. Brown and William M. Smoak, both of Aiken, S. C., on the brief), for appellants.

J. N. Nathans, of Charleston, S. C. (Nathans & Sinkler, of Charleston, S. C., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The appellee was, at the time of the filing of the petition herein, engaged in the mercantile business. It was alleged in the petition that appellee, while insolvent, had made certain preferences and that he had made a general assignment for the benefit of his creditors. These allegations were denied by the alleged bankrupt. The learned judge who heard this case in the court below dismissed the petition upon the ground that no act of bankruptcy had been proven. It appears that Lybrand was heavily involved with his creditors. Numerous suits had been brought, and a number of judgments obtained against him. Creditors were pressing on every side. Under these circumstances Lybrand called a meeting of his creditors at Charleston on the 29th day of December, 1914, and at that time the creditors appointed five of their number as a committee to take charge of Lybrand's assets. A statement was sent to the creditors, showing the financial condition of Lybrand, and urging them to join in the plan of action adopted by the creditors present at the Charleston meeting.

The result of the meeting at Charleston was the execution by Lybrand of a deed of assignment conveying to T. S. Malone, as trustee, subject to the supervisory powers of the creditors' committee, all the property owned by Lybrand except a house and lot, valued at $2,000, in which he then resided. This deed was executed on the 21st day of January, 1915. The deed recites in the premises that Lybrand is indebted to sundry creditors in a large amount which he is unable to pay at present; that at a meeting held at Charleston on the 29th day of December, 1914, it was agreed that it would be for the best interest of Lybrand and his creditors for Lybrand to transfer to a trustee all his property, both real and personal, except his home in the town of Wagener, where he then lived. It further recites that five named persons were elected by the creditors at the meeting as an "advisory board" to represent the creditors and assist and supervise the trustee in the management and conduct of his trust. This advisory board is made the third party to the deed and is given therein certain explicit trusts to perform. The deed then purports to convey to Thomas S. Malone all the property, both real and personal, of the alleged bankrupt, except the house and lot in the town of Wagener, where he then resided.

The deed also sets out the conditions of trust and the powers to be exercised by the advisory board and Malone. The first condition empowers the advisory board (designated as the third party) to take charge of Lybrand's business and run it as the advisory board may deem advisable, to contract indebtedness, to mortgage, pledge, sell, and dispose of any or all of the property, when such disposition should meet the approval of a majority of the advisory board, also to fulfill any contract of purchase Lybrand had theretofore made, and to collect, settle, compromise, and sue for all the debts owing Lybrand, when necessary, in the name of the trustee. The second condition makes it the duty of trustee Malone to pay over moneys, realized from collections, to the creditors of the alleged bankrupt until all his creditors should be paid in full or all the property exhausted, such payments to be made under the direction of the other trustees, namely, the advisory board. The third condition of trust empowers the advisory board with discretion to remove trustee Malone, or any other trustee, and substitute another in his place, whenever and as often as the board should deem it best to do so.

The deed was delivered to Mr. J. N. Nathans, who testified that the same was to be held by him in escrow "and not delivered unless all of the creditors of Mr. Lybrand agreed to this proposed trusteeship." Malone, the trustee, went to Wagener on the 16th day of January, 1915, and remained there a day or two. He then went to his home in Georgia for a short stay, after which he returned to Wagener and has been there ever since. The bank account was immediately turned over to him as trustee. There were 133 chattel mortgages taken in his name as trustee. It is further insisted by counsel for appellants that the trustee looked after all claims in attorneys' hands for collection against the alleged bankrupt, and that he gave checks in payment of the same by himself as trustee; that he was drawing a salary of

$1,500, which was fixed for him by the advisory board. These are substantially the facts relied upon by the appellants.

At the trial in the court below it was shown that owing to the "depreciation caused by war conditions" the alleged bankrupt found himself in December, 1914, in a position where, if he attempted to realize on his assets in order to pay his creditors, that it would mean a needless sacrifice of them, and that, being desirous to pay his creditors in full, and realizing that, if he could secure a postponement for even a short time, his assets were amply sufficient to pay every creditor in full, and, such being the case, the meeting was held in Charleston for the sole purpose of formulating a plan for protecting the interests of himself as well as those of his creditors; that the committee being advised by counsel that unless all the creditors consented the trustee could not take charge of the property, and, being anxious to carry out the plan agreed upon, the alleged bankrupt executed a trust deed which was to become effective only when all the creditors consented thereto; that this deed was not delivered to the trustee at that time for the reason stated, but was delivered to J. N. Nathans, an attorney, to be held in escrow with the express understanding that it should not be delivered until all the creditors had consented. This fact was clearly established by the evidence of Mr. Nathans.

It was further shown that the advisory board requested Malone, the trustee, to go to Wagener in order that he might be on the spot to advise with Mr. Lybrand and the board, and thus be able to advise the board as to the manner in which Mr. Lybrand was conducting his business. It was also shown that the trustee, under a mistaken idea that he had a right to act as trustee before the delivery of the deed, had signed liens in his own name as trustee, and also had about $1,000 transferred to him, but when this was discovered the advisory board immediately had it stopped; that the liens taken by the trustee were such a small part of the assets of Lybrand that it could not be considered as an assignment when considered in connection with the fact that the deed had not been delivered.

[1] It is not seriously contended that the appellee was insolvent at the time of the filing of the petition. Appellee appeared with his books, and, among other things, introduced the following statement:

Assets.

Merchandise (actual cost)	$ 22,500.00
Accounts due me	119,250.00
Real estate	59,200.00
Bank stock	15,000.00
Real estate mortgages	13,500.00
4,450 bales of cotton at $35 per bale	155,750.00
R. L. Lybrand stock	5,000.00
Total assets	**$390,200.00**

Liabilities.

Amount due on open accounts and notes outstanding	$158,806.66
Owing to banks	39,200.00
Due on cotton holdings	90,682.00
Total liabilities	**$288,688.66**

Thus it appears that the assets of the alleged bankrupt were far in excess of his liabilities. Such being the case, we think the action of the court below in refusing to find that appellee was insolvent is fully justified by the evidence.

[2] However, it is insisted by counsel for appellants that there was a general assignment which was executed and delivered. While it is not denied that a deed of trust was executed, Mr. Nathans, a reputable attorney, stated positively and unequivocally that this deed was placed with him to be held in escrow to be delivered in the event that all the creditors should consent to the agreement which had been entered into by the advisory board, and had not been delivered to the trustee. In Collier on Bankruptcy (9th Ed.) page 98, it is said:

"A debtor may have prepared a deed of assignment with intent to execute it, but so long as he has left it unexecuted or in escrow the general assignment contemplated has not been made."

Reference is also made to 13 Cyc. 567, and cases there cited. Indeed, this principle is so well settled that we do not deem it necessary to cite any other authorities in support thereof.

[3] It was shown that the creditors of the alleged bankrupt had been receiving payments on their debts in pursuance of the agreement entered into at Charleston, and that within 90 days all the creditors would be paid in full. This, we think, is sufficient to show that it was not the purpose of the appellee in executing the deed of trust to in any wise hinder, delay, or prevent his creditors from collecting the debts which he owed.

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

VIRGINIAN RY. CO. v. LINKOUS.

(Circuit Court of Appeals, Fourth Circuit. November 24, 1915.)

No. 1379.

1. MASTER AND SERVANT ⊜287—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

A railway company's rules made conductors and enginemen responsible for the safety of trains with the duty on each of them to take every precaution for their protection, enjoined upon the conductor the duty of enforcing rules applicable to all other employés on the train, made it his duty to take entire charge of all employés thereon, and instructed enginemen to obey the conductors' orders as to starting, stopping, etc. A bulletin notified all employés that, at all stations where a train was required to meet or wait for an opposing train, the engineman would give one short sound of the whistle, and that, if this signal was not given, trainmen would take whatever steps were necessary for safety to prevent the train passing the meeting point. The rules also required the conductor to deliver a copy of the running orders to the engineer, who was required to read them back to the conductor, and required the conductor and engineer to show the order to the brakeman and fireman. An engineer was killed by running by a point where he was ordered to meet another train and colliding with such train. The conductor, fireman, and front brakeman were riding on the engine, but they were also killed in the collision,

and there was no testimony as to what was said or done by them prior to or at the time of the accident. Copies of the train order were found in the pockets of the conductor and engineer. *Held*, that no inference of negligence on the part of the trainmen other than the engineer could be drawn from the facts, and the court erred in submitting their negligence to the jury, as it could not be reasonably inferred that they approved of or assented to the engineer's action in running past the meeting point thereby endangering their lives.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054–1067; Dec. Dig. ⇐287.]

2. EVIDENCE ⇐67—PRESUMPTIONS—CONTINUANCE OF CONDITION.
Where train employés killed in a collision were in the full possession of their mental faculties when last seen, the presumption was that they were still in a normal condition at the time the accident occurred.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 87, 88, 103; Dec. Dig. ⇐67.]

3. MASTER AND SERVANT ⇐228—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE—STATUTORY PROVISIONS.
Employers' Liability Act April 22, 1908, c. 149, §§ 2, 3, 35 Stat. 65, 66 (Comp. St. 1913, §§ 8658, 8659), make interstate carriers by railroad liable in damages to any employé suffering injury from the negligence of any officers, agents, or employés of such carriers, and provide that contributory negligence shall not bar a recovery, but that the damages shall be diminished in proportion to the amount of negligence attributable to such employé. *Held* that, while this is intended to abolish the fellow-servant doctrine, it is not intended to afford relief where one's injury is due solely to his own reckless and indifferent conduct.

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

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Action by Daisy M. Linkous, administratrix of J. M. Linkous, deceased, against the Virginian Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

H. T. Hall, of Roanoke, Va., and G. A. Wingfield, of Norfolk, Va., for plaintiff in error.

W. L. Welborn and S. H. Hoge, both of Roanoke, Va. (Welborn & Jamison and Hoge, Williams & Darnall, all of Roanoke, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This action was instituted in the District Court of the United States for the Western District of Virginia by the administratrix of J. M. Linkous, deceased, against the Virginian Railway Company, to recover damages for the death of her intestate.

The plaintiff in error will hereinafter be referred to as defendant, and the defendant in error as plaintiff; such being the respective positions occupied by the parties in the court below.

The plaintiff set forth the grounds of her alleged cause of action in a declaration containing seven counts. The court sustained a demurrer to the second count, the third, fourth, fifth, and seventh

counts were withdrawn by the plaintiff before issue was joined, and the case went to trial upon the first and sixth counts. The jury was instructed that there was not sufficient evidence to sustain a recovery under the sixth count, and we therefore only have to consider the alleged cause of action set up in the first count of the declaration.

[1] This count alleges, in substance, that the negligence of the defendant consisted in the failure of the conductor, fireman, and front brakeman to intervene and prevent the effect of the plaintiff's intestate's failure to stop his train and observe the meet order at Keever. The jury returned a verdict in favor of plaintiff in the sum of $8,541, for which judgment was entered, to which defendant excepted, and the case now comes here on writ of error.

The plaintiff's intestate was the engineer on a coal train on the run from Roanoke to Victoria. This train was designated as "Extra 468," and ran on a contingent schedule under which the train had certain rights. When this train passed Altavista, a point about 23 miles west of Keever (the point near which the accident occurred), both the conductor and engineer received an order to meet and pass No. 33, the local west-bound freight train, at Keever. The local freight No. 33 was a regular train running on a regular schedule, under which it had certain rights. The local freight No. 33 received a similar order at Phenix, a station some distance east of Keever, the meeting point. In the absence of these orders, these trains, under their schedule rights, would have been required to meet and pass at Seneca, a station 6.1 miles west of Keever. The effect of this order was therefore to enable Extra 468 to proceed beyond Seneca, the regular passing point, and go on to Keever.

Extra 468 left Seneca with the engineer, the conductor, the fireman, and the front brakeman riding on the engine. The local freight No. 33 was directed to take the siding at Keever and allow Extra 468 to pass on the main line.

Under the orders issued, Extra 468 had no right to proceed beyond the east switch at Keever, unless the local No. 33 was in the clear on the siding at Keever. The testimony shows that no effort was made to stop No. 468 at Keever, and that it proceeded beyond the east switch, the engine working under steam to a point variously estimated from 1,500 to 2,500 feet east of the east switch at Keever, where it collided with the local No. 33. The engineer, fireman, and front brakeman on local No. 33 observed Extra 468 approaching at a distance of from 1,000 to 1,200 feet away. The engineer on No. 33 shut off steam, put on the emergency brake, and blew the stop signal. They then, seeing that a collision was imminent, jumped from their train and escaped uninjured.

It appears that engine No. 468 continued working steam up to the point of the collision, and there was no effort, so far as the testimony discloses, on the part of the plaintiff's intestate to stop his train. The four members of the crew of Extra 468 who were on the engine at the time of the collision were all instantly killed. The train orders under which Extra 468 was required to pass local No. 33 were found on the persons of plaintiff's intestate and the conductor of

Extra 468 when their bodies were removed from the wreck caused by the collision. There is no explanation in the testimony of how or why the plaintiff's intestate and other members of the crew of Extra 468 disregarded the meet order at Keever.

The material sections of the Employers' Liability Act, in pursuance of which this suit was instituted, are as follows:

"Sec. 2. Every common carrier by railroad [engaging in commerce between any of the several states] shall be liable in damages to any person suffering injury while he is employed by such carrier [in such commerce] for such injury * * * resulting in whole or in part from the negligence of any * * * officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * engines, appliances, machinery, etc.

"Sec. 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, * * * the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé."

It will be observed that, while one is employed by a carrier engaged in interstate commerce, such carrier shall be liable in damages for any injury which may be sustained "resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier." It was intended by this provision to abolish what was known at common law as the "Fellow-Servant Doctrine." The statute is based on the idea that where one is injured by the negligence of the carrier he shall not be denied the right of recovery even though it appear that he contributed in a measure to his own injury; but it is provided that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé."

It is insisted by counsel for plaintiff in the case at bar that plaintiff's decedent lost his life "as a result of a combined mutual, concurring, and joint failure of these four men to fulfill their primary duty by executing the order to meet No. 33 according to its terms and as prescribed by the defendant's rules, which was the controlling and proximate cause of the collision."

In support of this contention it was shown that rule 105 provides that conductors and enginemen are to be responsible for the safety of trains, and that under conditions not provided for by the rules that each of them must take every precaution for their protection; that rule 451 enjoins upon the conductor the duty of enforcing rules applicable to all other employés on the train and to report any insubordination, misconduct, or neglect of such duty; that rule 457 provides that it shall be the duty of the conductor to take entire charge of all employés on such train until the same is finally set off from the main track at the terminal station; that rule 701 is in the nature of an instruction to enginemen to obey the orders of the conductors as to starting, stopping, switching cars, speed and general management of the train, unless such orders endanger the safety of the train or would require the violation of the rules or cause injury to company property; also, that bulletin No. 1082, dated September 7, 1911, contains the following language:

"All Concerned:

"At all stations where a train is required by the rules or train order to meet or wait for an opposing train the engineman will give one short sound of the whistle, immediately after whistling for the station.

"In event of failure on the part of the engineman to give the prescribed signal, trainmen will take whatever steps are necessary for safety to prevent the train from passing the station. George Reith, Superintendent."

At the trial the court below gave the following instructions to the jury bearing upon the question as to whether the plaintiff, under the circumstances, was entitled to recover:

"The court instructs the jury that negligence is the failure to use ordinary care to perform a duty, that negligence may be proved by circumstantial evidence, and that you are at liberty to draw reasonable inference from the facts in evidence.

"The plaintiff cannot recover if the evidence shows only that the collision may have resulted from one of several causes for some of which the defendant is not liable; but, if you believe from the evidence that negligence on the part of the employés in the engine is the only reasonable inference to be drawn from the facts in evidence, you may find for the plaintiff."

Thus it will be seen that the court below submitted to the jury the question as to whether the evidence was such as to justify them in drawing the inference that the death of plaintiff's decedent was in part due to the negligence of the other employés on the engine. This brings the point in controversy within a narrow compass, to wit, was there evidence from which the jury might reasonably infer that the death of plaintiff's decedent resulted in whole or in part from the negligence of the officers, agents, or other employés of the defendants?

Save the fact that they were on the engine at the time plaintiff's decedent was killed, there is not a word of testimony as to what was said or done by the other employés prior to or at the time of the accident. Therefore it could only be by inference, if at all, that the jury might form any opinion as to what actually transpired in so far as the conduct of the other employés is concerned. Under these circumstances, what is the reasonable inference to be drawn therefrom? Could it be reasonably inferred that the conductor or any other employé on the engine approved of or assented to the action of the engineer in running his engine past the station in utter disregard of the orders under which he was operating? Would it not be more reasonable to infer that the conductor and other employés did not consent to the train being carried by the station, but rather protested against the action of the engineer for the purpose of saving their own lives, if for no other cause.

[2] When last seen, the engineer and the other employés were in the full possession of their mental faculties in so far as the record shows, and therefore the presumption is that they were still in a normal condition at the time the collision occurred, and if this be true it would be repugnant to reason to say that they acquiesced in a course of conduct by the engineer which they must have known would necessarily result in disaster.

Therefore, if this be the correct inference to be drawn from the testimony, the plaintiff's decedent did not lose his life on account of the

negligence of the officers, agents, or employés of the defendant, and therefore the plaintiff would not be entitled to recover.

Under the rules of the company, it was the duty of the conductor to deliver a copy of the order to the engineer, who, in turn, was required to read the same back to the conductor. The rules further require that such order must be shown by the conductor and engineer to their brakeman and fireman, and as evidence that this rule was complied with on this occasion copies of the train order were found in the pockets of the conductor and engineer after the accident occurred.

While, as contended by plaintiff, it is, in certain emergencies, the duty of the conductor, fireman, or brakeman to use all means within their power to stop the train, nevertheless it should be borne in mind that in the first instance it is the positive and primary duty of the engineer to stop the train in obedience to train orders. Notwithstanding the fact that such is the case, this unfortunate engineer, for some inscrutable reason in utter disregard of the danger to his own life, as well as the lives of others, deliberately ignored his train orders, and as a result a catastrophe occurred by which all were sent into eternity without a moment's warning.

[3] While the Employers' Liability Act was manifestly intended to modify the law as it formerly existed so as to materially benefit those who might be injured in the future, by abolishing the harsh rule known as the "Fellow-Servant Doctrine," yet it cannot be reasonably insisted that it was the purpose of the act to afford relief where one's injury is due solely to his own reckless and indifferent conduct.

After an exhaustive examination of the authorities cited we find nothing to support the contentions of the plaintiff.

Under the circumstances the jury could not reasonably have drawn any other inference than that the other employés were not in any degree primarily responsible for the accident. Such being the case, we are of opinion that the jury was not warranted in reaching the conclusion that plaintiff's decedent's death resulted in whole or in part from the negligence of the employés of the defendant.

From what we have said, it follows that the court below erred in refusing to grant the motion to direct a verdict in favor of the defendant.

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

GUIDONI v. WHEELER, City Jailer.

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

No. 2592.

1. MUNICIPAL CORPORATIONS ⟸594—POWER TO DEFINE CRIME—ORDINANCES. Act March 2, 1903, c. 978, 32 Stat. 944, authorizes the council of municipal corporations in Alaska to declare by ordinance what shall be a misdemeanor. Act April 28, 1904, c. 1778, 33 Stat. 529, entitled "An act to amend and codify the laws relating to municipal corporations in the district of Alaska," provides that the common council shall have and

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

exercise the powers therein enumerated, and embraces all the subjects contained in the former act, with the single exception that it omits the provision giving power to declare what shall be a misdemeanor. *Held*, that the act of 1904 was intended to take the place of the act of 1903 and repeal it, and withdraws the authority to declare what shall be a misdemeanor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1316–1320, 1327, 1328; Dec. Dig. ⊂⊃594.]

2. MUNICIPAL CORPORATIONS ⊂⊃594—POWERS OF COUNCIL—STATUTORY PROVISIONS.

Act April 28, 1904, authorizing the common council of municipal corporations in Alaska to prohibit conduct endangering the public peace, health, or safety, to define such offenses and prescribe the punishment therefor, and to take such action by ordinance, resolution, or otherwise, authorized a city council to adopt an ordinance providing that all persons within the corporate limits having no visible means of living or lawful employment, and all healthy persons found begging the means of support, and all persons habitually roaming about the streets, and all idle or dissolute persons living in or about houses of ill fame, and all persons having no known occupation found wandering about the streets after 11 o'clock at night, should be deemed vagrants.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1316–1320, 1327, 1328; Dec. Dig. ⊂⊃594.]

3. MUNICIPAL CORPORATIONS ⊂⊃594—POWERS OF COUNCIL—STATUTORY PROVISIONS.

Where the exigencies of municipal life require more rigid regulations than is required in the state at large, a municipal corporation has implied authority under the general powers granted to it to penalize acts already punishable under a statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1316–1320, 1327, 1328; Dec. Dig. ⊂⊃594.]

4. MUNICIPAL CORPORATIONS ⊂⊃592—ORDINANCES—VALIDITY—"WANDER."

Comp. Laws Alaska, § 2031, provides that all idle or dissolute persons, who have no visible means of living or lawful occupation, and all persons living in houses of ill repute, shall be deemed vagrants. An ordinance of the city of Juneau provides that all persons having no known occupation, found wandering about the streets after 11 o'clock at night, shall be deemed vagrants. *Held*, that the offense defined by the ordinance is not the same offense made punishable by the statute, and the ordinance is valid, since to "wander" is to ramble here and there without any certain course, and the gist of the offense defined by the ordinance is the act of wandering upon the streets after 11 o'clock at night by persons whose act may be a menace to the peace and order of the city, while the statute is intended to prevent vagabondage and worthlessness tending to place upon the public the burden of supporting unworthy persons.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311–1314; Dec. Dig. ⊂⊃592.]

5. MUNICIPAL CORPORATIONS ⊂⊃625—ORDINANCES—VALIDITY.

An ordinance adopted by a city in the exercise of power vested in its common council should be sustained, unless clearly unreasonable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. ⊂⊃625.]

6. MUNICIPAL CORPORATIONS ⊂⊃625—ORDINANCES—VALIDITY.

A city ordinance, providing that persons having no known occupation or business, and found wandering about the streets after 11 o'clock at night, should be deemed vagrants, was not unreasonable and inequitable, because of the discrimination respecting the commission of the same act between persons with and persons without occupation or property, since

the discrimination is against a whole class of persons lawfully regarded as proper subjects for police regulation, such as persons without occupation or visible means of support.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. ⟸625.]

7. MUNICIPAL CORPORATIONS ⟸63—ORDINANCES—PRESUMPTION OF VALIDITY. Every intendment should be indulged, and every doubt should be resolved, in favor of the validity of a police regulation in the form of a city ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1879; Dec. Dig. ⟸63.]

Appeal from the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Habeas corpus by Ben Guidoni against J. H. Wheeler, City Jailer of the town of Juneau, Alaska. From an order dismissing the proceeding and remanding the petitioner to custody, he appeals. Affirmed.

John Rustgard, of Juneau, Alaska, for appellant.

J. A. Hellenthal and Simon Hellenthal, both of Juneau, Alaska, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This is an appeal from an order dismissing a habeas corpus proceeding and remanding the petitioner to custody. The appellant, who was the petitioner, was convicted under a complaint which charged him with the misdemeanor of vagrancy, committed in the city of Juneau, Alaska, in that on March 5, 1915, and for 30 days prior thereto, he resided within the corporate limits of the city of Juneau with no visible means of living, or lawful occupation or employment with which to earn a living, and that during said period he did wander about the streets of Juneau after the hour of 11 o'clock p. m., without a lawful occupation or business, contrary to section 2 of Ordinance 27 of the city of Juneau. That section provided as follows:

"All persons within the corporate limits of the city of Juneau who have no visible means of living, or lawful occupation or employment by which to earn a living; all healthy persons who shall be found begging the means of support; all persons who habitually roam about the streets without any lawful business; all idle or dissolute persons who live in or about houses of ill fame; all persons having no known occupation or business, who shall be found wandering about the streets of the city of Juneau after the hour of eleven o'clock at night—shall be deemed vagrants," etc.

[1, 2] The appellant contends that the ordinance is null and void for the reason that the common council of Juneau had no authority to enact it, and had no authority at any time to declare any of the acts denounced, or attempted to be denounced, an offense or crime. The court below sustained the ordinance upon the authority conferred by Act Cong. April 28, 1904, c. 1778, relating to municipal corporations in Alaska (33 Stat. 529), which provides that the common council shall have power to appoint a municipal magistrate, and that the municipal magistrate shall have jurisdiction of all cases for violations of munici-

pal ordinances, and Act March 2, 1903, c. 978, 32 Stat. 944, which gave the city the power to declare by ordinance "what shall be a misdemeanor."

But we are of the opinion that the express authority to declare what shall be a misdemeanor was withdrawn by the act of 1904, which in its title is named an amendment and codification, and which we think was intended to take the place of the act of 1903, and to repeal all of the prior act. It contains an enumeration of the powers conferred upon corporations, and it embraces all the subjects which were contained in the former act, with the single exception that it omits the provision which in the former act gave power to declare "what shall be a misdemeanor." The authority of the city to enact the ordinance in question here must depend, therefore, upon the powers granted by the act of 1904. We think such authority exists by implication in the provisions which give power—

"to prohibit * * * conduct endangering the public peace, public health, or public safety," and "to define such offenses and to prescribe the punishment therefor," and power "to take such action by ordinance, resolution or otherwise, as may be necessary to protect and preserve the lives, the health, the safety, and the well-being of the people of the town."

[3, 4] It is well settled that an act may be made a penal offense under the statute of a state, and also made punishable under an ordinance of a municipal corporation. The appellant contends that this is so only in cases where express authority has been given to the municipal corporation to legislate upon the subject, and he cites cases to the doctrine that, under general powers granted to a corporation, the city has no implied authority to penalize acts which are already denounced as punishable by the Legislature. Upon that proposition there is great lack of harmony in the decisions. We incline to the view that the better doctrine is that the city may exercise such implied authority in police control where, as here, the exigencies of municipal life seem to require more rigid regulation than is required in the state at large.

Again, it is to be observed that the offense which is defined in the last clause of the ordinance under which the appellant is charged is not the offense which is made punishable by the Penal Code of Alaska. Section 2031 of the Compiled Laws of Alaska provides:

"That all idle or dissolute persons who have no visible means of living, or lawful occupation or employment by which to earn a living; all able-bodied persons who shall be found begging the means of support in public places, or from house to house, or who shall procure a child or children so to do; all persons who live in houses of ill repute—shall be deemed vagrants."

The law thereby defines an offense against the United States. The gist of the offense against the municipality defined by the clause of the ordinance which is under review is the act of wandering upon the streets of the city after 11 o'clock at night, and the ordinance declares that all persons who have no known occupation or business, who shall be found so wandering shall be deemed vagrants. Such an ordinance is a police regulation, for the enforcement of good order and the public safety within the limits of the corporation. Taylor v. Sandersville, 118 Ga. 63, 44 S. E. 845. To wander is:

"To ramble here and there without any certain course, or with no definite object in view; to range about; to stroll; rove; roam; stray." Webster's Dictionary.

And where the wanderer proceeds upon uncertain courses after 11 o'clock at night, upon the streets of a city, and is without occupation or property, it should not be said as a matter of law that the city authorities are without just ground for apprehension that he may be a menace to the peace and order of the city and the safety of its inhabitants. It was for the prevention of such evils that the ordinance was adopted; whereas, the act of vagrancy which is defined in the Criminal Code of Alaska was intended to prevent that vagabondage and worthlessness which tend to place upon the public the burden of supporting unworthy persons, for the offense consists in being idle, and, although able to work, refusing to do so, and living without labor or on the charity of others.

"At common law a vagrant is defined to be a wandering, idle person; a strolling or sturdy beggar; a person who refuses to work, or goes about begging." 39 Cyc. 1108.

In Daniel v. State, 110 Ga. 916, 36 S. E. 293, the court said:

"The statute was enacted to prevent men, able to work, from idling and wandering about the community and becoming drones or thieves, or charges upon the public."

[5-7] It is contended that the ordinance is void as unreasonable, oppressive, and inequitable; and it is said that the man without a job has as good right to wander on the streets as the man with a job. If the ordinance does, indeed, contravene the constitutional requirement of equality, it should be held void for discrimination. But it has been adopted by the city in the exercise of the power vested in its common council, and it should be sustained unless it is clearly unreasonable. We are not prepared to say that it is subject to the objection which is urged. If it were an ordinance which interfered with the right to work, or the right to the use of the streets during working hours, by any class of persons within the municipal territory, a different case would be presented. But since it is well settled that state Legislatures have the right to punish vagrancy, and to denounce a penalty against vagabondage and the wandering of beggars from place to place, it follows that a municipal corporation may not, upon constitutional grounds, be denied the right to discriminate against those who are without occupation or property, and to say that they shall not wander about the streets of the city at an hour of the night when they have no legitimate need to be upon the streets, and when their presence in their needy condition is likely to result in the commission of acts inimical to the peace and the safety of the inhabitants; for while an ordinance, which makes an act done by one penal and imposes upon another no penalty for a like act done under like circumstances, cannot receive judicial sanction for the reason that it is unjust and unreasonable, the same cannot be said of discrimination by municipal authority against a whole class of persons who are lawfully regarded as proper subjects for police regulation, such as persons without occupation or visible means of support.

The ordinance was adopted by the city of Juneau in view of local conditions, of which we are not advised by the record, but which we must assume were sufficient to justify its enactment. Every intendment should be indulged, and every doubt should be resolved, in favor of its validity. Said the court in Commonwealth v. Price, 123 Ky. 163, 94 S. W. 32, 29 Ky. Law Rep. 593, 13 Ann. Cas. 489:

"The city council has a large discretion in the enactment of ordinances, and an ordinance enacted under the police power will not be declared void unless it is clearly oppressive and unreasonable."

"An ordinance, to be void for unreasonableness, must be plainly and clearly unreasonable. There must be evidence of weight that it took inception either in a mistake. or in a spirit of fraud or wantonness on the part of the enacting body." Horr & Bemis, Municipal Police Ordinances, § 127.

The order is affirmed.

CLONINGER v. FINLAISON.

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

No. 2595.

1. MINES AND MINERALS ⊂⊃21—LOCATION—NOTICE—VERIFICATION.
Under Laws Alaska 1913, c. 74, relating to the locating of placer claims, an unverified certificate of location should not be recorded, and furnishes no basis for claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 45–50; Dec. Dig. ⊂⊃21.]

2. MINES AND MINERALS ⊂⊃21—LOCATION—CERTIFICATE—SUFFICIENCY.
Laws Alaska 1913, c. 74, § 10, requires the locator of a mining claim to file a certificate setting forth a description of the location of the claim with reference to some natural object, permanent monument, or well-known mining claim. Rev. St. § 2324 (Comp. St. 1913, § 4620), declares that the monument or natural object may be such as will identify the claim. The certificate of location declared that the name of the claim was "No. 1 Bear Creek placer mining claim," and that it was situated in the White River mining district, and that Bear creek was tributary to Big Eldorado. *Held*, that the certificate was insufficient, for it did not necessarily mean that the claim was located on Bear creek, and, had it so meant, the mere mention of Bear creek would not establish its location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 45–50; Dec. Dig. ⊂⊃21.]

3. MINES AND MINERALS ⊂⊃14—LOCATION—POWERS OF ATTORNEY.
Under Act Cong. Aug. 1, 1912, c. 269, § 2, 37 Stat. 243 (Comp. St. 1913, § 5055), declaring that no person shall locate any placer mining claim in Alaska for another, unless he is duly authorized by power of attorney, acknowledged and recorded in the recorder's office, the power of attorney to locate a placer claim for another need not be recorded before location; it being sufficient if it is recorded before an adverse claim is filed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 19, 20; Dec. Dig. ⊂⊃14.]

4. MINES AND MINERALS ⊂⊃38—LOCATION—CLAIMS.
In a suit over a placer mining claim in Alaska, which had been located for defendant by his attorney, evidence *held* insufficient to prima facie

show that the power of attorney was not recorded before plaintiff's location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½–113; Dec. Dig. ⊂=38.]

In Error to the District Court of the United States for the Third Division of the District of Alaska; Fred M. Brown, Judge.

Ejectment by Archie A. Cloninger against A. H. Finlaison. Judgment for defendant, and plaintiff brings error. Affirmed.

On August 1, 1912, Congress, in an act to amend the mining laws in their application to Alaska, provided "that no person shall hereafter locate any placer mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made." 37 Stat. 243 (Comp. St. 1913, § 5055). In July, 1913, news of a strike at Shushuna came to the plaintiff and others at Chitina, Alaska. It was reported that claims had been staked at Shushuna under powers of attorney which had not been recorded in the district, for the reason that the district was but newly formed, and the recorder had not yet arrived. The plaintiff, who was not a miner, together with his partner, Maddox, having been grubstaked by others, left for Shushuna, in the hope of finding good claims covered by locations made under unrecorded powers of attorney. They arrived there July 30th, and on August 1st they found the claim in controversy, which appeared by the stakes on the ground to have been located by one Taylor under power of attorney for the defendant. The plaintiff made a location of the claim, staked the same, and entered into possession thereof; but, having been thereafter ousted by the defendant, he brought ejectment to recover the possession, alleging in his complaint the facts of his location. The defendant answered, alleging that Taylor had located the claim on July 3, 1913, for the defendant, under a power of attorney executed on May 29, 1913. The answer further alleged that on July 12, 1913, at a miners' meeting, a local mining district was duly formed at Big Eldorado, and a recorder was elected, and that the power of attorney was recorded with him on July 12, 1913, and that on July 25, 1913, the United States commissioner, who was ex officio recorder of the district, arrived, and that the power of attorney was recorded with him on that date, on page 18, volume 1, of his records. The reply denied the execution of the power of attorney, or the recording of the same, and alleged that all that was recorded in volume 1, page 18, was a memorandum showing: "No. 1, A. H. Finlaison to A. M. Taylor, absolute power attorney drawn by G. C. Cole, American consul, Dawson, 29th May, 1913, Rec. 8:35 a. m., July 12/13." On these issues the case went to trial before a jury, and at the conclusion of the plaintiff's testimony in chief a judgment of nonsuit was entered against him, on the motion of the defendant. The court below excluded from the evidence the plaintiff's verified notice of location, on the ground that it did not conform to the requirements of the statute, and held that it was not the purpose of the act of Congress to require the recording of a power of attorney prior to the initial step in making a location.

T. C. West, of San Francisco, Cal., T. J. Donohoe and E. E. Ritchie, both of Valdez, Alaska, and O. A. Tucker, of Juneau, Alaska, for plaintiff in error.

Maurice D. Leehey and Lyons & Orton, all of Seattle, Wash., for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] We find no error in the exclusion from the evidence of the plaintiff's

certificate of location. The Session Laws of Alaska, approved April 30, 1913, among other provisions require that, within 90 days from the date of discovery, the locator shall record with the recorder of the precinct in which the claim is situated a certificate of location, and that the certificate, among other things, shall set forth a description of the location of the claim with reference to "some natural object, permanent monument or well-known mining claim" (Laws 1913, c. 74, § 10), and that the certificate shall not be accepted for record by the precinct recorder unless it be verified by the recorder. There is a further provision that, if the discoverer of a placer deposit shall fail to comply with any of these requirements of the law, his right by reason of his discovery shall cease (section 11). The plaintiff's certificate declared that the name of the claim is "No. 1 Bear Creek placer mining claim," that it is situated in the White River mining district, territory of Alaska, and that "Bear Creek is tributary to Big Eldorado." There was no verification to the certificate. Washoe Copper Co. v. Junila, 43 Mont. 178, 115 Pac. 917; Van Buren v. McKinley, 8 Idaho, 93, 66 Pac. 936. These two defects are such as to invalidate the location, notwithstanding the rule, which the plaintiff invokes, that prospectors' notices are construed with extreme liberality by the courts.

This court extended that rule as far as is permissible in Vogel v. Warsing, 146 Fed. 949, 77 C. C. A. 199. But in that case the claim was described as about a mile from Anvil Mountain, in a southeasterly direction, and the location notice was headed "Bristow Gulch, Cape Nome Mining District." We held that this reference to two permanent objects was sufficient. But in the case at bar the description refers to no natural object, or permanent monument, or well-known mining claim. The name "claim No. 1, Bear Creek placer mining claim" does not necessarily mean that the claim is located on Bear creek, and if the claim had been described as located on that creek, the notice would still be insufficient to comply with the statute, for a creek or a river, without other description, will not answer for the natural object required by the statute, so as to give the claim definite location, and meet the requirements of section 2324, Revised Statutes (Comp. St. 1913, § 4620), which provides that the monument or natural object must be such "as will identify the claim."

In McKinley Mining Co. v. Alaska Mining Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331, the claims were described as located on McKinley Creek, and at a stated distance from the first falls on the creek. The court said:

> "These notices constituted a sufficient location. The creek was identified, and between it and the stump there was a definite relation, which, combined with the measurements, enabled the boundaries of the claim to be readily traced."

But in the present case the claim has no definite relation to the creek, and the mere mention of Bear creek serves in no way to identify the claim. Faxon v. Barnard (C. C.) 4 Fed. 702.

[3, 4] We think, also, that the judgment of nonsuit is sustainable on the ground that the plaintiff failed to show that the power of attorney from the defendant to Taylor was not recorded. We are of

the opinion that the location of a mining claim in Alaska under a power of attorney is valid, if the power of attorney is duly recorded at any time before adverse rights accrue, or location is attempted to be made of the same ground by another. The evidence which the plaintiff offered falls short of showing that the power of attorney in question was not duly recorded on August 2, 1913, the date when the plaintiff made his attempted location. The testimony on that subject is that on August 1st the plaintiff went to the recorder's office at Big Eldorado, and that the deputy recorder, Waller, showed him the books, and that neither he nor Waller could find a place where Taylor had a power of attorney recorded; that they looked at but one book, which Waller said was the only one that he had. On his cross-examination, being shown a book which was marked "Volume 1 of the Records of the White River Recording Precinct," the plaintiff stated that it was not the book which he had examined. He further testified that the book which he and Waller examined was examined by them by turning over the pages, that they started in about the month of July, and went through, turning it page by page, and that the book was then about half full. This evidence was entirely insufficient to show, even prima facie, that the power of attorney was not recorded. The book so examined was evidently not the book referred to by the defendant when he stated in his answer that the power of attorney was recorded on July 25, 1913.

The judgment is affirmed.

OWENS v. DANIEL et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1916.)

No. 2769.

1. BANKRUPTCY ⊂=303—SETTING ASIDE TRANSFER—SUFFICIENCY OF EVIDENCE—CONSIDERATION.

In a suit by a trustee in bankruptcy to set aside a conveyance of land from the bankrupt to his wife, evidence *held* insufficient to show that the land was purchased with the wife's money and equitably belonged to her.

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

2. BANKRUPTCY ⊂=303—FRAUDULENT TRANSFER—PRESUMPTIONS AND BURDEN OF PROOF.

Where the wife of a bankrupt, to whom he conveyed land shortly before bankruptcy, claimed that the land was purchased with her money, there was a presumption against her, to be overcome by affirmative proof.

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

3. BANKRUPTCY ⊂=178—FRAUDULENT TRANSFERS—TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Where a husband, to the knowledge of his wife, held himself out for years as the owner of land claimed by her to have been purchased with her money, and refused to admit that she had any interest therein, returned it for taxation in his own name, and obtained credit on the

strength of his ownership, the property was the husband's for the purpose of paying his debts, and he could not convey it to the wife when insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264–274, 283, 284; Dec. Dig. ⊜178.]

Appeal from the District Court of the United States for the Southern District of Georgia; William T. Newman, Judge.

Suit by George W. Owens, trustee of Henry R. Daniel, bankrupt, against J. Addie Daniel and another. Decree for defendants, and complainant appeals. Reversed and remanded, with directions.

Frederick T. Saussy and T. M. Cunningham, Jr., both of Savannah, Ga., for appellant.

Jas. K. Hines, of Atlanta, Ga., for appellees.

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

FOSTER, District Judge. On March 31, 1913, certain creditors filed a petition against Henry R. Daniel to have him adjudicated a bankrupt, alleging that on December 19, 1912, while insolvent he had conveyed certain real estate to his wife, J. Addie Daniel, with intent to hinder and defraud his creditors. The case was tried to a jury and resulted in a verdict against the defendant. An adjudication followed. In due course G. W. Owens was elected trustee, and thereafter filed his bill to set aside the said conveyance. The bill alleges that the sale was fictitious, and the consideration of $6,900 named in the deed was never paid by the grantee. Mrs. Daniel answered, and admitted the above allegations, but set up that the property in question had been paid for originally with her money, and the transfer assailed had been made to give her the legal title.

The bill was also brought against Mrs. Hattie D. Fountain, a daughter of Mr. and Mrs. Daniel, to set aside a security deed made November 3, 1906, securing a loan of $2,500 from her to her father. The bill alleges the debt has been paid in full, or that at most a very small balance remains due. Mrs. Fountain filed a separate answer, claiming a balance of $2,360.30 to be due on the original loan, and alleging an additional loan of $150 was by agreement also secured by the said deed. Subsequently Mrs. Fountain attempted to foreclose her security deed in the state court, and the trustee by supplemental bill obtained an injunction staying those proceedings until the termination of this suit. There was no trial on the merits as to the issue between the complainant and Mrs. Fountain. The case as to the title of Mrs. Daniel to the property was tried in open court, and resulted in a decree in favor of Mrs. Daniel, declaring her to be the owner of the property and dismissing the bill as to both defendants. From this judgment the trustee appeals.

We have carefully considered the evidence in the record, and, notwithstanding the great weight to which the opinion of the trial court is entitled when the judge has seen and heard the witnesses, we are constrained to draw different conclusions from the facts before us. The property in question will be sufficiently described for the purposes

of this opinion as lots 48, 89, 96, 97, and 98 in the town of Swainsboro, Ga.

[1] It is contended by Mrs. Daniel that in 1875 her father, A. S. Kirkland, gave her 500 acres of land in Emanuel county, Ga., and she exchanged it for lot 48. It is shown, however, by deeds and receipts in the record, that in 1878 Mrs. Daniel sold the timber on the 500 acres to George Garbutt for $375, and later, in 1882, transferred to him the fee simple as security for $363, with the agreement that it would be conveyed back to her on the payment of the debt within three years. The debt was evidently not paid, as in 1886, four years later, Garbutt sold the 500 acres to E. H. Edenfield. The same day Edenfield conveyed to him lot 48 here in question. About a year later lot 48 was retransferred from Garbutt back to Edenfield. Thereafter lot 48 was conveyed from the heirs of Edenfield to Victoria McLemore, from her to B. F. Coleman, and from him in turn, in 1891, to H. R. Daniel for the consideration of $1,500. It is impossible to reconcile these recorded facts with the contention of Mrs. Daniel as to lot 48. Both she and her husband testified, and neither denied, she received the purchase price for the 500 acres shown by the deeds and her receipts. Most of the parties and witnesses to the various deeds are dead, but those still living were not called. Under these conditions the recitals of the deeds are conclusive.

It is shown by the deed that H. R. Daniel acquired lots 89, 96, and 97 from J. J. Moring in 1890 for $178.50. With regard to this Daniel testifies he bid them in at auction and received a bond for title, that he could not pay for them, and that his wife agreed to buy them with her own money. His only explanation of why the deed was made in his name is that it was because of the bond for title having issued to him.

H. R. Daniel acquired lot 98 from Victoria McLemore in 1891 for $200. He testifies he personally handed over the purchase money, but says it was his wife's money. It is contended that Mrs. Daniel obtained the money to purchase lots 89, 96, 97, and 98 from the rent of a hotel in Swainsboro; but this property was the lot 48 above referred to, and the testimony is vague and indefinite at best. We find nothing in the record sufficient to show from what source Mrs. Daniel might have obtained her separate funds to make the purchases. It is shown that Daniel held the legal title to the said five lots from April, 1891, to the date of the conveyance complained of, and in August, 1891, mortgaged them to secure his own debt. When this mortgage was foreclosed in 1894, his wife claimed the property, and filed a suit to have herself declared the owner, but did not press it when Daniel paid off the mortgage debt. In 1906 he made a security deed to secure a loan from his daughter. He owned no other property, and in 1912 stated he was worth $12,000 to a bank and was accepted as indorser on the notes of Cook and Fountain, his sons-in-law, for $8,260. The notes fell due in the fall of 1912, were not paid, and on December 12 1912, a receiver in bankruptcy was appointed to Cook and Fountain. Just one week later, on December 19, 1912, the deed herein complained of was executed.

There is the hearsay testimony of a number of witnesses in the record that Mrs. Daniel had claimed to be the owner of the property, and it was generally considered hers; but as against this is the significant allegation of her daughter's answer:

"On November 3, 1906, this defendant dealt with said Henry R. Daniel as the owner of the lands mentioned in said two paragraphs, and at that time believed him to be the true and lawful owner thereof."

The daughter did not testify.

[2] In Seitz v. Mitchell, 94 U. S. at page 582, 24 L. Ed. 179, the Supreme Court said:

"Purchases of either real or personal property, made by the wife of an insolvent debtor during coverture, are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife, such purchases are so often made a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife there is, and there should be, a presumption against her, which she must overcome by affirmative proof."

The above remarks are particularly applicable to the state of facts disclosed by this record. Except for the bald statements of the husband and wife that the purchases were made with the wife's money, there is nothing to show she did pay or could have paid for the property with her separate estate. The husband was confessedly insolvent at that time, and the deed is admitted to be without consideration. Upon all the facts the wife has failed to sustain the burden of showing that the equitable title was in her at any time.

[3] There is also another view of the case not unworthy of consideration. It is conclusively shown that for years Daniel held himself out to be the owner of the property to the knowledge of his wife, and refused to admit she had any interest in it. He returned it for taxation in his own name, and obtained credit on the strength of his ownership. In Humes v. Scruggs, 94 U. S. 22, 24 L. Ed. 51, a case practically on all fours with this one, the Supreme Court had this to say:

"If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband, and be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is thus used for a series of years, there being no specific agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He cannot retain it until bankruptcy occurs, and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband."

Appellee relies principally on the case of Garner v. Bank, 151 U. S. 420, 14 Sup. Ct. 390, 38 L. Ed. 218, cited with approval by the District Court as overruling the Seitz and Humes Cases, supra; but in that case the burden of showing that the property had been purchased with the separate money of the wife was fully sustained, and the court concluded the wife had done nothing to estop her. It is true the Supreme Court in that case gave full force and effect to the testimony of the husband and wife. All things considered, we are in-

clined to give equal force to the testimony of the spouses in this case; but their evidence is bare of the essential facts necessary to support their contentions.

The decree is reversed, and the cause remanded, with directions to enter a decree in favor of complainant as against Mrs. J. Addie Daniel in accordance with this opinion, and for such other proceedings as may be necessary.

VINTON PETROLEUM CO. v. SUN CO*

(Circuit Court of Appeals, Fifth Circuit. February 28, 1916.)

No. 2800.

1. SALES ⟸64—OPTIONS—PRICE—CREDIT BALANCE PRICE—"CONTRACT PRICE."
A contract whereby defendant agreed to buy plaintiff's production of oil for two years gave defendant an option to renew the contract for an additional two years, the oil in such case to be paid for at a price equal to the highest contract price then in good faith being paid by any pipe line company doing business in a specified oil field. There was evidence that the price at which pipe line companies gave credit or paid for oil for which they had not contracted was commonly spoken of as the market or "credit balance price," and frequently differed from the price paid producers contracting for future delivery; but it did not appear that the words "contract price" had a technical meaning, other than their ordinary and popular meaning. When the option was exercised pipe line companies were paying $1 a barrel for oil previously contracted for, but were only offering 60 cents a barrel for oil then sold for future delivery. *Held*, that the price to be paid was $1 a barrel, as the words "contract price" mean a price fixed by contract, whether the contact is one previously made, governing past, contemporaneous, or future transactions, or one presently agreed upon with reference to future transactions, and a price being paid under a contract previously made was within the express language of the contract, while a price which parties were offering or willing to pay under contracts proposed to be made, but not made, was not a price then being paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 156; Dec. Dig. ⟸64.

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

2. CONTRACTS ⟸152—CONSTRUCTION—MEANING OF LANGUAGE USED.
To ascertain the meaning of a written agreement in which no technical word or expression is used, nothing is to be looked to except the language employed, taken in its ordinary sense, the subject-matter, and the surrounding circumstances, and the agreement cannot be given a meaning not expressed by the language used.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 732, 733, 738; Dec. Dig. ⟸152.]

3. SALES ⟸64—CONSTRUCTION—PRICE TO BE PAID.
By a contract defendant agreed to buy at a specified price plaintiff's production of oil up to, but not exceeding, 2,500 barrels per day for a period of two years, the contract further providing that, if the production exceeded the maximum quantity specified during the period of the contract, defendant was given the option of purchasing such additional production "at the market price at the time." *Held*, that oil produced at any time during the period of the contract in excess of 2,500 barrels a day was within the option to purchase at the market price, though plain-

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

*Rehearing denied April 18, 1906.

tiff's total production for the entire term of the contract did not exceed 2,500 barrels multiplied by the total number of days.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 156; Dec. Dig. ⊂=64.]

Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action by the Vinton Petroleum Company against the Sun Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. D. Gordon, of Beaumont, Tex., and Geo. E. Holland, of Orange, Tex. (Townes, Foster & Hardwicke, of Beaumont, Tex., on the brief), for appellant.

E. E. Townes and T. L. Foster, both of Beaumont, Tex., for appellee.

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

WALKER, Circuit Judge. By a written contract made on or about December 21, 1912, by and between the appellant, the Vinton Petroleum Company, the plaintiff below, and the appellee, the Sun Company, the defendant below, the former sold and the latter bought at the price of 90 cents per barrel the former's production of oil of a specified quality from wells located on its leases in the Vinton oil field, not exceeding 2,500 barrels per day for the period of the sale; that period being two years commencing the 25th day of December, 1912. The contract contained the following provision:

"In consideration of the obligations assumed by the first party hereinabove (the appellee), said first party is to have the option to renew for an additional two years following December 24, 1914, this contract, at the expiration of said two years, the oil for said following two years to be paid for in case said option to buy the same is exercised by the Sun Company at a price to be equal to the highest contract price then and in good faith being paid by either of the pipe line companies now doing business in the Vinton oil field for similar oil in said field; notice of the exercise of said option by the said first party to be given to the second party by the first said party in writing within ten (10) days following December 25, 1914."

On January 2, 1915, the appellee exercised the option it had under the clause just quoted by giving the written notice prescribed therein.

[1] A principal controversy in the case, in which is sought the specific enforcement of the contract made by the appellee's exercise of its option, turns upon the meaning of the words, "the highest contract price then and in good faith being paid by either of the pipe line companies," etc. The contention of the appellee, which was sustained by the District Court, is that the language quoted gave to its exercise of the option the effect of obligating it to pay 60 cents per barrel for the specified oil to be produced during the additional two years; that being the highest price which the evidence showed that either of the pipe line companies doing business in the Vinton oil field was, at the date of the exercise of the option, offering or willing in good faith to pay for similar oil contracted for future delivery. The contention in behalf of the appellant is that the appellant's exercise of the op-

tion obligated it to pay $1 per barrel for the oil; the evidence showing that that was the highest contract price which, at the date of the exercise of the option, one or more of the pipe line companies operating in the Vinton oil field was paying for similar oil, that price then so being paid under a contract or contracts made prior to that time.

The court heard much evidence as to the circumstances leading up to and attending the making of the contract and as to the methods of selling and buying oil which prevail in the locality which was the scene of the transaction. It was made plain that the price at which the pipe line companies in that territory accept and give credit or pay for oil for which they have not contracted is commonly spoken of as the market or "credit balance" price, and that frequently there is quite a difference between this price and that paid or to be paid to a producer who contracts for the future delivery of oil. There is a recognized distinction between a "credit balance" price and a contract price; but nothing in the evidence furnishes any support for the conclusion that the words "contract price," when used in dealings in the oil business, have a technical meaning or are to be taken in any other than their ordinary and popular sense. The words mean a price fixed by contract, whether the contract is one previously made, governing past, contemporaneous, or future transactions, or is one presently agreed upon with reference to future transactions. They are used as aptly to describe what at a given time is paid or becomes payable pursuant to a contract previously made as to describe what is then contracted to be paid for future deliveries. If at the time of the expiration of the first two years period named in the contract $1 per barrel was in good faith, under a contract previously made, being paid for similar oil by either of the pipe line companies which was doing business in the Vinton oil field when the contract was made, and that was the highest price fixed by contract which then was so being paid by such a company, then a conclusion that the appellee's exercise of the option obligated it to pay less than $1 a barrel for the oil contracted for during the additional two years must be supported otherwise than by giving to the option provision the meaning which its words express. A price which one at a given time offers or is willing to pay under a contract proposed to be made, but not made, is not a "price then and in good faith being paid." The substitution of other language for that actually used is required to describe a price then merely offered or proposed to be paid. The language of the agreement is not contradictory, obscure, or ambiguous. Giving to the words used their plain and ordinary signification, the meaning is not doubtful. The provision as to the price to govern in the event of the exercise of the option is not fairly susceptible of both the two constructions for which the opposing parties respectively contend. The rule which would be applicable if that was the case does not apply. A. Leschen & Sons Rope Co. v. Mayflower G. M. & R. Co., 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N. S.) 1.

[2] To adopt the construction contended for on behalf of the appellee would require giving to the agreement a meaning not expressed

by the language used. This is not permissible. To ascertain the meaning of a written agreement in which no technical word or expression is used, nothing is to be looked to except the language employed, taken in its ordinary sense, the subject-matter, and the surrounding circumstances. Moran v. Prather, 23 Wall. 492, 23 L. Ed. 121. It is argued that the correctness of the interpretation of the provision which is insisted on in behalf of the appellant is impeached, because the result of adopting that interpretation is to make the agreement such an unusual, unreasonable, or improbable one as to suggest that the parties could not have intended the language they used to have that effect. We find nothing in the subject-matter or in the circumstances attending the making of the contract to warrant the conclusion that the agreement, if the language expressing it is taken in its plain and ordinary signification, was an inequitable one so far as the appellee was concerned, and such a one as reasonable men might be expected to refrain from making. The contention of the counsel for the appellee is indicated by the following statements made in their brief:

"To adopt such an interpretation is to force the Sun Company to pay for the oil 40 cents per barrel more than the highest contract price was at the time the renewal took effect. * * * To so construe the contract that the Sun Company can renew the same by paying the highest contract price being currently offered at the time makes the contract reasonable and one that prudent men would naturally enter into. To construe it as counsel for appellant wants it construed, and thereby establish for a price standard something that had no relation whatever to the conditions existing at the time of the renewal, would make a contract that cautious and prudent men would naturally not be expected to make."

This argument leaves out of view the fact that the provision in question gave the appellee an option which it was at liberty to exercise or to refrain from exercising. It was left free to cease to buy appellant's oil at the end of the original two years, if the highest price then in good faith being paid by either of the pipe line companies in that territory was more than it then was willing to obligate itself to pay for the appellant's production of oil during the succeeding two years. It cannot be said that it was lacking in prudence in acquiring such a mere privilege, involving no consequences which it might not readily avoid by electing not to renew the contract. Certainly it is not more unlikely that the appellee intended to acquire the option which the language of the provision gave it than that the appellant, when the contract was made in December, 1912, consented to bind itself to sell, to a party not bound to buy, its production of oil during an additional term of years, at the highest price that either of the two or three pipe line companies operating in the Vinton oil field might, at a date then two years in the future, be offering or willing to pay for similar oil under contract, whether that price did or did not have any takers, and though it was so low that no producer was willing to accept it for oil contracted for future delivery. The conclusion is that the plain language used in the provision in question has the meaning for which the appellant contends, and did not have the effect which was given to it by the decree appealed from.

[3] Another controversy in the case is as to the meaning of the

following provisions of the contract which was renewed by the appellee's exercise of its option:

"And the amount of oil bought and sold hereunder shall consist of all of second party's production during the period herein named from said wells up to, but not exceeding, 2,500 barrels per day for the period of this sale. * * * In consideration of the first party's obligations herein undertaken, should second party's oil from said production exceed the maximum quantity above specified, during the period of this contract, first party is hereby given the option of purchasing such additional production at the market price at the time."

It is contended in behalf of the appellant that the contract price applied to all oil produced during the two years period of either the original or the renewal contract, if the production for the entire period did not average more than 2,500 barrels per day; in other words, that there was no excess production to which the last-stated option provision and the market price were applicable, if the total production for the entire term of the contract did not exceed 2,500 barrels multiplied by the number of days in two years. We are not of opinion that this contention is sustainable. The result of adopting it would be to make the amount of oil bought and sold what it would have been if the contract had stated it to be the production during the period named "up to, but not exceeding, an average of 2,500 barrels per day for the period of this sale." Whatever doubt there might have been as to what was intended by the words "but not to exceed 2,500 barrels per day for the period of this sale," if the contract had contained no other provision indicative of the intention of the parties as to the amount of oil deliverable at the contract price, we think was dispelled by the other provision, which gave to the appellee the option to purchase "at the market price at the time" appellant's production in excess of "the maximum quantity above specified," whenever "during the period of this contract" the production exceeded the maximum quantity stated. The language used indicates that the understanding was that a production, at any time during the period of the contract, of more than 2,500 barrels a day, would be an "additional production" not embraced in the sale made. It well may be inferred that different language would have been used if the understanding had been that more than 2,500 barrels a day was in any event to be deliverable at the contract price, though the previous average daily production might have been less than the maximum stated, or that the option provision was not to come into play until the purchaser had received the total amount of oil which in any event could be a subject of the sale at the contract price. The two provisions, considered together, manifest a purpose to make the contract price inapplicable to so much of the appellant's production as at any time during the period of the contract may be in excess of 2,500 barrels a day, and to make the option to buy "at the market price at the time" applicable whenever there may be a daily production in excess of that quantity.

As to the last-considered feature of the contract, the decree appealed from is in harmony with the conclusion just stated. Because

of the effect it gave to the provision of the contract first above mentioned, that decree is reversed, and the cause is remanded for further proceedings not inconsistent with the conclusions above stated.

GAULEY MOUNTAIN COAL CO. v. HAYS, Collector of Internal Revenue.

(Circuit Court of Appeals, Fourth Circuit. December 2, 1915.)

No. 1376.

1. INTERNAL REVENUE ⟸9—CORPORATE EXCISE TAX—"INCOME" TAXABLE.
The Corporation Excise Tax Law of 1909 (Act Aug. 5, 1909, c. 6, 36 Stat. 112 [Comp. St. 1913, §§ 6300–6307]) provides that every corporation shall be subject to pay annually a special excise tax equivalent to 1 per cent. upon its entire net income from all sources during the year, over and above $5,000, and that such net income shall be ascertained by deducting from the gross income all losses sustained within the year. A corporation in 1902 purchased stock in another corporation which it sold in 1911 at an advance of $210,000. *Held*, that the portion of this profit in proportion to the time elapsing between the taking effect of the statute and the sale of the stock was not "income" taxable for the year in which the sale was made.

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

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

2. INTERNAL REVENUE ⟸9—CORPORATE EXCISE TAX—INCOME TAXABLE.
It is the manifest purpose of the Corporation Excise Tax Law of 1909 to tax the net income of corporations for the year in which the assessment is made.

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

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action by the Gauley Mountain Coal Company against S. A. Hays, Collector of Internal Revenue for the District of West Virginia. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

Henry B. Closson, of New York City (Robert T. Hubard, Jr., of Fayetteville, W. Va., on the brief), for plaintiff in error.

W. E. Ross, Asst. U. S. Atty., of Bluefield, W. Va. (William G. Barnhart, U. S. Atty., of Charlestown, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an action instituted in the District Court of the United States for the Southern District of West Virginia by the Gauley Mountain Coal Company against S. A. Hays, Collector of Internal Revenue, for the recovery of taxes to the amount of $525.06, alleged to have been unlawfully collected by defendant from plaintiff under the Corporation Excise Tax Law of August,

1909. The case was submitted upon an agreed statement of facts, and the lower court after considering the same directed that a verdict be entered in favor of the defendant and against the plaintiff for the sum of $525.06.

[1] The Gauley Mountain Coal Company is a corporation organized under the laws of the state of West Virginia for the purpose of "mining, marketing, purchasing and using coal, iron ore and other minerals." The business of trading in stocks was not included among its corporate powers, nor does it appear that, save for the one transaction in question, it ever bought or sold any.

On December 9, 1902, the Gauley Mountain Coal Company purchased 8,000 shares of the stock of the Loup Creek Colliery Company, another West Virginia mining corporation, for $800,000. It held this stock (at first in the names of trustees, but later in its own name) for nearly nine years. On October 16, 1911, it sold the stock for $1,010,000. This was a sum less by $214,933.33 than its cost and interest on its purchase price at 6 per centum from the date of the purchase, but greater by $210,000 than its cost, ignoring interest.

Upon these facts being ascertained by the Commissioner of Internal Revenue, he held that of this $210,000, a proportion of it represented by the ratio of 1,019 days which elapsed between January 1, 1909, when the Corporation Excise Tax Law became effective, and October 16, 1911, when the sale was made, to the 3,233 days which elapsed between December 9, 1902, when the purchase was made, and October 16, 1911, when the sale was made, to wit, $66,189.30, constituted "income" of the corporation for the year 1911 within the meaning of that word as employed in the statute.

He thereupon amended the return of annual net income which had been filed for the company for the year 1911 by including in its gross income for that year this item of $66,189.30, and on this amount, reduced to $52,506 by certain lawful reductions not at issue here, levied an additional assessment of one per cent., to wit, $525.06, against the company for the year 1911, which, on July 16, 1913, he collected from the company by duress. To recover this amount, with interest, after the necessary preliminary appeal to the Commissioner of Internal Revenue, this suit was brought.

This suit involves a construction, not of the present income tax law of 1913, but of the corporation excise law of 1909; which, except for the collection of the excise taxes on corporations accruing for the year 1912, was repealed by the act of 1913.

As we have stated, the property in question was purchased on the 9th day of December, 1902, and not disposed of until the 16th day of October, 1911, at which time the plaintiff was able to dispose of it at a profit of $210,000. Therefore the principal question is as to whether the increase in value of the property which accrued during such period was subject to taxation as the entire net income of the plaintiff.

The act of 1909 is in the following language:

"Every corporation * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year.

* * * Such net income shall be ascertained by deducting from the gross amount of the income of such corporation * * * received within the year from all sources * * * all losses actually sustained within the year."

[2] It is manifestly the purpose of this act to tax the net income for the year in which the assessment is made. The Supreme Court in the case of Gray v. Darlington, 82 U. S. (15 Wall.) 63, 21 L. Ed. 45, passed on the precise question involved in this controversy. That case was decided under the amendatory Internal Revenue Act of March 2, 1867, c. 169, 14 Stat. 477. The plaintiff being the owner of certain United States treasury notes exchanged them in 1865 for United States 5-20 bonds. In 1869 these bonds were sold at an advance of $20,000 over the treasury notes which had been given in exchange, and were assessed upon this amount as gains, profits, and income for that year. The court said in disposing of that case, among other things:

"The question presented is whether the advance in the value of the bonds, during this period of four years, over their cost, realized by their sale, was subject to taxation as gains, profits, or income of the plaintiff for the year in which the bonds were sold. The answer which should be given to this question does not, in our judgment, admit of any doubt. The advance in the value of property during a series of years can, in no just sense, be considered the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. * * *

"The rule adopted by the officers of the revenue in the present case would justify them in treating as gains of one year the increase in the value of property extending through any number of years, through even the entire century. The actual advance in value of property over its cost may, in fact, reach its height years before its sale; the value of the property may, in truth, be less at the time of the sale than at any previous period in ten years, yet, if the amount received exceed the actual cost of the property, the excess is to be treated, according to their views, as gains of the owner for the year in which the sale takes place. We are satisfied that no such result was intended by the statute."

The defendant relies upon the cases of Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, and McCoach v. Minehill & S. H. R. Co., 228 U. S. 300, 33 Sup. Ct. 419, 57 L. Ed. 842. We have carefully considered these cases, but find nothing therein which modifies the decision of the Supreme Court in the case of Gray v. Darlington, supra, in so far as this phase of the question is concerned. The Supreme Court in the cases cited by defendant, among other things, held that any gains or profits accruing from investments in real estate or other property incidental to the business in which a corporation may be engaged are subject to taxation, and to this extent the case of Gray v. Darlington, supra, is modified. Therefore, according to the rule therein announced, if the plaintiff in this instance had purchased and sold real estate within the year for which the assessment was made, any profits realized therefrom would be subject to taxation.

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

Reversed.

BLOCK v. ST. LOUIS, I. M. & S. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. February 21, 1916.)

No. 2833.

1. PLEADING ⊜228—DEMURRER OR EXCEPTIONS—OVERRULING—JUDGMENT.
Under Rev. Code Prac. La. art. 329, providing that, when the defendant in his answer alleges on his part new facts, they shall be considered denied, and neither replication nor rejoinder shall be admitted, where an answer was filed, and a cause fixed for trial on the merits, and on the day set for the trial defendant filed a further answer or plea of estoppel, the court, in overruling exceptions to such plea, erred in dismissing the case, as, a jury not having been waived by the parties, the questions of fact involved were for a jury.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584–590; Dec. Dig. ⊜228.]

2. ESTOPPEL ⊜3(2)—BY PLEADING—"ACCIDENTAL."
Where plaintiff was injured when the steamboat upon which he was riding collided with a bridge owned and maintained by defendant, allegations in an action on an accident insurance policy that he incurred a bodily injury by accidental means caused directly, solely, and independently of all other causes and means, and allegations in an action against defendant that the accident was due to defendant's negligence, were not inconsistent, as the injury was "accidental," as between plaintiff and the insurance company, and within the meaning of the insurance policy, but many accidents are traceable more or less remotely to the negligence of third parties (citing Words and Phrases, Accidental).

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 3; Dec. Dig. ⊜3(2).]

In Error to the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Action by Maurice Block against the St. Louis, Iron Mountain & Southern Railway Company. The action was dismissed, and plaintiff brings error. Reversed and remanded.

This case comes up on a writ of error from a judgment sustaining a plea of estoppel to an action for damage for personal injuries. On May 2, 1913, plaintiff was a passenger on the steamboat Concordia, which came into collision with a bridge owned and maintained by defendant across the Tensas river, in the Western district of Louisiana, as a result of which plaintiff sustained severe injuries, including the loss of one arm at the shoulder. The original suit was filed in the state court, and was removed by defendant to the United States District Court, where defendant filed certain exceptions, and where plaintiff filed a motion to remand to the state court. The motion to remand was withdrawn on the undertaking of defendant's counsel to waive the exceptions and file an answer to the merits. This answer was filed, and the case was fixed for trial on the merits, when, on the day set for trial, to wit, May 3, 1915, defendant filed a further answer herein, called a plea, in which it was set up that plaintiff had filed a suit in the city of Memphis on August 4, 1913, against the Great Eastern Casualty Company on a policy of insurance, claiming indemnity because of the injuries sustained at the time of the wreck of the Concordia, in which plaintiff alleged "he incurred a bodily injury by accidental means and caused directly, solely, and independently of all other causes or means, which necessitated the amputation by surgical operation of plaintiff's left arm at the shoulder." By this plea defendant urged that plaintiff was estopped from setting up in a suit against defend-

ant that the accident was due to defendant's gross negligence and want of care.

To this so-called plea plaintiff filed the following exceptions: "Now comes the above-named plaintiff, through his undersigned counsel, and excepts to and opposes the filing of the plea of estoppel herein filed by defendant this day, on the ground that the same comes too late, that the issues herein have been made up, that the bill in chancery referred to in said plea appears on its face to have been filed prior to the institution of this suit, and in the alternative, on the ground that said plea is insufficient and without merit on its face, and prays its dismissal."

On hearing the exception, the court below entered the following judgment: "This cause came on to be heard at this time on the plea of estoppel filed herein by the defendant St. Louis, Iron Mountain & Southern Railway Company on the 3d day of May, A. D. 1915, the same being taken up, evidence adduced, tried, argued by counsel for the plaintiff and the defendant, and submitted; and it appearing to the court that the law and the evidence is in favor thereof and in favor of the St. Louis, Iron Mountain & Southern Railway Company, and against the plaintiff in this cause, Maurice Block, and upon consideration thereof, it is thereupon by the court ordered, adjudged, and decreed that the said plea of estoppel of the defendant St. Louis, Iron Mountain & Southern Railway Company be and the same is hereby sustained, and the demands of the plaintiff, Maurice Block, be and the same are hereby rejected, and the suit dismissed at his own cost. Thus done, read, and signed in open court at Alexandria, within the Western district of Louisiana, on this the 5th day of May, A. D. 1915."

John P. Miller, of New Orleans, La., for plaintiff in error.

Henry Bernstein, of Monroe, La., for defendant in error.

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

PARDEE, Circuit Judge. [1] The record showing that the case was at issue upon the answers (Rev. Code of Prac. La. art. 329), the questions involved were questions of fact, and the issues were for a jury, and, a jury not having been waived by the parties, it was error to dismiss the case.

[2] As the error requires a reversal, and on a new trial the question of estoppel claimed in the plea may be again urged, we consider it proper to say that we see no inconsistency between the allegations of plaintiff in this suit as to the negligence of the defendant in the construction of the railway bridge, which it is claimed caused the injury to the Concordia resulting in the accidental injury to the plaintiff, and his alleged allegations in his declaration in his suit against the insurance company. As between the plaintiff, without fault, and the insurance company, and within the meaning of the insurance policy, the injury was accidental, and he might well aver that "on the steamer Concordia he incurred a bodily injury by accidental means, and caused directly, solely, and independently of all other causes or means," etc. See adjudged cases in point cited volume 1, Words and Phrases, pp. 62, 63. Many accidents are traceable more or less remotely to the negligence of third parties, and the plaintiff's right of recovery depends upon his ability to prove that the proximate cause, the causa causans, of his injury was the negligence of the defendant.

The judgment is reversed, and the cause is remanded for further proceedings according to law.

STARK et al. v. SIMS et al.

(Circuit Court of Appeals, Fifth Circuit. February 28, 1916.)

No. 2770.

JUDGMENT ⇐497(2)—PRESUMPTIONS IN SUPPORT OF VALIDITY OF JUDGMENT.

Where a Texas judgment, rendered in 1857, under which land was sold at execution sale, recited that there had been regular service of process upon the defendant, it would be presumed that there was such service as would uphold the judgment, though the file of papers in the case showed an ineffective attempt to get jurisdiction by publication, especially where it appeared that the judgment debtor lived in Louisiana, near the Texas border, was accustomed to visit the state of Texas, that he never asserted any claim to the land after the sheriff's sale, and that neither he nor any one claiming by inheritance from him had had possession after the sale.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 937; Dec. Dig. ⇐497(2).]

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

Action by Mrs. M. E. Sims and others against W. H. Stark and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Geo. E. Holland, of Orange, Tex., for plaintiffs in error.

G. P. Dougherty, of Houston, Tex., and T. L. Foster, of Beaumont, Tex. (W. T. Davis, of San Augustine, Tex., J. W. Minton, of Hemphill, Tex., and Sol. E. Gordon, of Beaumont, Tex., on the brief), for defendants in error.

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

WALKER, Circuit Judge. Both the plaintiffs (defendants in error) and the defendants claim the land sued for through M. Y. Garlington, who died in 1873; the former by inheritance, and the latter through a sheriff's deed made in 1857, following a sale of the land under execution issued upon a judgment of the district court of Jasper county, Tex., a court of record; against said Garlington, recovered on two promissory notes alleged to have been made by him. No claim based upon adverse possession is asserted. The petition in the suit in which the judgment mentioned was recovered alleged that the defendant therein was a nonresident of the state of Texas, attached to the petition was an affidavit of the plaintiff to that effect, and a citation by publication was prayed for in the petition. The file of papers in that case did not show that there was a personal service of process upon the defendant. The judgment in the case was by default, and commenced with the following recitals:

"And comes the said plaintiff, by attorney, and asks the court for a judgment by default against the said defendant for want of answer. And it appearing to the satisfaction of the court that there has been regular service of process upon the said defendant, and that he has failed to appear and file his

answer within the time prescribed for pleadings, and that the plaintiff's suit is upon a liquidated demand."

M. Y. Garlington rendered the land for taxes and paid taxes thereon for the years 1853 to 1857, inclusive. It does not appear that after the sale of the land in 1857 he ever rendered the land for taxes or paid taxes thereon, or that he ever asserted any claim to the land after the date of the sheriff's deed, though from 1858 until his death in 1873 he lived in Texas and not far from the land in question.

The recital of the judgment, "it appearing to the satisfaction of the court that there has been regular service of process upon the defendant," does not indicate whether the service referred to was personal or constructive, and is as consistent with the one kind of service as the other. There is nothing in the record of that case which is inconsistent with the conclusion that there was personal service of process upon the defendant. The fact that the file in the case, as it was found more than half a century after the case was disposed of, shows that there was an ineffective attempt to get jurisdiction by publication, does not prove the absence of personal service of process upon the defendant. After the lapse of more than 50 years since the rendition of that judgment almost any fact essential to support the regularity and validity of the judgment and of the title acquired thereunder is to be presumed, certainly when the indulgence of such presumption involves no contradiction of the recitals of the judgment. Baeder v. Jennings (C. C.) 40 Fed. 199, 217; Duncan v. Williams, 89 Ala. 341, 350, 7 South. 416; Voorhees v. United States Bank, 10 Pet. 449, 9 L. Ed. 490; 16 Cyc. 1075; 2 Chamberlayne's Modern Law of Evidence, §§ 1199, 1200.

Added force is given to the presumption that there was such a service of process as to make the recitals of the judgment correct, rather than false, by the evidence tending to prove that the defendant in the execution, for several years prior to the rendition of the judgment, lived at a place in Louisiana but a short distance from the Texas border, and was accustomed to visit the latter state, where personal service upon him could have been made, that he never asserted any claim to the land after the sheriff's sale of it, and that neither he nor any one claiming by inheritance from him has had possession of the land since that sale was made. The conclusion is that, in view of the presumptions which should be indulged in favor of the validity of the judgment against Garlington, the court was in error in deciding that that judgment was an invalid one, and that the claim of the defendants to the land under the sheriff's deed was not sustainable.

It follows that the judgment should be reversed; and it is so ordered.

IOWA WASHING MACH. CO. v. SAECKER.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916.)

No. 2244.

PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—GEARING FOR WASHING MACHINES.

The Victor patent, No. 863,120, for a mechanical movement for washing machines, is valid, and, while of somewhat narrow scope, is not limited to any particular form of transmitting power, its essential feature being the removal from the lid of unnecessary weight, enabling it to be lifted without much effort, while preserving the momentum of the flywheel, in which respect it is entitled to a reasonable range of equivalents; also *held* infringed.

Appeal from the District Court of the United States for the Western District of Wisconsin; Arthur L. Sanborn, Judge.

Suit in equity by the Iowa Washing Machine Company against E. C. Saecker. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 219 Fed. 247.

Appellant sought to have appellee held as an infringer of its patent No. 863,120, granted one Victor on August 13, 1907, for "gearing" used in washing machines, and enjoined. The claims in issue, numbered respectively 2 and 4, reading as follows, viz.:

"In a mechanical movement for washing machines, a vertical rotary stirrer shaft, and a horizontally disposed drive shaft connected to the same, in combination with a vertically disposed lever of the second class actuating said drive shaft, a flywheel the axis of which is parallel to that of said drive shaft, and means for transmitting the motion of said lever to said flywheel."

"In a mechanical movement for washing machines, a vertical rotary stirrer shaft, and a horizontally disposed drive shaft connected to the same, in combination with a vertically disposed lever of the second class actuating said drive shaft, a flywheel the axis of which is parallel to that of said drive shaft, a gear the axis of which is parallel to that of said flywheel for transmitting the motion of said lever to said flywheel"

—were held to be valid by this court in Horton Mfg. Co. v. White Lily Mfg. Co., 213 Fed. 471, 130 C. C. A. 117. The record in this present case upon the question of validity is substantially the same as in that case.

Appellee's device, it is claimed, is constructed in accordance with the teaching of Wyman patent, No. 957,024, granted May 3, 1910, for a washing machine. It is called "Big Three Vacuum Washer." It consists of a tub with a hinged lid, a balance wheel mounted on its side, having a small spur pinion and a moving lever handle carrying a pitman link. Resting upon the cover is a driving shaft and a motion translating device, which is connected to a vertical driving shaft, which passes through the lid and operates a dolly, which is made to move up and down in the tub while at the same time it is rocked or oscillated first in one direction and then in the other. This vertical driving shaft is hollow, whereby air is exhausted from the tub, causing a partial vacuum as the cone or dolly rises. By the return movement, so it is claimed, the air remaining in the cone is forced through the clothes, assisting in cleansing them. The outer end of the driving shaft carries a gear, adapted to engage the small pinion on the flywheel. One end of the pitman link on the lever is connected to a stub on this larger gear, whereby the motion of the lever handle is imparted to said larger gear and thence to the driving

shaft, and through said small gear to the flywheel shaft. The cone is claimed to be superior in effectiveness to appellant's dolly. It, together with its connection and mode of operation, is said by appellee's counsel to be the characteristic feature of his device.

Some of the differences between the two devices here involved, as claimed by appellee, are: (1) The difference in form and construction of the dashers. (2) The difference in operation thereof, Victor's having no pounding or vertical action. (3) The creation of a partial vacuum in the one and the solid dasher of the other. (4) The use of bevel gears by Victor and translating devices by appellee. (5) The absence of a segmental gear or rack in appellee's device. (6) Appellee has no slot or pin in a speed-up gear. (7) Victor uses no pitman. (8) Victor fulcrums his lever in the plane passing vertically through the axis of the drive shaft and located adjacent to speed increasing gear, while appellee is not so limited. (9) Appellee can dispense with a lever; Victor cannot. (10) The Victor requires three speed gears and a segmental gear. Appellee uses only two speed gears. (11) Appellee's lid has relatively heavy parts upon it. (12) Victor's line of cleavage is between two slow-moving separable gears, the segmental rocking rack on the lever, and the rocking spur gear on drive shaft; while appellee's is between two fast moving gears, the flywheel pinion and gear on drive shaft.

Appellee also claims that the functions of the parts of its device differ from those of the Victor—i. e., that the Victor's large gear is just a part of the speeding device, while in appellee's machines the gear on the outer end of the drive shaft operates both the shaft and the flywheel at different speeds; that the small gear at the outer end of Victor's rotating shaft serves only to impart motion to the shaft, while appellee by the use of two gears of different sizes secures, what in Victor requires three gears, a gear segment or lever, and slot and pin connections to accomplish, viz., the rocking motion of the drive shaft and continuous rotary motion to the flywheel. Appellee also claims for his operating shaft three functions—i. e., creation of a partial vacuum, actuation of the dasher and, in part, operation of the translating device; while the Victor's shaft simply agitates the dasher or stirrer shaft, and that he (appellee) by reason of his cone or dasher, secures a much better manipulation of the clothes to be washed than does appellant. Appellee claims that in his device the lid cannot be lifted out of and restored to mesh with the flywheel pinion when supplied with water and clothes. This, however, does not seem to be substantiated by the record.

The District Court found no infringement and dismissed the bill for want of equity. The assignment of errors challenges the correctness of that decree.

Wallace R. Lane, of Chicago, Ill., for appellant.

Taylor E. Brown and Clarence E. Mehlhope, both of Chicago, Ill., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). We find no reason in the present record for modification of our former decision sustaining the validity of the patent in suit, and therefore proceed at once to consider the question of infringement. "The object of my invention," says the patentee, "is to utilize the momentum of a flywheel to assist in the operation of the lever by which such stirrer shaft mechanism is actuated. This I accomplish by the means hereinafter fully described and as fully set forth in the claims."

Claim 2 calls for (1) a vertical rotary stirrer shaft; (2) a horizontally disposed drive shaft connected thereto, in combination with (3) a vertically disposed actuating lever of the second class; (4) a flywheel with its axis parallel to that of the drive shaft; (5) means for transmitting the motion of the lever to the flywheel.

Claim 4 calls for (1) a vertical rotary stirrer shaft; (2) a horizontally disposed drive shaft connected thereto, in combination with (3) a lever of the second class actuating said drive shaft; (4) a flywheel with axis parallel to that of the drive shaft; (5) a gear, the axis of which is parallel to that of the flywheel, for transmitting the motion of the lever to the flywheel.

In the Horton Mfg. Co. Case, above cited, we held the patentee's assignee entitled to the idea of the lid free from the weight of the heavy operating device, and what was therein termed the line of cleavage, whereby the top could be lifted without much effort and the momentum of the flywheel preserved, in a device employing or actuated by a lever of the second class. In substance, we held that the combination of these two accomplishments with a lever-operated mechanical movement, was new with Victor, and awarded them to him in such combination. With regard to the character of the means, it will be seen that little was said. While the Victor patent was decreed somewhat narrow, no attempt was made to hold the patentee to details of construction not essential to the accomplishment of the beneficial results arising from Victor's construction. These matters were all old in different relations. We were of the opinion, in passing on the Horton Case, as we now are, that Victor was entitled to a reasonable range of equivalents, and placed little stress upon details. In a general way we were of the opinion that the removal of unnecessary weight from the lid was not limited to the exact means disclosed; that the form of the agitating means was not of the substance of the invention nor the make-up of the mechanical submovements. The form and function of the stirrer in no wise affected the matters therein deemed to constitute the invention, so long as those new features remained.

Appellee has appropriated the combination in which the heavy operating mechanism is carried by the tub. The difference between the load of the Victor lid and that of appellee is negligible. He has taken the arrangement of the parts of the gearing which effect the line of cleavage. He has combined these with the operating lever of the second class. This had never been done before. The result was a tub-actuating device which we found, in the Horton Case above referred to, to involve invention. Claim 2 can in substance be read upon appellee's device. It has the vertical rotating stirrer shaft, the horizontally disposed drive shaft in combination with a vertically disposed actuating lever of the second class, a flywheel with its axis parallel to that of the drive shaft, and means for transmitting the motion of the lever to the flywheel. It has also the elements of claim 4, including a gear with its axis parallel to that of the flywheel for transmitting the motion of the lever to the flywheel.

Victor was not by his claims limited to the particular actuating mechanism shown in the specification. The fact, if it be a fact, that by reason of appellee's adjustment of its minor parts his tub is capable of being adjusted to run by power, may serve to disclose an advance over Victor, though that is not hereby conceded. The same may be said of some other minor differences between the two devices. If such be the case, nevertheless the fact still remains that appellee, as a basis for

his mechanical movement or gearing, has the combination of Victor. To hold otherwise would make the Victor patent practically worthless. If minor details of moving apparatus are to be construed to evade the essential principles, the vital concept, of the Victor gearing, then the grant was not worth seeking.

The patent is not limited to any particular form of transmitting power. The object sought and recognized by us in the former suit consisted in the easily lifted lid, and the line of cleavage combined with the lever of the second class. These features appellee has taken and must account for.

The decree of the District Court is reversed, with direction to grant the prayer of the bill.

PROUDFIT LOOSE LEAF CO. et al. v. KALAMAZOO LOOSE LEAF BINDER CO.
KALAMAZOO LOOSE LEAF BINDER CO. v. PROUDFIT LOOSE LEAF CO. et al.

(Circuit Court of Appeals, Sixth Circuit. December 15, 1915. On Rehearing, March 7, 1916.)

Nos. 2601–2604, 2645.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—LOOSE LEAF BINDER.
The Bushong patent, No. 941,757, for a loose leaf binder, claims 13, 15, 16, were not anticipated, disclose patentable invention, and are valid; also *held* infringed.

2. PATENTS ⟸109—VALIDITY—CLAIMS INTRODUCED BY AMENDMENT.
A claim of a patent introduced into the application by amendment is not invalid because its substance was not contained in the original application in the form of a claim or claims, but it is sufficient if it was disclosed by the specification.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 152; Dec. Dig. ⟸109.]

3. PATENTS ⟸26—"INVENTION"—NEW COMBINATION OF OLD ELEMENTS.
Although every element of a patented combination was old, "invention" still exists, if the combination either produces a new and useful result or effects an old result in a new and materially better way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26.

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

4. PATENTS ⟸16—INVENTION—QUESTION OF FACT.
Whether the device of a patent involves invention, as distinguished from mechanical skill, is a question of fact.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. ⟸16.]

5. PATENTS ⟸326—VIOLATION OF INJUNCTION—DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT—GOOD FAITH.
Advice of counsel and good-faith conduct do not relieve from liability for a civil contempt, although they may affect the extent of the penalty; but the mere violation of an injunction against infringement of a patent,

in the belief in good faith that the order is being properly interpreted, and without any intention to disobey it, is not a criminal contempt, even though actuated by a desire to find a lawful means of avoiding infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613–619; Dec. Dig. ⟸326.]

6. PATENTS ⟸326—VIOLATION OF INJUNCTION—APPEAL OR ERROR—AFFIRMANCE IN PART AND REVERSAL IN PART.

A court adjudged defendants in an infringement suit guilty of contempt for violation of an injunction, and awarded one-half the fines imposed to complainant as reimbursement for its damages, costs, and expenses. *Held* that, in so far as the order was for the benefit of complainant, it was civil, but as to the remainder of the fines it was of a criminal nature, and that, where the opinion of the court indicated that it did not intend to find defendants guilty of a willful and contumacious disregard of its authority, upon a writ of error to review the order generally, the criminal portion of the judgment should be reversed, but in so far as it was remedial it should be affirmed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613–619; Dec. Dig. ⟸326.]

7. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—LOOSE LEAF BINDER.

The Bushong patent, No. 851,276, for a loose leaf binder, claims 36, 39, 46, 47, 48, 49, 50, 51, and 52, *held* valid, but not infringed.

8. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—LOOSE LEAF BINDER.

The Bushong patent, No. 878,340, for a loose leaf binder, claims 13, 14, and 24, held valid and infringed; claims 18, 22, and 23 *held* valid but not infringed; and claim 19 *held* void, as too broad, in view of the prior art.

9. PATENTS ⟸20—INFRINGEMENT—IDENTITY OF RESULT.

Infringement is not avoided by combining two elements of the patented structure into one unitary structure, so long as each element operates in substantially the same way to produce substantially the same result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 20–22; Dec. Dig. ⟸20.]

10. PATENTS ⟸238—"INFRINGEMENT"—OMISSION OF ELEMENTS.

A combination claim is not infringed, if one of its elements is omitted, without the substitution of an equivalent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 376; Dec. Dig. ⟸238.

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

11. PATENTS ⟸165—CONSTRUCTION OF CLAIMS.

An element cannot be read into a claim, for the purpose of narrowing it, and thus making it valid, as against objection that it is too broad, in view of the prior art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⟸165.]

On Rehearing.

12. PATENTS ⟸109—AMENDMENT OF APPLICATION—NEW OATH.

Where a claim added to an application for a patent by amendment had previously been a part of another application by the same applicant, and was in interference proceedings, in which, after a hearing, he was awarded priority of invention, and then transferred the claim to the application

for the patent in suit, the specification of which covered the subject-matter, his failure to make a new oath after the amendment did not invalidate the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 152; Dec. Dig. ⊂=109.]

Appeals from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by the Kalamazoo Loose Leaf Binder Company against the Proudfit Loose Leaf Company and another. From the decree, all parties appeal; and defendants seek by writ of error to review an order imposing fines for contempt. Affirmed on appeal of plaintiff, reversed in part on appeal of defendant named, and reversed on writ of error by defendants as to criminal feature of contempt, but affirmed in other respects.

F. L. Chappell and O. A. Earl, both of Kalamazoo, Mich., for complainant.

Cyrus W. Rice, of Grand Rapids, Mich. (H. C. Lord, of Erie, Pa., of counsel), for defendants.

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

KNAPPEN, Circuit Judge. Nos. 2601 to 2604, inclusive, are appeals and cross-appeals, respectively, from the decrees of the District Court in infringement suits upon three separate Bushong patents owned by the Kalamazoo Loose Leaf Binder Company. The writ of error in No. 2645 is brought to review an order of the District Court adjudging the Proudfit Loose Leaf Company and certain individuals guilty of contempt in violating the order and injunction of the court below with respect to one of the patents. The cases were heard together in this court, and will be disposed of in one opinion.

The patents all relate to improvements in loose leaf binders. In the order of application therefor they are: No. 941,757, applied for March 21, 1903, issued November 30, 1909; No. 851,276, applied for August 5, 1904, issued April 23, 1907; No. 878,340, applied for December 31, 1906, issued February 4, 1908. These patents will be spoken of as the "first," "second," and "third" patents, respectively, in order of date of application. As is apparent, all three applications were pending in the Patent Office at the same time.

The inventions of the three patents relate, broadly speaking, to the binding devices, including the covers, of loose leaf account books of the type in which the sheets are detachably mounted, through slots in their binding edges, upon binding cords or binding strips extending into the covers of the book, the cords being adjusted by mechanism located within the covers.

The First Patent.

[1] The first patent (No. 941,757) has 16 claims, Nos. 13, 15, and 16, printed in the margin,[1] being the only ones involved here. Claims

[1] "13. In a loose leaf binder, the combination of a pair of swinging covers, one of which is provided with an internal recess or chamber, binding strips

2 to 12, both inclusive, include as a prominent element an automatically adjustable back, one edge of which telescopes into a pocket in the adjacent cover; the other edge being rigidly connected to the other cover. Neither of the claims in suit involves this adjustable back feature. Claim 14 differs but slightly from the claims in suit, all of which the District Court held valid and infringed. The original application contained no claims upon the features of claims 13 to 16 which distinguish them from all other claims, viz.: The inclusion of the strip-adjusting mechanism within a recess or chamber in the cover of the book, and its arrangement or adaptation for being operated from the outside of the cover (and thus the outside of the book) without opening or uncovering the chamber containing the strip-adjusting mechanism. Claim 13 was formulated, at the suggestion of the Patent Office, during the pendency of still another application of Bushong, interference declared as between Bushong, Proudfit and two other applicants; the claim being, at Bushong's suggestion, for the purpose of getting advantage of earlier filing date of application, included within what we call the first patent. Priority was awarded Bushong, as against Proudfit (the two other parties having dropped out), through the successive actions of the examiner of interferences, the board of examiners in chief, and the Commissioner. Claims 14, 15, and 16 were thereupon added.

[2] It is urged that the distinguishing elements of the claims in suit were not disclosed in the application, and that therefore these claims are invalid under section 4888 of the Revised Statutes, which requires the inventor to "particularly point out and claim the part, improvement, or combination which he claims he has invented or discovered." The authorities most relied upon in support of this claimed invalidity are Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586, the decisions of this court in Michigan Central R. R. Co. v. Consolidated Co., 67 Fed. 121, 14 C. C. A. 232, and American Lava Co. v. Steward, 155 Fed. 731, 736, 84 C. C. A. 157, and the decision of the Supreme Court affirming the American Lava Co. Case, 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139.

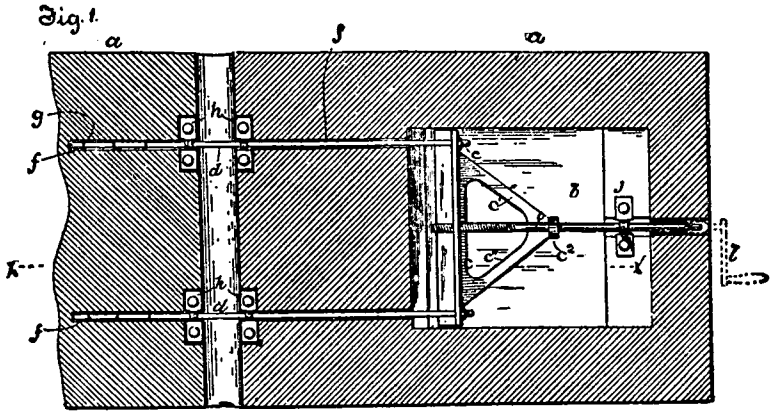
In our opinion the case is not brought within the statute or the decisions cited, for we think the subject-matter of the claims in suit is

to which the loose leaves are secured extending between the covers, and adjusting mechanism for the strips situated within said recess or chamber in the cover, and arranged to be operated from the outside of the chamber without opening or uncovering the same."

"15. In a loose leaf binder, the combination with a pair of covers, one of which is provided with an internal recess or chamber, of binding strips to which the leaves are secured extending between the covers, and an adjusting screw for said strips situated within said recess or chamber in the cover and adapted to be manipulated from without the same by means of a key."

"16. In a loose leaf binder, the combination of a pair of covers, one of which is provided with an internal recess or chamber, binding strips to which the leaves are secured extending between the covers, and an adjusting mechanism for the strips situated within said recess or chamber in the cover and adapted to be operated by means of a key without opening or uncovering the chamber."

disclosed by the original application. Fig. 1 of the drawings (which we herewith reproduce) suggests a recessing of the adjusting mechanism in the cover and its operation by a key from the outside; no means



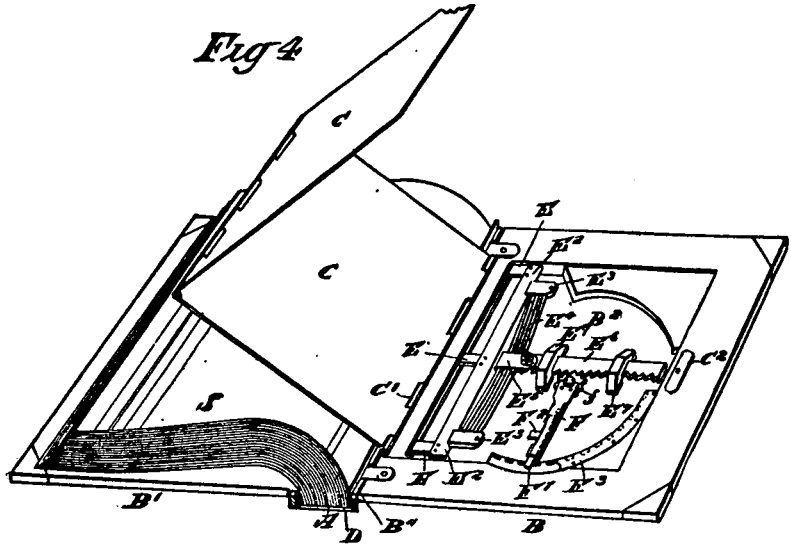
of operating from the inside being shown. The specification, moreover, expressly states that the adjusting angle bar is contained within "a rectangular cavity" in one of the covers, and describes the angle bar and its adjustment by means of a screw rod in a guide bar inserted in the threaded perforations in the angle bar; it being also said that the "outer end" (which can only mean the end outside the cover) of the screw rod is "provided with a head adapted to receive the key *l*," which appears in the drawing. It is obvious that if the "binding cords are contained in longitudinally extending cavities provided in both sections of the cover," and if the angle bar is in the "rectangular cavity," so must be the adjusting mechanism, including the screw rod and the guide bar. The original application was accompanied by the usual inventor's oath. Unless, therefore, the claims are invalid because their substance was not contained within the original application, *in the form of claims,* as distinguished from disclosure by specifications, the claims are not subject to the objection stated. The authorities cited do not, in our opinion, sustain such proposition. In each of them the amendment held not to be covered by the original oath was made in the specifications themselves. In the instant case no amendment of the specifications in the respect stated was either necessary or in fact made. We cannot think the omission to specifically include the features in question within the statement of the "characteristic features" of the invention is fatal to the validity of an otherwise complete disclosure, especially in view of the broad statement of the nature of the invention as relating "to the binding device, and also to the covers of loose leaf account books," and that "it has for its object to eliminate certain inconvenient and objectionable features common to books of this kind"—the disclosure of the adjusting mechanism before referred to occurring in the statement of "the devices employed for * * * accomplishing said objects."

The defenses requiring most consideration are anticipation and lack of invention in view of the prior art. The art of temporarily binding loose leaves or sheets was not new when Bushong entered the field, and (with one exception) each individual element of the combination of each of the three claims in suit is, broadly speaking, found in the prior art, by at least more or less substantial equivalents. But we find no reference in the prior art showing a complete anticipation either of the entire combination of either of the three claims in suit, or even of what we have spoken of as their distinguishing elements, viz. the inclusion of the strip-adjusting mechanism within a recess or chamber in the cover of the book arranged or adapted for being operated from the outside of the cover, without opening or uncovering the chamber containing such mechanism.

The reference regarded by defendant's expert as most clearly resembling the invention of the claims in suit is that of England—No. 194,230 (1877)—who discloses a spring within a recess of one cover of a file or binder for letters, periodicals, etc. The binding cords are attached to the free end of the spring, passing through eyelets in the binding edge of the cover and through an index secured to the opposite cover. A strap extends from the free end of the spring to the front edge of the cover. Claim 13 of the first Bushong patent reads literally upon England, although this is not true of claims 15 and 16. However, England does not in form or substance disclose the essence of Bushong's device. For example, England's strap has nothing to do with adjusting the tension of the binding strips relatively to the leaves, except that manually pulling upon it relaxes the tension of the spring; the strap serving also to bring together and fasten the two covers of the file when closed. It is in no proper sense the key of Bushong. The adjusting mechanism is not designed to preserve a uniform tension of the binding strips, nor does it effect such result. On the contrary, the mechanism is such that, necessarily, the greater the thickness of the contents of the file the greater the tension of the spring, and vice versa. Moreover, it is not clear that England's cords were "secured" to "loose leaves," except as the contents of the file are held between the members of a so-called "index"; that is to say, it is not clear that the cords pass through the filed papers. It plainly lacked utility as respects loose leaf ledger work, as it had little, if any, adaptability to use in connection with strips or cords carrying the detachable leaves of an otherwise substantially and permanently bound book.

Rosenthal, No. 583,335 (1897), disclosed in an expansible binding, "adapted to be used in connection with account books or with periodicals, or any other such books which require to be bound together," a series of removable leaves, their rear edges having rectangular notches (adapted to receive the binding strips) and perforations corresponding to those upon metallic bars placed at the rear margins of the leaves, both on the outside of the outer leaves and at intervals between the leaves; the bars having pins and holes registering with pins and holes in the other bars, as well as slots through which also the binding strips pass, thus holding the leaves and bars tightly together. He shows a pair of swinging covers (pivoted, respectively, to the two plates form-

ing the back of the book) and an adjusting mechanism for the strips situated in a recess in one of the covers. His adjusting mechanism (as shown by Fig. 4, herewith reproduced) consists of a notched bar (at-



tached to a crosshead to which the binding strips are fastened) made to slide through guides by the operation of a lever pivoted to the cover, whose notched end engages the teeth of the bar, and whose other end, for the purpose of such engagement or disengagement, is manually swung within the limits of a semicircular bar. But Rosenthal did not anticipate Bushong, for his adjusting mechanism was arranged to be operated only from the inside of the cover. Indeed, it would seem that his mechanism did not (in case of considerable variation in thickness of the book) effect a complete automatic adjustment of binder strip tension; it being necessary, in such case, to manually shift the point of attachment of crosshead upon binding strips.

Nott, No. 648,987 (1900), discloses (in a compressing or clamping device for the purpose of a temporary binder for loose sheets of paper or for account books) a base on which the sheets rest, having on the upper side, at the inner margin, a binding plate or clamp, with transverse perforations therethrough at the respective ends of the binding plate, through which perforations flexible bands, preferably of metal, pass either across the side edges of the sheets or through slots in the same, into a recess in the base, where they connect with carriages in the form of nuts upon a screw operated by a key without the chamber. Nott's device was not adapted to loose leaf ledger purposes. It was practically merely a clamping device, and not a book. It had no pair of covers, for its clamping member was in no sense a cover, and its base was not strictly such. While his adjusting device, which was merely for tightening the clamping strips, was operated from the out-

side, it was not in what would be called the cover (treating the device as a book), but in the back.

While the devices of England, Rosenthal, and Nott are by no means the only ones pertinent upon the questions of anticipation and invention, they are the most prominent; and unless anticipation is found in one or more of these devices, it is not, so far as appears from this record, to be found in the prior art. We think anticipation of the claims in suit is not shown.

The more serious question is whether these claims involve invention in view of the prior art. In view of that art and the history of the application in question in the Patent Office (including the applicant's acquiescence in the rejection of his original claim 1, and the amendment made to claim 16), the District Judge held that "the vital and novel feature of the invention embodied in each of the three claims in suit is the means for operating and the operation of the adjusting mechanism, contained within the chamber of the cover, from without the cover, and without opening or uncovering the chamber," and that the claims so restricted are valid.

[3] Taking the entire record into account, we are disposed to the view that these claims, as narrowly limited by the District Court, involve patentable invention. If every element was old, invention would still exist if the combination either produced a new and useful result or effected an old result in a new and materially better way. Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Ferro Concrete Constr. Co. v. Concrete Steel Co. (C. C. A. 6th Cir.) 206 Fed. 666, 669, 124 C. C. A. 466. Again, conceding that it would not have been invention merely to provide for operating Rosenthal's adjusting mechanism from the outside in connection with the method of construction and operation of his book as disclosed, nor merely to substitute a removable key for Nott's integral key, it does not follow that there was no invention in the conception of Bushong's device.

[4] Whether the inclusion of the novel features which were held to distinguish Bushong's conception involve invention, as distinguished from mechanical skill, is a question of fact. Herman v. Youngstown Co. (C. C. A. 6th Cir.) 191 Fed. 579, 582, 112 C. C. A. 185; Ferro Concrete Constr. Co. v. Concrete Steel Co., 206 Fed. at p. 668, 124 C. C. A. 466. As bearing upon this question of fact, it may be noted that Bushong made his first application nearly 6 years after the issue of Rosenthal's patent, nearly 3 years after Nott, and more than 25 years after England, without the complete adaptation of the devices of either of those patents to loose leaf binding strip ledgers; and notwithstanding the great development in the loose leaf binder art, especially since 1877, the record indicates that when the testimony in this case was taken no structure of the Rosenthal, England, or Nott patents was upon the market.

The structure which Bushong has produced (and to which the devices of the claims in suit here materially contribute) constitutes a loose leaf ledger (as distinguished from a mere clamping or compressing device, such as Nott), having binding strips (as distinguished from post, ring, or purely string construction), a pair of covers (as distinguished

from the base and clamp of Nott), into and between which covers the binding strips extend operating as hinges for the covers (as distinguished from the attachment of Rosenthal's covers to the back of the book), one of the covers having a recess therein (as distinguished from the back) containing the adjusting mechanism mentioned, this mechanism being completely operable from the outside (when the book is either open or closed) by means of a key (as distinguished from England, whose mechanism was not adjustable in the sense of the patent in suit, and from Rosenthal, whose adjusting mechanism was incapable of being operated from the outside), the whole comprising a complete, convenient, and permanently bound volume.

There are obvious advantages in a mechanism arranged to be operated only from the outside and by means of a key (as applied especially to commercial ledgers), first, in permitting complete and compact adjustment and alignment of the leaves; second, in retaining such alignment and preventing sagging when the ledgers are in storage, and when being handled back and forth in connection with their use; and, third, in the absence of a rigid, protruding end of an adjusting shaft, when not being actually operated. The utility of the device is beyond dispute, for not only Proudfit, but two other applicants besides Bushong, claimed in the interference proceeding priority of invention. Moreover, while the favor with which a device has been received by the public cuts no figure, where lack of invention is clear, such favorable reception may in a doubtful case determine the existence of invention. Cincinnati Traction Co. v. Pope (C. C. A. 6th Cir.) 210 Fed. 443, 449, 127 C. C. A. 175, and cases cited. A prominent blank book manufacturing company was so impressed with the value of Bushong's invention that it bought early in 1904 a half-interest in the patents and took similar interest in the manufacture. The binder was favorably received by the trade, and has continued to meet with favor. Indeed, it seems to be conceded that the ledgers of Bushong and Proudfit are in a class by themselves, without competition in their particular field, as distinguished from loose leaf binders of post, string, or ring construction; and the effect of this situation is not entirely overthrown by the fact that post binders, which are much less expensive than either Bushong's or Proudfit's, still supply 90 per cent. of the loose leaf ledger trade; nor by the fact that until the clamping device of Bushong's second patent was added his book was not highly successful commercially, because of the wear of the edges of the covers upon the binding edges of the leaves, and their consequent wear and displacement.

We are not impressed with the contention that a double patenting of the claims in suit resulted from the fact that the combination of claim 23 of patent No. 914,383 to Bushong contains as an element a cam in an adjusting mechanism, of a different nature from that of the patent in suit, arranged to be "adjusted from the outside of the cover," and that the combination of claims 18 and 25 of patent No. 878,340 to Bushong each contained as one element an adjusting member contained in the cover. This means, at most, that each of two prominently distinguishing elements of the claims in suit (but not both)

had been an element of a different patented combination; that is to say, that each of the two elements in question was old. The authorities cited do not in our opinion sustain the contention that double patenting resulted from such situation. We think the claims, construed and limited as stated, are valid.

Infringement of First Patent.—We think it clear that the claims in suit, if valid, are infringed. Defendant's binder has the swinging covers, binding strips to which the leaves are secured extending between the covers, an adjusting mechanism for the strips situated within a recess or chamber in one of the covers, and arranged to be operated from the outside of the chamber by means of a key, and without opening or uncovering the chamber. In both devices the covers swing on the binding strips as hinges. The prominent differences between the two structures are these:

(a) Instead of the adjustable back of Bushong, defendant employs a metallic, removable, spring back, only partially adjustable; the idea being to vary the width of the back to correspond with the thicknesses of the leaf-body. The form of back is not involved in the claims in suit.

(b) Plaintiff uses stiff leather binding strips, originally in the form of round thongs, latterly made flat, of double material, and stitched. Defendant uses two or more layers of thin, flexible, steel bands or ribbons. In both structures the binding strips are attached directly to a cross-head forming a part of the adjusting mechanism.

(c) In plaintiff's device a key inserted in the front edge of the cover engages the head of a screw shaft, whose revolution directly actuates the crosshead longitudinally to the cover. Defendant's device employs, in the place of a screw shaft, a bell crank and worm; a key inserted in the lower edge of the cover engages the head of the worm, the thread of which engages the geared segment of the short arm of the bell crank, the revolution of the worm (which lies transversely of the cover) moving the short arm of the bell crank, and thus the crosshead to which the longer arm of the crank is attached. We think defendant's worm and bell crank mechanism the equivalent of plaintiff's screw mechanism.

(d) Defendant's covers have a thin, metallic rear extension edge, a fraction of an inch wide, the metallic binding strips thus entering the thick covers a little forward of the strip-engaging perforations in the leaf-body. As a result of the feature last mentioned, together with the flexible springlike action of the binding strips, perhaps contributed to by the spring back, an arching of the springs is created, resulting, when the book is closed, in a convex arrangement of the rear edges of the leaves and a concave arrangement of the front edges; and, when the book is opened, a concave arrangement of the rear edges of the leaves, elevating the rear ends of the same; thus giving the distinctive appearance and operation of an ordinary spring-back bound book. The metallic springs probably are given, by the loosening of the adjusting mechanism, a slight thrusting effect, not so clearly received by plaintiff's leather strips. Defendant's steel strips in the movement stated may be an improvement upon plaintiff's leather strips, including their cover connection; but in our opinion they are in principle and spirit

an equivalent, and do not so far employ a different method, or perform a different function, as to escape infringement.

We think each of the three claims in suit infringed by defendant.

The Contempt Proceeding.

Previous to the decree below defendant's key-lock binder had a cardboard flap extending (from the rear edge of the cover) over the adjusting mechanism, cloth-hinged to the cover at a little distance from its outer edge, and otherwise unsecured, as shown by reduced photograph (Fig. 1) below. Since the decree and service of injunction defendant company has marketed the enjoined infringing devices in the same form as condemned by the decree, with this exception: It has cut the cover flap from its binders on hand, and instructed its selling agents to take the same course with those in their hands; its new binders have been made without the cover flap, as shown by reduced photograph (Fig. 2) below.

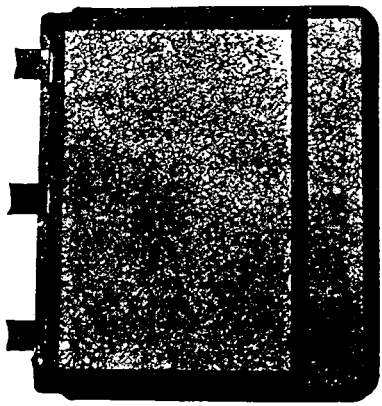


Fig. 1.

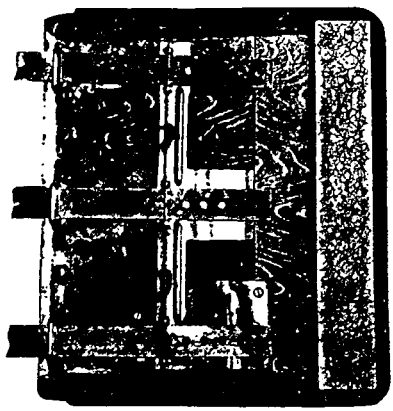


Fig. 2.

The District Court held the defendant company, its president, its vice president, and its secretary and treasurer guilty of contempt in so doing, and imposed upon each a fine of $150.

Plaintiffs in error insist that the removal of the cover flap avoids infringement, according to both the plain meaning of the patent and the District Court's construction of that meaning; that the call in the claims for a housing of the adjusting mechanism in an "internal recess or chamber" in the cover, coupled with the clause "arranged to be operated from the outside of the chamber without opening or uncovering the same" necessarily means a chamber "entirely inclosed within one cover of the structure," "one having a cover and one not already opened"; and that defendants, in removing the flap, "removed the cover with the internal recess or chamber"—that is to say, that they have thus removed the recess itself. It is urged that this conclusion necessarily results from the court's characterization of the novel feature of the invention embodied in the claims in suit as "the means for operating and the operation of the adjusting mechanism, contained

within the chamber of the cover, from without the cover without opening or uncovering the chamber." Further confirmation of this view is sought in the fact that the District Judge approved as substantially accurate a description by complainant's counsel of the mechanism of the patent, containing the statement that "the adjusting mechanism is entirely inclosed within the covered chamber"; and plaintiffs in error say that, now that the cover flap is removed, the recess containing the mechanism is not "internal even in the sense of being wholly contained within the inner surface of the cover." (It is in fact wholly contained within the inner surface of the cover, as defined by the upper surface of its framework and margins.)

The District Judge rejected this interpretation of his opinion and decree and the stated construction of the patent, and thus the claimed noninfringement by defendant's binder without the cover flap. We agree with the District Judge. We think defendant's interpretation sacrifices spirit to letter, substance to mere form. There is, we think, no merit in the suggestion that either a recess or a chamber must be "entirely inclosed." According to the dictionaries, the word "chamber" includes, not only a "compartment or inclosed space," but a "hollow or cavity," and a "recess" may be merely a "niche, alcove, or the like." "Internal" may mean only "situated or comprised * * * within an inner part or place." A chamber does not necessarily cease to be such by having an open door space or other opening therein. Not only do the claims say nothing about a "cover" for the mechanism, but no suggestion to that effect is found in either the drawings or the description of the invention. The description is only of a "rectangular cavity." Naturally a commercial ledger would be provided with some means for protecting the leaf body from the wear of the adjusting mechanism, and defendant's proposal to substitute a heavier flyleaf for the purpose suggests a view that such protection is the only advantage thought to be afforded by the cover flap. Its omission affects in no way the function, use, or operation of the mechanism. It scarcely need be said that the language of counsel, in describing plaintiff's mechanism, does not furnish a binding construction of the patent.

We think the claims interpreted according to their obvious meaning and as construed by the District Court call for an adjusting mechanism contained within a recess of the cover and arranged to be operated from the outside without the necessity of opening or uncovering the chamber; that is to say, without the necessity of access to the chamber from within for the purpose of such operation. Such is the reason and spirit of the invention as so construed. We find nothing in the Patent Office history, or in the distinction sought to be drawn between the patents of Bushong and Rosenthal, conflicting with this interpretation. We think the omission of the cover flap, at the most, a merely colorable change, and that it did not avoid infringement.

[5] Were plaintiffs in error properly convicted of contempt? Each had actual knowledge of the decree and injunction. All actively participated in the changing and marketing of the infringing

binders. The two respondents who were not parties to the original suit were thus properly parties to the contempt proceedings. Ex parte Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110.

We assume, in the absence of objection, that the petition is broad enough to cover contempt proceedings, both civil and criminal. But see, on this subject, Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 441, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; In re Kahn (C. C. A. 2) 204 Fed. 581, 123 C. C. A. 107; Phillips Co. v. Amalgamated Ass'n (D. C.) 208 Fed. 335, 342. Both aspects may properly be included in one proceeding. Kreplik v. Couch Patents Co. (C. C. A. 1) 190 Fed. 565, 571, 111 C. C. A. 381; Merchants', etc., Co. v. Board of Trade (C. C. A. 8) 201 Fed. 20, 31, 120 C. C. A. 582. The order in the instant case provided that one-half the fines imposed be paid to complainant as reimbursement for its damages, costs, and expenses in the contempt proceedings, including damages on account of the sale of the infringing binders in violation of the orders of the court. The individual defendants were ordered committed until payment of their respective fines, and execution was awarded against the corporation defendant for its fine. The order was of a civil nature so far as it was for plaintiff's benefit, as it clearly was to the extent of one-half the fines. True, plaintiffs in error were advised by counsel that the removal of the cover flap avoided infringement; but advice of counsel and good-faith conduct do not relieve from liability for a civil contempt, although they may affect the extent of the penalty. It is clear that the order, so far as it adjudged compensation to defendant in error here, was amply justified. Board of Trade v. Tucker (C. C. A. 2) 221 Fed. 305, 307, 137 C. C. A. 255.

As to the one-half of the fines impliedly to be paid to the United States purely as punishment, the judgment was of a criminal nature. Bessette v. W. B. Conkey Co., 194 U. S. 324, 332, 24 Sup. Ct. 665, 48 L. Ed. 997; Re Christiansen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072; Gompers v. Bucks Stove & Range Co., supra; Re Merchants' Stock Co., 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584; Grant v. United States, 227 U. S. 74, 78, 33 Sup. Ct. 190, 59 L. Ed. 423; Brown v. Detroit Trust Co. (C. C. A. 6) 193 Fed. 622, 623, 113 C. C. A. 490; and cases cited. A willful and contumacious disregard of the injunction of a court is a criminal contempt; that is to say, where it indicates a contempt of the court and a disregard of its authority. Bessette v. W. B. Conkey Co., 194 U. S. at page 329, 24 Sup. Ct. 665, 48 L. Ed. 997; Doyle v. London Guarantee Co., 204 U. S. 599, 606, 27 Sup. Ct. 313, 51 L. Ed. 641; Merchants', etc., Co. v. Board of Trade, 201 Fed. at page 24, 120 C. C. A. 582. A mere violation of an injunction, however, if in a good-faith belief that the order is being properly interpreted, and without any intention to disobey or set at naught the order of the court, is not a criminal contempt, even though actuated by a desire to find a lawful means of avoiding infringement. But while in proceedings for criminal contempt the good faith of the respondents is material, as bearing upon the question whether the disobedience was willful and contumacious or otherwise, yet as the case is here on writ of error (and that is the only method of

review open—Bessette v. W. B. Conkey Co., supra; Re Merchants' Stock Co., supra; Grant v. United States, 227 U. S. at page 78, 33 Sup. Ct. 190, 57 L. Ed. 423) we are limited to the consideration of questions of law. The decision of the court below upon the facts is conclusive as to them (Bessette v. W. B. Conkey Co., 194 U. S. at page 338, 24 Sup. Ct. 665, 48 L. Ed. 997), unless, indeed, the record should permit a conclusion that the finding is unsupported by evidence.

[6] The primary question thus is, as respects the criminal feature of the order, whether the District Judge has found expressly or by necessary implication that the contempt adjudged was in fact willful and contumacious, and in purposeful disregard of the court's order, as it clearly would have been had respondents continued to market the condemned binders without change therein. Re Star Spring Bed Co. (C. C. A. 3) 203 Fed. 640, 122 C. C. A. 36. While the distinction between the civil and criminal features of the order is not clearly raised on the record, we think that under the authority existing in criminal cases to consider, even in the total absence of objection or exception, a case of plain error in a vital matter (Wiborg v. United States, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 221, 25 Sup. Ct. 429, 49 L. Ed. 726; Crawford v. United States, 212 U. S. 183, 194, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Morse v. United States [C. C. A. 2] 174 Fed. 539, 544, 98 C. C. A. 321, 20 Ann. Cas. 938), we should interpret assignments 1, 2, and 8 broadly enough to cover the point stated. The finding contained in the order is only "that the respondents * * * are guilty of contempt." The opinion contains no finding of criminal contempt unless in the paragraph we quote in the margin.[2]

Counsel for plaintiff in error, having in mind the sentence beginning with the words, "Their avowed purpose has been to avoid infringement," say that "it would seem that the court regarded the respondents as having been in some sense contumacious, or disposed to set at naught the order of the court." But, taking the entire opinion into account, we seriously doubt whether the court intended to formally find respondents guilty of a willful, intentional, and contumacious disregard of the court's authority, constituting a criminal, as distinguished from a civil, contempt, especially in view of the fact that re-

[2] "Respondents make no attempt to plead ignorance as an excuse or the advice of counsel as a justification for their conduct. Their acts, whether innocent or otherwise, have been carefully planned and deliberately performed with a full understanding of the consequences to complainant and to themselves. They may have been mistaken as to the law of the case, but not as to the facts. Their avowed purpose has been to avoid infringement by a very narrow margin, to evade and sidestep the decision and mandate of this court with the least possible effort and inconvenience to themselves, and thus to render complainant's victory barren of beneficial results. Have they succeeded? Or, to put the question in a different form, does the slight modification or mutilation of the binder, effected by removing the cover flap, or manufacturing it without such flap, avoid infringement of the three patent claims in suit as such claims have been construed and interpreted by the opinion and decree of this court? If it does, the order of the court has not been disobeyed. If it does not, the injunction has been violated, and such violation is without excuse or justification."

spondents admittedly marketed the binders in question openly and upon the advice of reputable counsel that the change made avoided infringement, and was strictly within a proper interpretation of the decree. And unless the court's intent to find the contempt willful, intentional, and contumacious is reasonably clear, the feature in question should not be sustained, having in mind its nature as a criminal judgment, and the fact that it does not appear that the criminal aspect was expressly brought to respondents' attention, or treated separately from the civil feature, as was done in Kreplich v. Couch Patents Co., supra. We are therefore constrained to the view that the criminal portion of the judgment should be reversed. As to the effect of reversal in part, a similar, but not identical, question was passed without decision in Re Merchants' Stock Co., supra; but, in view of the separable nature of the civil and criminal features, we think the order, so far as it is purely remedial, should be affirmed.

The Second Patent.

[7] In Bushong's first binder the thick rear edges of the covers lay directly over the binding edges of the leaf body, and in the process of opening and closing the book bore in direct frictional engagement upon the binding edges, thus tending to crowd the sheets rearwardly of the ends of the lids, and, if the binders were drawn taut, to give a "jerky movement," due naturally to the varying tension of the binding strips. Bushong's idea when the binder was first conceived was "to put two clamping bars pivotally hinged on the lids to protect the sheets from tearing out." His first binder omitted this feature, because at the time he "could not scheme out a way for hinging the clamping bars to the ends of the lid, and the proper arrangement of the binding cords in relation to the clamping bars." The distinguishing feature of patent No. 851,267 is Bushong's solution of this problem. He cut off the rear edge of each cover, so that it would not extend over the binding edges of the leaves, and attached to the rear end of each shortened cover a clamping bar; each bar being, as stated in the specification, "pivotally secured" by hinges to the cover, the bars being "preferably flat on their inner or clamping faces" and "preferably rounded on their rear or outer faces," so that "they may rock on their journals without engaging the inner edges of the covers." The clamping bars contain "transverse perforations" (through which the binding cords pass), terminating in "transverse slot-like cavities in the rear portions of the clamping bars to permit the same to rock freely on the binding cords." The specification states that "thus arranged, the covers may be opened without communicating the movement to the clamping bars"; that the "strain upon the binder and upon the leaves is reduced to a minimum"; and that the danger of tearing the leaves "which are thus clamped along their entire rear edge" is similarly reduced.

The claims in suit are 36, 39, 46, 47, 48, 49, 50, 51, and 52. Claims 36, 39, and 47 (printed in the margin [3]) are fairly typical. The par-

[3] "36. The combination with the covers; clamping bars pivotally connected to said covers; binding cords arranged through said clamping bars secured

ticular differences between the claims by groups may be thus summarized: Claims 36, 46, 47, 49, 51, and 52 specify "clamping bars pivotally connected to said covers." [4] Claims 36, 39, and 46 provide for openings of such size through the clamping bars as to permit their rocking upon the cords independently of the covers, and the consequent independent movement of the covers and clamping bars when opening or closing the covers or the clamped sheets. Claims 47, 49, 50, and 52 provide for openings in the bars for the binding cords of such size as to permit rocking of the clamping bars thereon, without special mention, however, of the independent movement of the covers and clamping bars with respect to each other.

Plaintiff's means for clamping the sheets thus embrace thick, rigid bars directly hinged to the covers, directly and positively bearing upon the binding edges of the sheets (not reached by the covers proper), the slots for the binder cords formed by the cutting away of the upper and inner surfaces of the bars operating to assure substantial identity of axial movement of cover hinges and binding cords, and thus to accomplish measurable uniformity of binding tension, in spite of the size, structure, and method of operation of the clamping members. The covers proper never bear directly upon the sheets, and are never over the binding edges of the sheets when the book is closed or when entirely open. On the other hand, the thin rear edges of defendant's covers extend over the binding edges of the leaves and bear directly upon thin flexible, metallic plates strung through openings therein upon the binding strips, and always lying directly between covers and leaf body. The covers are not hinged except by the binding strips. The clamping bars of the patent in suit are wholly lacking, unless the metallic plates mentioned are their equivalent.

The District Judge held the claims in suit valid, but not infringed. We agree with this conclusion. In our opinion, defendant's structure differs from the device of plaintiff's patent not only in form and appearance, but in essential principle. It lacks, in our judgment, not only the pivotal connection between the clamping bars and covers, but also

to one of said covers, the openings in said clamping bars for said binding cords being of such size as to allow the clamping bars to rock thereon independently of the covers whereby the covers and the clamping bars may move independently in opening or closing the covers or the sheets clamped by said bars; and means for adjusting said binding cords carried by the opposite cover."

"39. The combination with the covers; clamping bars; binding cords secured to one of said covers, arranged through said clamping bars, the opening in said clamping bars for said binding cord being of such size as to permit the rocking of the clamping bars thereon independently of the covers whereby the covers and the clamping bars may move independently in opening or closing the covers or the sheets clamped by said bars; and means for adjusting said binding cords carried by the opposite cover."

"47. The combination of the covers; clamping bars pivotally connected to said covers; binding cords arranged through said clamping bars and secured to one of said covers; the openings in said clamping bars for said binding cords being of such size as to permit the rocking of the clamping bars thereon and a screw for adjusting said binding cords carried by the opposite cover said binding cords being connected to said cover independently of said clamping bars; for the purpose specified."

[4] Claim 52 reads: "Covers pivotally connected to clamping bars."

the rocking movement of clamping bars upon binding cords and the independent movement of covers and clamping bars within a fair construction of the patent. While the movement of defendant's cover edge in the slightly concaved "wear plates" is in a sense pivotal (as was to a slight extent the movement of Bushong's cover edge on the binding edges of the leaves under his first construction), yet such movement is not in a proper sense the equivalent of the pivotal connection of plaintiff's patent, which is obviously the direct and positive hinged connection between clamp and cover; and while the openings in defendant's wear plates are slightly larger than the binding strips which pass through them, the slight movement which results when the book is manipulated, although in a sense rocking, is not the rocking and independent movement of plaintiff's bars, whose form is such as to require the peculiar slot specified in order to maintain constant pivotal relation. The openings in defendant's wear plates are not, in our judgment, in a proper sense the equivalent of the transverse slotted openings of plaintiff's bars. True, the object of both plaintiff's "bars" and defendant's "wear plates" is to prevent the covers from working the sheets from the binding strips when the covers are swung; and it is equally true that neither plaintiff's nor defendant's binders would be entirely successful commercially without some means of correcting this evil. It is also true that defendant's so-called wear plates are clamped between the covers and the leaves, and are the means through which the pressure of the cover edge is communicated to the leaf-body; but plaintiff's patent does not cover broadly the use of clamping means of any and every kind to protect the binding edges and slots of the sheets. Defendant's wear plates, moreover, are more accurately characterized as *clamped between* the cover and the leaves, as distinguished from the active and positive clamping effect of plaintiff's bars. Defendant has retained the covers extending over the binding edges of the sheets (rejected by Bushong after trial) and, by making the cover edges thin, has retained their positive and direct frictional bearing, as a clamping means, upon the leaf body, protected only by what is, in effect, a metal reinforcement of bearing surface of leaf and strip slot edges—which, so far as appears, would be equally effective if rigidly attached to the flyleaf or even to the outer sheet, and which, again so far as appears, Bushong could not effectively employ while retaining, as he did, his thick cover edges. It is thus not highly significant that Proudfit in his patent characterized what defendant now calls "wear plates" as "bearing strips," "binding strips," "binding bars," and "binder bars." Their function and effect are independent of nomenclature.

We conclude that although the claims in suit may perhaps be made literally to read upon defendant's structure, such result is accomplished only by a strained and unnatural interpretation of the claims, in violation of the spirit of the invention as disclosed by the patent.

The Third Patent.

[8] The distinguishing feature of patent No. 878,340 is the so-called "quick-adjusting" mechanism, which as illustrated and as manu-

factured, is this: One end of each binding cord is attached to a crossbar in one of the covers, mounted upon a ratchet or rackbar adapted to be engaged by a pawl seated upon the crossbar; the free end of the blade spring pivoted to the crossbar when swung in one position over the pawl holds it in engagement with the rackbar (thus preventing return movement of the crossbar); when the blade spring is swung to its other position it holds the pawl out of engagement. The blade spring is provided for its manipulation with a button-like finger piece projecting through a slot in the inner wall of the cover; another finger piece arranged to drop through the slot when not in use is pivoted on the crossbar; by grasping this last-named finger piece the bar may be moved along the rack to tighten the cords.

The binder containing this quick-adjusting mechanism may or may not contain (in the other cover) the key-locking mechanism of the first patent. The claims alleged to be infringed are Nos. 13, 14, 18, 19, 22, 23, and 24. The defenses are that claim 19 is invalid and that none of the other claims are infringed. The District Court held claims 13, 14, 19, and 24 valid and infringed, and claims 18, 22, and 23, valid, but not infringed.

Claims 22 and 23 are so clearly not infringed that they may be disposed of in a few words. Each of these two claims obviously contains as an element a crossbar in each of the two covers, to which crossbar the respective ends of the binding cords are secured. Neither of defendant's structures carries both the quick-adjusting and the key-adjusting devices. Neither has a crossbar (to which the binding strips are secured) in more than one cover, except defendant's binder style 2, which has in one cover its key-adjusting worm and crank mechanism, and in the other cover a crossbar to which the binding strips are attached, which does not contain the mechanism of the patent under consideration, but only a so-called "flop" mechanism, permitting merely a slight relaxation of the binding strips.

Laying aside for the present claims 18 and 19, and considering the remaining three claims: We print claim 13 in the margin.[5] Claim 14 differs from claim 13 in omitting the finger piece of the crossbar. Claim 24 differs from claim 14 (a) in describing the element to which the binding cords are connected as "an adjustable member" mounted on the ratchet bar, instead of as a "crossbar"; and (b) in omitting the "chamber" in one of the covers. Defendant's mechanism differs from the mechanism of the patent only in these respects: It has steel binding strips instead of leather; the crossbar to which the strips are attached is mounted upon a rackbar which has two rows of teeth; the locking element is a small plate mounted on the crossbar, having on its lower side teeth at each end to engage the double rack; the handle is pivotally and eccentrically mounted over the detent plate; when the handle is turned down forward and lying flat its lugs bear upon the

[5] "13. The combination with the covers, one of said covers having a chamber therein, of binding cords; a crossbar to which said binding cords are secured arranged in said chamber in said cover; a ratchet bar arranged in said cover; a pawl carried by said crossbar; means for disengaging said pawl from said ratchet bar; and a finger piece on said crossbar for the purpose specified."

plate, forcing it into engagement with the rack and locking against movement in either direction; when the handle is raised a spring underneath the plate is released and holds the latter out of engagement, permitting the crossbar to be moved by pulling directly upon the handle.

Infringement of claims 13, 14, and 24 is denied on the grounds: (1) That defendant's steel binding strips are not the binding cords of the claims; and (2) that defendant's mechanism is not the equivalent of plaintiff's pawl and ratchet bar. It follows from what we have already said in discussing the question of infringement of the first patent that, in our opinion, defendant's steel strips are the equivalent of plaintiff's binding cords.

We also agree with the District Court that defendant's mechanism, in all material and essential respects, operates in the same way, to accomplish the same result, as plaintiff's ratchet bar and pawl. True, a ratchet bar and pawl, according to strict definition and as plaintiff's binders are made, locks only against return movement; while defendant's rack and detent plate lock against movement in either direction; and again, plaintiff's pawl is capable of locking automatically as each tooth of the rackbar is passed, while defendant's mechanism does not automatically lock. But when the object and effect of the locking and releasing mechanism is considered, the differences stated are, in our opinion, in form rather than in substance; and as they produce no substantially new result infringement is not escaped (Veneer Mach. Co. v. G. R. Chair Co., recently decided by this court, and cases there cited), for the most (if not the only) important locking is against return movement; and while plaintiff's mechanism permits step by step locking, it is at least equally natural and convenient not to lock the pawl (previously released, as it must be to permit the slackening of the binding cords) so as to re-engage the rack until the cords are pulled taut.

[9] Turning to claim 18: It reads:

"The combination of the covers, one of said covers having a chamber therein; binding cords; an adjustable member to which said binding cords are secured, arranged in said cover; means for securing said adjustable member in its adjusted positions; and a finger piece pivoted on said member adapted to be swung down into the chamber when not in use."

The District Judge held claim 18 not infringed, for the reason that one of its essential elements is lacking in defendant's structure. We agree with this conclusion. The claim contains as one element "means for securing said adjustable member in its adjusted position," and as another element "a finger piece pivoted on said member *adapted to be swung down into the chamber when not in use.*" In defendant's binder the one piece performs the functions both of a handle for pulling the binding strips taut and for securing and releasing the clamping mechanism, by turning the lugs so that they bear upon the detent plate. If defendant's device in question performs the functions of both elements of the claim, infringement would not be avoided by the mere fact that the separate pieces of plaintiff's mechanism were combined into one unitary structure, so long as each element operated in sub-

stantially the same way to produce substantially the same result. Caster Co. v. Caster Co. (C. C. A. 6), 113 Fed. 162, 168, 51 C. C. A. 109; Eames v. Worcester Polytechnic Institute (C. C. A. 6) 123 Fed. 67, 72, 60 C. C. A. 37, and cases cited; Natl. Tube Co. v. Aiken (C. C. A. 6) 163 Fed. 254, 260, 91 C. C. A. 114; Herman v. Youngstown Car Mfg. Co. (C. C. A. 6) 191 Fed. 579, 586, 112 C. C. A. 185; Gould v. Cincinnati Shaper Co. (C. C. A. 6) 194 Fed. 680, 685, 115 C. C. A. 74. And were it not for the clause in the claim which we have italicized above, we should probably be disposed to think that infringement had not been avoided. But a necessary element of the claim is that the finger piece be "adapted to be swung down into the chamber when not in use." In defendant's structure the so-called "finger piece" is adapted to be swung down into the chamber *only* when *in use*.

[10] True, this "use" is in locking the adjusting mechanism; but if it be said that the claim means that the finger piece be adapted to swing down into the chamber when not in use as a finger pull in drawing the binder strips taut, the answer seems obvious that the only object of swinging into the chamber the finger piece of the patent is to keep it out of the way when performing no function; and we cannot think that a structure which *requires* the swinging of the finger piece into the chamber in the performance of one of its functions, viz. locking the mechanism, and whose unlocking imperatively requires the removal of the finger piece from its "swung" position, is within the spirit even if within the letter of the claim. We think, in other words, that defendant's binder lacks the "finger piece * * * adapted to be swung down into the chamber when not in use"; and a claim is not infringed if one of its elements is omitted without the substitution of an equivalent. Cimiotti Unhairing Co. v. Amer. Fur Refining Co., 198 U. S. 399, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100; Union Paper Bag Co. v. Advance Bag Co. (C. C. A. 6) 194 Fed. 126, 138, 114 C. C. A. 204; Underwood Typewriter Co. v. Royal Typewriter Co. (C. C. A. 2) 224 Fed. 477, 479, — C. C. A. —; Natl. Cash Register Co. v. Gratigny (C. C. A. 6) 213 Fed. 463, 465, 130 C. C. A. 109. We think the equivalent lacking.

[11] Claim 19, which is the broadest of the claims in suit, is printed in the margin.[6] It is assailed as invalid (a) because anticipated by Rosenthal, if the longitudinal bar of the Bushong patent is regarded as a guide only; (b) for lack of invention over the prior art generally; and (c) because of prior invention by Proudfit, if the claim is construed as requiring the longitudinal bar to act as an anchor to the crossbar as well as a guide.

It will be seen that the claim reads directly upon Rosenthal (see illustration in this opinion), provided his guides, which longitudinally engage the extension of his crossbar, are the equivalent of the "bar on which said crossbar is slidably mounted" of claim 19; for Rosenthal's notched bar is clearly an extension of his crossbar (especially in

[6] "19. The combination with the covers, of binding cords; a crossbar to which said binding cords are secured; a bar on which said crossbar is slidably mounted carried by one of said covers; and means for securing said crossbar in its adjusted position on said bar."

view of the statement in his specification that it may be attached directly to the crossbar without the interposition of the spring); and in finding infringement of other claims of the patent in suit we have regarded defendant's extension of its crossbar as the crossbar of the patent. Manifestly, mere reversal of parts so as to make Rosenthal's notched bar (crossbar extension) run *over and upon* instead of *through* his guides would not avoid infringement. Duner v. G. R. Railway Co., C. C. A. 6, 171 Fed. 863, 866, 867, 96 C. C. A. 531. If, then, the "bar on which" the "crossbar is slidably mounted" is merely a guide for the movement of the crossbar in tightening and loosening the strips—unless, in other words, we can construe the claim as requiring the bar to carry an element of the locking mechanism—we think the claim anticipated by Rosenthal; for a bar which operates only as a guide would be but the equivalent of Rosenthal's guides. In view of the facts that 12 of the claims of Bushong's third patent expressly provide for a sliding of the crossbar on the ratchet (while others of the claims omit this feature), and that in his specification Bushong not only did not limit himself to his improvement as illustrated and described, but expressly claimed it "broadly," we think we are not justified in construing the broad claim in question as requiring that the bar on which the crossbar slides shall carry one element of the locking mechanism—notwithstanding in all of Bushong's reductions to practice his longitudinal bar performed that office. We think to so construe the claim would violate the general rule which forbids writing an element into a claim for the purpose of narrowing it, and thus making it valid as against objection that it is too broad in view of the prior art. McCarty v. Railroad Co., 160 U. S. 110, 116, 16 Sup. Ct. 240, 40 L. Ed. 358; Scaife v. Falls City Woolen Mills Co. (C. C. A. 6) 209 Fed. 210, 213, 126 C. C. A. 304; Natl. Cash Register Co. v. Gratigny (C. C. A. 6) 213 Fed. 463, 467, 130 C. C. A. 109; Veneer Mach. Co. v. G. R. Chair Co., 227 Fed. 419; — C. C. A. —, decided by this court November 2, 1915. For the reasons stated, we think claim 19 invalid. It is thus unnecessary to consider the alleged priority of invention by Proudfit.

The decree below awarded injunction against defendant Proudfit, but denied his liability to account. This was the correct disposition. Proudfit's relation to the defendant company, including his organization and management of it, justified his being made defendant; but no individual infringement on his part, either before or after the company's organization, is shown. The paragraphs of the answers relied on do not amount to admissions of such infringement.

It results from these views that the decrees, so far as appealed from, in Nos. 2601, 2602, and 2604, should be affirmed, with costs to appellee or appellees respectively; that the decree, so far as appealed from, in case No. 2603, should be reversed, so far as it found claim 19 of the third patent valid and infringed, and that cause remanded to the District Court, with directions to enter decree of affirmance as to claims 18, 22, and 23; also affirming as to claims 13, 14, and 24, provided complainant within 30 days (or such further time as may be given by the District Court) after the filing of the mandate below file in the

court below a certified copy of a due disclaimer under claim 19, according to the practice recognized in Herman v. Youngstown Co., 191 Fed. 579, 587, 112 C. C. A. 185, and Houser v. Starr, 203 Fed. 264, 275, 121 C. C. A. 462; and that in No. 2645 the order should be affirmed, except as to the criminal feature, and as to that feature should be reversed and remanded, with directions to award a new trial—the costs of this court upon the writ of error to be divided.

On Rehearing.

PER CURIAM. Rehearing is asked upon the ground that the patent in suit (No. 941,757) is invalid for lack of statutory oath specially directed to the particular claims in suit, which were added by way of amendment to the original application.

[12] We think the following considerations make this asserted ground of invalidity wholly untenable:

The subject-matter of the three claims in suit was, in our opinion, sufficiently disclosed by the original application, which was supported by the usual oath. Claim 13 was first introduced in another application made by Bushong, and was involved in interference proceedings between the latter and other applicants; it was later included in the application for the patent in suit, was made the subject of interference proceedings therein between Bushong, Proudfit, and two other applicants, and priority was awarded Bushong upon full hearing and consideration and through the successive actions of the examiner of interferences, the board of examiners in chief and the commissioner. Claims 14, 15, and 16, which are of scope similar to claim 13, were thereupon added.

It is, we think, fairly open to presumption that the Patent Office required no supplemental oath in connection with the amendment because of the disclosure of the invention in the application for the patent in suit, and because satisfied that the subject-matter of the amendment was invented by Bushong before the original application for the patent in suit was presented, and was a part of the original invention covered by that patent; and that Bushong was the first and sole inventor of such subject-matter—subjects with respect to which we entertain no doubt.

The history of the Patent Office proceedings (including the interference) precludes any suggestion of ignorance or of personal nonparticipation on Bushong's part with respect to the amendment by the addition of the claims in suit. Moreover, lack of supplemental oath was not raised in this cause by the pleadings.

These considerations, in our opinion, effectually differentiate the cases relied upon in support of the asserted invalidity.

The petition for rehearing is denied.

WARD BAKING CO. et al. v. WEBER BROS. et al.

(Circuit Court of Appeals, Third Circuit. January 17, 1916.)

No. 2010.

1. APPEAL AND ERROR ⊜874(2)—INFRINGEMENT SUIT—APPEAL FROM INTERLOCUTORY DECREE—SCOPE OF REVIEW.

Under Judicial Code (Act March 3, 1911, c. 231) § 129, 36 Stat. 1134 (Comp. St. 1913, § 1121), which authorizes an appeal from an interlocutory decree granting or refusing an injunction the complainant in an infringment suit in which an injunction is prayed for may appeal from an interlocutory decree, which dismisses the bill as to certain of the claims sued on, either on the ground of invalidity or noninfringement; but such appeal brings up for review only that part of the decree relating to such claims and specified as error, and defendant can have the other parts of the decree reviewed only by a cross-appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3533; Dec. Dig. ⊜874(2).]

2. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—MACHINE FOR WORKING AND SHAPING DOUGH.

The Corby & Corby patents, reissue patent No. 11,751 (original No. 590,133), for a machine for working and shaping dough, claims 8 and 13, *held* not infringed; No. 611,563, for improvements on such machine, claims 1, 2, 4, 5, and 16, *held* void for lack of invention; and No. 649,437, claim 6, and No. 672,414, claim 13, also for improvements *held* not infringed, and claims 10, 11, and 16 of the latter void for lack of invention.

Appeal from the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Suit in equity by the Ward Baking Company and the Thomson Machine Company against Harry J. Weber and Frederick W. Weber, trading as Weber Bros., and the J. H. Day Company. From the decree, complainants appeal. Affirmed.

The following is the opinion of the District Court, by Haight, District Judge:

The Ward Baking Company, one of the plaintiffs, is the owner of, and the Thomson Machine Company, the other plaintiff, is the exclusive licensee to manufacture and sell under, the following patents, which were each issued to William S. and Charles I. Corby, viz.: Reissue No. 11,751, dated June 20, 1899; No. 611,563, dated September 27, 1898; No. 649,437, dated May 15, 1900; and No. 672,414, dated April 16, 1901. It is alleged that a machine manufactured by defendant the J. H. Day Company, and used by the defendants Weber Bros., infringes the following claims of these patents, viz.: Claims 6, 7, 8, 9, 11, 12, 13, 15, and 17 of reissue No. 11,751; claims 1, 2, 4, 5, and 16 of No. 611,563; claim 6 of No. 649,437; and claims 10, 11, 13, and 16 of No. 672,414. All of the patents relate to a machine for working and shaping dough. The reissued patent is the basic one; the others covering merely variations and improvements thereof.

J. H. Day, to whose business the J. H. Day Company succeeded, had originally been licensed by the patentees to manufacture and sell dough-moulding machines under the patents in suit. Subsequently the patents were transferred to one of the predecessors in title of the Ward Baking Company, to whom Day also transferred his rights in the patents. In 1908 the J. H. Day Company entered into an agreement with the predecessor in title of the Ward Baking Company, whereby the former was to manufacture and sell the dough moulders and pay the latter a royalty. A number of machines

were manufactured under this agreement. It was later superseded by the exclusive license, granted in 1911 to the C. A. Thomson Machine Company, whose name was subsequently changed to the Thomson Machine Company. This latter company had been manufacturing and selling a dough-moulding machine in competition with the machine of the patents in suit, and in 1910 a suit was instituted in the Eastern District of Pennsylvania by the predecessor in title of the Ward Baking Company against the C. A. Thomson Machine Company for an alleged infringement of reissued patent No. 11,751. This suit was settled, and the exclusive license before mentioned, granted to the C. A. Thomson Machine Company. In 1912 the C. A. Thomson Machine Company, having learned that the Day Company was making a machine which it considered infringed the patents in suit, caused a notice to be sent to the latter company to that effect, and called upon it to refrain from further infringement. Thereafter this suit was instituted.

The machine of the patent was designed to be used in one of the processes of making bread on a large scale. After the dough has acquired the proper degree of lightness, it is separated into small masses, to be made into loaves for baking. It is the design of the machine of the patent to knead and shape such masses. The machine of the reissued patent may be briefly described thus: Upon a suitable frame a rigid table is constructed, at each end of which is mounted a roller, and over the rollers an endless belt or apron is passed, the upper part of which rests upon and travels over the table. Above the table and the belt is a yieldingly supported pressure board held in place by suitable devices, with means provided for adjusting it toward and away from the table and belt. It is between this pressure board and the belt that the dough is kneaded and shaped as it is carried along by the belt. The batch of dough which is to be so converted into a loaf first passes between a pair of rollers, mounted at the forward end of the frame, by which it is sheeted. At the front entrance of the space between the top of the belt and the under side of the pressure board is a device referred to in the patent as a "curler." Its function is to engage the front end of the dough sheet after it has passed between the sheeting rollers onto the carrying belt and retard it sufficiently to start it coiling or rolling up so that the sheeted dough will pass into the space between the traveling belt and the pressure board (which space is greater than the thickness of the sheeted dough) in a coiled or thickened condition, and thus will be kneaded and shaped into a loaf. The curler of the reissued patent is not an integral part of the pressure board. It is yielding, so that, as the dough sheet, which is engaged by it, is rolled up or coiled, it rises out of the way and thus allows the coiled or rolled-up mass to pass into the passageway between the pressure board and the belt. It normally projects into the path of the advancing dough sheets, so as to constrict or narrow the width of such passageway. The "curler" is an element of each of the claims in suit.

The defenses are stated, in defendants' brief, to be as follows: That the reissued patent is void because no statutory ground for reissue existed; (2) that each patent is void for want of novelty; (3) that each is void for want of invention; and (4) that the defendants' machine does not infringe. Several other matters are also apparently urged as defenses, or as reasons why the relief which the plaintiffs seek should not be granted in equity. These will be first considered, and then the main defenses in the order stated.

1. It is contended on behalf of the defendants that the reissued patent is invalid because the description mixes up the new and old, and does not describe what the invention really is. Evans v. Eaton, 7 Wheat. 356, 5 L. Ed. 472, and Jacobs Mfg. Co. v. Almond Mfg. Co., 177 Fed. 935, 101 C. C. A. 215 (C. C. A. 2d Cir.), are cited in support of this contention. It is also urged that the patent is void because the specification "by ambiguity and a needless multiplication of nebulous claims is calculated to deceive and mislead the public." In support of this Carlton v. Bokee, 17 Wall. 463, 21 L. Ed. 517, is cited. These contentions may conveniently be considered together. It is quite true that the specification does not point out what elements of the machine were old, but the invention and patent relate, not to a single element or an improvement on an existing machine, as in one phase of Evans v. Eaton,

supra, but to a combination of elements, producing as a whole, as is claimed, an entirely new device. What the patentees claimed as their invention are the combinations set forth in the respective claims; the devices of which the machine is composed are specifically described, their mode of operation given, and the new and useful result to be accomplished is pointed out. Unless defective in other particulars, the specification is therefore sufficient. Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235, Parks v. Booth, 102 U. S. 96, 26 L. Ed. 54. If in fact the combinations claimed to be new are not so, or if the invention is merely an improvement on an old device, the patent is void on other grounds. Nor can I perceive that the description of the invention is not "in such full, clear, concise, and exact terms as to enable any person skilled in the art * * * to make, construct * * * and use the same." Rev. Stat. § 4888 (Comp. St. 1913, § 9432). The important feature of the invention, so far as the claims in suit are concerned, is the "curler." Not all of the claims of the patent however, include this as an element of the combination. It is stated in the specification that some of the advantages of the invention may be retained in a machine without a curling device. Because of this statement in the specifications, counsel for plaintiff seems to contend that the further description of a curler in the specifications makes the latter ambiguous and indefinite. This clearly is without merit. The curler is a very essential element of some of the claims, whereas it is not included in others. As it was an essential part of some of the claims, it was necessary to be described; but the inventors pointed out that there were other combinations which were claimed and in which the curler formed no part. Exception is also taken to the explanation of the meaning of the term "curler." The curler is first described thus: "Adjacent to the front end of the pressure board *E*, we arrange a yielding pressure device *I*, under which the dough must pass before it enters the space between the belt and the board *E*, and which operates to curl or fold over the advancing end of the mass of dough, and which from its function we term the 'curler.'" Then follows a description of the preferable form of the curler and the manner and mode of its operation. Later on the description contains this: "By the term 'curler,' as employed in this case, we refer to a device which effects a curling, rolling, or folding over or other thickening of the forward ends of the dough masses, which device is untimed in its operations relative to the other moving and operative parts of the apparatus so that in operation it is always in position and ready to act upon the dough masses, whether they be delivered rapidly or slowly, or at regular or irregular intervals." It is urged that these two provisions make the meaning of the curler indefinite and ambiguous. It should, perhaps, be noted that the latter provision was not in the original patent, but was included in the reissue, apparently to meet some objections of the examiner. There is no inconsistency, that I can see, between the two descriptions. They both describe a device which causes a curling, rolling, or folding over of the dough masses before the latter are carried into the space between the belt and the pressure board. The effect of the latter provision was merely to indicate that the inventor was not to be bound by the particular form of "curler" described. The same may be said of the objection to the parts of the specifications which refer to the "pressure board." I cannot perceive any merit in the contention that there was a needless multiplication of claims, even if such in itself invalidates an otherwise valid patent. Certain claims do not embrace the curler element, and the reason why they do not is explained in the specification, as above stated. Those which do include the "curler" describe it in different ways, as is customary, one broadly, to embrace infringing devices, and the others more narrowly, to avoid devices which might anticipate the broad claim.

2. I fail to appreciate any force in defendants' contention that relief should be denied to the plaintiff in equity because the reissued patent will shortly expire, or because suits which had formerly been instituted against alleged infringers were not prosecuted to a conclusion, or because the Thomson Machine Company is manufacturing machines under a different patent than any of those in suit, or because of all of these facts taken together. The reissued patent has in fact expired since the beginning of this suit. If, however, the

defendants have infringed it, the plaintiffs are entitled to the usual accounting, although, of course, not now to an injunction. So far as the evidence reveals, this suit was brought promptly after the plaintiffs learned that the Day Company was constructing and selling, and Weber Bros. were using, what the plaintiffs considered an infringing machine. J. H. Day and the J. H. Day Company had, pursuant to a license, manufactured machines under the original patent granted the Corbys (No. 590,133, of which patent No. 11,751, now in suit, is a reissue) from shortly after the time it was issued until the license was granted, in 1911, by the predecessor in title of the Ward Baking Company, to the Thomson Machine Company. Two of the suits which were not prosecuted to a conclusion were instituted in 1898, and the other one against the C. A. Thomson Machine Company and others in 1910. The abandonment of these suits could in no way have misled the J. H. Day Company, even if such could be considered a proper ground for denying relief, because after the suits were abandoned the J. H. Day Company continued to operate under its license. The license which was granted to the Thomson Machine Company was the result of the litigation instituted against that company by the owners of the reissued patent, and as this license superseded the license which had formerly been granted to J. H. Day Company it follows that the latter must have had notice of it and of the reason why the suit was discontinued. The granting of the license to a competitor who was manufacturing under a different patent could not under any reasonable view have led the Day Company to believe that the owners of the patent considered it of no validity, but should rather indicate that the alleged infringer considered it valid and that it was necessary to acquire a license to manufacture under it in order to avoid further infringement. But at any rate the fact that the Thomson Machine Company saw fit to manufacture machines under a patent of which it was the owner, and not under the patents in suit, either standing alone or taken in connection with the fact that suits which were instituted against it and others for infringement were subsequently either discontinued or not prosecuted, affords neither justification for an infringement of the patent nor a reason why a court of equity should deny relief as against an infringer.

3. It is urged that the reissued patent is invalid because no statutory ground for reissue existed. Counsel have not pointed out, however, wherein the statutory ground is lacking, except to state that the meaning of the word "curler" in claim 6 of the reissued patent (which claim is the same as claim 6 of the original patent) has been broadened by a general definition of the curler which is inserted in the description of the reissued patent; otherwise, they have contented themselves with quotations from the opinions in several cases, without showing their applicability to the facts of this case. I have considered however, the validity of the reissue in the light of those cases. It is, of course, entirely well settled that a reissued patent cannot cover any other or different invention than that which is described in the original patent; but it is apparent from a comparison of the original and the reissued patents in this case that the latter is not open to that objection. While it is also true that a reissued patent is invalid if the defect in the original was not due to inadvertence, accident, or mistake, it is equally true that the courts will not review the decision of the Commissioner upon the question of inadvertence, accident, or mistake unless it is manifest from the record. Topliff v. Topliff, 145 U. S. 156, 171, 12 Sup. Ct. 825, 36 L. Ed. 658; Hobbs v. Beach, 180 U. S. 383, 395, 21 Sup. Ct. 409, 45 L. Ed. 586. The record in the Patent Office does not by any means make manifest that any defect in the original patent, which the reissue sought to cure, was not due to an actual mistake or inadvertence. The first 10 claims of the reissue are identical with the 10 claims of the original patent, and the remaining claims of the former, rather than broadening the scope of the claims of the original, limit them.

Quite a different situation is therefore presented than if they broadened the claims of the original. Mahn v. Harwood, 112 U. S. 354, 362, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. Ed. 665. What the patentees undoubtedly desired to protect themselves against was the possibility that the combinations of the original claims were too broad; and they therefore sought to have introduced into

the reissue additional claims, narrower and more limited. The patentees were entitled to claim their invention in the broadest way in which it could be properly claimed as well as the narrowest. If, through accident or inadvertence or mistake it was not claimed in the latter way, and the validity of the patent was thereby jeopardized, they were entitled to have the mistake remedied by a reissue, and they were not compelled to await a suit upon the original patent in order to have it determined whether its claims were too broad. The remarks of Mr. Justice Brown in Hobbs v. Beach, supra, 180 U. S. at 394, 21 Sup. Ct. 414, 45 L. Ed. 586, are applicable here: "Possibly the error was such as would not have impaired the patentee's rights under his original designs; but he was entitled to the full scope of his invention, and if he were dissatisfied with the drawings as they stood, and the error was purely an inadvertent one, we think it was within the jurisdiction of the Commissioner of Patents to order the patent to be reissued. The defense is purely a technical one. * * * To justify a reissue it is not necessary that the patent should be wholly inoperative or invalid. It is sufficient if it fail to secure to the patentee all of that which he has invented and claimed. * * * The only alternative of a reissue was a suit upon the original patent, in which the patentee would be compelled to take his chances of success, notwithstanding the error in his drawing when in case of defeat the time in which to obtain a reissue might have expired. We do not think he should be driven to this expedient." See also Steiner & Voeghtly Company v. Tabor Sash Company, 178 Fed. 831 (C. C. N. J.). It also appears that claims 6, 8, and 9 of the reissue are the same as in the original patent. If they were valid in the original, they are valid in the reissue. Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601; Mahn v. Harwood, supra; Thomson-Houston Electric Company v. Black River Traction Company, 135 Fed. 759, 68 C. C. A. 461 (C. C. A. 2d Cir.). Of course, if the description in the reissue has given a broader meaning to any element of the claims than it had in the original patent, the claims of the reissue would not be the same as the claims of the original, and the rule just stated would not apply.

It is urged, as before stated that the definition of the "curler" in the description of the reissue has imparted a new meaning to the word "curler" as used in the claims thereof, the effect of which is to broaden the scope of the original claims, in which the curler was an element, and thereby bring the reissued patent within the well-settled rule first announced in Miller v. Bridgeport Brass Co., 104 U. S. 350, 26 L. Ed. 783. I do not think, however, that the general definition of the "curler" which is added to the description of the reissued patent, in any way substantially broadened the meaning of that term. Irrespective of what I hold, as above stated, to have been the purpose of inserting the general definition, the patentees would not have been confined to the particular form of the curler illustrated and described in the original patent, but, in view of the prior state of the art, would have been entitled to a fair range of equivalents. But if my conclusion in this respect is wrong, and the claims of the original which are also in the reissue, are broader, still I do not think that they are invalid for that reason, because they were for substantially the same invention, and the reissue was applied for in a reasonable time—about six months—after the original was granted, and before, as far as the record shows, any intervening rights of third persons had arisen. Topliff v. Topliff, supra, 145 U. S. 165, 12 Sup. Ct. 825, 36 L. Ed. 658. This case is not like Coon v. Wilson, 113 U. S. 268, 5 Sup. Ct. 537, 28 L. Ed. 963, where a reissue was held invalid which was applied for only a little over three months after the original patent was granted. In that case the patentee waited until the defendants produced their device and then applied for such enlarged claims as to embrace that device—which had not been covered by the claim of the original patent—and it was apparent, from a comparison of the two patents, that the application for a reissue was made merely to enlarge the scope of the original. I conclude, therefore, that the reissued patent was not improperly granted.

4. Nearly 200 printed pages of the record are taken up with patents showing the prior state of the art, the greater part of which might better have been omitted. Catalogues have also been offered. Of these only the French

patent issued to Dathis in 1885 seems to require any extended consideration. The others may be disposed of with the statement that they show that all of the elements of the claims in suit of the reissued patent, with the exception of the curler, were old in the art. In none of them, however, is there found a device corresponding to the curler of the reissued patent or an equivalent thereof. The flaring mouths of the Hotine, Keller, Kumler, and Driscoll patents are clearly not the equivalents of the curler of the reissued patent. They do not perform the same function. The purpose of the curler is to roll or coil the dough before it is carried into the passageway between the traveling belt and the pressure board. This is accomplished by constricting the entrance to the passageway as before described. Manifestly, if the passageway at the opening is larger than it is inside, as in the devices with the flaring mouths, there could be no rolling or coiling of the dough before it enters the passageway. If the dough were in sheet form of less thickness than the distance between the upper side of the belt and the under side of the pressure board when entering the passageway, it would pass through without any kneading taking place. It was to overcome this that the curler of the patent in suit was devised.

It is urged on behalf of the defendants that the Dathis patent is a complete anticipation of all of the patents in suit. If it does not anticipate the reissued patent, it does not anticipate any of the others. It is an apparatus designed to knead bread dough. It has a frame, at each end of which is mounted a roller, over which is passed an endless belt on which the dough is carried, and it has the upper plane or pressure board, as in the reissued patent. The dough is placed, as in the reissued patent, on the endless belt or conveyer, and is carried by it into the passageway between the belt and the pressure board and is thus kneaded. Underneath the belt, instead of the rigid table of the patent in suit, V-shaped laths are placed. These, as stated in the patent, form a lower plane and "by the rigidity that they give to the belt or conveyer whenever they come in contact with it, give the dough the combined flattening and stretching." Here the similarity between the machines ends. The shape of the laths tends to lengthen out the mass of dough, and the number used depends upon the thickness and length of the loaves desired to be made. The drawings show a third roller mounted above the forward roller over which the belt passes. The purpose of this roller as stated in the patent, is to exercise a sufficient pressure on the belt to prevent the trouble which might result from its insufficient tension. The forward end of the upper plane or pressure board is beveled, thus giving to the entrance of the passageway between the upper and lower planes a flaring mouth. There is no device independent of the pressure board and belt to perform the function of the curler of the patent in suit. The specifications state that the upper plane can be raised, lowered, or inclined as desired. The defendants contend that if this upper plane is inclined towards the forward end of the machine, the passageway between the belt and the pressure board is narrowed or constricted, as it is in the plaintiffs' patent by means of the curler; that the yielding feature of the curler is supplied by the yielding and flexible character of the belt and the foremost lath on which the belt rests, and that therefore this machine can be made to accomplish, without modification, the same function in substantially the same way as the machine of the plaintiffs' patent, the only difference between them being in the structure of the parts. Unless the upper plane is thus inclined and there is a yielding of the belt and laths, the machine clearly has no equivalent of the curler, for the reasons above given in discussing the other patents of the prior art.

If it be assumed that the defendants' contention in this respect is correct, the question arises whether the descriptions and drawings of the Dathis patent contain or exhibit a substantial representation of the invention of the patent in suit, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it pertains without the necessity of making experiments, to practice that invention, for, if they do not, this patent would not negative novelty in the patent in suit. Hanifen v. Godshalk, 84 Fed. 649, 28 C. C. A. 507 (C. C. A. 3d Cir.); Seymour v. Osborne, 11 Wall. 516, 555, 20 L. Ed. 33; Cawood Patent, 94 U. S. 695, 704, 24 L. Ed. 238. It is en-

tirely clear, both from the description and the claims of the reissued patent, that the curler of that machine is a device separate and distinct from the pressure board and the traveling belt, and that it is designed to engage the dough before it reaches the pressure board, and roll it up. There is nothing in the description or drawings of the Dathis patent which in any way suggests such a curler. In describing the operation of the machine it is stated that the dough is placed on the belt in prepared masses, either by hand or by a chain of buckets or by a chain pump, etc., and then carried by an endless belt *C* under the board *F*, fixed above the belt. The drawings also indicate that the mass of dough designed to be kneaded should be greater in diameter than the space between the top of the belt and the under side of the pressure board, and that it was not designed to operate on sheets of dough. There is nothing said in the Dathis patent about the laths being flexible; on the other hand, their purpose is stated to be to give "rigidity" to the belt whenever they come in contact with it. There is no mention of a curling operation or feature, and it would seem that it was never contemplated. The machine evidently was designed primarily to flatten and elongate lumps of dough greater in diameter than the space between the belt and the under side of the pressure board. The two machines, so far as the curler element is concerned, are quite different in principle. I cannot find that the disclosure of the Dathis patent measures up to the rule above stated, nor can I find a substantial identity between the two machines.

5. In regard to the contention that the claims in suit of the reissued patent are void for lack of invention, I think that the combination of the curler, which was new, with the other elements constituted invention. There was far more than a change in structure over Dathis. The latter did not, as I endeavored to show before, describe a curler or an equivalent thereof. The principle and mode of operation of the machines is quite different.

As patent No. 611,563, at least as far as the claims in suit are concerned, differs from the preceding patent only in the addition of the "shield," I am constrained to find that it lacks invention. At the most the only change made was in the form of the curler of the earlier patent. Such devices as the shield apparently were old in the art, and it is scarcely conceivable, if in practice it was found that the dough sheet might at times pass over, rather than under, the curler, that any ordinary mechanic would not have done just what the Corbys did, namely, extend the face of the curler towards the rollers through which the dough is fed to the belt. Neither do I think that claims 10, 11, or 16 of patent No. 672,414 exhibit invention. Their only new feature is a series of projections arranged on the under side of the pressure board to engage and operate upon the dough. This was but a duplication of the rib *H* of the sixth claim of patent No. 649,437. Under well-settled principles this did not constitute invention. Claim 13 on this point presents more difficulty, because one of the elements is a pressure board, having a pivotal part provided with projections. There is nothing in the prior art exhibiting a pressure board of this construction, and it may be that it constituted invention to have devised it; but I do not find it necessary to decide this question, because I do not think the defendants' machine infringes this claim.

6. The defendants' machine operates on the same principle as the machine of the reissued patent. It has the sheeting rollers, and in lieu of the traveling belt a rotary drum which admittedly is a mechanical equivalent of the traveling belt. There is an opposing pressure device, consisting of a semicircular compression plate, which performs the same function in exactly the same way as the pressure board of the reissued patent. It also has a curler at the forward end of the pressure plate; that is to say, at the end where the dough is fed into the passageway between the drum and the pressure plate, which constricts the entrance to the passageway, as does the curler of the reissued patent. The curler of the defendants' machine consists of a plate suspended at its upper end above the drum, at the forward end of the pressure plate. This upper end, with which the dough first comes in contact, is curved upward and away from the drum, making a flaring mouth, and at the same time a shield to prevent the forward end of the dough sheet from

passing over the upper edge of the pressure plate. The surface of the pressure plate is corrugated, so as to engage the dough as it is carried forward by the drum and to cause it to roll, curl, or thicken. These corrugations perform the same function and are the equivalent of the retarding shoulder of some of the claims of the reissued patent. The curler is not affixed to the pressure plate, but the lower end is provided with a hook clip extending downward and which straddles the upper edge of the pressure board or plate; the hook being attached to the curler plate in such a manner that the upper end of the pressure plate is between the lower end of the curler plate and the downward extending shank of the hook clip. Normally, when not in operation this shank of the hook clip rests upon the upper end of the pressure plate, and when in operation—that is to say, when the dough is passing under it—the curler plate is lifted, so that its lower end is brought in contact with the upper end of the compression plate. When in a position of rest, or not in operation, the curler plate hangs a short distance from the drum. As the dough passes through and is rolled or curled, the pressure plate is pressed upwards, and thus moves out of the path of the advancing dough, and then drops back into place, in the same manner as the curler of the reissued patent. The curler is mounted in a way which is substantially equivalent to being mounted on a fixed axis relative to the advancing means.

The weight of evidence tends to show that the forward end of a piece of dough passing between the sheeting rollers is engaged by the curler and curled before it entirely disengages the rollers. To all intents and purposes the curler of the defendants' machine performs exactly the same function in substantially the same way as the curler of the reissued patent. I therefore find that it infringes claims 6, 7, 9, 11, 12, 15 and 17 of the reissued patent. I do not think it infringes claim 8, because one of the elements of that claim is "a spring which holds the curler toward the belt." There is no such element in the defendants' machine, nor an equivalent thereof. Claim 13 is limited to a "longitudinally stationary pressure board." The pressure board of the defendants' machine is semicircular. As the patentees saw fit in this claim to limit the shape of the pressure board and to make the shape an element of their claim, I do not think that this claim is infringed by the defendants' machine. Claim 6 of patent No. 649,437 embraces only one element; that is to say, a pressure board with a curling device consisting of a rib located near its feed end. The pressure plate of the defendants' machine, considered as distinct and separate from the curler plate, has no such rib. The curler plate of the defendants' machine is not an integral part of the pressure plate. It is movable and yieldingly pivoted. It is this feature, among others, which causes it to infringe the curler element of the reissued patent. It cannot be said that the curler of the defendants' machine is a separate and distinct element and at the same time that it is an integral part of the pressure board. At the time this patent was applied for the field of invention as respects the curler had been narrowed by the previous patents. It is therefore not entitled to the same range of equivalents as the earlier patents. For substantially the same reasons I do not think that defendants' machine infringes claim 13 of patent No. 672,414. The curling plate of the former is neither an integral part of the pressure plate, nor is it pivotally connected thereto.

A decree will be signed in accordance with these conclusions. No costs will be allowed, as neither party has prevailed as to all of the claims in controversy.

R. M. Everett, of Newark, N. J. (Leo. J. Matty, of New York City, of counsel), for appellants.

James L. Hopkins, of St. Louis, Mo. (Clore, Dickerson & Clayton, of Cincinnati, Ohio, of counsel), for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The four devices in controversy relate to machines for working and shaping dough, and are capable of being used conjointly. The principal patent is reissue No. 11,751, dated June 20, 1899, the original having been issued September 14, 1897; the other three are for minor improvements, No. 611,563, issued September 27, 1898, No. 649,437, issued May 15, 1900, and No. 672,414, issued April 16, 1901. The Ward Baking Company acquired title to all the patents, and in December, 1912, brought this suit to restrain Weber Brothers from infringement. In paragraph XVI the bill specified the claims upon which the company relied, these being 19 in number, 9 belonging to the first patent, 5 to the second, 1 to the third, and 4 to the fourth. After a final hearing on pleadings and proofs, an interlocutory decree was entered declaring the reissue to have been properly granted, and upholding the novelty of the 19 claims in suit. The decree also declared the 9 claims of the reissue to be otherwise valid, and decided that 7 of them had been infringed. The 5 claims of the second patent were held void for lack of invention over the reissue, and 3 claims of the fourth patent were also held void for lack of invention over the only claim (the sixth) of the third patent that is involved. The remaining 2 claims of the reissue, the only claim of the third patent that is involved, and 1 claim of the fourth patent, were held to be infringed. No finding was made concerning the validity of the 6th claim of the third patent. From this decree the Baking Company alone has appealed, and assigns for error so much of it as affects the company's interest adversely. The defendants have not appealed, but they assert, nevertheless, that the whole decree has been brought up by the company's appeal, and that any part of it is open to attack by either side. Accordingly they specify the parts to which they object, and cite in support of their position Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810. The argument requires us to consider the scope of that decision and of some later cases.

The decision turned on the construction of section 7 of the act of 1891 (Act March 3, 1891, c. 517, 26 Stat. 828) establishing the Circuit Courts of Appeals; and the question was stated by the court to be:

"* * * Whether, in a suit in equity for the infringement of a patent, an appeal to the Circuit Court of Appeals from an interlocutory order or decree of the Circuit Court, granting an injunction, and referring the case to a master to take an account of damages and profits, may be from the whole order or decree, or must be restricted to that part of it which grants the injunction, and whether the Circuit Court of Appeals, upon such an appeal, may consider and decide the merits of the case, and, if it decides them in the defendant's favor, may order the bill to be dismissed."

Having pointed out that the federal courts were not completely in harmony on this subject, the court called attention to the fact that in England and in New York and New Jersey the appellate courts in chancery had power on appeal from an interlocutory decree to examine the merits of the controversy, and to dismiss the bill if the merits were with the defendant, thus saving both parties the needless expense of going on with the suit. But this practice had never prevailed in the federal courts; there no appeal in equity would lie except from a

final decree, and "an order or decree in a patent cause, whether upon preliminary application or upon final hearing, granting an injunction and referring the cause to a master for an account of profits and damages, was interlocutory and not final, and therefore not reviewable on appeal before the final decree in the cause."

This being the condition of the federal law in 1891, the court took up section 7 of the act establishing the Circuit Courts of Appeals, which provided as follows:

"* * * Where, upon a hearing in equity in a District Court, or in an existing Circuit Court, an injunction shall be *granted or continued* by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree *granting or continuing* such injunction to the Circuit Court of Appeals"

—and declared that this section authorized, "according to its grammatical construction and natural meaning, an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction." The object of the section was stated in the following paragraph:

"The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests, but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."

In Re Tampa R. R. Co., 168 U. S. 588, 18 Sup. Ct. 179, 42 L. Ed. 589, the court again considered the subject, and said:

"We are not called on to say that an appeal would lie from an order simply appointing a receiver, but where the order also grants an injunction, the appeal provided for may be taken, and carries up the entire order, and the case may indeed, on occasion, be considered and decided on its merits."

In Highland Railroad v. Equipment Co., 168 U. S. 630, 18 Sup. Ct. 241 (42 L. Ed. 605), the court had before it the 1895 amendment of section 7 (Act Feb. 18, 1895, c. 96, 28 Stat. 666), which changed the section so as to read:

"That where, upon a hearing in equity in a District Court or a Circuit Court, an injunction shall be granted, continued, *refused, or dissolved* by an interlocutory order or decree, *or an application to dissolve an injunction shall be refused*, in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, *refusing, dissolving, or refusing to dissolve* an injunction to the Circuit Court of Appeals."

And the court declared that, when an appeal is taken from an interlocutory order or decree, either granting or dissolving an injunction—

"the whole of such interlocutory order or decree is before the Court of Appeals for review, and not simply that part which grants or dissolves the in-

junction, and that on the hearing in the Court of Appeals that court may consider and decide the case upon its merits."

But the court went on to say that Smith v. Vulcan Iron Works and In re Tampa Railroad proceeded upon the ground that in each of those cases there was a distinct order granting, continuing, or dissolving an injunction, while in the case then before it there was no such order, although a receiver had been appointed and as a part of such appointment there had been the usual command to the receiver to take, and to the defendant to surrender, possession of the Highland Railroad's property. The court stated that the question was not whether some directions of a mandatory nature in the nature of an injunction might not properly be included in an order appointing a receiver, but whether Congress in this legislation (section 7, as amended) had provided for appeals in any case except where an injunction, technically speaking, was either the sole or a principal part of the order or decree; and the question was answered by deciding that if Congress had intended to permit appeals from orders appointing receivers, as well as from orders in respect to an injunction, an express provision to that effect would doubtless have appeared in the statute:

"Its omission of the one and the mention of the other is a clear declaration that only one should be the subject of appeal and the other not. And it would savor of judicial legislation to hold that, although Congress has not authorized appeals from orders appointing receivers, the mere fact that in such an order there is a direction of a mandatory character, either expressed or implied, in respect to taking possession, makes it appealable, as an order granting an injunction."

In Kirwan v. Murphy, 170 U. S. 209, 18 Sup. Ct. 592, 42 L. Ed. 1009, the ruling of Smith v. Vulcan Iron Works was stated to be that the Circuit Court of Appeals, on appeal from an interlocutory order or decree granting an injunction or ordering an accounting in a patent suit, might consider and decide the case on its merits, and thereupon render or direct a final decree dismissing the bill.

And in Mast v. Stover Co., 177 U. S. 494, 20 Sup. Ct. 712 (44 L. Ed. 856), the decision in Smith v. Vulcan Iron Works was again said to be:

"* * * That, if the appellate court were of opinion that the plaintiff was not entitled to an injunction because his bill was devoid of equity, such court might, to save the parties from further litigation, proceed to consider and decide the case upon its merits, and direct a final decree dismissing the bill."

In the Courts of Appeals, the following cases are in line with the foregoing decisions: United States Co. v. American Co. (C. C. A. 7) 82 Fed. 250, 27 C. C. A. 118; Carson v. Combe (C. C. A. 5) 86 Fed. 210, 29 C. C. A. 660; Stover Co. v. Mast (C. C. A. 7) 89 Fed. 336, 32 C. C. A. 231; Texas Ass'n v. Storrow (C. C. A. 5) 92 Fed. 9, 34 C. C. A. 182; Tornanses v. Melsing (C. C. A. 9) 109 Fed. 711, 47 C. C. A. 596; Berliner Co. v. Seaman (C. C. A. 4) 110 Fed. 33, 49 C. C. A. 99; Worth Co. v. Bingham (C. C. A. 4) 116 Fed. 793, 54 C. C. A. 119; Frye Co. v. Meyer (C. C. A. 9) 121 Fed. 535, 58 C. C. A. 529; Kerr v. New Orleans (C. C. A. 5) 126 Fed. 925, 61 C. C. A.

450; and Co-operating Co. v. Hallock (C. C. A. 6) 128 Fed. 597, 64 C. C. A. 104.

With one exception, each of these cases, whether in the Supreme Court or in the Courts of Appeals, has to do with an interlocutory decree granting an injunction against the defendant, and in each it was the defendant that appealed. The exception is Frye Co. v. Meyer, where an injunction had been granted originally against the defendant, but had been afterwards modified to the plaintiff's disadvantage, and it was the plaintiff that appealed from the modification. But the Court of Appeals of the Ninth Circuit, saying that "this appeal is, in effect, an appeal from an order of the District Court dissolving an injunction," held that the merits of the case were brought up, and decided them in the plaintiff's favor, setting the modifying order aside.

This brings us to Ex parte National Enameling Co., 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707, a case that requires careful consideration. The National Company had sued the New England Company for infringement of a patent, and had brought the case to a hearing on pleadings and proofs. The Circuit Court sustained 9 claims, but held the remaining 3 to be void. Of the 9 claims, 5 were held to be infringed, and 4 not to be infringed. As to 7 claims, therefore, the bill was dismissed, while it was sustained as to the remaining 5, and on these an account was ordered and the New England Company was enjoined. Thereupon the New England Company appealed to the Court of Appeals of the Second Circuit, and within a few days the National Company took a cross-appeal. Soon afterwards the cross-appeal was dismissed for want of jurisdiction, whereupon the National Company asked for a mandamus to reinstate the appeal. The Supreme Court refused the writ on the following ground: After pointing out that the decree in the Circuit Court was interlocutory, and not final, and that in the federal courts no appeal could ordinarily be taken except from a final decree, the opinion turned to section 7 of the act of 1891. This section had then been twice amended—once by the act of 1895 already referred to (28 Stat. 666), and once by the act of 1900 (Act June 6, 1900, c. 803, 31 Stat. 660); but the amendment of 1900 had in effect repealed the act of 1895, so that in 1906, when the Enameling Company's Case was decided, the section read as follows:

"Where, upon a hearing in equity in a District Court or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be *granted or continued, or a receiver appointed,* by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree *granting or continuing such injunction or appointing such receiver* to the Circuit Court of Appeals." Act April 14, 1906, c. 1627, 34 Stat. 116.

It will be noted that the section thus amended contains no provision authorizing an appeal from the refusal or dissolution of an injunction, or from the partial dismissal of a bill, and of course the language of the opinion is to be applied to that condition of things:

"It will be noticed that the appeal is allowed from an interlocutory order or decree *granting or continuing* an injunction, that it must be taken within 30 days, that it is given precedence in the appellate court, that the other proceedngs in the lower court are not to be stayed, and that the lower court may require an additional bond. Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise especially ordered. * * * And the purpose of Congress in this legislation was that there be an immediate review of the interlocutory proceedings, and not an advancement generally over other litigation."

Taking up the case of Smith v. Vulcan Iron Works, upon which the National Enameling Company mainly relied, the court went on to say that:

"In that case it was held that, when an appeal is taken from an interlocutory order granting or continuing an injunction, the whole of the order is taken up, and the appellate court may (if upon an examination of the record as thus presented it is satisfied that the bill is entirely destitute of equity) direct a dismissal, and is not limited to a mere reversal of the order granting or continuing the injunction. Take an ordinary patent case. If an injunction is granted by an interlocutory order, and the order is taken on appeal to the Circuit Court of Appeals, and that court is of opinion that the patent is on its face absolutely void, it would be a waste of time and an unnecessary continuance of litigation to simply enter an order setting aside the injunction and remanding the case for further proceedings. The direct and obvious way is to order a dismissal of the case, and thus end the litigation. And such is the scope of the opinion in that case. * * * But nowhere in the opinion is it intimated that the plaintiff was entitled to take any cross-appeal or to obtain a final decree in the appellate court."

It was argued on behalf of the National Company that, since the bill had been dismissed as to 7 of the claims, the decree was final as to these, and the plaintiff was entitled to appeal. For the reason already given, the company could not rely on the amended section 7 of the act of 1891 (since the section gave no appeal in such a case), and the earlier cases, upon which the plaintiff did rely to sustain the position that under the general rules of law the decree was final, were distinguished by the court, and were held to have no application to the case in hand.

Since the decision of the Enameling Case, the court has referred to it twice, but merely as authority for the proposition that on appeal from an interlocutory order the Circuit Court of Appeals "might direct the bill to be dismissed if it appeared that the complainant was not entitled to maintain its suit" (Metropolitan Co. v. Kaw Valley District, 223 U. S. 523, 32 Sup. Ct. 248 [56 L. Ed. 533]), or as authority for the proposition that the Court of Appeals might "review the whole of the interlocutory decree, not merely the part granting the injunction, and [might] determine whether there was any insuperable objection, in point of jurisdiction or merits, to the maintenance of the suit, and, if there was, to direct a final decree dismissing the bill" (U. S. Fidelity Co. v. Bray, 225 U. S. 214, 32 Sup. Ct. 624, 56 L. Ed. 1055).

In several cases the Courts of Appeals have been called on to con-

sider the scope of the decision. In Page Co. v. Dow, 168 Fed. 704, 94 C. C. A. 209, the second Circuit stated its understanding to be that the Enameling Case had "made it necessary, when a trial judge held some claims to be valid and infringed and other claims to be invalid, to have two appeals on practically the same record—sometimes years apart—to secure a determination of the controversy." In Highland Glass Co. v. Schmertz Co., 178 Fed. 972, 102 C. C. A. 316, this court distinguished the Enameling decision from the case then under review, and showed its inapplicability to a situation where the defendant alone had taken the appeal. And in General Elec. Co. v. Allis Co., 194 Fed. 413, 114 C. C. A. 375, we followed the decision, where an interlocutory decree had dismissed the bill as to one of two defendants; such dismissal being held not to be an appealable order. In Electric Co. v. American Co., 184 Fed. 924, 107 C. C. A. 238, the eighth Circuit held the decision to cover in principle the case of "a suit for the infringement of different patents for the same or kindred inventions, which may be joined in one suit; and when in such a case the bill is sustained as to some of the patents but dismissed as to others by an interlocutory decree, no appeal lies from that part of the decree which dismisses the bill as to some of the patents until after the final decree." And the following cases also refer to the decision: Sheppy v. Stevens (C. C. A. 2) 200 Fed. 946, 119 C. C. A. 330; Howe Machine Co. v. Dayton (C. C. A. 4) 210 Fed. 804, 127 C. C. A. 351; Odell v. Batterman (C. C. A. 2) 223 Fed. 295, 138 C. C. A. 534; and Mershon v. Bay City Co. (C. C.) 189 Fed. 753.

Now, if section 7 of the act of 1891 had undergone no change since the decision of the Enameling Case, we should be obliged to hold that the Ward Baking Company could not appeal from the interlocutory decree before us, because in that event Congress would have given the company no such appeal, and none would be allowable under the general rules governing the federal courts. But the section *has* been changed in essential particulars. Since January 1, 1912, it has become section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. 1913, § 1121]), and now reads as follows:

"Where upon a hearing in equity in a District Court, or by a judge thereof in vacation, an injunction shall be granted, continued, *refused, or dissolved* by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, *refusing, dissolving*, or refusing to dissolve, an injunction, or appointing a receiver, to the Circuit Court of Appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court."

In other words since the plaintiff is the party adversely affected by the refusal or the dissolution of an injunction, the section now gives the plaintiff the right to appeal therefrom. This covers the situation where a bill has been dismissed as to certain claims of a patent, whether the dismissal be put on the ground that the claims are void or on the ground that they have not been infringed; for there can be no more effectual refusal of an injunction than to dismiss the bill that

asks for such relief. It follows that the Baking Company's appeal properly brings up the questions that were decided against it, namely:

(1) Whether claims 8 and 13 of the reissue have been infringed by the defendants' machine.

(2) Whether claims 1, 2, 4, 5, and 16 of patent No. 611,563 involve invention over the reissue.

(3) Whether claims 10, 11, and 16 of No. 672,414 involve invention over claim 6 of No. 649,437; and

(4) Whether claim 6 of No. 649,437, claim 13 of No. 672,414, and the claims specified in (2) and (3) have been infringed by the defendants' machine.

We need not discuss these questions, however, for the District Judge has considered and decided them satisfactorily and we adopt his opinion thereon as the opinion of this court.

It remains to say a few words about the defendants' position. We find nothing in any of the foregoing cases that supports the argument presented on their behalf. It is a novel proposition that a party may have all the benefits of an appeal that has been taken by his adversary without taking an appeal on his own behalf. No case so decides, and no statute has so declared. There are legislative provisions and rules of court with which a party desiring to appeal must comply, and these would be impliedly nullified by such an irregular proceeding. A party appealing must ordinarily have his appeal allowed, and must specify the errors to which he objects. In order to protect his adversary, he must also give bond for such sum and for such purposes as may be required of him; and he must comply with the rules of court that define and govern his conduct as an appellant. It is true that the decree below does not place the defendants under injunction, but merely orders them to account, and it would seem, therefore, under the decisions considered above, that the statute did not give them the right of appeal. Nevertheless they claim all the advantages of such a position although they did not have the statutory right to occupy it, and even if they had they neither presented a petition, nor gave a bond, nor assigned errors, nor complied with the rules of court in any particular. In the absence of any authority sanctioning such a procedure, we decline to consider the questions that the defendants seek to raise.

The decree is affirmed.

KENNICOTT CO. v. HOLT ICE & COLD STORAGE CO.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1915. Rehearing Denied January 3, 1916.)

No. 2096.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—WATER-SOFTENING APPARATUS.
The Bruce patent, No. 912,802, for a water-softening apparatus, claim 5, was not anticipated, and discloses invention; also *held* infringed.

2. PATENTS ⊂=165—UTILITY OF INVENTION—NEW USES.
A patentee is not required to particularly point out and distinctly claim the uses to which his invention may be put, but some utility is to be presumed from the grant, and additional and new uses, even if unknown to the inventor, are within the patent, and may properly be considered in determining the status of the invention in the art.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⊂=165.]

3. PATENTS ⊂=170—INFRINGEMENT—STATUS OF PATENT IN THE ART.
In determining an alleged infringement, the court should have in mind the true worth of the claim as measured by the inventor's contribution to the art, and should remember that each claim of a patent is in law a separate invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 245; Dec. Dig. ⊂=170.]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by the Kennicott Company against the Holt Ice & Cold Storage Company. Decree for defendant, and complainant appeals. Reversed.

Russell Wiles, of Chicago, Ill., for appellant.

Dwight B. Cheever, of Chicago, Ill., for appellee.

Before BAKER and MACK, Circuit Judges.

BAKER, Circuit Judge. [1] Appellant's bill for alleged infringement of patent No. 912,802 for a water-softening apparatus, issued February 16, 1909, to Bruce, assignor, was dismissed for want of equity.

Eleven claims are stated in the patent; but the fifth is the only one said to be infringed. It reads as follows:

"5. In a water-softening apparatus, the combination with a precipitating tank, of a box supported above said tank to receive the water to be treated and provided with a relatively large opening discharging to said tank and a smaller discharge opening, a water supply pipe discharging into said box, a chemical solution holder discharging to said tank, means connected with said holder for proportioning the discharge therefrom, a regulating box communicating with said smaller discharge opening, and a float in the regulating box operatively connected with said proportioning means, for the purpose set forth."

In opening the specification Bruce stated his general purpose thus:

"My invention relates, particularly, to improvements in the mechanism commonly employed in industrial water-purifying apparatus, and surmounting the precipitating or settling tank, for automatically proportioning to the supply

of water to be treated the chemical used for treating it by mixture therewith in its course to the tank."

Then follows a lengthy detailed description of the specific construction of the various features of the apparatus, with numeral references to five sheets of drawings; but it is unnecessary to do more than epitomize from the specification a view of the apparatus and its method of operation so far as claim 5 is concerned.

At the top of the apparatus a supply pipe discharges water into a box. In the bottom of this receiving box are two openings, one much larger than the other. From the large opening the water flows directly into the precipitating tank at the bottom of the apparatus. From the small opening the water is conducted into a tank, which is much smaller than the precipitating tank, and which during the operation of the apparatus has no outlet. This smaller tank is above the precipitating tank. For convenience of description, Bruce in his specification gave to this smaller tank the name "regulating box." In the regulating box is a float. To the top of the float is attached a chain. This chain leads up over pulleys and down to the chemical holder, which also is above the precipitating tank. In the side and near the bottom of the chemical holder is a spout through which the liquid chemical is discharged into the stream of water flowing from the large opening in the receiving box into the precipitating tank. To the inner end of this spout is attached a short piece of flexible tube. To the other end of the flexible tube is attached a rigid tube. And to the open end of this rigid tube or "lift pipe," as it is called in the specification, is attached the chain that comes over the pulleys from the float in the regulating box. As the float rises, the lift pipe's open lip, which is at the surface of the liquid chemical, is lowered; and thus is obtained the result of "automatically proportioning to the supply of water to be treated the chemical used for treating it by mixture therewith in its course to the tank."

Claim 5 is the most generical one in the patent; and Bruce apparently had its structure and method of operation in mind when, in closing the specification, he declared:

"It will be understood from the foregoing description of the detailed construction and operation of the apparatus that my improvement, in its broadest sense, lies in the employment of a float-containing regulating box to cooperate with suitable means on or in the solution holder for properly proportioning to the outflow from the latter the flow of water into the regulating box to cause such water to raise the float in the same ratio and produce the same amount of solution discharge as the predetermined amount of water that flows into the regulating box."

Many ways of attaining the general result of softening hard water are shown to have been old. Two are relied on to defeat claim 5.

One is exhibited in patents to Greth, No. 749,728, January 19, 1904, and to Gaillet, No. 563,660, July 7, 1896.

Taking from them the structure most nearly corresponding to claim 5, we find: A supply pipe; a receiving box with a large and a small opening in the bottom; a precipitating tank into which water flows directly from the large opening; a chemical holder; and a small tank with no outlet, which is poised over the chemical holder by means

of a counterweight, and into which flows the water from the small opening in the receiving box. As the water flows in, it causes this small tank, which counsel for appellant conveniently name a "blind tank," to sink into the liquid chemical and displace a proportionate amount thereof, which flows over a lip in the rim of the chemical holder into the precipitating tank.

In the above Greth-Gaillet combination the movable blind tank serves two purposes: It serves, equally with a stationary blind tank, to hold the water that flows from the small opening in the receiving box; and, by reason of its descending movement due to the inflow of the water, it also serves as a displacer to cause the liquid chemical to overflow into the precipitating tank. In claim 5 the stationary blind tank performs only the first above named function; the second is accomplished through the progressively rising float's being operatively connected with other means for proportioning the discharge from the chemical holder. If the Greth-Gaillet combination were later than the patent in suit, it would not infringe. For a five-element structure is not within a six-element claim. And therefore the Greth-Gaillet structure is not an anticipation of claim 5.

Two Kennicott patents, No. 655,606, January 8, 1901, and No. 708,-717, September 9, 1902, and an apparatus described in a German publication by Wehrenfennig are the bases of the other alleged anticipation.

Kennicott shows: A supply pipe; a receiving box having in the bottom but one outlet, and that of such a size that the water maintains a constant level in the receiving box so long as there is a constant flow from the supply pipe; a precipitating tank into which flows all the water from the receiving box; a large chemical holder that discharges through a pipe in its bottom into a small chemical holder, in which a constant level is maintained by means of a float-controlled valve in the inlet pipe, and from which the chemical flows into the precipitating tank through a flexible tube, which is always submerged in the chemical, and to the inner end of which is attached a rope that goes up over pulleys and down to a float in the receiving box. If the influx from the supply pipe is constant, the float in the receiving box performs no office; and this should be the normal operation. If, however, the influx should increase, the rising float in the receiving box lowers the open end of the submerged flexible tube, and the increased head causes an increased outflow of chemical proportionate to the increased flow of water; and if the influx should decrease, the operation is reversed. Thus the effects of undesired fluctuations from the desired and intended constant level of water in the receiving box are counteracted. Kennicott's constant level receiving box is not the equivalent of Bruce's blind tank. Kennicott's corrective float is not the equivalent of Bruce's progressively rising float. The two types are utterly dissimilar in structure and in principle of operation. They have nothing in common but their separate lines of descent from a remotely common ancestor.

Wehrenfennig's device belongs to the Kennicott rate-of-flow type. It is identical in principle. Except for stress laid upon a useless de-

tail in structure, it would not further be noticed. A supply pipe discharges water into a primary receiving box. In the bottom of this are a large and a small opening, as in Bruce's receiving box. From the large opening the water falls directly into the precipitating tank, as in Bruce's apparatus. From the small opening the water is conducted into a small tank containing a float. By calling this small tank a "regulating box" with a "float operatively connected with chemical proportioning means," appellee obtains an anticipation in words. But it is purely verbal. For the water flows through an opening in the bottom of this small tank, and the Wehrenfennig float is the fluctuation correcting float of Kennicott. So this small tank is seen to be in principle only a secondary receiving box of the Kennicott type. Through both primary and secondary receiving boxes the rate of flow is the same, and the corrective float performs its function equally well in either box. This useless secondary receiving box therefore distinguishes Wehrenfennig from Kennicott not at all in mode of operation. And we are not acquainted with any authority that justifies appellee in applying to the Wehrenfennig structure the words by which Bruce defined his blind tank with its progressively rising float. We are not advised that a "regulating box" has a fixed meaning in mechanics, like cam, lever, pulley, shaft, wedge, etc. At all events a patentee is at liberty to supply his own dictionary; and a claim is neither enlarged nor limited by taking its terms in the sense given in the lexicon of the specification. Chicago Woodenware Co. v. Miller Ladder Co., 133 Fed. 541, 66 C. C. A. 517.

By removing the Greth-Gaillet blind tank from the chemical holder, making it a stationary member of the apparatus, and depriving it of its function as a displacer, Bruce obtained desirable results. If an emulsion or milk of lime is used as the precipitating agent (and with some hard waters it is the most efficient), settlement of the lime upon the blind tank would to some extent upset its accuracy as a measurer of the chemical discharge, and the blind tank itself is an obstruction to the most feasible way of introducing a mechanical stirrer into the chemical holder. Both of these objections are absent from the Bruce apparatus.

Appellee insists, however, that the proofs with respect to the use of milk of lime cannot properly be noticed, first, because "solution" is the only word appearing in the patent in connection with lime and other recommended chemicals, and second, because a stirrer is not included as an element in claim 5.

[2] First. If lime be added to a completely saturated solution of lime, strictly the solution ceases to be merely a solution. But even if the patentee is to be held to the utmost nicety in the selection of words, still the insistence is without weight. True, a patent covers, not what the patentee may actually have invented, but only the machine or process or composition that he "particularly points out and distinctly claims." Harder v. U. S. Piling Co., 160 Fed. 463, 87 C. C. A. 447. But he is not required particularly to point out and distinctly to claim the uses to which his invention may be put. Some utility is to be

presumed from the grant; other uses and advantages need not be enumerated; even if unknown to the inventor the additional and the new uses are within the patent; and they may properly be considered in determining the status of the invention in the art. Diamond Rubber Co. of New York v. Consolidated Rubber Tire Company, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; Hogan v. Westmoreland Specialty Co., 167 Fed. 327, 93 C. C. A. 31.

Second. If only saturated solutions be used, a stirrer is not needed; and the apparatus of claim 5, complete within itself, is efficient to put a measured amount of the liquid chemical into the hard water. If solutions that are supersaturated and that cease therefore to be technical solutions be used, a stirrer may be helpful and even necessary; but the apparatus of claim 5, complete within itself, is efficient to put a measured amount of the liquid chemical into the hard water. A stirrer, whether mechanical or human, has only to do with the quality of the chemical discharged into the hard water, has nothing to do with the quantity. It (or he) is a separate auxiliary means, needful or needless for a different purpose as the case may be, while the apparatus of claim 5, self-contained, always stands ready to perform its independent office of measuring out any sort of liquid chemical discharge.

Though neither the Greth-Gaillet nor the Kennicott-Wehrenfennig type of water-softener is an anticipation, appellee contends that in view thereof no invention was exercised in producing the Bruce apparatus of claim 5. Water-softening was quite an old art. All apparatus were necessarily akin in that they proportioned the chemical to the hard water. Several distinct types had been developed and improved from time to time. But Bruce, we believe, brought forth a new genus in the family of water-softeners. In general the elements were old. Appellant concedes this except as to the blind tank with its float, the "float containing regulating box" of the patent's terminology. Respecting this feature the contention of appellant is that Bruce invented the water-measuring blind tank with its progressively rising float as a new instrumentality for causing the necessary movement of the chemical discharging means. He failed, however, to claim this element as an independent mechanical movement. It must therefore stand as a known, or at least an open, means of furnishing power. But, even so, Bruce was the first to bring it into a water-softening apparatus and there combine it with the necessary elements that were common to the art. This does not seem to have been an obvious thing to do. The record disposes us to doubt that appellee's modifications of the prior devices in order to show how easy it was for Bruce to go forward, were suggested by the old devices themselves or came from the knowledge and skill of the prior art. The record inclines us to believe that they originated in a study and an appreciation of the Bruce patent. For when we consider the capabilities and advantages of the new combination, Bruce's long connection with the practical art, his endeavors to build an apparatus that would handle clear solutions and also milk of lime as efficiently as this final apparatus does, and his failure in earlier attempts, we are driven from doubting that he should be classed as an

inventor. Pieper v. S. S. White Dental Mfg. Co., 228 Fed. 30, — C. C. A. — (at this term).

Appellee's apparatus follows Bruce's claim 5 at all points except with respect to the means for getting the chemical out of the chemical holder into the precipitating tank. In the Bruce apparatus, as hereinbefore we have seen, the progressively rising float in the water-measuring blind tank proportionately lowers the lip of the chemical discharger. If, instead of a lowering lip, a stationary lip in the rim of the chemical holder were made, and if the progessively rising float in the blind tank should cause a plunger to be lowered into the chemical so that a proportionate amount thereof should flow over the stationary lip, we would not hesitate to find infringement. For the Greth-Gaillet type proves that the stationary lip and the moving displacer were old and well known means for discharging the chemical; and the claim, relying in this respect on the general dictionary, employs the general term "means." Now appellee's discharging means are also of the displacer type. But, in lieu of a displacer of fixed dimensions, appellee utilizes a varying quantity of water. A conical valve, located over the chemical holder, is caused by the progressively rising float in the blind tank to open and discharge a continuously increasing quantity of water into the chemical holder, and this produces an overflow from the stationary lip in the rim. As this water displacer necessarily thins the formulated chemical solution, it is evident that a continuously increasing quantity of the holder's contents must be made to overflow in order that the same amount of chemical for a given quantity of hard water shall be discharged into the precipitating tank. In the use of this improvement of chemical discharging means appellee is protected by the Bartlett patents, Nos. 1,017,728 and 1,017,729, February 20, 1912. Is infringement avoided?

[3] In determining an alleged infringement the court should have in mind the true worth of the claim as measured by the inventor's contribution to the art, and should remember that each claim of a patent is in law a separate invention. Though it may sometimes happen that only verbal differences are found, the skillful solicitor in drafting claims on a combination invention will for each claim seize upon some particular feature to characterize and distinguish that claim from others, and will then combine it with its needful associates named in the broadest possible terms. Scaife & Sons Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 C. C. A. 304; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 C. C. A. 23, and cases there cited.

What gives character and distinction to Bruce's claim 5 is the stationary water-measuring blind tank with its progressively rising float, operatively connected to any chemical proportioning and discharging means. In other claims emphasis is put upon various specific features, among them the "lift pipe" as the specific means of proportioning the chemical discharge. Claim 5 is plainly intended to secure the new specific "float-containing regulating box" in combination with any old or any new chemical discharging means and any old or any new forms of the necessary pipes and tanks. And appellee has seized upon the

characterizing thought of claim 5 in combination with the other necessary general elements (one of said general elements being present in a new form) and has thereby obtained the advantages first brought into the art by Bruce.

Nevertheless appellee strives to escape through certain phraseology of the claim and specification.

"Means connected with said holder for proportioning the discharge therefrom" is the claim's definition of the chemical discharging element; and the word "connected" affords the alleged loophole.

Appellee's stationary lip, like Greth-Gaillet's, is a part of the discharging means, and it is immovably connected with the chemical holder. Of course neither appellee's water displacer nor Greth-Gaillet's metallic displacer nor appellant's lift pipe that is flexibly attached to the discharge spout can immovably be connected with the holder. In this art a holder implies a contained chemical. It is only by operating immediately upon the chemical that any of said discharging means is effective. Manifestly the chemical must be held by the holder in position to be operated upon. And so the discharging means in connection with the holder effect the discharge. In that sense, the only working sense, the discharging means are connected, and they are in fact mediately through the contained chemical operatively connected, with the chemical holder.

When Bruce was describing his invention in its broadest aspect, in a part of the specification hereinbefore quoted, he stated that the inflow of water into his "float-containing regulating box" produced "the same amount of solution discharge"; and the last quoted words, with the emphasis on "same" and also on "solution," are said to offer another avenue of escape.

But the measure of the patentee's protection is the claim, not the specification. Looking to the chemical in its original dry form, we find that both Bruce's and appellee's apparatus put a predetermined amount into the hard water, say one pound to a thousand gallons. When the chemical is considered in the form of a solution or a milk, we find that the same result is accomplished through the same use, in each apparatus, of the blind tank with its progressively rising float to proportion and effectuate the chemical discharge. So both apparatus clearly respond to all the elements of the claim, including "means for proportioning the discharge" from the chemical holder.

Even if the words picked as aforesaid from the specification should be taken to limit the generic claim (which, however, is impermissible), the attempted deliverance fails. If the chemist at a manufacturing plant should prepare a certain amount of a certain solution, the apparatus of Bruce's claim 5 would discharge the same amount of the prepared solution for each thousand gallons of hard water. So would appellee's. In both, the means for proportioning and effecting the chemical discharge are operated by precisely the same mechanism to obtain precisely the same old general result together with precisely the same new advantages that Bruce contributed to the art. And the fact that appellee's water displacer as a discharging means mingles with

the solution as prepared according to formula and progressively weakens it so that a progressively larger amount of the holder's contents must be discharged, does not alter the other fact that the water displacer, as effectively as a metallic displacer or Bruce's lift pipe of other claims, utilizes Bruce's characterizing blind tank with its progressively rising float of claim 5 to discharge the same amount of the formulated solution for each given quantity of hard water.

The decree is reversed, with direction to grant the prayers of the bill.

PAGE MACH. CO. v. DOW, JONES & CO.

(District Court, S. D. New York. December 6, 1915. On Petition for Rehearing, December 14, 1915.)

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—PRINTING TELEGRAPH RECEIVER.

The Joy patent, No. 780,664, for a printing telegraph receiver, claim 12, as modified by disclaimer filed April 19, 1909, was not anticipated and is valid; also *held* infringed by defendant's modified machine.

In Equity. Suit by the Page Machine Company against Dow, Jones & Co. On final hearing and rehearing. Decree for complainant.

See, also, 166 Fed. 473; 168 Fed. 703, 94 C. C. A. 209; 200 Fed. 72, 74.

The J. M. Joy patent in suit, No. 780,664, relating to a printing telegraph receiver, has been before this court at various times in recent years, and certain of its claims have been held valid and infringed by the defendant company. 166 Fed. 473. In the original litigation it was substantially held that the claims covered mechanisms for the operation of the type wheel and carriage and for letter spacing and line spacing, each under constant stress, and that the efficiency of the printing machine was due to the operation and control of such elements from a single source of power—a constantly rotating drive shaft which held them intermittently at rest by independent escapements operated by a current passing over the line wire. According to the specification the type wheel escapement magnet and letter spacing or feeding escapement were positioned in the the same circuit; the former being operated by an alternating current from the transmitter at the central station, but without affecting the latter. The rotating type wheel presented the letters to the paper and the direct current which followed the alternating currents operated the printing magnet and released the letter spacing shaft, causing the type wheel carriage to move a letter space to the right.

On rehearing claim 12 was held too broad and not infringed by defendant's page ticker. On appeal to the Circuit Court of Appeals the decision of this court was affirmed, whereupon the defendant requested the Circuit Court of Appeals to modify its mandate, so as to require a disclaimer of claim 12 in its entirety as a condition of affirmance; but this request was denied. 168 Fed. 703, 94 C. C. A. 209. On April 19, 1909, however, the complainant filed a disclaimer in the Patent Office in the following words: "As to claim 12 of every constantly acting source of power in the combination of elements therein contained excepting a constantly rotating drive shaft." A supplemental bill was then filed, alleging that the defendant company infringed claim 12 as modified by the disclaimer, which view was adopted by this court at the hearing, and an injunction issued.

On June 11, 1912, the complainant moved the court to punish the defendant for contempt on the ground that the latter's machine (Defendant's Exhibit K in evidence) was an infringement of the combination claim in suit and a

violation of the injunction. The evidence showed that in the original infringing machine the line spacing mechanism was connected by friction gears, the rock shaft *102* being connected with the escapement of the line spacing element, and that by alternating the operation the paper was moved upward to make the spaces between the lines, while in the modified machine the line spacing mechanism was operated by a magnet and a ratchet and pawl. The magnet, on becoming energized, closed the battery circuit and actuated the pawl and ratchet, so as to cause the line spacing mechanism to automatically move the paper up and make the spaces between the lines. But such modification did not avoid infringement, and the defendant was held to have violated the injunction. 200 Fed. 72.

No appeal from such decision was taken, and defendant next constructed and used another page ticker, the subject of this controversy, which is asserted by complainant to be an evasion of claim 12 as modified by the disclaimer. The said claim reads as follows: "12. In a printing telegraph receiver, the combination of a type wheel paper feeding mechanism, a constantly acting source of power, and means for continuously feeding the paper without feeding the type wheel as long as said source is supplying power for substantially the purposes set forth."

Gifford & Bull, of New York City (J. Edgar Bull and Charles S. Jones, both of New York City, of counsel), for plaintiff.

Newell & Neal, of New York City (Emerson R. Newell, of New York City, of counsel), for defendant.

HAZEL, District Judge (after stating the facts as above). Concededly the first three elements of claim 12 are employed by the defendant, but it is contended that infringement is avoided because the fourth element—"means for continuously feeding the paper without feeding the type wheel"—is not embodied in its machine. It is argued that the evidence conclusively establishes the impossibility of feeding the paper in defendant's present machine without feeding the type wheel to the right and spacing the letters, and that there can be no continuous feeding of the paper upward or in the direction of its length without advancing the carriage a letter space, and that accordingly such structure is different in principle and mode of operation from complainant's. But on consideration I am of another opinion. I believe that the structures are still substantially identical, that they perform their functions in substantially the same way, and accomplish practically the same result. The difference in organization has not produced different modes of operation, except in a single instance, which is not sufficient to avoid infringement.

The specification in suit describes means for continuously feeding the paper for successive line spacing without in any way advancing or rotating the type wheel, while in defendant's present machine (Defendant's Exhibit L) the paper is fed for line spacing from an initial position or from the first letter space; the circuit to the paper feed magnet being closed and the armature attracted until the finger *30* on the carriage is pulled out from the contact springs *33*. To break the circuit to the paper feed magnet it is necessary that the type wheel be fed out to the right from its initial position at least a letter space. There can then be no further feeding of the paper until the pawls are raised from the racks and the type wheel carriage shifted back to the extreme left, for by such return movement only can the circuit be broken and the paper fed a second line space.

The contention that in defendant's machine the paper cannot be fed without feeding the type wheel, as that phrase is explained herein, is unpersuasive, as it is clear that the line spacing may be continuous at the desire of the operator so long as the continuously rotating drive shaft supplies power to the letter spacing shaft. Obviously there can be no feeding of the paper or of the type wheel if the drive shaft is not rotated as the various instrumentalities are actuated only by means of said drive shaft *34*—the essential element of the claim—which is maintained in constant readiness to respond to the line spacing mechanism. I think that the words "without feeding the type wheel" imply that the paper may be fed continuously while the drive shaft is being rotated, without feeding the type wheel as it was necessary to do in the prior Merritt & Joy machine of which the patent in suit is an improvement. There is nothing in the prior art to require the literal interpretation of the claim demanded by the defendant or to limit it to the exact means for continuously feeding the paper without feeding the type wheel.

In the Merritt & Joy patent No. 558,506, as was, I think, pointed out in the prior litigation, it was necessary that the type wheel should be fed to the right a number of spaces, so as to generate power in the spring *36* which effected the feeding of the paper on the return of the carriage by a pin coming in contact with a bent wire actuating a pawl and ratchet on the paper feed roll and within the line spacing mechanism. Such a feeding of the paper was not the feeding of the patent in suit. So also in the Joy patent, No. 676,137, it was important that the type wheel carriage should be first shifted a considerable distance to the right in order that the bent wire, used also to actuate a pawl and ratchet, might be brought into use for actuating the line spacing feature. The paper in such machine was fed by the return of the carriage and not, as in the defendant's present machine, by the movement of a magnet armature. In both complainant's and defendant's machines the rotative drive shaft obviated the necessity of feeding the type wheel carriage to obtain power from a spring so as to actuate the paper feed, and a fair and reasonable construction of claim 12 is that the phrase "without feeding the type wheel" relates to means for achieving a successive upward movement of the paper for line spacing without the necessity of first feeding the type wheel so as to obtain power to achieve such end. Such a construction finds support not only in the oral evidence, but also in the specification of the Joy patent in suit wherein it refers to the movement of the type wheel in the former machine (patent No. 676,137), stating that in the present invention "the paper may be fed line by line without feeding the printing wheel."

But defendant insists that claim 12, as modified by the disclaimer, is also anticipated by the patents to Wright, No. 460,328 and 466,858, and to Essick, No. 531,677. The Wright patent, No. 466,585, though it had a rotating type wheel shaft and a rotating shaft for line spacing, is not anticipatory as the said shafts were operated by independent motors, and the machine, unlike complainant's and defendant's machines, was incapable of immediate action on a plurality of mechan-

isms. In patent No. 460,328, the rotating motor did not rotate the letter spacing mechanism, for while the type wheel shaft was intermittently rotated by a constantly rotating motor, the letter spacing shaft was rotated by a magnet, and the line spacing mechanism by a weight and cord. As the combination in suit was not suggested by the disclosures of the Wright patents, they are not anticipatory.

The Essick patent concededly has no constantly rotating motor shaft, although it embodies a number of the features of complainant's patent, including a magnet feed in place of the bent wire line spacing mechanism of the Merritt & Joy patent; but as the claim in controversy is for a combination of elements achieving a new and novel result, its separate elements found in different machines of the prior art certainly do not anticipate it. In my opinion it was not an obvious thing to take an element such as the magnet feed from a prior ticker machine and position the same in another machine, operated on a different principle, in such a way as to secure the required cooperation with other elements and instrumentalities. This was the achievement of an inventor.

It is unnecessary to set forth in detail the method by which additional line spacing was secured in the machines employed by the parties to the litigation. But briefly stated: The type wheel was actuated by keys on a transmitter keyboard, a letter spacing key, and the return key, each having blank spaces. On depressing the blank letter space key the type wheel moved one letter space to the right, and on depressing the return key the type wheel shaft and letter spacing shaft rotated causing the pawls to disengage the rack and the type wheel carriage to slide to the right. After the blank letter spacing key, the return key, instead of the repeat key, was struck to avoid so-called skating through and to secure uniformity of operation in the different machines when a message was sent. While two motions were required of the operator instead of one to effect an additional line space, this in my opinion was not substantially the feeding of the carriage of the prior Merritt & Joy machine. Defendant's initial movement of the type wheel carriage to the right was not made to create power for feeding the paper, but was merely an incidental step in the line spacing operation, and was not a feeding analogous to that of the prior art.

My conclusion is that the defendant company in its present machine has not succeeded in avoiding the claim with which we are herein concerned, and that in its adaptation of prior infringing machines it still infringes complainant's patent by equivalent means which achieve substantially the same result. Even if defendant has succeeded in avoiding the letter of the claim, the charge of infringement, in the circumstances herein presented, is nevertheless made out. Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136.

The complainant may enter a decree for an injunction and an accounting, with costs.

On Petition for Rehearing.

A petition for rehearing has been filed, specifying error in the interpretation of claim 12 as set forth in the original opinion. It is contended that the effect of such interpretation is to disregard an important feature of the claim, namely, the expression "without feeding the type wheel" in connection with means for continuously feeding the paper for line spacing. The specification in suit, it is true, with considerable detail sets forth means for feeding the paper line by line without moving or rotating the type wheel in either direction, the same remaining in a fixed position.

Now the controlling question is whether the claim as modified by the disclaimer is strictly limited to a mechanism for continuously feeding successive line spaces without permitting any movement whatever of the type wheel. The answer must be found in a consideration of the Merritt & Joy patent in connection with the improvement in suit, for, as heretofore stated, in the former patent the paper was fed by the return movement of the carriage which contacted it with the lever (Figure 2) and depressed the type wheel actuating the rolls for feeding the paper, and it was absolutely necessary for the type wheel to be fed forward in order to feed the paper for line spacing. Now, does the defendant avoid infringement by modifying its machine so that the paper cannot be fed a second line space (quoting from defendant's brief) "without feeding the type wheel a true letter space movement; that is, feeding it out to at least the second letter space and returning it again"?

From my examination of the Merritt & Joy machine and the prior art generally in connection with the present invention, I have no doubt that in the patent in suit the phrase "without feeding the type wheel" was intended to mean without moving it to the right for creating power to directly feed the paper for line spacing on the return of the carriage, as I have heretofore explained was done in the Merritt & Joy structure. Such a construction, however, defendant urges is equivalent to reading out of the claim entirely the words "without feeding the type wheel," and McCarty v. Lehigh, 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358, and Westinghouse v. New York, 119 Fed. 874, 56 C. C. A. 404, are cited in support of the argument that no element, not present, is readable into a claim for the purpose of making out a case of invalidity or infringement. But such adjudications do not apply to the present case as the movement of the type wheel carriage to the right in defendant's machine is not expressly for the purpose of feeding the paper as in the Merritt & Joy patent. Indeed, defendant's movement of the type wheel one letter space to the right for successive line spacing occurs because of the operation of keys at the transmitting office which method of operation also obtains in complainant's machine.

There is no substantial feeding of the type wheel in defendant's machine, but merely a negligible movement to the right, which certainly does not successfully avoid the intendment of the specification and claim, whatever may be said of the phraseology of the latter. But it is urged that the claim as interpreted does not inform the public how

the machine may be constructed; that if the type wheel, in spite of the plain wording of the claim, may be moved any number of spaces, so long as it is not fed by the movement of the carriage, then manifestly the claim is unduly broadened. It is not within the province of the court to point out how far to the right the type wheel can be moved on the shaft without infringement, but it is sufficiently clear that in defendant's adaptation the movement of the carriage was not to create power for feeding the paper which, as in complainant's machine, is fed by the constantly rotating drive shaft (when in rotation), and the slight initial movement cannot, I think, be considered as anything other than an evasion of the claim.

A decree may now be entered, but on notice to the solicitor for the defendant.

WATERLOO CEMENT MACHINERY CORP. v. ENGEL.

(District Court, W. D. New York. December 8, 1915.)

1. PATENTS ⊜167(1)—CONSTRUCTION OF CLAIMS.

An element of a mechanical combination, which is an essential part of the invention, and is clearly described and shown in the specification and drawings, may be read into a claim, although not specified therein, and although the claim does not contain the words "substantially as described."

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. ⊜167(1).]

2. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—MIXING MACHINE.

The Snell patent, No. 842,262, for a concrete mixing machine, claims 1 and 2, *held* not anticipated, valid, and infringed.

In Equity. Suit by the Waterloo Cement Machinery Corporation against George Engel. On final hearing. Decree for complainant.

Charles W. Pooley, of Buffalo, N. Y. (George M. Finckel, of Columbus, Ohio, of counsel), for plaintiff.

G. C. Kennedy, of Waterloo, Iowa, for defendant.

HAZEL, District Judge. This is an action for infringement of claims 1 and 2 of letters patent No. 842,262, issued to Ransom Z. Snell, January 29, 1907, for a mixing machine particularly designed for mixing concrete and similar substances, which has a mixing tank supported on a frame, and rotated on its vertical and horizontal axis to mix the material, and then tilted to discharge the same. Claim 1 is for the following elements: (1) A pair of standards; (2) a supporting crossbar connected at each end with the top of the standards; (3) a mixing tank journaled at the center of the supporting crossbar; (4) an annular rack around the mixing tank; (5) a driving shaft journaled in one standard; (6) a gear on the driving shaft meshing with the annular rack; (7) means for rotating the drive shaft; (8) a spindle at the other end of the supporting crossbar journaled in the other standard; and (9) means connected with the spindle to rotate it and tilt the mixing tank. Claim 2 comprises the following ele-

ments: (1) Standards; (2) crossbar; (3) mixing tank; (4) a shaft journaled in one of the standards and pivotally supporting one side of the crossbar; and (5) a gear wheel on the shaft meshing with the rack and the mixing tank.

[1] According to the specification the supporting crossbar is provided with an upwardly projecting spindle so affixed as to make it a part of the crossbar. Neither of the claims in issue particularizes such feature, and the first question to be answered is whether the particular crossbar of the specification is included in the claims and protected by the patent. It is referred to in the specification with considerable detail, and stress is laid upon the manner of arranging the shaft in relation to the mixing tank and extending it into "an integral upwardly extending sleeve *13* of the tank so as to provide an axle bearing for the tank, preventing the latter from swerving or tilting on its ball bearings." The drawings quite clearly illustrate the details of construction of the crossbar, and, indeed, the feature of projecting the shaft into the tank was evidently regarded by the patentee as a highly important feature of the invention. To project the bearing into the tank, instead of projecting it outwardly from the bottom of the tank, as shown in prior patents in evidence, was conducive to a more even distribution of the load and a better balancing of it on the bearing shaft, and also to a more convenient use of the tank for mixing and discharging material. In my opinion the claims must be construed to cover the actual invention; that is, as if the claims had specified the crossbar or spindle as one projecting into the tank. Such a construction I believe is justified, even though the claims do not contain the words "substantially as described." Mitchell v. Tilghman, 19 Wall. 287, 22 L. Ed. 125.

In Fowler & Wolfe Mfg. Co. v. McCrum-Howell Co., 215 Fed. 905, 132 C. C. A. 143, the Circuit Court of Appeals for this circuit had before it a somewhat similar question arising from the failure of the claim of the patent to specify the size of tubes for a radiator, and Judge Rogers, writing the opinion, said:

> "We cannot understand why the court below should have reached the conclusion that an invention described in the specification, but not included in the 'claims,' cannot be protected by a patent. We regard the law as well established that the claims of a patent are to be construed in the light of the specification."

[2] Giving effect to that decision requires reading into the claims in suit the particular bearing or crossbar described in the specification and drawings, notwithstanding the fact that the claims on their faces are broader; and, when thus construed, the method of mounting the crossbar is unimportant, so long as it is supported by spindles which enable it to swerve or tip.

Anticipation by the prior art is not proven. In neither the Creeke, Smith, Taylor, Hoffken, nor Hornsteiner patents is found the combination of elements of the claims under discussion. Tilting appliances with both ends open for mixing material, bearings, and specific journaling, it is true, are disclosed in such patents; but in all of them different methods of assembling are shown, and they did not achieve

the same result as the patent in suit. In none of them is disclosed a combination with a sleeve extending from the bottom or middle of the tank and a spindle projecting upwardly into a sleeve from the center of the crossbar.

Defendant's construction shows a crossbar with a spindle or shaft attached thereto and extending through bearing plates integrally and upwardly into the tank. The mounting or journaling of the supporting crossbar is somewhat different from complainant's; but the adaptation is the full equivalent of complainant's and achieves the same result. The defendant has merely changed the form of the principal element of the combination in suit, and does not avoid the charge of infringement as alleged in the bill.

A decree, with costs, may be entered in favor of the complainant.

In re PROGRESSIVE WALL PAPER CORP.

DOCK & COAL CO. v. JUSTIN.

(District Court, N. D. New York. February 28, 1916.)

BANKRUPTCY ⊂=184(1)—CHATTEL MORTGAGES—CONSENT OF STOCKHOLDERS—STATUTORY PROVISIONS.

Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 6, authorizes stock corporations to mortgage their property, and provides that every such mortgage, except purchase-money mortgages and mortgages authorized by contracts made prior to May 1, 1891, shall be consented to by the holders of not less than two-thirds of the capital stock, which shall be given either in writing or by vote at a special meeting called for that purpose, and that a certificate under the seal of the corporation that such consent was so given shall be subscribed and acknowledged, and filed and recorded with the clerk or register of the county. *Held*, that this statute is for the benefit of creditors, as well as stockholders, and where the statute was not complied with a chattel mortgage was void as against a trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 275; Dec. Dig. ⊂=184(1).]

In Bankruptcy. In the matter of the Progressive Wall Paper Corporation, bankrupt, wherein Fred H. Justin, was trustee. On review of an order of the referee in bankruptcy, holding invalid and void, because its execution was not assented to by a majority of the stockholders of the corporation, a chattel mortgage given to secure the payment of three promissory notes made by the Progressive Wall Paper Corporation, aggregating in amount $11,382.59, and which notes had been made at a prior date by the Progressive Wall Paper Corporation to the Dock & Coal Company, the claimant herein. Order affirmed.

Patrick J. Tierney, of Plattsburgh, N. Y., for claimant.

Weeds, Conway & Cotter, of Plattsburgh, N. Y. (Frank E. Smith, of Plattsburgh, N. Y., of counsel), for trustee.

RAY, District Judge. The Progressive Wall Paper Corporation is a domestic stock corporation, and was organized in 1904 under the

laws of the state of New York, with a capital stock of $210,000, divided into 2,100 shares, of $100 each. In 1913 the capital stock was increased by the addition of $100,000 of preferred stock, consisting of 1,000 shares, of $100 each. The chattel mortgage, the validity of which is in question here, was executed in July, 1914, and there had then been issued and was outstanding 1,283 shares of the common stock and 118 shares of the preferred stock of said corporation, making the total issued and outstanding stock at that time 1,401 shares. July 4, 1914, at a meeting of the directors of said corporation, there was present John J. Cunningham, its president, and John H. Derby, Archibald S. Derby, and Grenville M. Ingallsbee, directors, and a resolution was then and there adopted authorizing the execution of a mortgage to the Dock & Coal Company as collateral security for the payment of three promissory notes of the said corporation and covering two piles of wood pulp belonging to the corporation. The president of the corporation was authorized to execute and deliver said chattel mortgage. On said day the mortgage was executed and delivered to the Dock & Coal Company to secure the payment of three promissory notes, which had theretofore been made by the Progressive Wall Paper Corporation, and which were then held by the said Dock & Coal Company, viz., one for $3,382.59, dated June 27, 1914, and due August 22, 1914; one for $4,000, dated June 27, 1914, and due September 26, 1914; and the other for $4,000, dated June 27, 1914, and due October 24, 1914. This mortgage covered the property above mentioned and was duly filed in Clinton county clerk's office July 6, 1914. There is no claim that there had been any prior agreement made by the corporation or its stockholders to execute and deliver any such mortgage. Cunningham, J. H. Derby, A. S. Derby, and Ingallsbee, who were present at the meeting when the above resolution was adopted, owned of the common and preferred stock 826½ shares.

The Dock & Coal Company was a partnership composed of George C. Kellogg and John F. O'Brien. Said Kellogg was then a stockholder of the Progressive Wall Paper Corporation and owned 80 shares of the common stock. No consent in writing to the making of said chattel mortgage was executed, and no consent in writing signed by the holders of two-thirds of the issued capital stock of the said corporation was ever made or signed by said stockholders, and no meeting of the stockholders was called or held to consider the question of executing such a mortgage. No certificate that the consent of the holders of two-thirds of the capital stock of said corporation to the making of such mortgage has ever been filed in the office of the clerk of Clinton county, in which county the principal office and place of business of said corporation was located.

November 23, 1914, a petition in bankruptcy was filed against or by the said Progressive Wall Paper Corporation and adjudication followed. December 10, 1914, Fred H. Justin was duly appointed and qualified as trustee of said bankrupt. The trustee thereupon took possession of all the pulp mentioned in the chattel mortgage which then remained in the possession of the Progressive Wall Paper Corporation. January 5, 1915, the said Dock & Coal Company asserted

its claim by notice on the said wood pulp and asserted its right to sell the same. The referee thereupon made an order for a hearing in relation to the validity of said chattel mortgage, and the matter was tried out before the referee, and thereupon the order under review holding the mortgage invalid was made.

Section 6 of chapter 61, Laws of 1909 of the state of New York, being section 6 of chapter 59 of the Consolidated Laws, and known as "Stock Corporation Law," reads as follows:

"*Power to Borrow Money and Mortgage Property.* In addition to the powers conferred by the general corporation law, every stock corporation shall have the power to borrow money and contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation; and it may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for said purposes. Every such mortgage, except purchase-money mortgages and mortgages authorized by contracts made prior to May first, eighteen hundred and ninety-one, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice-president and by the secretary or an assistant secretary, of the corporation, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business. When authorized by like consent, the directors under such regulations as they may adopt, may confer on the holder of any debt or obligation, whether secured or unsecured, evidenced by bonds of the corporation, the right to convert the principal thereof, after two and not more than twelve years from the date of such bonds, into stock of the corporation; and if the capital stock shall not be sufficient to meet the conversion when made, the directors shall from time to time, authorize an increase of capital stock sufficient for that purpose by causing to be filed in the office of the secretary of state, and a duplicate thereof in the office of the clerk of the county where the principal place of business of the corporation shall be located, a certificate under the seal of the corporation, subscribed and acknowledged by the president and secretary of the corporation setting forth,

"1. A copy of such mortgage; or resolution of directors authorizing the issue of such bonds;

"2. That the holders of not less than two-thirds of the capital stock of the corporation duly consented to the execution of such mortgage or resolution of directors authorizing the issue of such bonds by such corporation;

"3. A copy of the resolution of the directors of the corporation authorizing the increase of the capital stock of the corporation necessary for the purpose of such conversion;

"4. The amount of capital theretofore authorized, the proportion thereof actually issued and the amount of the increased capital stock.

"If the corporation be a railroad corporation the certificate shall have indorsed thereon the approval of the public service commission having jurisdiction thereof. When the certificate herein provided for has been filed, the capital stock of such corporation shall be increased to the amount specified in such certificate."

From the statement of facts it is seen that the mortgage in question is not a purchase-money mortgage, and was not authorized by a contract or contracts made prior to May 1, 1891. It is also seen

that the execution and delivery of the mortgage was not consented to by the holders of not less than two-thirds of the capital stock of the corporation. It is also seen that there was no meeting of the stockholders of the corporation called or held for the purpose.

On the part of the trustee in bankruptcy it is contended, as was held by the referee in bankruptcy, that for these reasons the mortgage was and is invalid, not only as to the stockholders of the corporation, but as to unsecured creditors, and that the trustee in bankruptcy may take advantage of the noncompliance with section 6 of the Stock Corporation Law above quoted. On the part of and, in behalf of the Dock & Coal Company, claimant, it is urged and contended that, even if the mortgage referred to was invalid for noncompliance with the requirements of the statute referred to as to stockholders, it was not invalid as to creditors, and that the trustee in bankruptcy representing the bankrupt corporation and its creditors cannot raise the question or assert the invalidity of such mortgage.

Much will be found in the opinions given by various judges in passing upon this provision of the Stock Corporation Law or similar provisions tending to the conclusion that the section was enacted for the protection of stockholders and no other person or persons. Much will be found in the opinions and some of the decisions tending to a contrary conclusion. I do not find that the Court of Appeals of the state of New York has ever passed directly upon the question. In reading the relevant opinions of that court as much can be found tending to the one conclusion as to the other.

The learned counsel for the Dock & Coal Company contends that the mortgage in question here is not void, but voidable merely, and cites in support of this contention the following cases: Rochester Savings Bank v. Averell, 96 N. Y. 467; Hamilton Trust Company v. Clemes, 17 App. Div. 152, 45 N. Y. Supp. 141; Paulding v. Steel Company, 94 N. Y. 334; Greenpoint Sugar Company v. Whitin, 69 N. Y. 328. He also contends that section 6 of the Stock Corporation Law above quoted was enacted for the purpose of protecting the stockholders of the company, and that none but the stockholders can avail themselves of this provision, and that the trustee cannot avail himself of this provision for the benefit of creditors and avoid the lien of the chattel mortgage. He cites the following cases: Rochester Savings Bank v. Averell, 96 N. Y. 467; Hamilton Trust Company v. Clemes, 17 App. Div. 152, 45 N. Y. Supp. 141; Paulding v. Steel Company, 94 N. Y. 334; Greenpoint Sugar Company v. Whitin, 69 N. Y. 328; Black v. Ellis, 58 Misc. Rep. 391, 111 N. Y. Supp. 347; Id., 129 App. Div. 140, 113 N. Y. Supp. 558; Id., 197 N. Y. 402, 90 N. E. 958.

In Black, as Receiver, v. Ellis, 129 App. Div. 140, 113 N. Y. Supp. 558, affirmed 197 N. Y. 402, 90 N. E. 958, a number of cases were referred to which bear upon this question. The opinion in the Appellate Division was written by Clarke, J., and concurred in by Patterson and Houghton, while Judges Ingraham and McLaughlin dissented with opinions. This is an authority in favor of the claimant Dock & Coal Company, but it was rendered by a divided court. When the case

came into the Court of Appeals (197 N. Y. 402, 90 N. E. 958), it was gage was given under such circumstances as constituted it a purchase-decided on other grounds, and that court held that the chattel mort-money mortgage containing a covenant to renew every year during the term thereof; that the mortgagor transferred the chattels to a corporation which accepted the title thereto subject to the lien of the mortgage and under a covenant on its part to renew, and that it executed a new mortgage in compliance therewith without obtaining the consent of the stockholders. That court also held that the statute requiring the consent of two-thirds of the stockholders to a mortgage applies to creating a new incumbrance on corporate property, and not to keeping alive one on existing property acquired subject to a mortgage and under an agreement to continue it as a valid and subsisting lien; that a court of equity would upon proper application have compelled the corporation to perform its contract by giving a new mortgage without the consent of the stockholders, and a decree for specific performance would have followed if all the stockholders had united in opposition thereto; hence that their consent was not necessary to a valid renewal of the mortgage in question. It is seen that the Court of Appeals avoided a decision on the main question passed upon by the court below and upon which that court stood divided.

In London Realty Co. v. Coleman Stable Co. et al., 140 App. Div. 495, 125 N. Y. Supp. 410, it is expressly held that a stock corporation, when sued for the recovery of goods which the plaintiff claims are his by virtue of a chattel mortgage executed by such corporation, may itself defend on the ground that the necessary assent of its stockholders was not given to the execution of such mortgage, as required by section 6 of the Stock Corporation Law above quoted. The court said:

"In order to take advantage of the invalidity of a mortgage, executed without the statutory requirements having been observed, it is not necessary that the objection should be raised by a stockholder or creditor, but the defense is available to the corporation itself."

Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547, 2 N. E. 909, is cited as authority. If the corporation itself, as here held, may assert the invalidity of a chattel mortgage for want of assent thereto by its stockholders, it would seem perfectly clear that the trustee in bankruptcy, who succeeds to and takes the place of the corporation, may assert the invalidity and plead and sustain any defense which the corporation itself might present.

As an original proposition under the section of the statute referred to, it would seem plain to this court that the requirement of the consent of the stockholders was not for the benefit or protection of the stockholders alone, but for the protection and benefit of the corporation itself and the benefit and protection of the creditors of the corporation. The statute itself does not declare that it is for the protection of the one any more than for the protection of the other. It is now elementary law and well decided that the directors of a corpora-

tion hold its property in equity as a trust fund for the benefit of the creditors of such corporation and also for the benefit of the stockholders. The proceeds of such property is to be applied in equity, first to the discharge of the debts of the corporation, and the surplus, if any, goes to the stockholders. In fact, stockholders cannot take the assets of the corporation for their own benefit to the exclusion of the creditors, and hence a provision for the benefit of the stockholders is a provision for the benefit of the creditors of such corporation.

If the contention made by the claimant here is sustained, it will follow that chattel mortgages executed by the officers and directors of a New York corporation, organized and existing under the provisions of the New York Stock Corporation Law, and which, in order to be valid, must be assented to in the manner required by statute, cannot be challenged by any one except the stockholders themselves, and, it is claimed, for their own benefit, and hence, as a result, when the officers and directors of such a corporation, without the consent of the stockholders, execute such a mortgage to secure a creditor to the exclusion of other creditors, and bankruptcy follows, and actual fraud or intent to prefer cannot be established, and as a result of such bankruptcy the stockholders have no interest to contest the validity of the mortgage, the secured creditor will hold the property to the exclusion of the other creditors and to the exclusion of the trustee in bankruptcy, even though such mortgagee could not have done so if the corporation had remained solvent and the stockholders had seen fit to assert the invalidity of the mortgage because of noncompliance with the statute quoted. That which is for the benefit of the stockholders of a corporation is primarily for the benefit of the creditors of such corporation, inasmuch as unincumbered property owned by such corporation is in equity a trust fund in the hands of the officers and directors, for the benefit of and to be applied first to the payment of creditors, and the balance, if any, to be divided amongst the stockholders on the winding up of the corporation.

It seems to me plain that when the Legislature provided that such a mortgage, executed by the officers and directors of the corporation, in order to be valid, must be assented to by a majority of the stockholders in the manner prescribed, it had in mind and sought to protect, not merely the stockholders, but the corporation itself and its creditors, whose rights are ordinarily superior to those of stockholders. It would be unjust and inequitable to hold that stockholders for their own benefit may avail themselves of a noncompliance with this statute, but that when bankruptcy comes the trustee, representing creditors and charged with the duty of protecting their rights, may not assert a noncompliance with the provisions quoted.

So far as this court is concerned, in the absence of a decision by the Court of Appeals of the state of New York directly in point and to the contrary, it is bound and concluded on this question by the decision of the Circuit Court of Appeals in this (the Second) circuit in Re Post & Davis Co., 219 Fed. 171, 135 C. C. A. 69. In that case the Circuit Court of Appeals expressly disapproves of the holding in

Black v. Ellis, 129 App. Div. 140, 113 N. Y. Supp. 558. The Circuit Court of Appeals holds in the case cited, not only that the trustee may assert the invalidity of the mortgage executed without the necessary consents, but as follows, after quoting the statute:

"The language of the statute is most clear and specific; manifestly it was made so to accomplish some purpose. That purpose is very plainly indicated on the face of the statute; it substitutes for mere oral expressions of assent, casually given it may be, an orderly permanent record, which can be referred to. The provision, in the language of the New York Court of Appeals, 'involves an application to the stockholders, and, on their part, consideration, judgment, and final determination, and, on the part of the assenting stockholders, a written expression of their conclusion.' * * * To hold that written assent of two-thirds of the stockholders may be dispensed with in this case would go much further than any decision of the New York Court of Appeals to which we have been referred or which we have found. There is no pretense that any written assent was ever signed, or that it was ever voted at any stockholders' meeting, special or general. If the statute had been so construed by the state court of last resort, we should follow its construction of the state statute; but until such a decision is cited we are unwilling to fritter away the specific provisions of an act which manifestly were put there to accomplish a plain purpose."

It follows that the order of the referee must be affirmed.

In re STRINGER.

(District Court, E. D. New York. February 7, 1916.)

1. BANKRUPTCY ⊜345—PLEDGED PROPERTY—RIGHTS OF PLEDGOR.

Where stockbrokers, who subsequently became bankrupt, having the apparent right to use as collateral securities belonging to their customers, pledged such securities for a debt, and the pledgee sold them and paid the surplus to the trustee, the customers could obtain the identified proceeds, but had only a general claim against the estate for such amounts as were not represented in the hands of the trustee by the identified proceeds of the securities owned by them, as, though the bankrupt might be prosecuted criminally or disciplined by the Stock Exchange, the securities could not be treated as stolen property, and the use of them by the bankrupt and sale in the regular way by the pledgee conveyed a good title.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⊜345.]

2. BANKRUPTCY ⊜210—JURISDICTION OVER ASSETS—JURISDICTION OF STATE COURTS.

Stockbrokers, who subsequently became bankrupt, pledged as collateral security certain stock which had been deposited with them by customers as collateral or left with them as bailees. The pledgee sold the stock for more than his debt. R., one of the customers, sued the pledgee in a state court, and the bankruptcy court directed the pledgee to turn the surplus over to the trustee, to hold subject to a determination of the claim of R. "herein," and authorized the trustee to intervene in the state court action to fix the amount of R.'s claim. The state court found that the surplus was derived in part from the property of R., and judgment was rendered for him. *Held*, that the judgment of the state court was in effect a determination that, as between R. and the bankrupt, the surplus

belonged to R., and this determination the state court had jurisdiction to make.

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

3. BANKRUPTCY ⊂⊃196—CLAIMS—EFFECT OF JUDGMENT.

The judgment estopped the trustee and the bankrupt estate, so far as any claim of the estate generally would diminish the fund available for R., but did not affect the right of the bankruptcy court to pass upon all claims presented to it with respect to property in the control of its officers, and R. could claim only in competition with other claimants of the same rank.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306–316; Dec. Dig. ⊂⊃196.]

4. BANKRUPTCY ⊂⊃305—CLAIMS—EFFECT OF JUDGMENT.

A provision in the judgment allowing execution to issue against the trustee was unavailing beyond the right given thereby to use the sheriff, if necessary, in seeing that an application was made to the bankruptcy court for the requisite order to the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 466–468; Dec. Dig. ⊂⊃305.]

5. CORPORATIONS ⊂⊃123—PLEDGES OF STOCK BY BROKER—RIGHTS OF OWNERS.

Where stockbrokers pledged as collateral security stock belonging to their customers, if a particular block of collateral was sold and the amount credited on the secured debt apart from a sale of other blocks of collateral, the claimant of such block of stock would have no claim to a surplus in the hands of the pledgee arising upon the subsequent sale and application of such other blocks of collateral.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507–512, 537, 539–546, 569, 618; Dec. Dig. ⊂⊃123.]

6. CORPORATIONS ⊂⊃123—PLEDGES OF STOCK BY BROKER—RIGHTS OF OWNERS.

If all the blocks of stock belonging to a stockbroker's customers and pledged by the stockbroker as collateral security were subject to the same claim by the customers when held as collateral, the claimants were entitled to share pro rata in the surplus existing after payment of the secured debt.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507–512, 537, 539–546, 569, 618; Dec. Dig. ⊂⊃123.]

In Bankruptcy. In the matter of G. Franklin Stringer, individually and as member of Stringer & Co., and the firm of Stringer & Co., bankrupt. On application for the payment of certain proceeds of securities owned by customers of the bankrupt. Taking of further evidence ordered.

James E. Duross, of New York City, for Richardson.
Henry M. Stevenson, of New York City, for Lewis.
Frederick W. Stelle, of New York City, for Graff.
Charles A. Hitchcock, of New York City, for Nixon.
Leon M. Woodworth, of New York City, for Spooner.
A. Gordon Murray, of New York City, for trustee in bankruptcy.

CHATFIELD, District Judge. Adjudication was had in this case upon January 12, 1915. Prior thereto the firm of Stringer & Co. had

pledged with Winslow & Co., as collateral security for a loan, certain shares of stock, which were thereafter sold on the dates and at the prices set forth below:

January 11th, $1,000 5% bond, Lorrilard		$ 1,021 81
3 Chicago, Milwaukee & St. Paul $1,000 5% bonds		3,066 89
2 Eastern Tennessee & Georgia $1,000 5% bonds		2,088 72
2 Chicago & Northwestern 4% $1,000 bonds		1,881 72
25 shares American Cotton Oil preferred		2,373 22
Total		$10,432 36
January 14th, 30 shares Union Pacific	$3,545 37	
11 shares American Telegraph & Telephone	1,299 97	
60 shares New York, New Haven & Hartford	3,160 72	
10 shares California Petroleum preferred	499 29	8,505 35
January 15th, a dividend on the American Telegraph & Telephone stock added		22 00
Making a total in the hands of Winslow & Co. of		$18,959 71

The debt owing from Stringer & Co. to Winslow & Co., upon January 11th, was $13,561.86.

It appears from the record that the Lorrilard bond above named had been deposited with Stringer & Co. as collateral by a customer, one Spooner, who, after liquidation of his other transactions with the Stringer firm, is indebted to the estate in the sum of $23.80.

The three Chicago, Milwaukee & St. Paul bonds, the two Eastern Tennessee & Georgia bonds, and the two Chicago & Northwestern bonds had been deposited by a customer named Graff as collateral for his transactions with Stringer & Co. Graff had also deposited in the same way the 11 shares of American Telegraph & Telephone which were sold on the 14th of January. After liquidation of his other claims, he is shown by the record to have a claim against the estate of Stringer & Co. in the sum of $4,612.40.

The 25 shares of American Cotton Oil preferred were deposited with Stringer & Co. by one Richardson, who also was a customer, and who, so far as other transactions are concerned, appears to have a claim against the estate in the sum of $1,677.07.

The certificate for 30 shares of Union Pacific had been deposited with Stringer & Co. by one Carpenter, a customer, but no claim is made against the estate for these shares, inasmuch as liquidation of the account proves Mrs. Carpenter to have been indebted to Stringer & Co. for a greater amount than the proceeds of the shares. She therefore makes no claim specifically for any part thereof. But her debt to the estate will be diminished by such amount as she may receive therefrom, if she be entitled to any part.

The 60 shares of New York, New Haven & Hartford stock had been loaned to Stringer & Co., or to individuals as members of that firm, by Mrs. Lewis, who is a sister of the surviving partner of the firm. She has other claims against the estate for other securities, loaned by her in the same way, and her claim to the return of these securities when found in the hands of the trustee (or to the equities

therefrom when returned to the trustee) has been upheld by previous orders of the court.

The ten shares of California Petroleum preferred had been deposited with Stringer by one Nixon, a customer, who, on liquidation as to other matters, had a claim against Stringer & Co. for the sum of $932.86.

It will thus be seen that the shares sold out by Winslow & Co. upon January 11th wiped out the indebtedness of Stringer & Co. to them, with the exception of $3,128.50, and that thereby the collateral of Richardson, Spooner, and Graff was disposed of, except for the American Telegraph & Telephone stock of the customer, Graff.

Under these circumstances, a sale of Mrs. Carpenter's Union Pacific stock would have sufficed to pay the Winslow & Co. claim, and the California Petroleum preferred stock of Nixon, the New York, New Haven & Hartford stock of Mrs. Lewis, and the American Telegraph & Telephone stock of Graff would have been returned to the trustee intact. Under the doctrine applied to the Pippey and Hudson stock, in the case of In re T. A. McIntyre & Co., 181 Fed. 955, 104 C. C. A. 419 (see, also, Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845), these shares would have survived the dangers to which the same had been exposed and would be still available in the hands of the trustee to fulfill the obligations for which they had been deposited with the bankrupts as a pledge.

Before considering whether the other customers whose stock had been used by Winslow & Co. to liquidate the indebtedness to them can insist upon contribution from those customers who would have been fortunate enough to find their stock in the hands of the trustee, if Winslow & Co. had not sold out the entire amount pledged, and before we consider whether this sale by Winslow & Co. establishes any different rights as between the customers than would have existed if the stock which was not needed by Winslow & Co. had been returned intact, it is necessary to consider the claim of Richardson, which is placed upon an entirely different basis.

Application has been made to compel the bankrupt estate to account for and return these sums of money representing the balance received by the trustee in bankruptcy from the sale of stocks pledged before bankruptcy as collateral by the bankrupts. It has been shown that the identical shares of stock so pledged were deposited with the bankrupts by the petitioners seeking their return.

[1] There is no question that the equity from the sale of any particular block of stock, if that equity is created by some one who held the stock with the apparent right to use it as collateral, is all that can be *traced* into the present estate. The customers, who are now the petitioners, would have but a general claim against the estate for the amounts which are not represented in the hands of the trustee by the same certificates or the identified proceeds thereof. Although the bankrupt might be prosecuted criminally, or disciplined under the rules of the Exchange, for hypothecating (without authority or without substitution of others) securities intended to be held only as collateral, nevertheless the securities themselves are not to be treated as

stolen property. The use of them by the bankrupt as collateral, and the sale of that collateral in the regular way, against the bankrupt, conveys good title to those particular securities as against the customer (who might, however, have claimed them from the bankrupt estate, if still in its possession). Markham v. Jaudon, 41 N. Y. 235; Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981; Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047.

In the present cases, the estate of the bankrupt has received only a surplus derived from the sale of the stocks, which the firm of the bankrupt had used as collateral for its own purposes, without purchase of other stock in its place. Admittedly this surplus, upon the findings presented to the court, belongs to some one or all of the petitioners as their rights may appear. Thomas v. Taggart, supra, 209 U. S. at page 391, 28 Sup. Ct. 519, 52 L. Ed. 845; In re T. A. McIntyre & Co., supra.

In such a situation, a fund in the hands of the trustee, claimed by five separate individuals and derived from the sale of five different specific properties, by the person holding those five properties as collateral, would require a reference, so as to separate or distinguish the exact equity which was obtained from each property. Each petitioner would be entitled to so much of the surplus as represented the equity of the property which had belonged to that petitioner, or to a pro rata share if the fund has been created by one sale and is insufficient to answer all the claims.

With respect to some of the present applications, this solution might easily be followed, and if it were impossible to trace the respective equities the claims would have to be prorated from the total surplus. But others of these claims raise other questions.

One claim (Richardson) has been presented to this court upon a judgment obtained in the Supreme Court of New York, in an action wherein the trustee in bankruptcy was substituted for the firm holding the collateral against the bankrupt, and in which action the judgment establishes the right of the petitioner to whatever fund may be affected, in exactly the same way as the order of this court establishes the right of each of the other four petitioners against the trustee in bankruptcy upon determination of their claim. When, however, this first claim was brought into litigation in the state court, the then defendants, Winslow & Co., who held the collateral in question, and who had applied it to the payment of their own loan, refused to turn over the equity therefrom to the trustee in bankruptcy, on the ground that they wished to interplead the bankrupt estate as a defendant to the state court action. Upon the application of the trustee, this court held that the property should be turned over to the trustee in bankruptcy; but he was given authority to intervene in the action in the state court to dispose of that litigation and to fix the amount of the claim.

The result of this proceeding was that the surplus accounted for by Winslow & Co. was turned over to the trustee, and that surplus was

found in the state court action to have been derived in part from the property of the plaintiff, who is the petitioner now seeking its return. The trustee opposed the application on behalf of all the others claiming through him.

Winslow & Co., the original defendants, in their action admitted that they had as much as the amount claimed by the plaintiff, which was the property of the bankrupt. The entire surplus was turned over to the trustee by order of this court, with a provision that the trustee "hold the amount so paid over to him by the said firm of Winslow & Co., subject to a determination of the claim of one Arleigh D. Richardson thereto herein."

[2] This was in effect a provision that the money be available to secure the claim of Richardson, to whatever extent that claim should be allowed "herein"; that is, in a court of bankruptcy. If Winslow & Co. had contended that this money was the property of Richardson, or if Richardson had claimed that he could prove, as against Winslow & Co., his right to this specific fund as an entirety, it would have been necessary to bring in all possible claimants to that fund and to adjust those claims before it could be known what portion of the money in the hands of Winslow & Co. belonged to Richardson. The judgment of the state court is in effect a determination that, as between Richardson and the bankrupt, the property would belong to Richardson, and this question the state court had full jurisdiction to determine. Frank v. Vollkommer, 205 U. S. 521, 27 Sup. Ct. 596, 51 L. Ed. 911.

[3-5] Richardson, therefore, is in the position of claimant against the estate in the hands of the trustee in bankruptcy, whose claim cannot be disputed, except by those claimants of equal rank in the bankruptcy proceeding. The trustee had no right to bind one claimant, or one set of claimants, as against another, by taking up the burden of litigating on behalf of Winslow & Co. the validity of their claim as against the bankrupt.

Nor does the jurisdiction of the state court in determining the validity of that claim affect the right of this court to pass upon all claims presented to it with respect to property in the control of its officers. Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. The proceedings in bankruptcy and the bankruptcy court must recognize the validity of the Richardson claim and the validity of the judgment as a basis for that claim, but the amount which can be paid thereunder depends upon the distribution of the fund in the bankruptcy proceeding.

If this question had been raised prior to the trial in the state court, the issue there might have been limited, so as to render judgment only with respect to so much of the fund as could be shown to have been the property of Richardson. The action of the trustee in litigating the question, without determining the precise amount which would result from a judgment in behalf of Richardson, estops him and the bankrupt estate, so far as any claim of the estate generally would diminish the fund available for Richardson. The expense of litigating the

Richardson claim would have to be borne by the estate in bankruptcy generally, and would be a matter to be considered between the trustee and the general creditors; but the fund which is available for the payment of the Richardson claim is only that fund which Richardson can claim at the hands of the bankruptcy court, in competition with other claimants of the same rank. It is evident that the provision allowing execution to issue against the trustee in bankruptcy is unavailing beyond the right given thereby to use the sheriff, if necessary, in seeing that an application is made to this court for the requisite order to the trustee in bankruptcy. But the court of bankruptcy must now determine, if possible, the total proceeds in the hands of Winslow & Co. from the property of each claimant, and must determine the way in which the surplus in the hands of Winslow & Co. shall be treated. If a particular block of collateral was sold and the amount credited apart from a sale of the other blocks of collateral, then the claimant of that block of stock would have no claim to the surplus in the hands of Winslow & Co., but must look entirely for recourse to the bankrupt and his estate.

[6] If all the blocks of stock held as collateral were subject to the same claim by their owners, when held as collateral by Winslow & Co., then the claimants are entitled pro rata to share in the surplus. This seems to be the doctrine as to the Hudson stock in the case of In re T. A. McIntyre & Co., supra.

The petition of Richardson for an order directing payment of his entire judgment is based upon his contention that (as in the case of Matter of Mills, 125 App. Div. 730, 110 N. Y. Supp. 314, affirmed 193 N. Y. 626, 86 N. E. 1128, and as in the case of the Pippey stock, in 181 Fed. 955, 104 C. C. A. 419) his shares of American Cotton Oil had not been deposited as collateral, but were held merely by the bankrupt firm as bailee. This seems to have been the finding of the state court, but the present record does not show how the Graff and Nixon stock was deposited, nor whether they were properly applied to maintain sufficient margins for those traders. If Graff, Nixon, Spooner, and Carpenter were all customers whose stock was needed to maintain margins, then Richardson would seem to have superior rights to each of the others. If any of these have equal rights with Richardson, that one would share with him in the fund in advance of the others.

It seems that Mrs. Lewis cannot claim any wrongful use of her stock, and that (like the Hudson claim in the McIntyre Case, supra) she can receive only what may remain in the hands of the trustee after the claims of those with superior rights are satisfied, and which can actually be traced as having survived the risks which were anticipated by her in loaning it. So far as the other claimants are concerned, she has no more right than a general creditor of the firm or of one of the individual partners. Further evidence must be taken to establish the relative priority of the claimants, in accordance with this opinion. A further hearing or reference for that purpose will be ordered on application.

In re BRIDGE.

(District Court, W. D. Washington, N. D. February 24, 1916.)

No. 5570.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⊂=25—RIGHT TO MAKE ASSIGNMENT.

Irrespective of statute, a party under the common law has a right to transfer all of his property to another for the purpose of converting it into money and paying it to all of his creditors in proportion to their debts.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 47; Dec. Dig. ⊂=25.]

2. BANKRUPTCY ⊂=198—EFFECT ON TRANSFERS MORE THAN FOUR MONTHS BEFORE BANKRUPTCY.

While an adjudication in bankruptcy supersedes and suspends a state insolvency act, where an assignment was made under an insolvency law recognized by the highest court of the state as valid and subsisting, and was assented to by all existing creditors, and no bankruptcy petition was filed within four months, an adjudication 20 months after the assignment, and after sales by the assignee and the payment of dividends to creditors, predicated upon new credits and a new act of bankruptcy subsequent to the assignment, did not avoid the assignment, set aside sales made by the assignee, and vest title to the property in the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296–316; Dec. Dig. ⊂=198.]

In Bankruptcy. In the matter of Alexander Bridge, bankrupt. On petition by the trustee for an order requiring an assignee to account for and surrender certain property. Petition denied.

De Roy & Sladkus and Leopold M. Stern, of Seattle, Wash., for trustee.

Oldham & Goodale, of Seattle, Wash., for assignee.

NETERER, District Judge. On December 7, 1915, Alexander Bridge was adjudicated bankrupt. In the creditor's petition it was alleged that he, while insolvent, did, within four months, commit an act of bankruptcy, in that, on October 8, 1915, he suffered and permitted P. B. Truax, assignee of a former business, to take "all his goods away from him," and "did not, within five days * * * before a final disposition of the property affected, * * * vacate * * * such preference," and obtain a preference through legal proceedings, etc. On August 13, 1913, bankrupt and his wife made an assignment to P. B. Truax of all of their property for the benefit of creditors. The assignment was assented to by all of the then existing creditors. The assignee took possession, and from time to time sold portions of the property and paid dividends to creditors to the amount of 65 per cent. of the indebtedness, and is now proceeding to sell the remaining assets for the purpose of prorating the proceeds among the creditors entitled to share therein. The trustee in bankruptcy has petitioned this court for an order requiring the assignee to account for and surrender all of the assigned property, to which the assignee has answered, praying dismissal of the petition upon the ground that the assignment was made more than four months prior to bankruptcy.

[1] The trustee contends that the Washington statute was suspended by the passage of the federal Bankruptcy Act, and that proceedings instituted thereunder are void. Numerous authorities are presented, and there appears to be some diversity of opinion among the various courts with relation to this issue. It may be said, however, that irrespective of statute a party, under the common law, has a right to do what he wills with his property, so long as he acts fairly and does not jeopardize the rights of others, and may carry this privilege to transferring all of his property to another for the purpose of converting it into money and paying the same to all of the creditors in proportion as the respective claims may bear to the value of the estate. Brashear v. West, 7 Pet. 608, 8 L. Ed. 801. The statutory enactments providing for assignments for the benefit of creditors have their basis upon the common-law right of disposition, and a proper construction of such statutory enactments can only be made by keeping in mind this fundamental basis of such superstructure; and where assignments for benefit of creditors are not invalid under state statutory enactments, they are "entitled to commendation." Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377.

[2] The Washington statute (chapter 5, §§ 1086–1103, Remington & Ballinger's Code) providing for the assignment by a failing debtor of all of his property for the benefit of his creditors, requires the giving of notice to the creditors, and provides for all proceedings, including the filing of claims, payment of dividends, and the final closing of the estate and discharge of the assignee, and also provides for the discharge of the debtor from debts existing at the time of the assignment, where he has been guilty of no act denounced by this law. It cannot be seriously urged that the provisions of the state statute providing for the discharge of the debtor are operative. Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760. This law is voluntary, and is designated "assignment for the benefit of creditors." It does not compel assignment, but prescribes a mode by which the trust created by assignment shall be administered.

With relation to the act as a whole, the state Supreme Court, in Jensen-King-Byrd Co. v. Williams, 35 Wash. 161, 164, 76 Pac. 934, 935, said:

"So that it will be seen that the vital question to be determined in this case is whether or not the bankruptcy law, which was passed by the United States Congress and approved on July 1, 1898, * * * supersedes or suspends the state insolvency law which was in existence at the time of the passage of said Bankruptcy Act. There is some conflict in judicial decisions on this question, but it was decided by this court, in State ex rel. Strohl v. Superior Court, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177, that the enactment of the federal Bankruptcy Law of July 1, 1898, did not suspend the jurisdiction of state courts in insolvency cases, where there had been no proceedings in bankruptcy instituted respecting the matter in controversy. * * * This case falls within the rule announced in the cases just cited, and the motion of the appellant should have been sustained."

The Supreme Court of Oregon, in Pelton v. Sheridan, 74 Or. 176, 144 Pac. 410, in passing on an assignment law similar to the Washington statute, by a divided court, held that such law was suspended by the Bankruptcy Act of 1898 (30 Stat. 544, c. 541), and confirmed

an attachment lien upon property included in a deed of assignment. In State ex rel. Strohl v. Superior Court of King County, 20 Wash. 545, on page 552, 56 Pac. 35, on page 37 (45 L. R. A. 177), the Washington Supreme Court held that "until adjudication by the proper tribunal" the remedies provided by existing state law were available to all parties, and said: "Unquestionably upon such adjudication the power of the state court to proceed further ceases." In this case the court was determining an issue involving a receivership of a corporation which was insolvent or in imminent danger of insolvency, and the trust fund doctrine having been frequently affirmed by the court, proceeded under the provisions of the Washington Code of Procedure, § 326, subd. 5; Ballinger's Code, section 5456.

A party is insolvent when the aggregate of his property shall not, at a fair valuation, be sufficient in amount to pay his debts. Section 1, subd. 15, Bankruptcy Act (Comp. St. 1913, § 9585). Section 3, subd. 4, of the Bankruptcy Act as amended in 1903 (section 9587), provides that an act of bankruptcy shall consist of having "made a general assignment for the benefit of his creditors. * * * (b) A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act." Two conditions must exist: First, insolvency; second, an act of bankruptcy. Under the laws of Washington an individual, although insolvent or in failing circumstances, may pay or secure one or more creditors to the exclusion of all others equally meritorious, even if by so doing he exhausts the whole of his property (Victor v. Glover, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53); and in the latter case the court held that a debtor had a right to stipulate in the deed, as a condition to receiving his pro rata from the property transferred, that a creditor shall deliver to the debtor a release of all claims against him.

No question of fraud or preference enters into this case. The purpose of the deed of general assignment was to make pro rata distribution to all of the creditors of the estate. It should be stated, in this connection, that at bar it appeared that the petitioning creditors are creditors scheduled in the deed of assignment, and who assented to the original assignment and participated in the dividends paid by the trustee, and that new credit was extended to the debtor subsequent to the deed of assignment, and the bankruptcy proceeding is predicated in part at least upon the new indebtedness. Under the Bankrupt Law of 1867 (14 Stat. 517, c. 176) an assignment for the benefit of creditors was valid if not impeached by a petition in bankruptcy within six months after its execution (Mayer v. Hellman, supra); and the 1898 act limits the filing of a petition to 4 months after the "general assignment" which is charged as the act of bankruptcy. The adjudication in bankruptcy unquestionably supersedes and suspends a state insolvency act, and no question could arise as to the right of the trustee to the possession of the property if the petition for adjudication had been filed within 4 months of the assignment; no controlling acts of estoppel being present. But where an assignment is made under the law of the state, recognized by the highest court of the

state as valid and subsisting, assented to by all of the then existing creditors, and no petition of bankruptcy is filed within the time limited by the Bankruptcy Act, shall it be said that 20 months after the assignment, and after a sale of many thousand dollars worth of property by the assignee and the payment of 65 per cent. upon the claims of the creditors, upon petition predicated upon new credits and a new act of bankruptcy, the assignment is thereby avoided, and all of the sales made by the assignee set aside, and the title to all of the property vested in the trustee? The creditors who assented to the deed of assignment, and participated in the administration of the estate and the distribution of the dividends, are unquestionably estopped by such proceeding. Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337. The rights of all parties interested in that estate became fixed and vested, and parties (old creditors) extending new credit did so with full notice of the assignment and vested rights of the parties as fixed by such deed of assignment, and not upon such property as the basis of credit, and should not be permitted, through this trustee in bankruptcy, to unsettle the rights and interests as fixed by the assignment and the various transfers made by the trustee to bona fide purchasers in good faith.

It is clear that the assignment of the property by the insolvent, to be disposed of under the provisions as prescribed by the laws of Washington, constituted an act of bankruptcy, which, upon a proper petition filed within the time provided by the Bankrupt Act, would afford basis for adjudication and secure administration in the bankrupt court. The way was open, by timely action, to secure such control; but nothing was done within the time prescribed by the act, and it is now too late to invoke the provisions of the Bankrupt Act. Boese v. King, supra. In that case the court, at page 385 of 108 U. S., at page 770 of 2 Sup. Ct. (27 L. Ed. 760), said:

"It can hardly be that the court is obliged to lend its aid to those who, neglecting or refusing to avail themselves of the provisions of the act of Congress, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure. If it be assumed, for the purposes of this case, that the statute of New Jersey was, as to each and all of its provisions, suspended when the Bankrupt Act of 1867 was passed, it does not follow that the assignment by Locke was ineffectual for every purpose. Certainly that instrument was sufficient to pass the title from Locke to his assignees. * * * And in the absence of proceedings in the bankruptcy court impeaching the assignment, and so long as Locke did not object, the assignees had authority to sell the property and distribute the proceeds among all the creditors, disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds, to conform to the local statute. The assignment was not void as between the debtor and the assignees simply because it provided for the distribution of the proceeds of the property in pursuance of a statute, none of the provisions of which, it is claimed, were then in force."

In Re Shinn (D. C.) 185 Fed. 990, at 992, the court said:

"It will be noted that the conveyance was made and the attachment issued more than four months before the institution of bankruptcy proceedings. They are therefore not null and void within the denouncement of the bankruptcy act. * * * So far as Shinn [bankrupt] is concerned, the conveyance to Bacharach [assignee] is irrevocable."

Justice Field, in Mayer v. Hellman, supra, at page 501 of 91 U. S. (23 L. Ed. 377), said:

"The great object of the Bankrupt Act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. For that purpose it sets aside all transactions had within a prescribed period previous to the petition in bankruptcy, defeating, or tending to defeat, such distribution. It reaches to proceedings of every form and kind undertaken or executed within that period by which a preference can be secured to one creditor over another, or the purposes of the act evaded. That period is four months for some transactions, and six months for others. Those periods constitute the limitation within which the transactions will be examined and annulled, if conflicting with the provisions of the Bankrupt Act. Transactions anterior to these periods are presumed to have been acquiesced in by the creditors. There is sound policy in prescribing a limitation of this kind. It would be in the highest degree injurious to the community to have the validity of business transactions with debtors, in which it is interested, subject to the contingency of being assailed by subsequent proceedings in bankruptcy. Unless, therefore, a transaction is void against creditors independently of the provisions of the Bankrupt Act, its validity is not open to contestation by the assignee, where it took place at the period prescribed by the statute anterior to the proceedings in bankruptcy. The assignment in this case was not a proceeding, as already said, in hostility to the creditors, but for their benefit. It was not, therefore, void as against them, or even voidable. Executed six months before the petition in bankruptcy was filed, it is, to the assignee in bankruptcy, a closed proceeding."

In re Weedman Stove Co., 199 Fed. 948 (District Court, Ark.), sustains the position of the trustee. In Frazier v. Southern Loan & Trust Co., 99 Fed. 707, 40 C. C. A. 76, the court held that an assignment for the benefit of creditors under the state law more than four months prior to bankruptcy was valid, and declined to take the property from the state court, and the same was done (In re Farrell, 175 Fed. 505, 100 C. C. A. 63); while in Re Curtis (D. C.) 91 Fed. 737, a voluntary assignment made under a state insolvency statute was held void; and to the same effect is Ketcham v. McNamara, 72 Conn. 709, 46 Atl. 146, 50 L. R. A. 641, 6 Am. Bankr. Rep. 160.

The trustee may have a right to recover from the assignee the property taken from the bankrupt, as charged in the petition for adjudication, or its value. But he has no right to an accounting from the assignee and the delivery to him of all of the property transferred by the deed of assignment.

The petition is denied.

In re PUGLISI.

(District Court, E. D. Pennsylvania. February 23, 1916.)

No. 20399.

TIME ⊂=11—COMPUTATION—DISREGARDING FRACTIONS OF A DAY—"TWO YEARS."

Under the statute, requiring applications for admission to citizenship to be filed not less than two years nor more than seven years after the making of the declaration of intention (Act Cong. June 29, 1906, c. 3592, § 4, 34 Stat. 596 [Comp. St. 1913, § 4352]), where a declaration of intention was dated October 16, 1912, and the petition for citizenship was dated October 15, 1914, jurisdiction would be entertained, as the day of

filing is to be included or rejected with a view to the entertaining of jurisdiction, and Congress is presumed to have intended the act to be construed in view of the principle of law that fractions of a day are not regarded.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 53; Dec. Dig. ⊂=11.]

Application by Antonio Puglisi for citizenship. On hearing on petition and proofs. Applicant admitted.

Antonio Puglisi, in pro. per.
Thomas B. Shoemaker, Chief Nat. Examiner, for the United States.

DICKINSON, District Judge. This case involves the vexing question of the computation of time. The proofs submitted by the applicant are in all respects satisfactory except that it is objected he is one day too soon in his application. His declaration of intention bears the filing date of October 16, 1912. The like date of his petition is October 15, 1914. The act of Congress requires the application to be made within the limits of two and seven years from the time of the declaration of intention is made. The point is of little real value to the parties concerned and of no value as a precedent as, however the computation is made, it would be nothing more than a construction of the act of Congress. No cases would arise of like kind unless the petitions were (as this was) filed without the date having been noticed. The real fact is that the time limit expired with the last instant of the 15th of the month. Upon the principle that the law does not regard fractions of a day a thing done at any time during the day is in legal effect done on the last instant of the day. Hence we have the phenomenon that a person attains his majority on the day before the anniversary of his birth. If this is the principle to be applied, the petition is not ahead of time. If the same principle were applied at the close of the period, the time is extended one day. The real inquiry here is, of course, into the declared will of Congress. The words used in the act can be given a construction which would call for the sixteenth as the earliest date of application. The plain truth doubtless is that such is the literal meaning. Congress, however, is presumed to have chosen its words with the legal rule of the computation of time in mind. It therefore is presumed to have intended the act to be so construed unless it has been made clear, not that the application might be made at the expiration of the two-year period, but that it could not be made until a day two years after the day of the date of the application if, indeed, even this phraseology would make the intention clear.

On the whole the computation to be adopted is that applied by Judge Orr in the case of the James Babjak (D. C.) 211 Fed. 551, application. It is that the date of filing is to be included or rejected in the count with a view to the entertaining of jurisdiction by the court. He, therefore, admitted as in time an application which otherwise would have been a day late. By the same rule we are constrained to admit an application which otherwise would be a day too soon.

Let the applicant be admitted upon taking the required oath.

CLIFFORD v. MORRILL.

In re SOMERSET WOOLEN CO.

(District Court, D. Massachusetts. January 21, 1916.)

No. 635.

BANKRUPTCY ⊂=303(1) — PREFERENCES — BURDEN OF PROOF — "REASONABLE CAUSE TO BELIEVE."

In view of the definition of insolvency contained in the present Bankruptcy Act, a trustee, suing to recover payments alleged to have been voidable preferences, must show that the defendant had reasonable cause to believe that the bankrupt's property at a fair valuation was less than its indebtedness at the time of the payments, and this would seem to require either actual knowledge of the property and debts on the part of the person receiving the alleged preference, or knowledge by him of circumstances warranting the inference that the debts probably exceeded the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458, 459; Dec. Dig. ⊂=303(1).]

In Equity. Suit by Philip G. Clifford, trustee in bankruptcy of the Somerset Woolen Company, against Samuel Morrill, to recover certain payments by the bankrupt to the defendant, alleged to have been voidable preferences. Bill dismissed.

Robert Hale, of Portland, Me., for plaintiff.

Archibald M. Hillman, of Worcester, Mass., for defendant.

MORTON, District Judge. That Morrill had reasonable cause to believe that the Somerset Woolen Company was insolvent, in the common-law meaning of the term, is clear. The change in the definition of "insolvency" made by the present Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) greatly increases the burden on the trustee in cases of this character. It now devolves upon him to show that the defendant had reasonable cause to believe that the bankrupt's property, at a fair valuation, was less than its indebtedness at the time when the payments in question were made. This seems to require either actual knowledge of the property and debts on the part of the person receiving the alleged preference, or knowledge by him of circumstances warranting the inference that the debts probably exceeded the property. No knowledge of the first sort is brought home to Morrill. He did not know of the Feiner mortgage; but he does not seem to have been intentionally shutting his eyes to the facts or evading knowledge of them.

"It is clear that the creditor cannot be said to have had reasonable cause to believe such a preference was intended, unless the evidence shows that it knew, or ought to have known, the substantial truth as to the bankrupt's financial condition." Dodge, J., In re Houghton Web Co. (D. C.) 185 Fed. 213, 214, 26 Am. Bankr. Rep. 202, 204.

Such inferences of insolvency, if any, as might be drawn by Morrill or his attorney from the mortgages, the slowness in paying him, and the failure promptly to get rid of his attachment—and there is

little else on which to find "reasonable cause to believe"—are to be considered in connection with Morrill's ignorance of the total indebtedness of the Somerset Woolen Company, the hopeful assertions of its managers, the misleading statements of condition made by them, the appraisal which had been exhibited to him, the facts that the company was running its plant as usual and did not appear to be in difficulties with any other creditors, and various other circumstances tending to repel such inference. On all the evidence it is not shown that Morrill, at the time when he received any of the payments in question, had reasonable cause to believe that the Somerset Woolen Company was insolvent, or that the effect of the payments would be a preference to him over other creditors.

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. The bill must be dismissed; but, as the trustee acted in a representative capacity, and was justified by the defendant's conduct in submitting the question to the court, the dismissal will be without costs.

LOUISVILLE & N. R. CO. v. BOSWORTH et al.

(District Court, E. D. Kentucky. August 31, 1915.)

No. 768.

1. TAXATION ⟸493(1)—ASSESSMENT—POWER OF COURTS TO REVIEW.
   An assessment of property by a board charged with that duty is subject to review and revision by the courts, where it is found that the board did not follow the method prescribed by statute, or otherwise adopted some fundamentally wrong principle, although fraud is not shown.
   [Ed. Note.—For other cases, see Taxation, Cent. Dig. § 876; Dec. Dig. ⟸493(1); Appeal and Error, Cent. Dig. § 141.]

2. TAXATION ⟸376(1)—ASSESSMENT OF RAILROAD FRANCHISE—KENTUCKY STATUTES.
   In computing the mileage of an interstate railroad company, for the purpose of the assessment of its franchise under Ky. St. § 4081, which requires the apportionment of the mileage as a factor in the apportionment of the capital stock valuation, the length of all the lines, either operated, owned, leased, or controlled by the company, in the state or elsewhere, is to be taken into consideration.
   [Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629–631; Dec. Dig. ⟸376(1).]

3. CONSTITUTIONAL LAW ⟸209—"EQUAL PROTECTION OF LAWS"—CONTROL OVER GOVERNMENTAL AGENCIES.
   The "equal protection of the laws" provision of the Fourteenth Amendment extends to each department of the state government in the exercise of its especial functions, and to all who represent the state as officers or agents, and the laws to which the provision refers are the laws of the state.
   [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. ⟸209.
   For other definitions, see Words and Phrases, First and Second Series, Equal Protection of the Laws.]

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4. CONSTITUTIONAL LAW ⊂=229(3)—EQUAL PROTECTION OF LAWS—INEQUALITY OF TAXATION.

Where the Constitution of a state requires the equal taxation of all property, the enactment by the Legislature of laws, or the action of executive officers in enforcing them, which in either case results in the intentional assessment or taxation of one class of property at a higher rate than another class is a denial of the equal protection of the laws in violation of the Fourteenth Amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. ⊂=229(3).]

5. TAXATION ⊂=485(1)—ASSESSMENT—APPLICATION OF DIFFERENT STANDARDS OF VALUATION.

Where the assessing department of a state uniformly applies different standards of valuation to different classes of property, the result is necessarily inequality and discrimination in taxation, which must be presumed to have been intentional, and the same is true, although the assessments are made by different boards or officers.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 861; Dec. Dig. ⊂=485(1).]

6. CONSTITUTIONAL LAW ⊂=229(3) — ASSESSMENT — RAILROAD FRANCHISE — EQUAL PROTECTION OF LAWS.

The assessment of the franchise of an interstate railroad company in Kentucky by the state board of valuation and assessment at a sum noted on its record to be in the opinion of the board "less than 80 per cent." of its fair cash value, whereas it was shown that other property in the state was uniformly undervalued and assessed at not more than 60 per cent. of its fair cash value, *held* a discrimination against the company, which denied it the equal protection of the laws, in violation of the Fourteenth Amendment and entitled it to equitable relief.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. ⊂=229(3).]

7. CONSTITUTIONAL LAW ⊂=209—"DENIAL OF EQUAL PROTECTION OF LAWS."

By "denial of equal protection of the laws," under Const. U. S. Amend. 14, is meant to refuse to grant or to withhold equal treatment in conferring or securing rights or imposing or exacting performance of duties, intentionally to treat differently, or to discriminate in so doing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. ⊂=209.

For other definitions, see Words and Phrases, First and Second Series. Equal Protection of the Laws.]

In Equity. Suit by the Louisville & Nashville Railroad Company against H. M. Bosworth, Thomas S. Rhea, and C. F. Crecilius, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky, H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, G. B. Likens, Assistant Auditor, James Garnett, Attorney General, C. H. Morris, First Assistant Attorney General, M. M. Logan, Second Assistant Attorney General, O. S. Hogan, Third Assistant Attorney General, of the state of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, and W. C. Marshall, County Attorney of Franklin County, State of Kentucky. On final hearing. Decree for complainant.

Henry L. Stone, Helm Bruce, Ed. S. Jouett, Wm. A. Colston and Robt. E. Fleming, all of Louisville, Ky., for plaintiff.

James Garnett, Atty. Gen., M. M. Logan, First Asst. Atty. Gen., C. H. Morris, Second Asst. Atty. Gen., O. S. Hogan, Third Asst. Atty. Gen., and John L. Rich, of Covington, Ky., for defendants.

COCHRAN, District Judge. This suit is before me for final decree. The plaintiff seeks thereby an injunction against the enforcement of the assessment of its franchise in this state for the year 1913. The amount of the assessment is $45,658,630. When it was brought another suit was pending in which plaintiff sought an injunction against the enforcement of the assessment for the year 1912, which amounted, substantially to the same sum, to wit, $45,428,074, and I had sustained a motion therein for a preliminary injunction on condition that the taxes on $22,899,300 thereof be first paid, which condition was complied with. In that connection I delivered an opinion reported in 209 Fed. 380. That suit is also before me for final decree and is disposed of by a separate opinion. Before bringing this suit plaintiff paid the taxes for the year 1913 on that sum, which left the assessment for enforcement only as to the balance of the $45,658,630. A preliminary injunction was granted on filing the bill.

The details of the assessment, showing the manner in which the board arrived at $45,658,630 as the value of the franchise, are these: The board first found the fair cash value of plaintiff's capital stock, hereafter termed its unit, to be $262,252,566. This valuation it arrived at by capitalizing at 6 per cent. what it took to be plaintiff's net income from operations on its own account for the year ending June 30, 1912, as of which date the assessment speaks, less what it took to be its net income from certain property which it took to be nontaxable. Plaintiff's reports to the Kentucky Railroad Commission and to the Interstate Commerce Commission as of that date state plaintiff's net income for that year to have been $18,052,905.12. This included the net income from the operation by plaintiff of three railroads, two in and one out of Kentucky, on account of the owners, which amounted to $1,439,604. The board deducted this sum from the total, leaving a balance of $16,613,301.12 of net income from operations on its own account. It then deducted from this balance the sum of $878,147 on account of its net income from such nontaxable property. This left a balance of $15,735,154, which capitalized at 6 per cent. gave the sum of $262,252,566, at which it valued the unit. The nontaxable property, the income from which was thus deducted, consisted of stocks in other corporations which owned property in this state and which had paid the taxes thereon. The deduction was based on sections 4085 and 4086, Kentucky Statutes, and the construction thereof by the Court of Appeals in the cases of Com. v. Walsh's Trustee, 133 Ky. 103, 117 S. W. 398, and Com. v. Fidelity Trust Co., 147 Ky. 77, 143 S. W. 1037. It then apportioned $92,181,766 of this sum to Kentucky. The sum so apportioned was 35.15 per cent. thereof. The percentage which it took was the percentage which the mileage operated by plaintiff in Kentucky on its own account was of the entire mileage so operated

by it. The entire mileage so operated by it was 4,478.61, of which 1,574.41 was in Kentucky. It then added to the sum so apportioned $2,468,612, the excess in the value which it took that the portion of the unit in Kentucky was over such mileage proportion of the value thereof. It found this excess in value to be in the intangible part of the portion of the unit in Kentucky, and that in this way: The value of the tangible part it took to be $177,038,113, and that of the intangible $85,214,453. The proportion of the gross income derived from Kentucky of the entire gross income it took to be 38 per cent., or 2.85 per cent. in excess of such mileage proportion. It took it that this showed that the value of the portion of the intangible part of the unit in Kentucky was 2.85 per cent. of the value of such part, or the sum of $2,468,612 in excess of such mileage proportion thereof. Adding this sum to such mileage proportion of the value of the unit, to wit, $92,181,766, made the value of the portion of the unit in Kentucky $94,650,388. It then reduced this sum to that of $94,500,000 as the value. This reduction is not to be accounted for, except on the ground that it wanted to place the value of such portion in round numbers. This lessened the addition to such mileage proportion of the value of the unit on account of the excess in value of the portion of the intangible part of the unit in Kentucky over such mileage proportion thereof from the sum of $2,468,612 to $2,318,244, which latter sum was the difference between $94,500,000 and $92,181,766. But the board had no sooner made this reduction than it made a further reduction from this sum in round numbers to another sum, not in round numbers, to wit $75,139,402, as the value of the portion of the unit in Kentucky, and there it stayed. On the assumption that this sum was reached by reducing from $94,500,000, there is no accounting for how it reached it, rather than any other sum. The only account of it which it gave was that it so did "to be conservative, and out of an abundance of caution, to the end that no injustice may be done respondent in arriving at the value of the corporate franchise of respondent in this state." And it noted the fact that this sum was "less than 80 per cent. of that which it believes to be the fair cash value of Kentucky's proportion of the entire capital stock of respondent." It then deducted from this last sum the assessed value of the tangible property in Kentucky, to wit, $29,500,772, which left the sum of $45,658,630 as the value of the franchise. Such is what the board did on the face of things.

In making the assessment for 1912 what the board did on the face of things was this: In the preliminary assessment it valued the portion of plaintiff's unit in Kentucky at $81,670,377, the manner in which it obtained such value not appearing, and then deducted therefrom the assessed value of the tangible property, to wit, $29,170,377. This left $52,500,000, which it fixed as the value of the franchise. In the final assessment it valued such portion at $74,598,451, the manner in which it obtained such value also not appearing, and then deducted therefrom such assessed value, to wit, $29,170,377. This left $45,428,074, which it fixed as the value of franchise. In my opinion in the case involving that assessment I took note (209 Fed. 460) of

the fact that it was possible, if not probable, that the board in making the preliminary assessment had obtained the value of the portion of the unit in Kentucky which it fixed at $81,670,377, not by first valuing the unit and then apportioning a part of such value to Kentucky, but by determining, in the first instance, that the franchise should be $52,500,000 and then adding the assessed value of the tangible thereto, and that in making the final assessment it merely made a reduction from the valuation so obtained to $74,598,451, at which it fixed it therein. In the case in hand one cannot avoid the suspicion, at least, that what the board really did was practically to adhere to the assessment for 1912 so reached—the change being only from $45,428,074, to $45,658,630—then to add the assessed value of the tangible property for 1913 thereto, which gave $75,139,402 as the value of the portion of the unit in Kentucky, deducting from which the assessed value of the tangible property gave the value of the franchise already fixed, and then to make the other figures to show that the sum at which it placed the value of the portion of the unit in Kentucky was less than 80 per cent. of its fair cash value. What lends color to this is the difficulty of determining how otherwise $75,139,402 was arrived at as the value of such portion. This tends to show that the assessment for 1913, as well as for 1912, was predetermined, and not the outcome of pursuing the method prescribed by the statute.

[1] The particulars in which plaintiff attacks the action of the board and the grounds thereof come next for statement. But before presenting them a preliminary contention of defendants should be noted and disposed of. It is that the action of the board is final and conclusive unless fraud on its part has been shown. It is contended that such is the case, even though it appears that the board did not follow the method prescribed by the statute. That such is their contention I quote from their brief. They say:

"This board is the judge of both the law and the facts, and its judgment as to the method followed is conclusive, unless fraud be proven tending to show that the board was actuated by fraudulent motives. These proceedings are not appeals from the judgments of the board of valuation and assessment. This court is not seeking for errors committed by this board. This court does not have the power to say whether the board followed an erroneous method in making the assessments, except as an incident to one thing, and that one thing is fraud. If there has been evidence showing fraudulent conduct on the part of the board, the court must consider other evidence touching on values and methods; but this court has no power to consider such things until after it is first shown that the assessment is void on account of fraud. If such state of facts should be shown, it would then be necessary for the court to take up the question of values, and in order to correctly ascertain values it would be necessary to consider methods."

And again they say:

"Until fraud is shown the court cannot consider any evidence as to either methods followed or as to values, but if fraud is shown the court must consider other matters in order to conclude whether the assessment is unjust."

They cite in support of this contention the following decisions of the Supreme Court of the United States, to wit: State Railroad Tax Cases, 92 U. S. 595, 610, 616, 23 L. Ed. 663; Kelly v. Pittsburg, 104

U. S. 78, 80, 26 L. Ed. 658; Pittsburg R. R. Co. v. Backus, 154 U. S. 421, 434, 435, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Maish v. Arizona, 164 U. S. 599, 610, 611, 17 Sup. Ct. 193, 41 L. Ed. 567; San Diego L. T. Co. v. National City, 174 U. S. 739, 750, 19 Sup. Ct. 804, 43 L. Ed. 1154; C., B. & Q. R. R. Co. v. Babcock, 204 U. S. 585, 593, 596, 598, 27 Sup. Ct. 326, 51 L. Ed. 636.

These decisions should be generalized. The cases of Kelly v. Pittsburg and Maish v. Arizona go together. They are alike, in that they involved assessments of ordinary property—in the one case a farm, in the other stock cattle—by local officials. That of San Diego L. T. Co. v. National City stands by itself. It involved the exercise of an analogous function, to wit, fixing water rates by a local body. The other three go together. They are alike, in that they were railroad cases and involved the assessment of a portion of a railroad unit. In the State Railroad Tax Cases the units were intrastate, and the portions thereof covered by the assessments complained of were the intangible parts there; i. e., the franchises. In the other two cases, the units were interstate, and the portions thereof so covered were the parts in the state where the assessments were made. The statutes involved therein did not view such parts as parts of interstate units. The boards, however, in making the assessments, did. In neither of the five tax cases did the statute prescribe the method of making the assessment. In the State Railroad Tax Cases it authorized the board to adopt such method as might seem equitable and just, and the method it had adopted and applied was approved by the court. In neither of the others was there clear evidence that improper methods had been adopted and applied. As neither of them involved a case where a method prescribed by statute had not been followed, there is no basis for the claim that they support the position that, if it clearly appears that the board in making the assessment departed in certain particulars from the method prescribed by the statute, its validity is thereby unaffected, unless fraud has been shown.

This much is certainly to be gathered from these decisions: The judgment of an assessing official or board as to the value of ordinary property, such as a farm or stock cattle, is final, in the absence of fraud; and this, though its valuation may be thought to be "very greatly in excess of its true value." No method of valuing such property is ever prescribed; correct thinking does not call for any particular method for so doing; and as to the true value thereof there is room for fair-minded and reasonable men to differ. Possibly it is also to be gathered therefrom that if the property valued is the unit of a railroad company, even though it be interstate, in which case the valuation thereof is merely a step in the process of valuing the portion or a part of the portion thereof in the state, its judgment as to its value is final, in the absence of fraud, if no method for valuing such unit has been prescribed. It is true that two methods of valuing it have been adopted and applied, and approved by the courts, known as the stock and bond and capitalization of net earnings. But there is room for fair-minded and reasonable men to differ as to which is the best method, and, in each case, as to the details thereof. Besides, per-

haps, it cannot be said that the valuation should be limited absolutely to either method. It may be proper to consider other matters, such. for instance, as the cost of construction. And it may be a case for the exercise to some extent at least of what Mr. Justice Holmes in C., B. & Q. R. Co. v. Babcock terms the "intuition of experience."

But this is not all that is to be gathered therefrom. From the case of C., B. & Q. R. Co. v. Babcock it is to be gathered that the courts are not limited to fraud as the only ground for overthrowing such an assessment; that if, in making it, the board adopted a fundamentally wrong principle in any particular, the assessment is void; and that in determining whether such a principle was adopted the court is to no extent affected by the judgment of the board. As to this it is free to substitute its judgment for that of the board. And it would seem that it would make no difference that the principle was embodied in the statute under which it acted. In such a case it would be immaterial that there had been no fraud on the part of the board. Mr. Justice Holmes, in that case, speaking generally as to the validity of such an assessment, said that the judgment of the "lay tribunal" was intended to be final, "notwithstanding mistakes of fact or law." He, however, did not say that it was so intended absolutely, but only "so far as may be." He went further, and pointed out the grounds upon which it might be attacked. And in so doing he did not limit the right to attack to fraud. He said that the court had to do with nothing less than fraud, or a "clear adoption of fundamentally wrong principle"; and again, that the tribunal was the ultimate guardian of certain rights, except "in the case of fraud or a clearly shown adoption of wrong principles."

What he had in mind as covered by the second alternative appears from the cases of Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385, 23 Sup. Ct. 468, 47 L. Ed. 519, and Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761. In the latter case it was held that certain personal property of the American Express Company located in New York was no part of its interstate unit, a portion of which was subject to taxation in the state of Indiana. The board of that state had taken it to be a part of the interstate unit and apportioned a part thereof thereto on the mileage basis. The Supreme Court held that in so doing it had erred. It substituted its judgment for that of the board and set the latter aside. There had been no fraud on the part of the board. The Sixth Circuit Court of Appeals had held likewise in the case of Coulter v. Weir, 127 Fed. 897, 62 C. C. A. 429. The other case was a Kentucky case. The board of valuation and assessment had taken the ferry franchise of the Louisville & Jeffersonville Ferry Company in Indiana to be a part of its interstate unit—which undoubtedly it was—and assessed it. The Supreme Court held that, notwithstanding it was a part of the company's interstate unit, it was not assessable to any extent in Kentucky. It substituted its judgment for that of the board and set the latter aside. There was no intimation of fraud on the part of the board.

If, then, it is the duty of the court to substitute its judgment for that of the assessing board, and to set the latter aside in making the

assessment, if it has adopted fundamentally wrong principles, clearly it not only has the right, but it is its duty, to so do if it determines that the board has not followed the method prescribed by the statute under which it acted and from which it obtained its power to act at all. And so the Court of Appeals of Kentucky has held in the cases of Hager v. American Surety Company, 121 Ky. 791, 90 S. W. 791, and James v. American Surety Company, 133 Ky. 313, 117 S. W. 411. If it then appears that, in some particular, the board in making the assessment in question here departed from the method prescribed by the statute, or adopted some fundamentally wrong principle, to the extent, at least, that such departure or adoption affects the amount thereof, it cannot stand.

The plaintiff attacks the valuation of the unit at several points. It urges that the capitalization should have been at 6.524 per cent., the average of the interest rates of the different states wherein plaintiff's unit lies, instead of 6 per cent.; that the true net income derived from operations by it on its own account was $15,862,099.26, instead of $16,613,301; that the true net income from nontaxable property was $992,494.08, instead of $878,147; and that the deduction should not have been of the net income received from such property from that received from operations on its own account, but of the actual value of such property, which it places at $33,743,900, from the sum arrived at by capitalizing the net income from such operations. I think that the board's valuation of the unit is impervious to attack in this court on either of these grounds. I am not satisfied that the nontaxable stocks are really worth the amount claimed or more than the capitalization of their income. And I am not sure that plaintiff is entitled to any deduction on this ground. I am sure that it is not my province to substitute my judgment for that of the board as to the rate of interest at which plaintiff's income should be capitalized in valuing its unit on the capitalization plan. The other two particulars in which the valuation of the unit is attacked are for mistakes of fact; and, conceding them to have been made, it is not in my power to correct them. So that in disposing of this case the value of the unit will have to be taken to be at least as much as $262,252,566, the amount found by the board.

[2] The plaintiff next attacks the action of the board in limiting itself to the mileage operated by it, and, as to it, to that operated by it on its own account, in arriving at the portion of the value of the unit to be apportioned to Kentucky. It claims that in so doing it should have considered all the mileage operated by it, and also that owned, but not operated, by it, and that operated by separate organizations, which it controlled either by virtue of ownership of a majority of capital stock or as joint owner or lessee, heretofore referred to as controlled mileage. The miles operated by it on its own account, as we have seen, were 4,478.61, of which 1,574.41 were in Kentucky; those operated by it on account of the owners were 221.86 of which 21.42 were in Kentucky; those owned, but not operated, by it were 269.45, of which 70.11 were in Kentucky; and those controlled by it were 2,937.89, of which 286.45 were in Kentucky. Adding the miles operated by it on its own account and on the owner's account, and those owned, but not

operated, by it, and those controlled by it together, gives 7,907.83 as the total number, of which 1,952.45 were in Kentucky. The percentage which the latter sum is of the former is 24.9601. It is this percentage, rather than that of 35.15, which it claims the board should have taken in apportioning a part of the value of the unit to Kentucky. And it bases this position on the express requirement of the statute. The proportion of the value of the unit which it prescribes is that "which the length of the lines operated, owned, leased or controlled in this state bears to the total length of the line owned, leased or controlled in this state and elsewhere." Beyond question the word "operated" was omitted by mistake in referring to the total length of the lines, and the clause should be read as if it had been inserted there as well as in the first instance.

It seems to me that this position is sound. I so held in the case of L. & N. R. R. Co. v. Coulter (C. C.) 131 Fed. 306, and the decision of the Kentucky Court of Appeals in the case of Com. v. L. & N. R. R. Co., 149 Ky. 829, 837, 150 S. W. 37, is to the same effect. That was a proceeding by an auditor's agent to have certain property of the plaintiff herein assessed for the year 1909 as omitted property. One basis for claiming that it had been omitted was that the board of valuation and assessment had not properly assessed its franchise, in that it had taken into consideration the controlled mileage. Clay, C., in delivering the opinion of the court, said:

"But there is an attempt to show that in this case the property sought to be assessed as omitted property was not included in the capital stock valuation, because the board of valuation and assessment, in fixing the capital stock, considered other roads controlled by the Louisville & Nashville Railroad Company, through stock ownership, but which were operated by their own organizations. The statute requires that the railroad company shall report to the auditor of public accounts its entire lines 'operated, owned, leased or controlled' in and out of the state. If the railroad company owns a majority of the stock of another company, so that it may elect its directors and dictate its policy, there can be no doubt that it controls it within the meaning of the statute, and that such other railroad should be included in the report required to be made to the auditor. If required to be reported, the board of valuation and assessment may take them into consideration in fixing the value of the franchise of the controlling company in * * * Kentucky. That being true, the allegations in the second paragraph of the petition are not sufficient to show that the board of valuation and assessment, in fixing the value of appellee's franchise, adopted a plan different from that provided by the statute."

The plaintiff next attacks the action of the board in adding first $2,468,612 and finally $2,318,244 to the mileage proportion of the value of the unit on account of excess of the value of the portion of the intangible part of the unit in Kentucky over the mileage proportion thereof. The board based its action in making this addition to such mileage proportion of the value of the unit on what it conceived I had held in the other case. I there took the position that the statute did not limit the assessment to the mileage proportion of the value of the unit, but contemplated that, if the portion of the unit in Kentucky was in fact of greater value than the mileage proportion of the value of the unit, the board, after ascertaining such proportion, should add thereto the excess in value, so that the value of such portion would represent the

true fair cash value thereof, and, further, that the method of ascertaining whether the portion of the intangible part of the unit in Kentucky exceeded in value the mileage proportion of its value, and, if so, the extent to which it exceeded it, was to determine the proportion that the gross income derived from Kentucky was of the entire gross income, and if it exceeded the mileage proportion the excess percentage of the value of the unit was to be taken as the excess in value.

The plaintiff, in making its attack on this part of the action of the board, contends that it is impossible to determine how much of the gross income of an interstate unit has been derived from a given state otherwise than on the mileage basis, and that therefore in no case can the intangible part of the unit therein exceed in value the mileage proportion of the value thereof. It claims that this position finds support in the decision of the Court of Appeals of Kentucky in the case of Southern Ry. Co. v. Coulter, 113 Ky. 657, 675, 676, 68 S. W. 873, and, further, that every case wherein the Supreme Court of the United States has taken note of the fact that the portion of an interstate unit in one state might exceed in value the average value per mile involved a case of excess in the tangible part, where there is a manifest physical difference which can be seen and measured by some rational and reasonably accurate judgment, such as extensive and expensive terminal property existing in one state, which does not exist in the other state into which the line extends, or where an extra amount of rolling stock is required in one state and not in others, which are illustrations given in the case of Pittsburg, etc., v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, and had in mind in the case of Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761. And it might be added that in the case of Erie R. R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595, which involved a tax on the gross receipts of an interstate railroad in Pennsylvania, the extent of the gross receipts therein was obtained by apportioning them on the mileage basis.

In taking the position I did on this subject I cannot say that I was sure of my ground. The problem was a difficult one, and I had not had the benefit of any suggestions of counsel in regard thereto. It had not been dealt with in any other case, so far as I was able to find. It was not then a vital question, necessitating that I should be sure of my ground. Nor am I any surer now than then as to the soundness of the position. The necessities of this case also do not require that I should absolutely commit myself on the question. What made me then, and makes me still, think that the portion of the intangible part of an interstate unit in a given state may be greater in value than the mileage proportion of the value thereof is the case of W. U. Tel. Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790. There an apportionment of a part of the interstate unit of the telegraph company to the state of Massachusetts on the mileage basis was upheld, notwithstanding that the value of the portion of the tangible part of that unit in that state was less than the mileage proportion of the value thereof, and this seems to have been done on the ground that the value of the portion of the intangible part thereof in that state was greater than the mileage proportion of the value thereof, and that because the

gross income derived from that state exceeded the mileage proportion of the gross income. What relieves me of the necessity of so committing myself is that, if my position so followed by the board be conceded to be sound, but one possible method to determine with any degree of accuracy the amount of the gross income derived from Kentucky, apart from the mileage basis, occurs to me, and the board not only did not pursue that method, but adopted a method that clearly did not yield the true amount thereof. The possible method to which I have reference is first to separate the interstate and intrastate gross income, then apportion to Kentucky a part of the interstate gross income on the mileage basis, and then add thereto the intrastate gross income. As stated, the board did not follow this method. It did not have the data which would enable it to follow it. It took what plaintiff in its report to the Kentucky Railroad Commission for the year ending June 30, 1912, gives as its Kentucky gross income as the true gross income derived from Kentucky.

But it clearly appears that the amount so reported was not obtained by the method I have suggested. It represented the gross income from traffic which originates and terminates in Kentucky and traffic which originates in Cincinnati, Ohio, where plaintiff has an important terminal, and passes entirely through Kentucky to states south of her. The fact that plaintiff in this report termed this income as Kentucky gross income or earnings did not prevent it from showing its true character. Other interstate railroad companies operating in Kentucky used this title in their reports and this in a different sense. The Cincinnati, New Orleans & Texas Pacific Company confines it to income from traffic which originates and terminates in Kentucky. It omits that arising from traffic which passes through the state of which there must be a large amount; and the Chesapeake & Ohio Railway Company confines it to income arising from traffic which originates in Kentucky. It is clear, therefore, that in this particular also the action of the board was not well taken. It cannot, however, be said that, in taking it, it did not follow the statute, or did that which the statute prohibited it from doing. The statute contains no provision on the subject. All that can be said is that the board in so doing adopted a fundamentally wrong principle, and this I think can be truly said.

In this connection I would restate with some difference the position which I took in the other case, to the effect that the board was limited to a consideration of the mileage proportion—i. e., the proportion which the mileage of that part of the unit which was in Kentucky was of the entire mileage thereof—of the value of the capital stock in apportioning a part of such value to Kentucky, and could not consider the proportion derived from averaging the mileage, gross income, and net income proportions of the value thereof in so doing. I emphasized the fact that what the statute provided the board should consider was not the mileage proportion, but the mileage proportion of the value of the capital stock. I would not repeat this emphasis. A consideration of the mileage proportion, in averaging it with the gross income and net income proportions, so as to obtain an average proportion to be used in apportioning a part of the value of the capital

stock to Kentucky, could be excluded, and the consideration limited to the mileage proportion of the capital stock, and exactly the same result obtained as if the mileage proportion were so considered. This would be by apportioning to Kentucky the mileage proportion of the value of the capital stock, the gross income proportion thereof, and the net income proportion, and then averaging the three. What excludes an apportionment to Kentucky of such average proportion of the capital stock, or the gross or the net income proportions of such value and then averaging them with the mileage proportions thereof, is the fact that the statute provides that the board shall consider the mileage proportion of the value of the capital stock, and says nothing about such average proportion, or the gross or net income proportions thereof.

That the statute (Ky. St. § 4081), in providing that the board should consider the mileage proportion of the value of the capital stock, meant that it should, after valuing the capital stock, as a step in the process of valuing the franchise, apportion a part of such value to Kentucky on such basis, follows from the fact that it contemplated that the franchise should be valued as a part of an interstate unit, the first step in which was to value the unit. There was no way to pass from this first step to the last one—i. e., valuation of the franchise—except by taking a mileage proportion of the value of the unit. It was not necessarily the only intermediate step. The intermediate steps might include an addition or subtraction on account of the portion of the unit in Kentucky exceeding or being less than the mileage proportion of the value of the unit. But it was necessarily one of the intermediate steps. Had the statute not limited the board's view of the franchise to it as part of an interstate unit, and permitted it to view it independently of its being so, a provision that the board in valuing it should consider the mileage proportion of the value of the unit would not necessarily mean that it should apportion a part of the value of the unit on such basis to Kentucky as a step in valuing the franchise. It could mean no more than that it should be considered merely for the purpose of determining whether the valuation of the franchise, otherwise reached, was correct or not. I have had difficulty in reaching a conclusion as to just what the statute means in providing that the board shall consider the mileage proportion of the capital stock, and this is the best that I can make of it.

These, then, are all the attacks made upon the action of the board save one, yet to be mentioned and considered. Apparently the effect of the conclusions so far reached, to wit, that the board's valuation of the unit at $262,252,566 cannot be lessened by me, that the percentage of the valuation of the unit which the statute requires to be taken is not 35.15, as the board took it to be, but 24.9601, and that no addition can be made to the part of the value of the unit apportioned to Kentucky on the mileage basis on the ground that the part of the intangible part of the unit in Kentucky was more valuable than the mileage proportion of the value of such part, is that the value of such portion must be taken to be 24.9601 per cent. of $262,252,566, or $64,750,418.79. But this is so apparently only. It is not really so, because

the board, in reaching $262,252,566 as the value of the unit, did not value the whole of the unit. If there was more of the unit than what it valued, if what it valued was worth $262,252,566, and if 24.9601 was the proper percentage of the value of the unit to be apportioned to Kentucky—I have accepted the second and held the third condition to be true—then the value of the portion of the unit in Kentucky was not $64,750,418.79. It was more than such sum.

Is it true, then, that the board did not value the whole of the unit, and, if so, to what extent did it come short of so doing? To answer this question it is essential that we come to an understanding as to what the unit consisted of. To do this it is only necessary that we hark back to a conclusion we have already reached. It is a conclusion which plaintiff has urged upon me, and which I have accepted as sound. That conclusion is that the proportion which the part of the unit in Kentucky was of the whole unit was 24.9601. To determine what that proportion was, two things had to be known, to wit, the extent of the unit (i. e., the miles in it) and the extent of the part thereof in Kentucky (i. e., the miles in such part). It was found that the miles in the unit were 7,907.83, and those in the part of the unit in Kentucky were 1,952.45. And in obtaining these figures all the mileage operated, owned, leased, and controlled—altogether and in this state—was considered. The unit, therefore, consisted of all such mileage. That such was the thought of the statute appeared from its provision that the board, after valuing the capital stock, should apportion to this state the proportion of such mileage in this state to the whole of such mileage.

Now the board, in valuing the unit, did not value the whole of such mileage. It valued only so much thereof as was represented by plaintiff's net income, or would have been represented by its stock and bonds, had that method of valuation been adopted. And that income, or those stocks and bonds, did not represent the whole of such mileage. It represented only such portion thereof as was represented by the stock and bonds of the separate organizations held by it, or as it held as joint owner or lessee. It did not represent such portion thereof as was represented by the stock and bonds of such organizations held by others, or its co-owners or colessees held. To the value of so much of the unit as the board valued—i. e., that portion thereof represented by its net income or its stock and bonds—it should have added the value of so much of the controlled mileage as was not so represented. Had it so done, it would have valued the whole of the unit. Not having so done, it did not value the whole thereof.

But it may be urged by plaintiff that to value more of the unit than so much thereof as was represented by its net income or stock and bonds would be to go beyond the statute. What the statute provides it shall value in the first instance is plaintiff's capital stock; i. e., all its property tangible and intangible. Such is undoubtedly the wording of the statute. But to confine one's self thereto is to stick in the bark. The words "capital stock" in the statute are not used in any technical sense; and I do not think that they are used in any other sense than the unit—a part of which the statute provides shall be ap-

portioned to Kentucky. To give them a restricted meaning is to attribute to the Legislature an intention to provide that, in arriving at the percentage that is to be apportioned to Kentucky, the whole of the controlled mileage is to be treated as a part of the unit, as well as that operated, owned and leased, but in arriving at the value of that which is to be apportioned only a portion of the controlled mileage shall be considered, which necessarily would result in an undervaluation of that portion of plaintiff's unit in Kentucky. In my opinion in the other case I called attention to the fact that the statute under which the assessment in question was made was a crude piece of legislation, and I noted (209 Fed. 419, 420) a number of imperfections in it. The detailed consideration which I there gave it finds its justification in the fact that it makes one fair towards it in arriving at its true meaning. It was its intent that the board, in assessing the franchises of interstate units, should value the whole of the portion of such unit in this state. In order to do this it was essential that it consider the whole of the unit in valuing it, as well as in ascertaining the percentage thereof in this state. For it not to do so would be for it to omit a portion of the unit in this state, and undervalue the franchise.

In holding that it was the duty of the board to add to the valuation of what it valued the value of that portion of the controlled mileage in which plaintiff had no interest, in order to arrive at the value of its unit, I am unable to see that any property out of the state will be imported into it and the Fourteenth Amendment violated. And I am not sure that an injustice has not been done to the state by the Legislature in plaintiff's case in requiring that controlled mileage should be considered as a part of its unit. There are not sufficient facts before me to enable me to form any opinion as to this.

This holding necessitates that the board shall take a step in addition to any that has heretofore been mentioned, and that is this: After valuing the whole of the unit, as I have indicated, and apportioning 24.9601 per cent. thereof to this state, it should, before deducting the assessed value of the tangible property, deduct the value of so much of the controlled mileage as is in this state; otherwise it will be considered twice in assessing franchises. It will be considered in the assessment of plaintiff's franchise and also in assessing the franchises of the separate organizations which own it.

I come, then, to the remaining attack made by plaintiff upon the board's action which has heretofore been referred to. It is that its finding that the value of the portion of plaintiff's unit in this state was $75,139,074 was contrary to the Fourteenth Amendment, in that thereby it was denied the equal protection of the laws. The way in which plaintiff makes this out is this: Property in this state generally—i. e., property subject to assessment by the county assessors, constituting the bulk of the property therein subject to taxation—was uniformly and intentionally assessed for the year 1913 at less than 60 per cent. of its fair cash value; whereas, the board, in valuing the portion of plaintiff's unit in this state in making the assessment of its franchise for that year, consciously adopted and applied a much higher standard of

valuation than 60 per cent., certainly as much as slightly less than or about 80 per cent., and possibly full fair cash value. The board has left it ambiguous—perhaps purposely so—as to which of two standards it applied in reaching that valuation. There is room to claim that it applied thereto the standard of fair cash value, notwithstanding it noted the fact that the valuation which it made was less—i. e., slightly less—than 80 per cent. of what it believed was its fair cash value. It stated that the reduction which it made from the sum of $94,500,000 to that of $75,139,074 was made in order to be "conservative," "out of abundant caution," and "that no injustice be done plaintiff in arriving at the value of its franchise." This would seem to mean that it was made in order that it might be sure that it was valued at its fair cash value and no more. If such is its meaning, then the standard applied was that of fair cash value.

In the other case, I attempted to show (209 Fed. 460, 461, 462) that the claim made before the oral argument on the motion for preliminary injunction by the defendants, through the affidavits of the members of the board as to the assessment of 1912, was that the standard applied was that of fair cash value, and the assessment for 1913 is substantially the same as that. Besides, from the beginning of this litigation down to the present time, defendants have claimed, not only that the board had the right, but that it was its duty, to make the assessment at fair cash value, and the members thereof would violate their oaths if they did not do so; and the Attorney General of the state so advised the board in the course of the making of the assessment for 1913. Yet, assuming that what the board really did was, after valuing the portion of plaintiff's unit at $94,500,000, to make a reduction therefrom to $75,139,074, it is not unlikely that it so did, if not to equalize plaintiff's assessment with that of other property, at least to render what it did impervious to attack on the ground that such property was uniformly and intentionally undervalued. In that case there is a touch of insincerity here in putting the matter as the board did and not saying expressly that the reduction was made for that purpose. In the answer herein the defendants claim that it was made for that purpose. If so, the standard applied by the board in valuing the portion of plaintiff's unit in Kentucky was slightly less than—or, as the answer has it, about —80 per cent., which is much higher than the standard claimed to have been applied in the assessment of other property.

The ground of the attack now to be considered may be taken to be that the board, in applying any standard above 60 per cent., adopted a fundamentally wrong principle. If, then, it be a fact that property generally in this state was so assessed, was the action of the board contrary to the Fourteenth Amendment? In my opinion in the other case I considered quite at length whether in such a case the amendment would be violated, and reached the conclusion that it would. The defendants, however, still contend earnestly and sincerely that this position is wrong. This and the desire to develop accurately just what is essential in such a case to constitute a violation of the amendment leads me to consider the matter afresh. I hope to be able to put it so lucidly and forcibly that it cannot but be accepted as sound. I will first limit

myself to the amendment itself and then consider the relevant decisions.

[3] It is impossible for one to see things just as they are and not otherwise, unless they are viewed from the right standpoint. The right standpoint from which to view an alleged violation of the Fourteenth Amendment is above its letter. It should be viewed from its real meaning. The letter of the amendment is that no state shall deprive or deny. Its real meaning is that no one who represents the state, acting for it and in its name, shall deprive or deny. This is its meaning, just as much so as it would have been, had it been so worded, instead of as it is. Such is its real meaning, because it cannot mean anything else; and it cannot mean anything else because, literally speaking, a state cannot act at all. Those representing it as officers or agents alone can act. The prohibition thus being against those representing the state as officers or agents, and not the state itself, it is against all such persons. It is not limited to the legislative department of the state government. It includes the executive and judicial departments as well. The positions thus taken find ample support in the following references, to wit: Ex parte Virginia, 100 U. S. 339, 346, 25 L. Ed. 667; Poindexter v. Greenhow, 114 U. S. 270, 290, 5 Sup. Ct. 903, 29 L. Ed. 185; C., B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Raymond v. Chicago T. Co., 207 U. S. 20, 28 Sup. Ct. 14, 52 L. Ed. 90; Home T. & T. Co. v. Los Angeles, 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510. The decision in the case of Barney v. New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, so far as it is to the contrary, is no longer in force. In the case of C., B. & Q. R. R. Co. v. Chicago Mr. Justice Harlan said:

"The prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and therefore whoever, by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'"

What "laws," then, are they the equal protection of which the legislative, executive, and judicial departments of the state are prohibited from denying? They can only be the laws which those departments have to do with and the only laws which they have to do with are the laws of the state in which they are such departments. And they are prohibited from denying the equal protection of such laws only in so far as they have to do with them. It cannot be that they are prohibited from so doing to any extent beyond this. The only connection which the legislative department has with the laws of the state of which it is such department is in their enactment. It has nothing to do with their enforcement. And the only connection which either the executive or judicial departments has with such laws is in their enforcement. Neither has anything to do with their enactment. What has thus far been said comes to this. The legislative department, in exercising its function of enacting the laws of the state of which it is such department, is

prohibited from denying the equal protection thereof; and the executive and judicial departments, in exercising the function of enforcing the laws of the state to which they belong, are prohibited from denying the equal protection thereof.

And what is it, then, to deny the equal protection of those laws? It is to refuse to grant or to withhold equal treatment in conferring or securing rights or in imposing or exacting performance of duties. It is to treat differently or to discriminate in so doing. And it may be said to include an intention, in doing what is done, to treat differently or to discriminate. But, if such is the natural consequence of what is done, it is to be taken that there was an intention to treat differently or to discriminate. One is always held to intend that which is the natural consequence of what he does. The essence of the Fourteenth Amendment, therefore, is to forbid discrimination and to require equal treatment on the part of each department of the state in the exercise of its particular function, and its effect is to empower and to make it incumbent on the courts, state and federal, to prevent discrimination and to secure equal treatment.

What has just been said, however, calls for some modification. In the case of Magoun v. Illinois Trust Co., 170 U. S. 280, 18 Sup. Ct. 594, 42 L. Ed. 1037, Mr. Justice McKenna, in referring to the equality of treatment which the legislative department in enacting the laws of the state is thereby required to give, stated that it is not a "rigid equality." It permits "many practical inequalities." The discrimination by such department which is forbidden is an arbitrary discrimination. A reasonable discrimination is not forbidden. But it is to be borne distinctly in mind that this freedom to discriminate is on the part of the legislative department, and that in the absence of any restriction on its power in the Constitution of the state. The legislative department, in so doing, has no such freedom, if its Constitution forbids, nor have the executive and judicial departments, in any case, any such freedom in enforcing such laws. Where the Constitution of the state forbids discrimination on the part of the legislative department in enacting its laws, I opine that a rigid equality—i. e., as much equality as the matter permits—is called for; and I see no reason why, if a rigid equality is not given, the Fourteenth Amendment is not violated, as well as the state Constitution. Equality is denied where no right to deny it exists. If there is a statement anywhere as to the equality of treatment which the executive and judicial departments must give in enforcing the laws of the state, it has escaped me. I would think that it is more rigid than that required to be given by the legislative department in enacting laws, where there is no restriction on its power in the Constitution of the state. Possibly it must be as much equality as the case permits; but possibly, also, it is sufficient if there is no intentional discrimination. Certainly an intentional discrimination is forbidden.

[4] These general statements as to discrimination forbidden and equality of treatment required should be applied to tax laws. So doing, we find that in the case of such laws we have an instance in which discrimination is not absolutely forbidden by the amendment. In the

case of Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, Mr. Justice Miller said:

"The federal Constitution imposes no restraints on the states in regard to unequal taxation."

And in the case of Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, Mr. Justice Bradley said that the Fourteenth Amendment was not "intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways."

But, if the Constitution of the state forbids unequal taxation, the legislative department in enacting tax laws has no right to make a discrimination, and, as stated, if in such a case it does discriminate, I see no reason why its action would not be in violation of the Fourteenth Amendment as well as of the state Constitution. Thereby the equal protection of the laws of the state would be denied, and by reason of the Constitution of the state the right to discriminate which might otherwise exist has been taken away. Such a law might impose a tax of $1 on the $100 on an owner or the owners of one class of property and 60 cents on the $100 on all other owners. No one would contend that in such a case the owner or owners of the class of property on whom the highest rate of tax had been imposed had not been denied the equal protection of the laws. Or it might take the shape of providing that the owner or owners of property of the one class should pay 50 cents on the $100 on an assessment thereof at its full fair cash value, and that all the other owners should pay the same rate on an assessment thereof at 60 per cent. of its fair cash value. No one would contend that in this case, as much so as in the other, the former owners were denied the equal protection of the laws. In the case of Bank v. Hines, 3 Ohio St. 15, as quoted by Mr. Justice Miller in the case of Cummings v. Merchants' National Bank, 101 U. S. 153, 25 L. Ed. 903:

"Taxing by uniform rule requires uniformity, not only in the rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation."

In the one case the denial would consist in prescribing the rate of taxation, and in the other in prescribing the rate of valuation of the property subject to taxation. So much as to the denial by the legislative department in the enactment of laws as to taxation. I pass therefrom to a denial by the executive and judicial departments—more particularly the assessing branch of the executive department, whose function is characterized as quasi judicial—in the enforcement of such laws by assessing property subject to taxation, and that where the Constitution and statutes of the state, as is the case here, require uniform taxation. It must be conceded that there is no such thing as perfect equality in the assessment of property for taxation. In the State Railroad Cases (92 U. S. 612, 23 L. Ed. 663) Mr. Justice Miller thus expressed himself on this subject:

"Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a

dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large state like Illinois, the application being made by men whose judgment and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded."

The inequalities due to the imperfections thus referred to cannot, therefore, be within the purview of the amendment. Those inequalities only can be within its purview which need not be; and such are inequalities due to intentional discrimination. The assessing department can refrain from such discrimination and thereby prevent inequalities due to that cause. It must be accepted, therefore, that intentional discrimination on the part of that department is contrary to the amendment. Such, then, is the ultimate fact upon which a case such as we have here must turn.

[5] How, then, is such a discrimination to be made out? It is made out if it is established that the assessing department has adopted and applied a rule prescribing different standards of valuation of the property of different persons or different classes of property. The natural consequence of the application of such a rule is inequality and discrimination, and, as in law one is taken to intend the natural consequences of his acts, a discrimination so brought about is intentional. It may be made out by evidence that one class of property has uniformly been assessed at one degree of value and all other property at another. The fact of uniformity has to be accounted for, and there is no accounting for it except on the basis that a rule prescribing such degrees of value as the standard of assessment has been adopted and applied. In this connection the adverbs "systematically" and "habitually" are frequently used. I prefer uniformity. They all come to the same thing. Where the discrimination complained of is against a single owner of property, it is made out by evidence of an acknowledgment on the part of the assessing department that a rule prescribing the higher standard was adopted and applied, and of uniform assessment of all other property at a lower degree of value. If, then, in a given case it is established that the assessing department of the state has uniformly assessed the property of interstate railroad companies at fair cash value of slightly less than or about 80 per cent. thereof, and has uniformly assessed all other property at less than 60 per cent., a case of intentional discrimination against each railroad company and violation of the Fourteenth Amendment is made out; or that, in its assessment of the property of a single such company, it stated that the assessment was at its fair cash value, or slightly less than or about 80 per cent. thereof, the valuation conforming thereto, and has uniformly assessed all other property at less than 60 per cent., a case of intentional discrimination against such railroad company is made out.

Thus far I have proceeded on the assumption that the assessing department is administered by a single board or individual, supposing

that were possible. How is it in a case where, as in this state, the bulk of the property—i. e., all but the franchises of corporations having special privileges and distilled spirits—is assessed primarily by a county assessor in each county, with county boards of supervisors over each assessor, and a state board of equalization over the assessments of each county, and such franchises and distilled spirits are assessed by a state board of valuation and assessment? Clearly, if all having to do with the assessment of property in any way were to meet in convention at the state capital or elsewhere, and adopt a rule whereby all property assessable by the board of valuation and assessment, or portions thereof, such, for instance, as the franchises of corporations having special privileges, or those only of them which are interstate railroad companies, or that of a single such company, was to be assessed at its full fair cash value, or slightly less than or about 80 per cent. thereof, and that all other property that was subject to assessment by the county assessors was to be assessed at 60 per cent. of fair cash value, and such rule was applied in making the assessment, the discrimination would be an intentional one, and contrary to the Fourteenth Amendment. But suppose no convention of or conference among any of the assessing officers is ever had, but each county assessor for himself adopts and applies a rule by which the property assessable by him is to be assessed at 60 per cent. of its fair cash value, either because he has heard of other county assessors having done so, or as a mere coincidence—a "developmental coincidence," resulting from the minds of the several assessors functioning the same way—which assessments are permitted to stand by the county boards of supervisors and the state board of equalization, and the board of valuation and assessment adopts and applies a rule prescribing full fair cash value, or slightly less than or about 80 per cent. thereof, as the standard in the assessment of the franchises of interstate railroad companies, or applies such a standard in the case of the assessment of a single such company, is there possible room for any one to claim that such a discrimination against such company or companies was not as much within the Fourteenth Amendment as if it had been brought about by the adoption and application of a single rule at a convention of all the assessing officers?

What reason is there for making a difference between a discrimination brought about by the conjunction of many separate rules and one brought about by a single rule? The discrimination is as much an intentional discrimination in the one case as in the other. And in such a case, if the property in each county was uniformly assessed at 60 per cent. of its fair cash value, and in the assessment of the franchises of interstate railroad companies the portions of the unit in the state were uniformly valued at full fair cash value, or at slightly less than or about 80 per cent. thereof, the reasonable inference would be that each county assessor and those over him had adopted and applied a rule to assess at 60 per cent. of fair cash value, and that the board of valuation and assessment had adopted and applied a rule to value at the higher rate. And if it were otherwise proven, as, for instance, by the statement of the board itself, that it had applied such rule in the

case of a single interstate railroad company, it would be the same as if it had been proven that it uniformly valued the portions of all such railroad companies, in making out a case of intentional discrimination against such single company. As, then, the Constitution and statutes of this state require uniformity of taxation, notwithstanding they also require that it be assessed at its fair cash value, I conclude that, if the property in this state subject primarily to assessment by the county assessors was uniformly assessed for the year 1913 at less than 60 per cent. of its fair cash value, and the board of valuation and assessment in assessing plaintiff's franchise applied as to the portion of its unit in this state as the standard of valuation thereof full fair cash value, or slightly less than or about 80 per cent. thereof, it violated the Fourteenth Amendment. This conclusion is a deduction from a consideration of the Fourteenth Amendment itself. I have viewed the alleged violation thereof to determine whether it was such from the standpoint of the amendment's real meaning—above its mere letter —i. e., as if it had in so many words said, instead of that no state shall deny, that neither the legislative, executive, nor judicial departments of the state shall deny.

[6] I will now consider how the matter stands under the authorities. The relevant decisions in the order of their date are as follows, to wit: Cummings, Treas., v. Merchants' National Bank of Toledo, Ohio, 101 U. S. 158, 25 L. Ed. 903; Nashville, C. & St. L. Ry. Co. v. Taylor (C. C.) 86 Fed. 168; Taylor v. L. & N. R. R. Co., 88 Fed. 350, 31 C. C. A. 537; Louisville T. Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299; New York v. Barker, 179 U. S. 279, 21 Sup. Ct. 121, 45 L. Ed. 190; Coulter v. L. & N. R. R. Co., 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615; C., B. & Q. R. R. Co. v. Babcock, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636; Raymond v. Chicago Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; Jersey City v. Central Railroad of New Jersey, 212 Fed. 76, 128 C. C. A. 532. The case of Cummings, Treas., v. Merchants' National Bank of Toledo, Ohio, and Taylor v. Louisville & Nashville Railroad Company go together. They are alike, in that in each relief was sought and granted against a discrimination in assessing property for taxation. In each, however, the ground upon which it was granted was that the discrimination was a violation of the Constitution of the state, which required uniformity of taxation, in the one case of the state of Ohio, and in the other of the state of Tennessee. In neither case was the bearing of the Fourteenth Amendment upon the discrimination considered. It may seem strange that it was not, and that more so in the Tennessee case. There the discrimination relied on was claimed in the bill to be in violation of the Fourteenth Amendment as well as of the state Constitution. Possibly it is to be accounted for by the fact that the discrimination as a violation of the amendment was not viewed from the right standpoint. But there was no real occasion for it to be considered as a violation of the amendment in either case. The federal courts, in which they originated, had jurisdiction irrespective thereof, in the one case because the plaintiff was a national bank, and in the other because of the diversity of citizenship between the par-

ties. And the fact that the discrimination was in violation of the state Constitution was sufficient to entitle plaintiff to the relief sought without reference to that amendment.

Mr. Justice Peckham, in the case of New York v. Barker, and defendants, following him, have erred in stating that the discrimination in the Bank Case was remedied because it was in violation of the act of Congress as to national banks; and I erred in my opinion in the other case in stating that the Railroad Case was based on the Fourteenth Amendment. In each case the relief granted was based on the requirement of uniform taxation by the state Constitution. The Bank Case was brought by it to enjoin the collection of a tax assessed against the shares of its stockholders, which the statute required it to pay, to the extent of the discrimination. The Constitution of Ohio not only required uniformity in taxation, but that all property be assessed at its true value in money. The statutes thereof provided for the assessment of real and personal property, except bank shares, primarily by district and ward assessors in each county, for the correction of their work by county and city boards of equalization, and for the increase or decrease of the county valuation by a state board of equalization, the increase or decrease to be no more than 12½ per cent. There was no state board that had jurisdiction over valuation of personal property, except bank shares. The provision as to the assessment of bank shares was that they should be assessed primarily by the county auditors, and that a state board of equalization, different from the one having jurisdiction of the county valuations of real property should have power to equalize the valuation thereof throughout the state as among themselves. Prior to the assessment complained of the county auditor of Lucas county, in which plaintiff was located, and the county auditors of 10 other counties in that part of the state, had held a conference, at which it was determined that a rule should be adopted and applied in their respective counties by which real and personal property, except money and invested capital, was to be assessed at one-third of its actual value, and money and invested capital at six-tenths, and the assessors and county auditor of Lucas county had met and adopted this rule for that county, and thereafter they applied it in making the assessment. Presumably this happened in each of the other ten counties. Such a rule had been adopted and applied in another county in that part of the state, and Mr. Justice Miller said probably this system of taxation prevailed over the entire state. Under this rule plaintiff and the other Toledo bank shares were assessed at six-tenths of their actual value by the county auditor of Lucas county. But the assessment returned to him by the state board of equalization placed them at their true value in money. It would seem that they had so assessed all bank shares in the state. This was the discrimination complained of, and against which relief was sought and granted. Plaintiff and all other bank shares had been assessed by the state board of equalization at their full value, and real and personal property, except money and invested capital, at least in those 12 counties, had been assessed by the assessors thereof at one-third of its value. The burden of plaintiff's complaint was that the stat-

ute providing for the state board of equalization of bank shares was in violation of the state Constitution, in that it limited its function to equalizing the valuation of bank shares as among themselves, and gave it no power to consider the valuation of real property and other personal property. But it was held otherwise, as inequality did not necessarily result therefrom. It was held, however, that the discrimination was not remediless. It was so held because of the discrimination in the rules of assessment applied by the county assessors and the state board of equalization of bank shares.

Beyond question it was an outstanding feature of the case that the application of the rule applied by the county assessors was the result first of the conference of the county auditors, and then the adoption thereof by the assessors and county auditors of the several counties. The state board had been no party to the adoption of that rule. But, though such was an outstanding feature of the case, there is no basis for claiming that it was an essential one. Had each assessor in the 12 counties, without previous conference with any other assessing official, acting for himself, adopted and applied such a rule, the result of the case could not possibly have been different from what it was. In such case the assessment of all real and personal property in the 12 counties, except money and invested capital, at one-third of its true value, of money and invested capital therein, except bank shares, at six-tenths thereof, and of bank shares therein at full value, and the resultant discrimination against the bank shares, would have been intentional. Mr. Justice Miller said:

"We are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

The only discrimination which the case recognizes as not being within the state Constitution and remediless is one that results from mistake of judgment and other sources of inequality which boards of equalization are designed to remedy. Still further, had nothing else appeared than that each assessor in the 12 counties had uniformly assessed the real and personal property, except money and invested capital, at one-third of its true value, and money and invested capital, except bank shares, at six-tenths thereof, and that the state board of equalization had uniformly assessed bank shares at their full value, the result could not possibly have been different. The reasonable inference would have been that this was the result of the adoption and application, separately at least, of rules to so assess such property.

It is to be noted that, without any evidence in the record bearing on the subject, Mr. Justice Miller observed that the assessment of real estate at less than its true value was not "limited to the state of Ohio, or to part of it"; that, though the Constitutions and statutes of nearly all the states require uniformity of taxation and assessment at actual value of all property subject to taxation, "it is a matter of common observation that in the valuation of real estate the rule is habitually

disregarded"; and that "it is believed that the valuation of real estate for purposes of taxation rarely exceeds half of its current salable value." He accounts for the existence of this condition of things by the effort of the landowner to produce something like equality of burden with personal property, especially invested capital, which so readily escapes taxation by removal or hiding.

The case of Taylor v. Louisville & Nashville Railroad Company was brought by the railroad company to enjoin the certification by the state board of equalization of Tennessee, whose function was to revise the assessments of the property of railroad, telegraph, and telephone companies by another state board, to the comptroller for apportionment to the several counties into and through which its railroad ran. The Constitution of Tennessee required uniform taxation, but did not require that property should be assessed at its true value in money. It merely provided that it should be taxed according to value. The statutes, however, provided that all property should be assessed at such value. The assessment of all other property than that of such companies was made by taxing officers in each county. The state board assessed plaintiff's property at its true value in money, and the taxing officers of the counties uniformly assessed all other property at not more than 75 per cent. of such value. This was the discrimination complained of, and against which relief was sought and granted. Judge Taft in his opinion noted that there was conflict in the decisions of the state courts as to the right to relieve against such a discrimination. He cited decisions of the Supreme Court of Connecticut, New Hampshire, Arkansas, Illinois, and Kansas upholding the right, and decisions of the Supreme Courts of Ohio, New Jersey, and Massachusetts against it. He might have cited, as to the same effect, the decisions of the Kentucky Court of Appeals in the case of Louisville Ry. Co. v. Commonwealth, 105 Ky. 710, 49 S. W. 486, decided about a month before, had he known of its existence. He stated, however, that the court was concluded by the decisions of the Supreme Court of the United States in the Bank Case, had its opinion been to the contrary, which it was not. Two reasons were urged why the decision in that case was not controlling. One was that in the case in hand there had been no preconcert of the county taxing officers and adoption by them of a rule of undervaluation, as in the Bank Case. In answer to this Judge Taft said:

"It has been pressed upon us that no such preconcert of action by the assessing officers, and no such uniform rule of undervaluation, have been shown in this case as appeared in the Cummings Case, and that upon these circumstances the Cummings Case turned. We have already found, from the evidence, that there is an intentional undervaluation of property in each county, and that this is uniform as to all real and personal property, and results from a clear understanding between the assessors and county boards of equalization, who have a common motive for the reduction. More than this, it is clearly shown that the state board of assessors and equalizers in 1896 intentionally equalized all real estate in the state at 75 per cent. of its true value for taxation for the year 1897. Could preconcert be clearer than this?"

The other reason was that Mr. Justice Miller, in speaking of the rule of valuation whose adoption would justify equity interfering, re-

ferred to it was one "which is designed to operate equally and to violate fundamental principles of the Constitution," and that in the case in hand it could not be said that the rule of undervaluation was so designed. In answer to this Judge Taft said:

"An intentional undervaluation of a large class of property, when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law. In the case at bar the county assessors and board of equalization * * * have been actuated in their violations of the law by the desire to reduce, as far as may be, their county's share of the state burdens. Their undervaluations of property have been uniform as to all property in their county but railroads. They could not but know that such undervaluation must work an injustice against the property of railroads, if assessed at its true value by a state board, and taxed for county and state purposes on that basis. In this sense, the rule of undervaluations adopted in each county is necessarily 'designed to operate unequally,' within the meaning of Mr. Justice Miller in the Cummings Case. The ratio decidendi of that case is to be gathered from the facts, and the language of the opinion is to be interpreted in the view of the facts."

The determining consideration for the court's relieving against such a discrimination, as Judge Taft put it, was that it was intentional. This appears from the quotations from his opinion already made, and more fully from the following. He said:

"Before equity will relieve in such a case, it must appear that the assessing officers, whose acts of undervaluation create the unjust burden, must intentionally and habitually violate the law, by assessing property at less valuation than that which they know to be its true value."

Again:

"Equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property; that such inequalities, due to mistake, to the fallibility of human judgment, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtained; that, in other words, what may be called 'sporadic cases of discrimination' cannot be remedied by the chancellor. He can only interfere when it is made clear that there is, with respect to certain species of property, systematic, intentional, and unlawful undervaluations for taxation by the taxing officers, which necessarily effect an unjust discrimination against the species of property of which the complainant is an owner. The reason for the distinction is obvious. The occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the result of an illegal purpose on the part of any one."

And again:

"If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from * * * fraud or intentional discrimination."

In each of these two cases the court was confronted with a dilemma. The Constitution of Ohio required both uniform taxation and assessment at the true value in money. The Constitution in Tennessee required uniform taxation, and the statutes thereof assessment at the

true value in money. The dilemma was as to which requirement would be enforced. Was the requirement as to uniformity to be enforced by leveling the higher assessment down to the lower, whereby uniformity would be secured, but no property would be assessed at its true value, or was the court to keep its hands off, whereby the assessments would be left as they had been made, so that, whilst there would be lack of uniformity, the assessments conforming to the requirement as to true value would stand? Compliance with both requirements could not be secured, because it was impossible to bring about a leveling of the lower assessments up to those of the higher. Mr. Justice Miller does not seem to have been conscious that he was confronted with such a dilemma, as he makes no reference to it. It was urged upon Judge Taft, and he deals with it. He undertook to show that, as compliance cannot be had with both requirements, the true course is to bring about compliance with the requirement as to uniformity by the leveling down process. He said:

"To enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution. To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident."

In neither case had the Supreme Court of the state taken position upon the question there involved. Whether, if it had, and the position was adverse to the right to relief against the discrimination, as the Court of Appeals of this State has done in such a case, it would have made any difference in the decisions, cannot be told from anything said in the opinions. Though this case, in view of this decision of the Kentucky Court of Appeals, has a feature in it that did not exist in either of these two, here the complaint against the discrimination is based on the Fourteenth Amendment, and not on the state Constitution, as there. If it so be that this complaint, therefore, has foundation in fact, this feature of the case, instead of being an obstruction to granting the relief sought, is an aggravation of the discrimination, and renders the granting of the relief more imperative, if that were possible. The Fourteenth Amendment only requires equality of treatment in the enforcement of the tax laws of states forbidding discrimination. It has nothing to say on the subject of assessing property at its true value. This makes it so that this court is not confronted with the dilemma which confronted the courts in the Ohio and Tennessee cases, where the complaint against the discrimination was based on the state Constitution, which in the one case required that property should be assessed at its true value, as well as that taxation should be uniform, and in the other, together with the statute, so required. What we have here, then, in that contingency, is an intentional discrimination, and the highest

court of the state holding that it is powerless to remedy it in the only possible way in which it can be remedied, notwithstanding it is as much its duty as this court's to enforce the Fourteenth Amendment, the supreme law of the land.

The next of the relevant decisions to be considered are those in the cases of Nashville, C. & St. L. Ry. Co. v. Taylor and Raymond v. Chicago Union Traction Company. They go together. They are alike, in that in each case relief was sought and granted against a discrimination in assessing property for taxation similar to that complained of herein. The first one, as did the case of Taylor v. L. & N. Ry. Co., arose in Tennessee. The other arose in Illinois. The Constitution of that state does not require uniformity as to the members of each class. In that case the discrimination complained of was amongst the members of the class to which the traction company belonged. In each of these two cases the right to the relief sought was based solely on the ground that the discrimination complained of was a violation of the Fourteenth Amendment, and the claim that it was was the sole basis of federal jurisdiction. In neither was there diversity of citizenship, or other ground of federal jurisdiction than this. The Supreme Court of the United States in the Traction Company Case cited and approved the decision in the Railway Company Case, a decision of the Circuit Court. Though the decision of an inferior court, it has behind it the Supreme Court. These two decisions are on all fours with the case in hand, and uphold the position which I have been led to take. An attempt is made to distinguish the Traction Company Case, on the ground that there the assessment complained of had been directed to be made by the Supreme Court of the state. There is nothing in this to call for a difference in decision. Besides, though the assessment complained of here was not made by direction of the Court of Appeals of Kentucky, it has held that it is powerless to relieve against it. Mr. Justice Peckham, in the Traction Company Case, thus expressed himself as to what is essential to bring a discrimination of the kind involved here within the amendment:

"A system of valuation was adopted and applied to a large class of corporations, differing wholly from that applied to other corporations of the same class, and resulting in a discrimination against the appellee of the most serious and material nature. It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method in the manner of assessing property of the same kind. Although the law itself may be valid, and provide for a proper valuation, yet if, through mistake on the part of the state, through its board of equalization and while acting as a quasi judicial body, the board erred in the method to be pursued in relation to the corporations now before us, the mistake is one which may be corrected in equity."

Then came the decisions in Louisville Trust Co. v. Stone, Coulter v. L. & N. R. R. Co., and C., B. & Q. R. R. Co. v. Babcock. They go together. They are alike, in that in each relief was sought against a discrimination in assessing property for taxation, similar to the one complained of herein, but it was denied. The first two arose in Kentucky, and that after the adoption of the present Constitution of the state. The last one arose in Nebraska. The Constitution of that state re-

quired uniformity of taxation. The sole ground upon which relief was sought against the discrimination was that it was in violation of the Fourteenth Amendment. Certainly in the first two, and not unlikely in the last one, the claim that it was was the sole basis of federal jurisdiction. The decisions in the first two cases, being Kentucky cases, may be thought to be of more significance here than any of the other relevant decisions cited. The ground upon which, in each of the cases, the relief sought was denied, was solely that the alleged discrimination had not been established by the evidence. In the case of Louisville Trust Company v. Stone it was more clearly recognized than in the other two that it came within the Fourteenth Amendment. Judge Day, now Mr. Justice Day, thus expressed himself on the subject:

"It may be conceded that, if the allegations of the bill are made out, there exists in respect to the property of complainant, and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the state, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases federal jurisdiction will arise because of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Because of the position thus clearly expressed this case was also cited and approved by the Supreme Court in the Traction Company Case as in accord with the decision there rendered. By reason thereof the Supreme Court may be looked to as an authority in support of the position that the law as thereby expressed is applicable to this state in a proper case.

The opinions in the other two cases were written by Mr. Justice Holmes. If one may be justified in taking them as reflecting to a certain extent his own individual views, apart from those of the court itself, he cannot avoid thinking that Mr. Justice Holmes, at least, doubted whether such a discrimination as is alleged here was within the Fourteenth Amendment, and his dissent in the Traction Company Case, which followed shortly afterwards, would indicate that he thought that it was not. Certainly, in describing what was essential to bring such a discrimination within the amendment, he used terms which had not theretofore been used, and which were not repeated in the Traction Company Case. In the case of Coulter v. L. & N. R. R. Co., in referring to the undervaluation of property generally, constituting "one-half" of plaintiff's case, he said:

"It is not contended that a mere undervaluation would be enough. It is admitted that it must have been systematic and intentional."

Here the language used is familiar. But further on in the course of the opinion he said:

"Inequality, we repeat, is nothing, unless it was in pursuance of a scheme."

Just what he meant by "in pursuance of a scheme" is not certain. As, however, what is here stated is put as the repetition of a thought theretofore expressed, it may be that he meant no more than what he had already intimated; i. e., that the inequality must have been brought about by a "systematic and intentional" undervaluation of such prop-

erty. But in the case of C., B. & Q. R. R. Co. v. Babcock he went further, and coupled the word "agreement" with "scheme." He there said:

"A point less pressed than the foregoing was that the other property in the state was greatly undervalued, and that thus the rule of uniformity prescribed by the Constitution of Nebraska had been violated. Upon this matter it is enough to say that no scheme or agreement on the part of the county assessors, who taxed the other property, was shown, or on the part of the board of equalization and assessment."

If he meant by this language that something more than what I have heretofore pointed out was essential to bring such a discrimination as is relied on here within the amendment, I respectfully submit that the position is not justified, either by reason or the authorities. And I cannot avoid the notion that his ideas on the subject were somewhat confused. I alluded to one of the indications of this in my opinion in the other case. He took note of the fact that the legislative department, in the exercise of its function of enactment of laws of taxation, is not held to a rigid equality, but may make reasonable discriminations, citing the authorities to that effect, seemingly as justifying the conclusion reached in that case. I would submit that this position has no relevancy whatever to the question whether the executive department of the state, where uniformity of taxation is required, in exercising its function of enforcing the tax laws of the state by assessing the property subject to taxation, may make a discrimination, and, if so, what discrimination it may make, which was the question involved in that case. Still further, he seems to have thought that a court having before it the question whether such a discrimination as is alleged here is a violation of the Fourteenth Amendment—which was the question he had there—is confronted with the dilemma which was put up to Judge Taft in the case of Taylor v. L. & N. R. R. Co., and which he considered and disposed of. He said:

"The railroad company contends that, when there is a uniform and general undervaluation of other property, then the only way in which the company can be put on an equality with other taxpayers is by a similar undervaluation in its case. The railroad company contends further that, although this contravenes the letter of the statute, the requirement of equality so far outweighs the requirement of a tax on the full value of property that, if by misconduct elsewhere both cannot be observed, the rule of equality must prevail."

And again:

"We may assume for purposes of decision, without deciding, that if we otherwise agreed with the railroad company's contention the injunction might be granted, although the franchise was valued as the law requires in every respect, except in the proportion which the assessment bore to the other valuations. The decisions are not agreed upon this point."

Now I would submit here that, though a court dealing with the question as to whether such a discrimination as is alleged here can be relieved against, when it is considered solely as a violation of the state Constitution, which also requires that property shall be assessed at its full value, as was the case in Cummings, Treas., v. Merchants' National Bank of Toledo, Ohio, and in Taylor v. L. & N. R. R. Co.,

is confronted with such a dilemma, a court dealing with the question whether it can be relieved against as a violation of the Fourteenth Amendment, which has no requirement as to how property shall be assessed for taxation, but merely requires that there shall be no denial of the equal protection of the laws, is not confronted therewith. Besides these matters, Mr. Justice Holmes' dissent in the case of Raymond v. Chicago Union Traction Company seems to indicate that he viewed alleged violations of the Fourteenth Amendment from the standpoint of the letter thereof, and not from that of its real meaning, as I have claimed it to be. His position was that the doctrine of the case of Barney v. New York should be perpetuated, notwithstanding that it was open to the criticism which I ventured in my former opinion (209 Fed. 446 et seq.), which doctrine was subsequently condemned in the case of Home T. & T. Co. v. Los Angeles.

There are but two other of the relevant decisions cited above to be considered. Each stands by itself. That in the case of New York v. Barker is of consequence merely because therein the Supreme Court assumed the position here taken to be sound. It involved the question whether the legislative department of the state had denied the corporations thereof the equal protection of the laws, in that a certain statute enacted by it afforded an opportunity for discrimination. It was held that it had not. Having thus decided, the court proceeded to consider whether a case was made out of such a denial by the assessing department of the state in enforcing its tax laws. It assumed that such a denial could be, but held that it had not been, made out. An indication of what was thought would be such a denial may be gathered from these words of Mr. Justice Peckham, to wit:

> "To raise the question which the plaintiff in error seeks, it was therefore obviously necessary to allege and prove as a fact that there was habitual violation of law by undervaluation."

According to this all that was necessary to make out a case was proof that plaintiff's property had been assessed at its full value and that in case of other property there was "habitual" undervaluation. The case modifies somewhat Mr. Justice Miller's statements in the Bank Case, tending to support the position that the court will take judicial notice of uniform undervaluation of real estate. It holds that it will not, and that it is a matter of proof like any other fact. The defendants cite this case as bearing on this point, but are unwilling to accept its assumption.

As to the decision in the case of Jersey City v. Central Railroad of New Jersey—a decision of the appellate court of the third circuit—it is not important to make further reference to it than to state that it was held therein that such a discrimination as is alleged here is contrary to the Fourteenth Amendment.

The result of this survey of the relevant decisions is to make good the position which I have deduced from a consideration of the Fourteenth Amendment by itself, and which I took in the other case. Those who want to may contend otherwise, but in so doing they will be butting their heads against a stone wall. And just here I would change

a position taken in the other case (209 Fed. 455). It is that it was the assessing officers, who had to do with the assessment of property subject to assessment by the county assessors, and not the board of valuation and assessment, which had denied plaintiff the equal protection of the laws, if the discrimination charged was made. I would take that back. Undoubtedly those assessing officers, in not assessing such property at its fair cash value, breached their duties, and thereby made it so that, if a higher standard of valuation was used in assessing plaintiff's property by the board of valuation and assessment, an injustice would be done it. Had they done their duty, less taxes would be required, which would call for a reduction in the rate of taxation, which, if made, would cause plaintiff to pay less on a valuation of its property at fair cash value. But it was not they who denied plaintiff the equal protection of the laws. It was the board of valuation and assessment. It had no right to value plaintiff's property at a higher rate than that at which it was reasonable for it, with the evidence before it, to believe such other property was assessed. There was nothing in the oaths which its members took to require that it should so value it. The federal Constitution is the supreme law of the land, and they, as well as all other persons within its jurisdiction, owed obedience thereto over and above everything else. And that it assessed the capital of banks at 80 per cent. of par value would seem to indicate that it did not think that it was imperative on it to assess plaintiff at any higher rate.

What, then, is the fact as to whether there was an intentional discrimination against plaintiff in the assessment for 1913? In determining what is the fact in regard thereto, there can be no question that the board, in valuing the portion of plaintiff's unit in this state, consciously adopted and applied the standard of at least slightly less than or about 80 per cent. of fair cash value, in placing it at the sum of $75,139,074—that of full fair cash value being the standard in placing it at $94,500,000—and possibly the standard of full fair cash value in placing it at the lesser sum. Which it was depends on the true construction of its minute. It was one or the other. How, then, is it as to the other half of the case which it is essential that it be established to make out the discrimination alleged, and one which comes within the amendment? At the outset of this litigation it seemed to be conceded that the property subject to assessment by the county assessor was uniformly undervalued and that to a substantial degree. This led me in the other case (209 Fed. 460) to say:

"Progress, therefore, has been made along the line of truthfulness since 1902. No longer do the courts have to contend with the sham and pretense that ordinary property in this state is assessed at its fair cash value, or substantially so."

But it seems that such is not now the case. The defendants have denied the allegations of the bill to this effect, and insist that these allegations have not been established by the evidence. The plaintiff, on the other hand, contends that there was no occasion to so establish them, as the court takes judicial notice of the truth of those allegations. It cites in support of this position the following decisions, to wit:

Cummings, Treas., v. Merchants' National Bank of Toledo, Ohio, 101 U. S. 162, 25 L. Ed. 903; Railroad & Telephone Cos. v. Board of Equalizers (C. C.) 85 Fed. 308; Wray v. Knoxville, etc., R. R. Co., 113 Tenn. 544, 82 S. W. 471; Miller v. Windsor Water Co., 148 Pa. 529, 23 Atl. 1132. It thinks that I committed myself to this position in the other case when I said, in referring to the case of Coulter v. L. & N. R. R. Co., supra (209 Fed. 457):

"I confined myself in that case entirely to reasoning from the facts in evidence. I might have been justified in saying then, as now, that it is a matter of common knowledge to any one living in this state with a reasonable acquaintance with its affairs that such is the case."

But I did not mean thereby to so commit myself. And the decision of the Supreme Court of the United States in the case of New York v. Barker, where what Mr. Justice Miller had to say in the Bank Case was qualified, would seem to be against it. Possibly the true position is that judicial notice will be taken of the fact that such property is uniformly undervalued for assessment purposes, but not of the extent of the undervaluation. This must be established by evidence. In Coulter v. L. & N. R. R. Co. Mr. Justice Holmes said:

"There is, no doubt, a natural inclination to think such an undervaluation probable when it is suggested."

I will therefore determine the question under the evidence. Evidence was available, but not presented, which it seems to me would have settled beyond question the truth, not only as to the fact of undervaluation, but as to the true percentage thereof. The Constitution and statutes of this state prescribe as a test of the fair cash value of property therein the price which it will bring at a fair voluntary sale. The Constitution of Illinois, quoted in Raymond v. Chicago Union Traction Company, prescribes the same test. The statute of New York, quoted in New York v. Barker, prescribes as the test of the full and true value of property what it would be appraised at in payment of a just debt from a solvent debtor. Now both of these tests are to a certain extent uncertain. Is the price which a given piece of property will bring at a fair voluntary sale the test, or what will it be appraised at when taken in payment of a just debt from solvent debtor? Fair-minded and reasonable men will differ as to this. But in case of real estate which has been sold at a fair voluntary sale the test of what it will sell for is no longer needed. The price at which it actually sold fixes its fair cash value, in the absence at least of any exceptional circumstances, and that price should appear from the record of the deed of conveyance. If, then, as to such property, its assessed value is compared with its fair cash value, as thus fixed, it can be determined at once with certainty whether it was assessed at its fair cash value, and, if not, the percentage thereof at which it was assessed. By taking into consideration all such property which has been sold in a given county during the year, the average percentage at which it was assessed can be obtained. It is a fair inference therefrom that the real estate which was not sold during the year was assessed at the same average percentage of its fair cash value, and that personal property was as-

sessed at no greater percentage. It is this evidence, to wit, evidence of the percentage at which all real estate which was sold in each of the counties of the state during the year 1913 was assessed, to which I refer.

Two hindrances no doubt existed in the way of this evidence being effective. One hindrance is this: Tabulated statements are required by statute to be furnished each year to the board of equalization by the county clerks of the sales of real estate during the year, the consideration therefor named in the deeds, and the assessed values thereof, in order that it may have such evidence as it furnishes of the percentage of cash value at which property in each county is assessed. To prevent the state board from increasing the assessments of the counties by reason of the showing made under these statements, it is the practice of the county assessors, as to which there is abundant evidence in this record, to assess the property sold during the year at a much higher percentage of its value than it had been theretofore and would be thereafter assessed. This hindrance could have been met by evidence as to the amounts at which the property sold had been assessed the preceding and succeeding years to that in which it was sold. The other hindrance is connected with the other term of the comparison, to wit, the consideration for which the sale was made. In many instances, no doubt, the conveyances would not disclose the true consideration, and this for the purpose of preventing a raise in the assessment. This hindrance could have been met by the testimony of the parties to such conveyances as to true consideration. To have presented this evidence in full would have necessitated the expenditure of much time, labor, and money; but the amount involved in this and its companion cases would have justified the expenditure. Saul lost his kingdom for want of thoroughness. He would save Agag and the choicest stock. And if the Germans do not save theirs it will not be for the want of this great quality. I do not overlook the fact that in the case of Coulter v. L. & N. R. R. Co. Mr. Justice Holmes seems to belittle the showing made by the tabulated statements furnished by the county clerks to the state board of equalization as bearing on the fact of undervaluation and the extent of it. He there said:

"It is obvious that the accidental sales in a given year may be a misleading guide to average values, apart from the testimony that some at least of the conveyances did not report true prices, yet they furnish the chief weapon of attack."

It is true that in one direction they were a "misleading guide," and the fact that all conveyances did not report true prices was against their effectiveness. But the direction in which these two considerations affected the value of this evidence was not to prevent the statements showing that the percentage of assessment to fair cash value was really greater than shown thereby, but to prevent them showing that it was really much less. It could be relied on without the slightest hesitation that the percentage was not greater than that, but that it was much less. These two weaknesses in the showing made by the comparison of the prices for which the real estate sold and the assessments thereof would be removed by the evidence to which I have al-

luded, to wit, of the assessments for the preceding and succeeding years and the testimony of the parties to the conveyances. With these weaknesses removed, such a comparison would give a definite and certain percentage of assessment to fair cash value. It is not possible to obtain a definite and certain percentage in any other way. A boom or a depression in a given year may make the comparison misleading for that year, so that some allowance would have to be made for this. But for years in this state there has been no such disturbing cause. The value of such a comparison in determining the percentage of assessment to fair cash value was recognized by the Legislature of Kentucky, in that it provided that the tabulated statements, notwithstanding the two weaknesses referred to, which worked against the state, should be prima facie evidence of the true percentage. And the present Constitution would seem to have had them in mind when it for the first time in this state prescribed the prices at which property would sell at fair voluntary sale as the test of its fair cash value.

Coming, then, to the evidence which has been introduced, what do we find? Several considerations which I made much of in the case of L. & N. R. R. Co. v. Coulter, my opinion in which is reported in 131 Fed. 282, I think can be availed of here. Down at least to the year 1906 there was legislative recognition of the fact that property generally in this state was not assessed at exceeding 70 per cent. of its fair cash value. In the opinion referred to I gave a historical survey of the legislation in Kentucky as to the assessment of property for taxation. It appears therefrom that down to 1886 the provision was that property should be assessed at its fair and full value, and then for the first time it was provided that it should be assessed at its fair cash value. In 1831 it was provided that the taxpayer should make oath to the value of his property. But this requirement did not remain long in force. It was repealed in 1838. And as I read the statutes it was not again required until 1886, when it was first prescribed that property should be assessed at its fair cash value. It was required, at the same time, that the assessors before beginning their work should make oath that they would assess, and again, after they finished their work and before they could receive their pay, that they had assessed, the property subject to assessment by them at its fair cash value, and that the members of the county boards of supervisors, before beginning their work, should make oath that in each instance where property had not been assessed at its fair cash value they would make the assessment conform thereto. No such oaths on the part of the assessors and members of the county boards of supervisors had theretofore been required. They had merely been required to make oath before beginning the performance of their duties that they would faithfully perform them. Why the necessity of this stringent legislation? How is it to be accounted for? It is not to be accounted for save on the ground that property in the state was not being satisfactorily assessed, and something stringent was needed to bring about a satisfactory assessment. This stringent legislation is a witness to this much at least. That such a condition of things existed is also witnessed about this time by the Court of Appeals of the state in the case of Spalding v.

Hill, 86 Ky. 656, 7 S. W. 27, decided February 11, 1888, just shortly after the state board of equalization was first created. Judge Bennett there said:

"It is the settled doctrine of this state that, for the purpose of taxation, property must be assessed according to its true value; * * * that equality of burden is essential to the correct administration of the government. But it is a fact, known by all, that for years past the grossest inequalities have existed in the value fixed upon all kinds of property by the county assessors, and that the county boards of supervisors have failed to correct the evil. In some counties it is said that assessors secure their election by pledges made to assess the property in the county, or certain kinds of it, at a low value. In creating the state board of equalization, the object was to correct this evil, and to have the assessment of taxes in the several counties equalized according to the value * * * therein, so that the state government might be supported by just and equal taxation."

Possibly this stringent legislation witnessed also a desire that property should be, and an expectation that by reason thereof it would be, assessed at its fair cash value. But the evidence is clear that, however it may have been as to the desire there was no expectation whatever that it would have any such effect. By the act of May 4, 1888, with these stringent provisions in the statutes, it was provided right alongside of them that the state board of equalization should adopt 69 per cent. of fair cash value as the standard to which the county assessments were to be made to conform, and in order that it might be in a position to know how far the assessments conformed to this standard it was for the first time provided that the county clerks should furnish the tabulated statements heretofore referred to. As stated, it was provided that they should be accepted as prima facie evidence of the percentage of fair cash value at which the assessments were made, provision being also made for hearing witnesses. By the act of May 27, 1890, the percentage was changed from 69 to 70. The effect of this legislation is to show that the expectation as to the stringent legislation referred to could have been no more than that the effect thereof would be to raise the assessments to as much as 70 per cent. Such was the condition of things at the time of the adoption of the present Constitution, which incorporated into it the requirement that property should be assessed at its fair cash value. Mr. Justice Holmes in the case of Coulter v. L. & N. R. R. Co., seems to have thought that the legislative recognition that property in this state was assessed at not more than 70 per cent. of its fair cash value was confined to the time before the adoption of the Constitution. He said:

"The state Constitution, whatever the statutes may have said, seems popularly to have been understood to have made a great change in the law. Practice before its adoption, therefore, hardly can raise a presumption as to practice afterwards, even on the liberal assumption that it properly could be considered in evidence."

Beyond question the Constitution made a great change in the law. Thereafter the Legislature could not, as before, prescribe anything less than fair cash value as the standard of assessment. There must have been something in the record, not appearing in the opinion, to justify the statement that it seems to have been popularly understood that the

Constitution had that effect; and it may be accepted that there was no presumption that practice before the Constitution continued afterwards. I cannot see, however, why it was a liberal assumption that former practice could be considered in evidence at all. One of the recognized methods of criticism in determining the truth of things is to consider them genetically. And it would seem not to require much evidence to convince one that the mere adoption of the constitutional provision did not have effect of changing the settled habit of the people of the state as to the assessment of property for taxation. From the beginning the statutes of the state had prescribed that property should be assessed at its fair and full value. This legislation was binding on the taxpayers thereof as much as the constitutional provision. The Legislature, in providing that the state board of equalization should equalize the assessments of the several counties on the basis of 70 per cent. of its fair cash value, indicated that it did not think that the requirement as to so much oath taking would increase the assessment beyond 70 per cent. of its fair cash value. In view of these considerations, is not the case quite weak for thinking that the mere embodiment of the requirement that property in the state should be assessed at its fair cash value would affect any material increase in the rate at which it was assessed?

But the legislative recognition that property in this state was assessed at no more than 70 per cent. of its fair cash value is not limited to the time before the adoption of the Constitution. The effect of the constitutional provision, of course, was to repeal the statutory provision as to equalizing the assessments on such basis. Immediately after the adoption of the Constitution, and because thereof, a long session of the Legislature was held, lasting nearly a year, to make the statutes of the state conform thereto. Most of them, with certain modification, were re-enacted. Amongst other statutes then enacted was a comprehensive one on the subject of "Revenue and Taxation," which went into force November 11, 1892. It contained the stringent provisions of the preceding legislation as to oath taking by the taxpayers, county assessors, and members of the county boards of supervisors, with the additional requirement that that of the taxpayer should be in writing and signed by him. This statute covered the entire subject, except in one particular. It omitted anything as to the state board of equalization. It left that matter to be still covered by the preceding legislation, which contained the requirement that the board should equalize the assessments of the various counties at 70 per cent. of fair cash value. Why the omission? Of course, one cannot tell for certain what was the reason thereof. Could it have been that, that Legislature's special function being to make the statutes of the state conform to the new Constitution, it could not see its way clear to provide that the state board of equalization should equalize on the basis of 70 per cent. of fair cash value, and yet it was not ready to provide that it should do so on the basis of fair cash value, either because it was not desired that it should do so, or it was thought to be useless to require it to do so? But so it was that it left this legislation unaffected by any act on its part.

Matters continued in this condition until the act of March 29, 1902. The special function of the Legislature which enacted it was not to make the statutes conform to the Constitution, and it was 10 years away from its adoption. That act also was a comprehensive one on the subject of "Revenue and Taxation." It covered the whole of it. It re-enacted the stringent provisions of the former act as to oath taking, and right alongside of it the legislation as to the state board of equalization in existence before the adoption of the new Constitution, with its provisions that that board should equalize the county assessments on the basis of 70 per cent. of fair cash value. This act remained in force until March 16, 1906, when another comprehensive act on the subject was passed, which is still in force. This was the first Legislature after the termination of the litigation in Coulter v. L. & N. R. R. Co., and then for the first time this requirement as to equalizing on such basis was changed, and that in awkward fashion (section 4274, Ky. Stat.), so as to require the equalization on the basis of fair cash value. The effect of this legislative recognition is not only to support the position that the assessments for 1913 could not have been for more than 70 per cent. of fair cash value, but to knock the props from under the only consideration appealed to by defendants to support the position that they were for as much as full fair cash value. That consideration is that, in view of the requirements as to so much oath taking in connection with the making of the assessments, it is to be presumed that they were at full fair cash value. No such presumption can be indulged in, in the face of the fact that right alongside of these requirements there existed for 20 years the legislative provision that the state board of equalization should equalize the assessments of the various counties on the basis of 70 per cent. of fair cash value.

Again, the comparisons which I made between the total assessments for the year 1902 and those previous to the adoption of the Constitution, and the showing made by the tabulated statements, which I took great pains to demonstrate, are not without some force here. There had been but little increase in those assessments in that time. And, doctored as those statements had been, they evidenced that property in the state had not been assessed at more than 80 per cent. of fair cash value. I have heretofore noted that Mr. Justice Holmes indicated that he was impressed by the force of my reasoning to the effect that property generally in the state was uniformly undervalued, and that substantially so. But, of course, if there was nothing more here than what was in that case, I could not, in the face of the decision of the Supreme Court in that case, take any such position here. The case in hand is not limited thereto. It contains much more than this in support of that position. I will simply enumerate the additional evidence, without elaborating on any item.

1. The United States census for the year 1910. In my opinion in the other case I noted that according to it the assessed value of farm property in this state, consisting of land, buildings, machinery, implements, and live stock, was 51.6 per cent. of the cash value. According to that of 1900, the percentage was 63, indicating that in the decade there had been an increase in the cash value, with no corresponding

increase in the assessed value. From a comparison of certain details of the census of 1910 with the report of the state board of equalization for the year 1913 as to the same details we have this result: The census gives the value of farm lands, with improvements, as $635,459,372; the report gives the assessed value thereof as $355,285,669. The assessed value thereof for 1913 was 55.9 per cent. of its true value in 1910, three years before. The census gives the value of live stock as $117,486,662; the report gives the assessed value as $57,318,478, or 48.8 per cent. of the true value thereof three years before. The census gives the value of agricultural implements and vehicles of all kinds as $20,851,846; the report gives the assessed value thereof as $8,921,889, or 42.8 per cent. of the true value, thereof three years before. The Report of Wealth, Debt, and Taxation issued by the Census Bureau in 1907 states that farm lands and improvements in this state constituted 52.872 per cent. of the value of all taxed real property and improvements. If this be accepted as the correct percentage, and the valuation of farm lands and implements given by the census for 1910 as the true value thereof, then the true value of all taxed property and improvements for that year was $1,201,822,607. The report of the state board of equalization for the year 1913 gives the assessed values thereof as $647,603,715, or 53.882 per cent. of the true value of the whole three years before.

2. The report of the state board of equalization to the Governor for the years 1910, 1911, 1912, and 1913. I quoted certain portions of the reports for the years 1910 and 1911 in my former opinion (209 Fed. 458, 459). They are all illuminating of true conditions in this state as to the matter of assessing property for taxation. The report of 1911 shows a real effort on the part of the board for the years 1910 and 1911 to raise the assessments. It raised the assessments in 1911 more than $22,000,000 over what they were the year before. The succeeding boards for 1912 and 1913 fell back in 1912 a little under $6,000,000, and went ahead of the assessment for 1911 about the same amount in 1913.

3. The report of the state tax commission, appointed under a joint resolution adopted by the Legislature and approved March 15, 1912, to that body made in December, 1913, after having been at work for nearly two years. The commission stated that the average ratio of assessed value to true value of farm lands throughout the state was about 52 per cent., and further that "no pains had been spared to ascertain the correct figure." Evidently the commission accepted the census of 1910 as the basis of its work and verified it. It found, not only the average ratio for the state, but the ratio for each county. There were at that time 119 counties in the state. It found that in all of them the ratio was between 30 and 40 per cent.; in 38 between 40 and 50 per cent.; in 44 between 50 and 60 per cent.; in 13 between 60 and 65 per cent., most of them nearer 60 than 65 per cent.; in 3 between 65 and 70 per cent.; in 6 between 70 and 75 per cent., most of them nearer 70 per cent. than 75 per cent.; in 3 between 75 and 80 per cent.; and in one 80.6 per cent.

4. The testimony of John E. Garner, a member of the state board

of equalization for the years 1908, 1909, 1910, and 1911, and its chairman and author of its reports for the years 1910 and 1911. His testimony was that the practice of the assessors was to assess real estate—lands and town lots—at from 40 to 50 per cent. of fair cash value; that as to personal property it "was more a matter of escaping taxation than paying taxes"; and that the board endeavored to raise the assessment to approximately 60 per cent. of its value.

5. The affidavits of about 190 individuals, men of affairs, from 47 counties in different parts of the state. They place the percentage of assessed value to fair cash value in their respective counties mainly at 60 per cent. Some of them place it lower than 60 per cent. and some as low as 15 per cent. As to only one county is the percentage placed higher than 60 per cent., and in that instance the percentage is placed at from 60 to 70.

6. The action of the board of valuation and assessment in assessing the banking capital of the state. It assessed it at 80 per cent. of par value, which not unlikely is not more than 60 per cent. of fair cash value. This action shows, not only that the board discriminated in its own work, assessing plaintiff at slightly less than or about 80 per cent. of possible full fair cash value, and the banks at 80 per cent. of par value, but tends to establish undervaluation claimed to exist of the property subject to assessment by the county assessors. This assessment cannot be accounted for on any other ground than that it was thought that banking capital should not be assessed at a higher percentage than such property is.

7. The action of the Attorney General of the state in filing before the board of valuation and assessment, when considering the assessment question herein, affidavits of certain individuals from eight different counties of the state, including the counties of Jefferson, Kenton, and Fayette, in which are located the cities of Louisville, Covington, and Lexington, the assessment of which counties cover more than one-third of the total assessed value of property in the state subject to assessment by the county assessors; and those affidavits were to the effect that property in those counties was assessed at 80 per cent. of its fair cash value. I am not now concerned with the question as to the percentage at which such property was undervalued, but with the question whether it is uniformly undervalued to a substantial degree. This item of evidence is to the effect that it was undervalued at least to the extent of 80 per cent.

Now as against this evidence the defendants have not introduced one particle of conflicting evidence. The only evidence which they have introduced consists of the affidavits of ex-county assessors for the years 1910, 1911, 1912, and 1913 from over 90 counties. With three exceptions they are of a stereotyped character. All but one were evidently prepared by some one acting on behalf of defendants, and distributed to be signed and sworn to by ex-county assessors of the state for those years. In all but the three each affiant states that he endeavored to follow the law and assess all property at its fair cash value, estimated at the price which it would bring at a fair voluntary sale; that if any property was assessed at less than such fair cash

value it was unintentional on his part; that never at any time had he entered into any agreement or understanding with any other officer in the state whose duty it was to assess property for taxation, or any one else, that property should be assessed at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, and that he never heard of any such understanding or agreement; and that no property was ever intentionally assessed by him for less than such fair cash value, and, if he so assessed any property, it was on account of mistake or lack of proper evidence as to its value. In none of them did the affiants negative the fact that the property assessed by them had been uniformly undervalued.

The absence of any evidence of this character from this case is striking when we come to compare it with the other cases in which the question of uniform undervaluation in this state has been involved. As has been seen, there are two of such other cases, to wit, Louisville Trust Co. v. Stone and Coulter v. L. & N. R. R. Co. In Louisville Trust Co. v. Stone the evidence to the effect that property was assessed at its fair cash value was quite formidable, as will be seen from Judge Day's opinion therein. The affidavits of 95 county assessors, 114 county clerks, 4 members of the board of equalization, and the chief secretary of the board were to the effect that the property in the state was so assessed. In Coulter v. L. & N. R. R. Co. the evidence to this effect was less formidable; and in this case there is an entire absence of any such evidence. This indicates that the fact of uniform undervaluation to a substantial degree has become so bald and patent that no one can now be found that will swear to the contrary. Those who would perpetuate the sham and pretense that property generally in this state is not uniformly and intentionally undervalued to a substantial degree, and would have the courts sanction its perpetuation, have withdrawn entirely from the objective field, save in the particular as to the existence of an agreement amongst the county assessors, which no one claims, and entered the subjective, where it may be thought that it is more difficult to determine the truth.

The evidence in the case, therefore, seems to be sufficient to convince any one of the truth of plaintiff's claim that the property in this state subject to assessment by the county assessors for the year 1913 was uniformly undervalued to a substantial degree. It is equally convincing that such undervaluation was intentional on the part of the ex-county assessors, notwithstanding the affidavits to the contrary. It was hardly to be expected that they would admit that they had intentionally undervalued the property assessed by them, and had not endeavored to assess it at its fair cash value, thereby acknowledging of record that they had violated their oaths. Nor would I say that in stating that they had not intentionally undervalued, and had endeavored to assess at fair cash value, they deliberately swore to that which they knew to be untrue, though it is quite difficult to see how, if they reflected on the matter, they could persuade themselves that they were speaking the truth. It is likely that none of them duly reflected upon the full effect of what they were swearing to, and that, in so far as they reflected at all, they in some way persuaded them-

selves that in some sense it was true, or at least not false. The fact of uniform undervaluation is so overwhelmingly established and to such a marked degree that it would be a reflection on one's capacity to see things as they are not to hold that the undervaluation was intentional. The real truth crops out from this quarter. One of the ex-county assessors to whom the stereotyped form of affidavit was sent came from Warren county. He interlined it so as to make it state that he endeavored to assess property at about 70 per cent. of its fair cash value, that if any one was assessed at less than 70 per cent. of its fair cash value it was unintentional, and that no property was ever intentionally assessed by him for less than 70 per cent. of its fair cash value. Another was the ex-county assessor of Carroll county. He put it in the waste basket and prepared an affidavit for himself. In it he stated that he assessed all real estate that was on the transfer sheet—that is, all that had been sold during the year just previous to the assessment—at 80 per cent., of its purchase price as shown by the records, and all other property was listed by the owner or agent under the oath prescribed by law. And still another was the ex-county assessor of McCracken county. He added thereto the statement that he tried to value all property fairly and equitably, and that in some instances property was assessed at less than he thought was its fair cash value, but he let it stand because it was assessed in his opinion as other property in the same neighborhood.

This leaves nothing to be determined but the percentage of fair cash value at which such property is uniformly assessed; and as to this I see no escaping the conclusion that it is not assessed at more than 60 per cent. thereof.

It remains to determine the effect of the conclusion that, in the making of the assessment for 1913 of plaintiff's franchise, there was an intentional discrimination against it within the Fourteenth Amendment, in connection with those heretofore reached, upon the relief, if any, which the plaintiff is entitled to herein. We have seen that, assuming $262,252,566 to be the true cash value of plaintiff's unit, as the board found it to be, 24.9601 to be the true percentage of the fair cash value of plaintiff's unit to be apportioned to Kentucky, and the portion of Kentucky's unit therein not to be of greater value than the mileage proportion of the value of the unit, the latter two of which assumptions I have held to be correct, the fair cash value of the portion of plaintiff's unit in Kentucky was $64,750,418.79. Sixty per cent. thereof is $38,850,251.12. Deducting therefrom $29,500,772, the assessed value of the tangible property, leaves $11,349,479.27 as the value of the franchise, which is about the amount of the assessment for 1911, and less than half of the amount on which payment has been made. But, if $262,252,566 was the fair cash value of what the board took to be plaintiff's unit, the fair cash value of its unit was more than this sum. Plaintiff's unit consisted of more than what the board took it to be. It consisted, in addition thereto, of so much of the controlled mileage as was not represented by the stock and bonds owned by plaintiff. Adding the value thereof to the sum of $262,252,566, and then taking 24.9601 per cent. of the total, deducting therefrom the value

of the controlled mileage in Kentucky, taking 60 per cent. of the remainder, and deducting the assessed value of the tangible property, would, as I view it, give the value of the franchise according to the statute. I am unable to make out its value in this way, because there is nothing in the record to show the value of the portion of plaintiff's unit not considered by the board, or the value of that portion of its controlled mileage which was in Kentucky. It is possible that the result of a consideration of these two matters, in the way indicated, would make the value of the portion of plaintiff's unit in Kentucky as much as $92,181,766, the sum at which the board fixed it, by apportioning to Kentucky a part of the value of $262,252,566 on the operated on its own account mileage basis. I doubt, however, whether it would.

The condition of things, then, is this: The board has found the fair cash value of the portion of plaintiff's unit in this state to be $92,181,766, without any excess value. They have not gone at it in the right way. But they have in fact found such to be its value. It is possible that, if they had gone at it in the right way, they would have found such to be the value thereof. And the consideration to which I referred to in the other case (209 Fed. 463), to wit, that the plaintiff on June 30, 1905, in a suit in this court, claimed that the portion of its railroad in this state, then consisting of 1,265.23 miles, was worth the sum of $70,599,484.81, renders it not unlikely—it would seem, most likely—that the fair cash value of the 1,644.58 miles of plaintiff's railroad in Kentucky, outside the mileage operated by it on account of the owner and by separate corporations in Kentucky for the year ending June 30, 1912, was as much as that sum. I will therefore dispose of the case on the basis that it was that much.

This is not such an exactness as I always like to attain, but the case is one where exactness is not, and only approximation is, attainable. Taking 60 per cent. of $92,181,766 would give $55,309,059.60 as the value of the portion of plaintiff's unit in Kentucky. Deducting $29,500,566, the assessed value of the tangible property, leaves $25,808,493.60 as the value of the franchise. And deducting from this balance $22,899,300, the amount on which payment has been made, leaves $2,909,192.60 on which payment should yet be made.

A decree will be entered enjoining defendants from enforcing the assessment complained of, and from making and enforcing any other assessment of plaintiff's franchise for the year 1913, on condition that it pays the taxes, state and local, on $2,909,193.60 in addition to what it has paid. But, if either side desires it, the decree may be limited to an injunction against the enforcement of the assessment complained of without prejudice to the making and enforcing of another assessment for that year, to be equalized at 60 per cent., and to be credited with the sum on which payment has been made.

GEIGER-JONES CO. v. TURNER, Atty. Gen. of State of Ohio, et al. COULTRAP v. SAME. ROSE et al. v. HALL, Superintendent of Banks and Banking of State of Ohio, et al.

(District Court, S. D. Ohio, E. D. February 10, 1916.)

Nos. 51–53.

1. CONSTITUTIONAL LAW ⊜48—PRESUMPTION AS TO VALIDITY OF STATUTE.
A statute must be sustained, unless it can be clearly shown to be in conflict with some constitutional provision.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⊜48; Statutes, Cent. Dig. § 56.]

2. CONSTITUTIONAL LAW ⊜38—VALIDITY—SCOPE OF INQUIRY.
If under the federal Constitution a state had no power to enact a statute, it is unimportant how wise, necessary, or beneficent the statute may be, as it is necessarily void because in conflict with the organic law of the land.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. ⊜38.]

3. STATUTES ⊜64—PARTIAL INVALIDITY—EFFECT.
If there are separate and independent unconstitutional provisions in a statute, which may be rejected, and the rest of the act permitted to stand and have effect according to the legislative intent, the valid portion must be upheld; but if an unconstitutional element pervades the entire statute as an inherent and essential part, it must fail as an entirety.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. ⊜64.]

4. STATUTES ⊜64—VALIDITY—ENFORCEMENT IN CONSTITUTIONAL MANNER.
That the officer charged with the execution of a law which authorizes the accomplishing of an unconstitutional purpose may not enforce it according to its terms, but only as he may deem wise and expedient, cannot save the statute, as it will not be presumed that the statute will only be used to accomplish what can be done in accordance with the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. ⊜64.]

5. COMMERCE ⊜12—INTERSTATE COMMERCE—VALIDITY OF STATE LAWS.
A state law which in its essentials is a legitimate exercise of the police power, is not rendered invalid by the fact that interstate commerce is thereby incidentally affected; but if such law directly burdens such commerce it is unconstitutional, though expressed to be a regulation under the state police powers.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 7, 9; Dec. Dig. ⊜12.]

6. COMMERCE ⊜15, 40—INTERSTATE COMMERCE—SUBJECTS OF INTERSTATE COMMERCE.
Stocks and bonds are articles of legitimate interstate commerce, and sales of them as between the states, and their transmission from one state to another by mail or by common carrier constitute interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 17, 29, 30, 34, 35; Dec. Dig. ⊜15, 40.]

7. COMMERCE ⊜57—STATUTES ⊜64—INTERSTATE COMMERCE—VALIDITY OF STATE LAWS.
The Ohio "blue-sky" law (Gen. Code, §§ 6373-1 to 6373-24, amended by Act May 6, 1913 [103 Ohio Laws, p. 743]) requires dealers in stocks, bonds, and other securities to obtain a license from the superintendent of banks,

and make application, giving certain information concerning the applicant, the location and character of its business, and references, establishing the good repute of the applicant's directors, officers and agents. If the applicant be a foreign corporation, it must also file a copy of its articles of incorporation, etc. Notice of the application must be published. A licensed dealer may not sell securities until it has also filed a statement concerning the issuer of the securities, etc. An issuer or underwriter is prohibited from disposing of securities, to organize any company, or assisting in the flotation of its securities, without furnishing similar information and procuring a certificate. The commissioner may revoke licenses or certificates, and, though his action is reviewable, the review is restricted to the court of a particular county. *Held*, that this imposes direct and substantial burdens on interstate commerce, and its unconstitutional features are so distributed through its various parts as to be inseparable and vitiate the entire act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 72–76, 88, 90, 92–102; Dec. Dig. ⟸57; Statutes, Cent. Dig. §§ 58–66, 165; Dec. Dig. ⟸64.]

8. CONSTITUTIONAL LAW ⟸296—DUE PROCESS OF LAW—DENIAL.

The Ohio "blue-sky" law, regulating the sale of bonds, stocks, and other securities, deprives dealers in stocks, bonds, and other securities to which it relates of their property and of their liberty or right to pursue a lawful calling without due process of law, limited only by the unrestrained discretion of the commissioner appointed under the act, and every investigation is ex parte, no rules of procedure are prescribed, nor is the commissioner required to establish any rule or regulation. He may hear only evidence unfavorable to the investigated party and without the safeguard of an oath, and the uncontrolled discretion of the commissioner or his assistant may injure and possibly destroy worthy business enterprises and cast a cloud on the name of the applicant or licensee.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825–838, 840–846; Dec. Dig. ⟸296.]

9. CONSTITUTIONAL LAW ⟸212—EQUAL PROTECTION OF THE LAWS—POLICE REGULATIONS.

A police regulation, like any other law, is subject to the equal protection clause of Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 684, 705; Dec. Dig. ⟸212.]

10. CONSTITUTIONAL LAW ⟸211—EQUAL PROTECTION OF THE LAWS.

A statute does not deny the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions, and if it does not subject the individual to an arbitrary exercise of the powers of government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. ⟸211.]

11. CONSTITUTIONAL LAW ⟸240—EQUAL PROTECTION OF THE LAWS.

The Ohio "blue-sky" law excepts from its provisions corporate bonds where more than 50 per cent. of the entire issue is included in a sale to one purchaser, and sales by an owner, not the issuer of a security, who disposes of his own property for his own account, when such disposal is not made in the course of repeated transactions of a similar character, and sales by a natural person, other than the underwriter of a security, who is a bona fide owner of the security and disposes of his own property for his own account. It requires licensed dealers, before disposing of any securities, to furnish information concerning the issuer of the security and its business, but provides that this information need not be filed if actual current sales of the securities at prices quoted shall have

been, for not less than six months, published in the regular market reports of a daily newspaper of general circulation in the state, or where there is a disposal of securities the price for which in a single transaction by one disposee shall amount to $5,000 or more, or where the disposal is made for a commission of less than 1 per centum of the par value by a licensee who is a member of a regularly organized Stock Exchange, and who has an established place of business in the state, regularly open for public patronage. *Held* that, in view of these exceptions, the statute denies the equal protection of the laws, in violation of Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697–699; Dec. Dig. ⊂⊃240.]

12. CORPORATIONS ⊂⊃39—STATUTORY PROVISIONS—AMENDMENT OR ALTERATION.

Const. Ohio art. 13, § 2, as amended September 3, 1912, providing that corporations may be classified, and that there may be conferred upon proper boards, commissioners, or officers such supervisory and regulatory powers over their organization, business, and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint-stock companies in the state as may be prescribed by law, vests in the Legislature no greater power than it possessed under the old section, which provided that laws under which corporations were formed might from time to time be altered or repealed, and does not authorize the Legislature to so burden the business of domestic corporations as in practical effect to destroy it, as is done by the "blue-sky" law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 119, 121–123; Dec. Dig. ⊂⊃39.]

13. STATUTES ⊂⊃64—PARTIAL INVALIDITY—EFFECT.

It cannot be presumed that the Legislature would have enacted the Ohio "blue-sky" law, if it had understood that its provisions could not be sustained as against foreign corporations, since this would work an obvious discrimination against domestic corporations.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. ⊂⊃64.]

In Equity. Three suits, by the Geiger-Jones Company and by Don C. Coultrap, against Edward C. Turner, Attorney General of the State of Ohio, and another, and by William R. Rose and another, against Henry T. Hall, Superintendent of Banks and Banking of the State of Ohio, and others. On application in each case for a temporary injunction. Temporary injunction granted.

E. N. Huggins, Timothy Hogan, and J. A. Shauck, all of Columbus, Ohio, M. B. & H. H. Johnson and Francis R. Marvin, all of Cleveland, Ohio, and A. M. McCarty, of Canton, Ohio, for plaintiffs.

Edward C. Turner, Atty. Gen., and Henry S. Ballard, First Asst. Atty. Gen., of Columbus, Ohio, for defendants.

Before WARRINGTON, Circuit Judge, and SATER and HOLLISTER, District Judges.

SATER, District Judge. The constitutionality of the so-called "blue-sky" law of Ohio (sections 6373–1 to 6373–24, General Code, as amended by 103 Ohio L. pp. 743–753, 104 Ohio L. pp. 110–119, 105–106 Ohio L. pp. 363–364) is assailed in each of the above-mentioned

cases, which, for convenience, are considered together. Statutes of a kindred character have in learned opinions been declared invalid by federal courts sitting in Michigan (Alabama & N. O. Transp. Co. v. Doyle [D. C.] 210 Fed. 173, Halsey & Co. v. Merrick, 228 Fed. 805), Iowa (Compton v. Allen [D. C.] 216 Fed. 537), West Virginia (Bracey v. Darst [D. C.] 218 Fed. 482), and South Dakota (Sioux Falls Stockyards Co. v. Caldwell). The last-named case, which is unreported, was decided by Sanborn, Circuit Judge, and Munger and Elliott, District Judges.* Although a consideration of the act will involve a reiteration of principles already ably and convincingly stated, it is thought advisable to review it in part, at least—a task rendered difficult on account of the numerous exceptions to its general provisions, and, in some instances, of exceptions to such exceptions.

The Geiger-Jones Company, an Ohio corporation, is engaged in buying and selling in Ohio and other states stocks and bonds principally of industrial corporations, domestic and foreign. It seeks to prevent the revocation of the license heretofore granted it to transact such business and the threatened enforcement of the law against its continued prosecution of the same. Coultrap, a citizen of the state of Pennsyl-

*In Sioux Falls Stockyards Co. et al. v. Caldwell no opinion was filed by the court, but a decree was entered reading as follows:

"On this 18th day of November, A. D. 1915, the case above entitled came on for hearing upon the order to show cause why an interlocutory injunction herein should not issue.

"Mr. George J. Danforth appeared and argued the matter for the plaintiffs, and Mr. C. C. Caldwell, Attorney General of the state of South Dakota, appeared and argued the questions in controversy for the defendants.

"And now, after consideration of the pleadings and the arguments, because, in the opinion of the court, chapter 275 of the Session Laws of the State of South Dakota for the year 1915, is violative of the Constitution of the United States, and this opinion is confirmed by the decisions in Alabama & N. O. Transportation Co. v. Doyle (D. C.) 210 Fed. 173, Wm. R. Compton Co. v. Allen et al. (D. C.) 216 Fed. 537, and Bracey v. Darst (D. C.) 218 Fed. 482:

"It is hereby ordered, that the defendants Clarence C. Caldwell, as Attorney General of the state of South Dakota, Harry O'Brien, as insurance commissioner of the state of South Dakota, and ex officio member of the state securities commission of that state, Joseph L. Wingfield, as public examiner of the state of South Dakota, and ex officio member of the state securities commission, and Dan E. Hanson, as state's attorney of Turner county, South Dakota, and each of them individually, and each and all of their agents, servants, and assistants, and all others to whom knowledge of this order may come, be and they are hereby enjoined from instituting and prosecuting any actions, civil or criminal, against the complainants under the aforesaid act of the Legislature of the state of South Dakota, for alleged violations thereof and from taking any proceedings for the enforcement of said act, against the complainants, except such proceedings as may be deemed proper by them in the criminal actions already pending against the complainants.

"This injunction shall take effect upon the filing of a bond, approved by the judge of the United States District Court for the District of South Dakota, to the United States, in the sum of three thousand dollars ($3,000.00), conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby; such bond to contain a clause providing that any damages sustained thereunder are to be ascertained as the court shall direct.

"And this injunction shall continue until the final decision of this case, or the further order of the court."

vania and an agent of the Geiger-Jones Company, is also the owner and holder of and a dealer in stocks of certain Ohio corporations, and conducts his business in part by mail and in part by personal visits to the state. He charges that the revocation of the license of his employer will operate as a cancellation of his authority, and that the contemplated enforcement of the statute will interrupt and destroy his business.

Rose was heretofore arrested, indicted, and convicted in one of the state courts for violating the act by selling the stocks and bonds of industrial concerns, and, particularly, the stock of his coplaintiff, a West Virginia corporation, and is now awaiting sentence. Both he and the RiChard Auto Manufacturing Company allege that the enforcement of the statute by the defendants named in their bill will prevent Rose from prosecuting his business of selling securities and his coplaintiff from completing its organization and capitalization for the manufacture of automobiles.

Briefly stated, the validity of the act is assailed on the grounds that (1) it is violative of the commerce clause of the federal Constitution; (2) it is constitutionally obnoxious, in that it deprives plaintiffs of property without due process of law and denies them the equal protection of the laws; (3) it delegates legislative and judicial power to an executive officer, in violation of the state Constitution; and (4) it is a law of a general nature, but does not operate uniformly throughout the state, as required by section 26, article 2, of the state Constitution. If the act be unconstitutional, each of the plaintiffs is, as he must be, within the class whose constitutional rights are invaded. Standard Stock Food Co. v. Wright, 224 U. S. 540, 550, 32 Sup. Ct. 784, 56 L. Ed. 1197. The prayer of each bill is for general as well as specific relief.

The act, which is entitled "An act to regulate the sale of bonds, stocks, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales," prohibits, under severe penalties, the disposition of all securities subject to its provisions, without discrimination as to and regardless of their value, unless authority so to do is first obtained from the superintendent of banks (termed the commissioner). The term "dispose of" is broadly construed to mean "sell, barter, pledge, or assign for a valuable consideration or obtain subscriptions for." The first section, 6373–1, in comprehensive language declares that, except as otherwise provided in the act, no dealer may within the state dispose of or offer to dispose of any stocks, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all termed "securities") evidencing title to or interest in property issued or executed by any private or quasi public corporation, copartnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without being first licensed so to do. Promissory notes are not within the terms of the act, as was the case in the original Michigan statute. A limited number of other securities are also excluded from its provisions. The inclusive character of the act extends, not only to "securities" coming within its provisions, but also to the persons subject to its exactions, prohibitions and penalties, as is

evidenced by its definition of the terms "dealer" and "company," the former embracing "any person or company" and the latter "any corporation, copartnership or association, incorporated or unincorporated, whenever and wherever organized." The term "dealer" does not, however, include national banks or any company engaged in the marketing or flotation of it own securities or any stock-promoting scheme, although such company and scheme are required to obtain the certificate of the commissioner mentioned, and must abide by all the provisions contained in sections 6373–14 and 6373–16. A restricted number of other persons, natural and artificial, having occasion to dispose of securities, are also excluded from the classification of dealers. An "issuer" is defined to be an original issuer.

[1, 2] The act must be sustained unless it can be clearly shown to be in conflict with some constitutional provision. The question as to its wisdom was for the determination of the Legislature; with that the court is not concerned. If the power under the federal Constitution to enact it is absent, it is unimportant how wise, necessary or beneficent it may be, for it is then necessarily void because in conflict with the organic law of the land. Rail & River Coal Co. v. Yaple (D. C.) 214 Fed. 273, 279, 280; Alabama & N. O. Transp. Co. v. Doyle (D. C.) 210 Fed. 176; Bracey v. Darst (D. C.) 218 Fed. 491, 492; Board of Health v. Greenville, 86 Ohio St. 1, 20, 98 N. E. 1019, Ann. Cas. 1913D, 52; State v. Toledo, 48 Ohio St. 112, 132, 133, 26 N. E. 1061, 11 L. R. A. 729.

[3, 4] If there are separate and independent unconstitutional provisions in the statute, which may be rejected, and the rest of the act be permitted to stand and have effect according to the legislative intent, the valid portions must be upheld. But if an unconstitutional element pervades the entire statute as an inherent and essential part, it must fail as an entirety. In such a case it does not avail that the officer charged with the execution of the law may not enforce it according to its terms, but only as he may deem wise and expedient. Assent cannot be given, under such circumstances, to the proposition that, although a statute may authorize the accomplishing of an unconstitutional purpose, it must, nevertheless, be presumed that it will, in fact, only be used to accomplish what can be done in accordance with the Constitution. Taylor v. Commissioners, 23 Ohio St. 22, 33, 34; Alabama & N. O. Transp. Co. v. Doyle (D. C.) 210 Fed. 181; Bracey v. Darst (D. C.) 218 Fed. 491, 492; People v. Warden, 144 N. Y. 529, 539, 39 N. E. 686, 27 L. R. A. 718.

Because a certificate of stock is only evidence of the ownership of shares, the interest represented by them being held by the company for the benefit of the true owner (Citizens' Sav. & Tr. Co. v. Ill. Cent. R. R., 205 U. S. 46, 57, 27 Sup. Ct. 425, 51 L. Ed. 703; Ball v. Mfg. Co., 67 Ohio St. 306, 314, 65 N. E. 1015, 93 Am. St. Rep. 682), it does not follow, as defendants' counsel contend, that such certificate is of less value than an unprinted sheet of paper of corresponding size and quality, and that it cannot therefore be a subject of interstate commerce. If it be but written evidence of an interest in corporate property, the same may be said of notes and bills, which are mere evi-

dence of indebtedness on the part of individuals or corporations that issue them. In Merritt v. American Steel-Barge Co., 79 Fed. 228, 235, 24 C. C. A. 530 (C. C. A. 8), in speaking of stock certificates, it was said that:

"In the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

In Ohio a stock certificate is so far property that it may be seized by an officer making an attachment or levy. Section 8673-13, G. C. (See Page & A. Gen. Code.)

[5] A state law, which, in its essentials, is a legitimate exercise of the police power, is not rendered invalid by reason of the fact that interstate commerce is thereby incidentally affected; but, if such law directly burdens such commerce, although expressed to be a regulation under the state police powers, it must be held to be unconstitutional, for the reason that the power to regulate commerce between the states is vested in Congress. Arnold v. Yanders, 56 Ohio St. 417, 421, 47 N. E. 50, 60 Am. St. Rep. 753; Re Oscar Julius, 4 Ohio Cir. Ct. (N. S.) 604, 609; Mugler v. Kansas, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205; Austin v. Tennessee, 179 U. S. 343, 344, 21 Sup. Ct. 132, 45 L. Ed. 224.

[6] Utterances emanating from the Supreme Court and express rulings by lower federal courts establish beyond all reasonable controversy that stocks and bonds, securities whose disposition is subject to the provisions of the act, are articles of legitimate interstate commerce. Bracey v. Darst (D. C.) 218 Fed. 495, 496; Compton v. Allen (D. C.) 216 Fed. 546. Sales of them as between the states, and their transmission from one state to another, whether through the mails or the instrumentality of common carriers, constitute interstate commerce. Sales may be and are effected by telegraph, telephone, correspondence, traveling salesmen, and the issuers or investment companies directly or through their local or branch houses. The securities may be delivered by such salesmen or branch houses at the times sales are made or subscriptions taken, or by the issuers or investment companies by means of any of the known and usual agencies for transmitting such instruments from one state to another.

Whether interstate transactions in the securities whose disposition is within the purview of the act directly burden interstate commerce must be determined by testing its provisions by the federal Constitution. The act (section 6373-3) requires as a condition precedent to the authorization and right of an applicant to do business in the state that such applicant shall submit, with a filing fee of $5, to the commissioner: (a) The names and addresses of the applicant's directors and officers, if the applicant be a corporation or association, and of all partners, if it be a partnership, and of the individual, if it be such, and also the names and addresses of all agents of such applicant, assisting or about to assist in the disposition of securities; (b) the location of its principal office without and within the state, if it have both;

and (c) the general plan and character of its business, and references as to its suitability to transact such business, which references the commissioner "shall confirm by such investigation as he may deem necessary, establishing the good repute in business of such applicant's directors, officers and agents." If the applicant be a foreign corporation, having its principal place of business beyond the boundaries of the state, it must also file a duly certified copy of its articles of incorporation, regulations and by-laws, and, if it be an unincorporated association, a certified copy of its articles of association or deed of settlement. Every applicant must also submit to the commissioner an irrevocable written consent to litigate in the courts of Franklin county only any action brought against him on account of any fraudulent disposal of securities by him or his agents, and also to be bound by service of process made personally or by registered mail. Notice of all applications for registration as a licensed dealer in securities must be published at the expense of the applicant in a daily newspaper of general circulation, and a further payment of an annual fee of $50 is exacted should a license be issued. An amended license is necessary whenever the name of an agent is added to or stricken from the original, a payment of $5 being exacted in the first instance and of $2 in the latter. Notice of each amendment to the license must be published at the licensee's expense. The commissioner may at any time revoke any license or refuse to renew the same upon ascertaining—the manner of which is not stated—that the licensee is of bad business repute, has violated any provision of the act, or has engaged, or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions. He is required to give at least five days' notice of his intention to revoke or to refuse to renew or grant a license, but the licensee or applicant, as the case may be, is not accorded a hearing. Following the refusal or revocation of a license, the applicant or licensee, as the case may be, may contest in the Franklin county court the correctness of the commissioner's ruling, but must assume the burden of disproving the grounds assigned as the basis of his official action, and must also meet any additional reasons which the commissioner may plead in justification.

Notwithstanding the granting of a license to an applicant, it may not dispose of any given securities until it has also filed, unless excused by the commissioner from so doing, a further statement (section 6373–9) touching the issuer of such securities, if the issuer be a company, setting forth (a) its name and the location of its principal office and the names of its officers and directors, or, if it be a copartnership, the names of the partners; (b) a general detailed showing of its assets, liabilities, and capital stock, as of a date not later than the close of the last fiscal year, and also of its gross income, expenses, and fixed charges for the year last prior thereto, or for such other time as the issuer has been in business, if that time be longer than a year; (c) a pertinent description of such securities and the purpose of their issue; and (d) the approximate price at which the licensee proposes to dispose of them. The exemptions from the filing of the information called for by such section which the statute permits the commissioner

to grant are enumerated in section 6373–10. In most instances they are so qualified as to relieve but a limited number of licensees and introduce a fatal inequality as regards the protection of the laws guaranteed by the Fourteenth Amendment.

The statute further provides that no issuer or underwriter, nor any person or company acting in behalf of either (section 6373–14), shall, within the state, for the purpose of organizing or promoting any company or of assisting in the flotation of its securities, dispose or attempt to dispose of any such securities until the commissioner has issued a certificate permitting such to be done, the granting of which must be subsequent to the issuer or underwriter filing an application (except in certain instances which need not now be noted), with a fee of $5, containing the information required by paragraphs (a), (b), (c) and (d) of section 6373–9, a certified copy of the issuer's articles of incorporation or association, regulations and by-laws, of all minutes of stockholders and directors relative to the issuance of such securities, of any contracts which have been made between the issuer and its underwriter of such securities (copies of all such subsequent contracts also to be filed when made), and of all contracts between any underwriter and any sales agent or broker, and also a sworn statement made by the president and secretary of the issuer showing in detail the items of cash, property, services, patents, good will, and any other consideration for which such securities have been or are to be issued in payment. The commissioner (section 6373–16) may, as he deems advisable, examine the issuer of such last-named securities at any time, both before and after his grant of the certificate named in section 6373–14. In the exercise of his discretion, he may require all or any part of the expense of such examination to be borne by the applicant, who is compelled to deposit with him in advance for such purpose whatever sum he may order. The applicant receives an itemized statement of expenditures made, but this follows the conclusion of the examination. If the commissioner finds that the applicant has complied with the law, is not fraudulently conducting its business, is not proposing to dispose of its securities on grossly unfair terms and is solvent, a certificate authorizing the disposal of such securities shall issue, providing, except in case of a licensed dealer, a fee of $10 be paid; but, if the commissioner does not affirmatively so find, the certificate must be refused. It must be issued or denied within a reasonable time after application for it is made, which time shall be within 30 days after the applicant or certificate holder, whose certificate has been revoked, has fully complied with all the requirements of the act; but as the commissioner is the sole judge of what constitutes compliance, and as the examination, especially of large concerns, would in some instances be prolonged and at times have to be conducted at distant points in this or another country, the issuing of a certificate may be delayed indefinitely and beyond the 30-day period. After the applicant is authorized to proceed with its proposed business, the commissioner may still revoke its certificate and deny it the privilege of continuing to dispose of the securities in question, if he has reason to believe that the certificate holder's business is fraudulently conducted,

or that the securities are disposed of upon grossly unfair terms, or that the issuer is insolvent, the right to review his action being again restricted to the Franklin county court. Whether such "reason to believe" shall be the result of an orderly examination of the issuer's conduct and affairs, or be otherwise acquired, does not appear.

Violation of the act constitutes a misdemeanor or felony, regard being had to the character of the offense, and is visited by a fine or imprisonment, or both.

[7] In 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, and Buck Stove Co. v. Vickers, 226 U. S. 205, 213–216, 33 Sup. Ct. 41, 57 L. Ed. 189, a Kansas statute, akin to the Ohio act, but less drastic, was held to impose a direct burden on legitimate interstate commerce, and to be violative of the commerce clause of the federal Constitution, not only on account of the license required as a condition precedent to the right to transact a lawful business, but because it is not competent for a state Legislature to prescribe, as a condition of the right of a foreign corporation to engage in legitimate interstate transactions, that it should prepare a statement as required, as to its stock authorized and paid-up and its par and market value, as to its assets, liabilities, officers, trustees, directors, manager, and stockholders, with a showing of the stockholdings of each of the latter and the amount paid on his holdings, and the post office address of all of such above-named persons. A quite similar but (as regards the parties at whom it was aimed) a more comprehensive statute, in that it ran, not only against express or transportation companies incorporated by any foreign government, but, like the present act, also against any association or partnership acting under the laws of any foreign government, was likewise denounced in Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, in a well-reasoned opinion which is freely quoted in the Pigg Case.

The draughtsman of the act here in question, unwittingly, no doubt, but with strange fatality, incorporated into it substantially all of the vices of the statutes considered in the above-named cases, and added others equally, if not more, obnoxious. The burdens which it imposes on interstate commerce are so direct, positive and substantial as to lend peculiar force to the rule announced in the Pigg, Vickers, and Crutcher Cases, and to vitiate the entire act for the reason that its constitutionally offensive features are so distributed through its various parts as to be inseparable. The enforced suspension from all business activity for a period of 30 days, imposed by the original Michigan act, was held to be a fatal "30-day paralysis." In the later decision rendered by the same court (Halsey & Co. v. Merrick) the subsequent act of that state was overthrown, notwithstanding the absence of such restrictive provision. In the present act the prohibition from the transaction of business must extend for a week, and possibly 20 or 30 days, or more; it therefore offends against the Constitution quite as much as the first of the Michigan acts.

[8] The act must be further tested by its effect upon the citizen's right to pursue a lawful calling. The natural right to life, liberty and

the pursuit of happiness is not an absolute right. It must yield whenever the concession is demanded by the public welfare, health or prosperity. But, however viewed, the act transcends the legitimate exercise of the police power and violates the due process clause of the Constitution. There is a fundamental distinction between what Mr. Justice Bradley termed, in Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 763, 4 Sup. Ct. 652, 28 L. Ed. 585, the ordinary occupations and pursuits of life, forming the large mass of industrial avocations which are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the general good may demand, and the kinds of business and transactions which are affected by a public interest or arise from public grant or exist by public sufferance. Of this latter class are the liquor traffic, grain elevators, innkeepers, warehouses, itinerant peddlers, insurance, motion picture shows, concerns exercising public franchises, and the like, all of which it is competent for the state lawmaking power to regulate and within proper bounds subject to executive license and control, as the interests of society may require. To the former class, with which alone we are now dealing, belongs the right in good faith to buy and sell securities and to fix their price by agreement, either in individual transactions or in the course of repeated and successive transactions of a similar character, a right which, when so exercised, is both property and liberty, and which cannot be made subject to either executive grant or denial. City of Cleveland v. Construction Co., 67 Ohio St. 197, 219, 65 N. E. 885, 59 L. R. A. 775, 93 Am. St. Rep. 670. In Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 Sup. Ct. 427, 41 L. Ed. 832, it was said that the liberty mentioned in the Fourteenth Amendment embraces—

"the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

If an issuer or owner of or dealer in securities issued in good faith, and based on value fairly commensurate with their face or selling value, is deprived of the right of disposal or of offering them for disposal, he is deprived, not only of his property, within the meaning of the Constitution, by taking from him one of the incidents of ownership (City of Chicago v. Netcher, 183 Ill. 104, 110, 55 N. E. 707, 48 L. R. A. 261, 75 Am. St. Rep. 93), but also of his liberty, as appears from Mr. Justice Matthews' saying in Yick Wo v. Hopkins, 118 U. S. 356, 370, 6 Sup. Ct. 1064, 1071 [30 L. Ed. 220], that:

"The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Legitimate commercial transactions, such as the disposal of securities of the kind above mentioned, cannot be regulated by legislative enactment. The act in question seeks to regulate private transactions,

but the person, natural or artificial, that sells securities based upon reasonable value, is entitled to the protection of the same safeguards as the man who sells clothing, dry goods, groceries, or hardware, or engages in any other private business that is not affected by a public interest. As was fittingly said in the Doyle Case, 210 Fed. 179:

"The issuing of * * * stocks or bonds by a private company to get money for its own business no one can suppose is a public or quasi public enterprise; the business of buying and selling stocks and bonds and other securities is no more 'affected by a public interest' than is the business of buying and selling groceries. When we thus recall that the prohibition applies to a private business, the question at once presents itself whether frauds and opportunities for fraud sufficiently characterize the business to justify its entire prohibition save under drastic restrictions."

Every proposed offering of securities must first be submitted to the commissioner, subject to the delay incident to his investigation or examination, which, should he temporarily grant a license or a certificate, may thereafter be continued and repeated, and in case of an issuer mentioned in section 6373–16, at its expense, limited only by his unrestrained discretion. Every investigation and examination authorized is ex parte. The applicant, whether a dealer or issuer, is not permitted to be heard as to the granting or revocation of a license or the award of a certificate, on the important questions of his own good repute, his alleged or surmised violations of the provisions of the statute, the legitimacy of his business, the honesty of his conduct, the fairness of the terms under which his disposals are made, or his own solvency. No rules of procedure are prescribed in accordance with which the investigation or examination shall be made, nor is the commissioner required to establish any rule or regulation as to what shall constitute good repute, solvency, or fraudulent conduct. He may at will deal with each case as it arises and vary his course to suit his pleasure. He is at liberty to hear, if he chooses, only evidence unfavorable to the investigated party. None of it need be safeguarded by an oath. The uncontrolled discretion, and even the whim and caprice (if he gives them play), of the commissioner or of his assistant (subject to the commissioner's supervision), may not only halt, but injure and perhaps destroy, a worthy business enterprise and cast a cloud on the name of the applicant or licensee, and when such applicant or licensee seeks redress in the courts he must assume the burden of disproving the findings made against him, however groundless they may be. Even an effort is in effect made to deny him access to the federal courts. Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167 (C. C. A. 8). In given respects the above-named law is more severe than that of any of the states whose "blue-sky" laws have been held unconstitutional. They afforded some opportunity, at least, to the applicant to be heard when his right to do business was under investigation, and, when his business and good name were assailed, opened to him the doors of all the courts of the state for redress against adverse rulings and limited the burden of cost to which he might be subjected in consequence of an examination into his affairs.

[9-11] A police regulation, like any other law, is subject to the equal protection clause of the Fourteenth Amendment. Atchison &

Santa Fé Ry. Co. v. Vosburg, 238 U. S. 56, 59, 35 Sup. Ct. 675, 59 L. Ed. 1199, L. R. A. 1915E, 953. A statute does not deny the equal protection of the law if all persons brought under its influence are treated alike under the same conditions (Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 209, 8 Sup. Ct. 1161, 32 L. Ed. 107), and if it does not subject the individual to an arbitrary exercise of the powers of government (Duncan v. Missouri, 152 U. S. 377, 382, 14 Sup. Ct. 570, 38 L. Ed. 485). The following illustrates instances wherein the act fails to meet the test thus prescribed:

If more than 50 per cent. of the bonds of a given issue by a corporation are included in a sale to one purchaser, such issue is not embraced within the act. Section 6373–2 (1), as amended by 104 Ohio Laws, p. 110. The residue of the bonds, whether worthless or of value, may be sold without the supervision which the law provides. Another corporation of similar or precisely the same character, having no single purchaser for a majority of its bonds, is subjected to the onerous provisions of the law, although its securities may be of the highest financial character. An owner who is not the issuer of the securities he holds is at liberty to dispose of his holdings for his own account regardless of the statute, providing he can do so without resorting to repeated and successive transactions of a similar character; but, if such transactions are expedient or necessary, he may not sell, unless, at inconvenience and financial cost and through delay and the commissioner's approving stamp of "good repute in business," he obtains a dealer's license so to do. A natural person, who has not underwritten and is a bona fide owner of his securities, whether he be of good repute or not in business, may dispose of them for his own account; but the underwriter, although he may possess the same moral qualities and wealth as the natural person, or outrank him in both of these respects, may not dispose of his holdings, except by compliance with the none too clear provisions of the act. Although a natural person may dispose of his holdings as above indicated, a partnership or association may not do so. The exemptions based on market reports of a daily newspaper of general circulation (section 6373–10 [b] and [a]) would fail to embrace large numbers of meritorious issuers of the different classes of securities, for it is well known that many securities are not listed on the market or mentioned in any standard manual of information. Section 6373–10 (c) can have no application to an issuer, if some disposee is found who in a single transaction acquires securities of a given issue to the amount of $5,000 or more. There are many worthy concerns, each capitalized for a considerable sum, in which no one's investment reaches that amount. There would, moreover, seem to be no reason why, if some one person who, risking that sum, should be defrauded, others should be cheated of smaller sums by sales of stock without the supervision which the law is intended to provide. A licensee may be relieved from giving information concerning the issuer of securities (section 6373–10 [f]), if the disposal of such securities is at a commission of less than 1 per cent. of their par value through a licensed member of a regularly organized and recognized stock exchange, having an established and lawfully conducted place

of business in the state regularly open for public patronage, of all of which the commissioner is the sole judge. He may not be thus relieved, if the disposal is made by any one else.

[12, 13] The above observations upon the act have been made with full appreciation of section 2, art. 13, of the Ohio Constitution as amended September 3, 1912, the pertinent portion of which provides:

"Corporations may be classified and there may be conferred upon proper boards, commissioners or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law."

It is to be regretted that the Supreme Court of Ohio has not been called upon either to construe this provision or to pass upon the statute now under consideration; nor have we had the benefit of the discussion of this constitutional provision by counsel. We are, however, impressed with the belief that the provision cannot be so construed as to change the conclusions we have reached concerning the operation and effect of the statute. The effect of the constitutional provision, in our judgment, is simply to give distinct expression to powers which were plainly implied under the same section and article of the Constitution of 1851, which provided that:

"Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

It is settled by Berea College v. Kentucky, 211 U. S. 45, 57, 29 Sup. Ct. 33, 35 [53 L. Ed. 81], that:

"A power reserved to the Legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary to secure either that object or any public right. Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 451 [6 Am. Rep. 247]; Holyoke Co. v. Lyman, 15 Wall. 500, 522 [21 L. Ed. 133]; Close v. Glenwood Cemetery, 107 U. S. 466, 476 [2 Sup. Ct. 267, 27 L. Ed. 408]."

It was there further held that, while the language of a statute may not in terms amend a charter, yet, where such appears to have been the legislative intent, the statute will be regarded as an amendment; Mr. Justice Brewer saying (page 57 of 211 U. S., page 35 of 29 Sup. Ct. [53 L. Ed. 81]):

"It would be resting too much on mere form to hold that a statute which in effect works a change in the terms of the charter is not to be considered as an amendment, because not so designated."

It is also settled that, where such power to alter or repeal a charter is reserved, it is competent for the Legislature to repeal the charter as well as to amend it. Greenwood v. Freight Co., 105 U. S. 13, 26 L. Ed. 961; Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, 269, 270, 271, 13 Sup. Ct. 90, 36 L. Ed. 963; Shields v. State, 26 Ohio St. 86, 93, 94, affirmed 95 U. S. 316, 324, 24 L. Ed. 357; State v. City of Hamilton, 47 Ohio St. 52, 73, 74, 23 N. E. 935. The most, then, that can be said of the statute in question is that its provisions operate to amend the articles of incorporation, the charters,

of all domestic corporations that are in terms affected by the provisions of the act. It inevitably follows that these reserved powers include the power to supervise and regulate corporations. The consideration, then, of the present statute cannot be aided upon any theory that section 2, art. 13, as amended, vests in the state Legislature any greater power than it possessed under the old section and article; for manifestly there can be no difference between an express power and an implied power to do the same thing. It results that the constitutional validity of the present statute is to be tested by considerations practically the same as it would have been prior to the amendment in question. For example, a state is without power either through constitutional or statutory provision to avoid the effect and force of the commerce clause of the federal Constitution; it hardly need be said that the statutory provisions before pointed out, which directly impose burdens upon interstate commerce, are of necessity violative of that clause; and, apart from everything else, it cannot be presumed that the Legislature would have enacted the statute if it had understood that the provisions aimed against foreign corporations could not be sustained, since this alone would work an obvious discrimination against domestic corporations.

Again, the power to supervise and regulate the business here involved was never before and cannot now be understood to signify authority so to burden the business of domestic corporations as in practical effect to destroy it, regardless of its actual character and merit. We are not to be understood by anything said in this opinion to intimate that it is not within the power of the state Legislature reasonably to regulate the business of corporations of its own creation or that of foreign corporations and joint-stock companies which are operating within the borders of the state (Alabama & N. O. Transp. Co. v. Doyle [D. C.] 210 Fed. 186, 187; Bracey v. Darst [D. C.] 218 Fed. 494, 495); such power of regulation being more extensive as to such artificial entities than as to individuals, copartnerships and voluntary associations. We do mean, however, to say, as we have already in effect stated, that the things attempted to be done by the present statute cannot be sanctioned under the guise of "supervisory and regulatory" measures in respect of the business of issuing and selling stocks and securities, whether of domestic or foreign corporations.

Other features of the act and other points argued have been considered; the treatment of the one and the discussion of the other would prolong this lengthy opinion and are not necessary.

The licenses mentioned in the first two of the above-entitled causes expired on December 31, 1915. No occasion, therefore, exists for enjoining their cancellation. The bill in each of them is drawn on narrow lines. The prayer of each, however, taken in conjunction with certain averments, is such as to warrant the temporary enjoining of the defendants therein named against enforcing or attempting to enforce the statute in question. In the third of the above cases, the motion filed by the defendants to dismiss is overruled. A temporary injunction is awarded in each case.

In re LOUIS J. BERGDOLL MOTOR CO.

(District Court, E. D. Pennsylvania. February 17, 1916.)

No. 4742.

1. BANKRUPTCY ⊂=311—RIGHT TO PROVE CLAIM—SURRENDER OF PREFERENCE.
Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1913, § 9644), provides that a transfer by an insolvent within four months of the filing of the petition in bankruptcy, operating as a preference to a person having reasonable cause to believe that its enforcement would be a preference, shall be voidable by the trustee. Section 67e (section 9651) provides that all conveyances, transfers, etc., by a person adjudged a bankrupt within four months prior to the filing of the petition with intent and purpose to hinder or defraud creditors, shall be void as against creditors, except as to bona fide purchasers, and that all such property shall remain a part of the assets of the bankrupt and pass to the trustee. Section 57g (section 9641) provides that the claims of creditors who have received preferences voidable under section 60b, or to whom conveyances or transfers void or voidable under section 67e have been made or given, shall not be allowed unless such creditors shall surrender such preferences or transfers. *Held*, that a preferred creditor was entitled to prove his claim, though there had been no surrender of his preference beyond what was involved in the payment of a final judgment secured against him in a proceeding by the trustee to avoid the preference, and though it was claimed that he was guilty of fraud in procuring the preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497–500; Dec. Dig. ⊂=311.]

2. BANKRUPTCY ⊂=328—TIME FOR PROVING CLAIMS—"LIQUIDATED BY LITIGATION."
Where a creditor of a bankrupt receives a preference which is recovered by the trustee, his claim is one "liquidated by litigation," within Bankr. Act, § 57n (section 9641), providing that claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication, or if they are liquidated by litigation, and the final judgment therein is rendered within 30 days before or after the expiration of such time, then within 60 days after the rendition of such judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. ⊂=328.

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

3. BANKRUPTCY ⊂=337—PROOF OF CLAIMS ASSIGNED AFTER PROOF AND ALLOWANCE.
The assignee of a claim proved and allowed against a bankrupt estate, and upon which dividends have been paid, need not and cannot make proof of the same claim in his own name as the then owner and assignee of the claim.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=337.]

In Bankruptcy. In the matter of the Louis J. Bergdoll Motor Company, bankrupt. On petition to review orders made by the referee respecting claims of Erwin R. Bergdoll. Orders vacated, with directions.

See, also, 225 Fed. 87; 229 Fed. 262.

Henry J. Scott, of Philadelphia, Pa., for claimant.

J. Frederick Jenkinson and Frank A. Harrigan, both of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. Whatever conclusion might be reached in this case if the questions involved had not already been passed upon, we feel bound to find these propositions to have been settled beyond our authority to disturb them.

[1] 1. A preferred creditor may prove his claim under section 57g of the Bankruptcy Act, notwithstanding there has been no surrender of his preference by him beyond what is involved in the payment of a final judgment secured against him in a proceeding instituted by the trustee to avoid the preference.

[2] 2. Such creditor is not barred by the one-year statute of limitation, but his claim is within the protection of the proviso in section 57n as a claim "liquidated by litigation."

[3] 3. The assignee of a claim proven and allowed, and upon which dividends have been paid, need not and cannot make proof of the same claim in his own name as the then owner and assignee of such claim.

The acts of which this claimant has been guilty excite the feeling, difficult to suppress, that he should not be permitted to share in this estate. Such exclusion, however, must be based upon some intelligible legal or equitable principle. No such excluding principle can be formulated which is not denied by the rulings in adjudged cases, some of which are authoritative and others of which show a current of judicial opinion which cannot be opposed. Boiled down, the argument against the claimant, and the answer to it, is this: The claimant merits punishment. The courts, however, cannot inflict it, because the law has not imposed it. The claimant fraudulently received payment, which is good as to him, although voidable by the trustee, and he cannot escape the consequences of payment by the proof of his own fraud. The Bankruptcy Act specifically provides that he may notwithstanding prove his claim. He has in attempted furtherance of his fraud exposed the estate to delay and expense by prolonged and unwarranted litigation, and should not be permitted to profit by an adverse ruling. It is his legal right to submit his cause to the ruling of the courts. It thus becomes clear that the whole question is whether he is within the condition imposed by section 57g and the saving clause of 57n. The courts have authoritatively ruled that he is, thus disposing of the case.

The very earnest argument which has been addressed to us on behalf of the trustee nevertheless supplies the excuse for a discussion of the legal merits of the case at what is perhaps undue length. There are certain features of this case which may, if permitted, so blur the vision and obstruct the view of the case as to prevent it from being seen as it really is. This claimant has acted either in open and utter disregard of all laws or in crass ignorance of hornbook principles of business as well as law. The orders made by the referee affect two claims presented by Edwin R. Bergdoll against this bankrupt estate. One of the claims we will call the claim of $32,000. The claimant had loaned moneys to the bankrupt, for which he held notes. On the eve of its bankruptcy, and because he knew the company was hopelessly insolvent, he secured what was in form a preferential payment

of the debt due him. In actual fact, what he did was to take possession of the property of the company. His plan had the merit of simplicity to the limit of crudeness. He was the owner of all the capital stock of the company. Thus controlling its actions, he reorganized the management by placing it in the hands of creatures of his own.

There was a sister corporation, known as the Bergdoll Machine Company which he also controlled. Late one Saturday after business hours, and on the Sunday following, when no one was about to observe what was going on, he removed certain manufactured products, finished and unfinished, belonging to the Motor Company, and transferred them to the Machine Company. He then had the latter company give its certified check to the Motor Company for a sum exactly equal to the amount of the debt due him. This was pretended to be in payment of the product thus "purchased." He then had a compliant official of the Motor Company give its check in "payment" of the debt due him. He, of course, arranged that the two checks should in form go simultaneously through the bank. There was doubtless the added feature that a like sum passed from the Machine Company to him. A few days later a petition in bankruptcy was filed and in due course there was an adjudication, followed by the election of a trustee. The trustee, of course, promptly moved to right the wrong which had been thus done to creditors, and in this he was, likewise of course, successful. He elected to treat the transaction as a sale of the property of the bankrupt, which he affirmed, and the "payment" a preferential payment to the creditor, which was voidable by the trustee. The litigation was protracted by the creditor to the end, finally reaching the Supreme Court of the United States. The judgment of the District Court was affirmed by the Circuit Court of Appeals and its judgment was summarily affirmed by the Supreme Court on the ground that the assignments of error were frivolous and appellate proceedings taken for delay. The judgment was a money judgment for the recovery by the trustee of the preferential payment. The claimant then paid the judgment and sought to make proof of his original claim of debt against the bankrupt estate. His right to do this was resisted by the trustee, and the claim disallowed by the referee. The grounds of disallowance will later appear.

Bringing the claim out of the dark cloud in which the claimant himself has enveloped it, and looking at the transaction in the clear light of the legal rights of the parties, we have this view of it. The original status of the claimant as a creditor is not attacked, nor the debt of the bankrupt denied. The Bankruptcy Law provides (inter alia) for the following cases: One is that of fraudulent transfers of the property of the bankrupt. Such transfers are void as against creditors unless the property shall have passed to bona fide purchasers. See section 67e. Trustees may recover the property through appropriate proceedings. See sections 67e and 70e (Comp. St. 1913, § 9654). The other is unlawful preferences given to creditors. See section 60b. Such preferences are not in terms declared void, but are "voidable by the trustee." The law, however, contemplates that a fraudulent grantee under section 67e may be a creditor as well as the payee under section 60b. See section 57g.

Although the creditors concerned are thus put in the same class, it may be helpful to us to inquire at this point with which of these classes we are dealing. Under the facts of this case the trustee might have pursued the property of the bankrupt which was transferred to the Machine Company. The question of the good faith of the transfer and of the purchaser would then have been in issue, and the rights of the purchaser determined under section 67e. It was the alternative right of the trustee to have affirmed this sale and go after the money paid to the claimant as an unlawful preference. The rights of the parties would then be determined under section 60b. He took the latter course, and we are, in consequence, done with section 67e, except in so far as payment involves (as it does) the idea of a transfer.

The first status of the claimant having been found to be that of a bona fide creditor, let us pause here to find his second status as a preferred creditor. In legal terminology the words "fraud," "mala fide," and like terms, may have a different meaning from that conveyed when they are used in their ethical sense. The idea of this difference in meaning is sometimes conveyed by some qualifying word or phrase. Hence we have the expressions "legal fraud" and "fraud in law." No one can be adjudged guilty of fraud merely because he has obtained payment of a just debt, even from a failing creditor. Indeed, insistence upon payment is commonly prompted by a suspicion, if not actual knowledge, of insolvency. In the absence of some such provision of the law as is found in the bankruptcy statute, there would be nothing unlawful in a creditor securing payment of his debt. It will be noticed that the Bankruptcy Law does not condemn it. Under certain circumstances the trustee may recover it back, but only under such circumstances. If bankruptcy does not intervene or if the creditor did not "have reasonable cause to believe," etc., the payment remains a lawful payment. No creditor can know with certainty that his debtor will be adjudged a bankrupt. He may therefore accept payment of his debt (if that is all he does) and retain the money subject to the possible claim of the trustee. When the trustee moves to recover the property as fraudulently transferred or the money paid as an unlawful preference we come to the third status of the creditor. It is to be observed that the fraudulent character of the transfer or the unlawfulness of the preferential payment has not yet been established. May the creditor assert, what is ordinarily his right, to "litigate" the question between himself and the trustee, and have it determined? We see no escape from an affirmative answer to that question. It is, however, involved to some extent in the point next discussed.

We are thus brought after this long prelude to the real question here involved. Much might be said (has indeed been said in the arguments addressed to us) of the effect of the fraud of the creditor upon what would otherwise be his right. All such discussion is, however, beside the mark, for the reason that the Bankruptcy Law defines with precision what his rights are. They are defined in section 57g. It cannot escape attention that the law, as already observed, makes no distinction between fraudulent transfers and preferential payments

to the creditor. He may, in either event and none the less, prove his claim at the cost of a "surrender" of what he has received. The trustee seeks to read into this clause the idea of a voluntary "surrender," as if he were permitted to prove his claim as a reward for anticipating an adverse ruling and saving the estate the expense of litigation. It will be observed that the act makes no such distinction. It does not in terms exclude compulsory, or limit its benefits to voluntary, surrenders. The right of the creditor to prove his claim is made to turn simply upon the fact of surrender. We are again saved the duty of construing the act, because it has been construed for us. It applies, or at least may apply, to cases in which the property has been given up after a ruling adverse to the right of the creditor to hold what he has received. Keppel v. Tiffin Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790.

This establishes a status for the creditor that he may still be a creditor, notwithstanding he was a party to a fraudulent transfer of property or an unlawful preferential payment, and that he has litigated to final judgment his right to retain what he had received. What, then, is his final status? Under section 57n every creditor loses his right to prove his claim, if not made within one year after adjudication of bankruptcy. The year limit is extended only in favor of claims which have been "liquidated by litigation." Is this such a claim? We are not at liberty to follow the argument (however plausible) that this provision does not extend to claims under section 57g in the face of the long line of rulings that it does embrace them. These rulings make discussion fruitless. Lange Co. (D. C.) 170 Fed. 114, 22 Am. Bankr. Rep. 414; Evans Furniture Co. (D. C.) 171 Fed. 673, 22 Am. Bankr. Rep. 623.

The referee was thus justified in his ruling that the claim was not barred by the one year limitation. The referee held, however, that the claimant had made no "surrender," such as to entitle him to prove his claim under section 57g. In reaching this conclusion, he distinguishes the case at bar from that of Keppel v. Tiffin on the ground that in the latter case the transaction was in good faith, while he finds the claimant in this case to have been guilty of fraud. In such cases of guilt we are prone (as already indicated) to lose sight of the legal questions involved and see only the justice of a condemnation of the fraud. The question of the legal rights of the claimant must, however, be faced. Before the Keppel Case was decided there were two views, either of which was open to be taken. The one is that presented by the majority, and the other by the minority opinion. The adjudication in bankruptcy in the Keppel Case was October 12, 1900. This, it will be observed, was after the act of 1898, but before the amendments of 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797), and 1906 (Act June 15, 1906, c. 3333, 34 Stat. 267). Section 57g, as it then stood, referred only to creditors who had received preferences. Section 57n was then as it now is. In respect to the feature under discussion, 60b, 67e, and 70e were likewise the same as now. The majority view is embraced in these propositions:

(1) The main purpose of the Bankruptcy Act in the features then under consideration was to assure equality of distribution of assets among creditors.

(2) To disallow a claim would be to impose a penalty upon the creditor.

(3) Such penalty could not be imposed by the courts merely because they thought the creditor deserved it, but only because the Bankruptcy Act prescribed it.

(4) A claim should not be disallowed because the creditor had appealed to the courts in defense of what he in good faith thought to be his rights.

(5) A creditor to whom has been given a mortgage, avoided under 60b and 67e, may, after final judgment, prove his claim under sections 57g and 57n; he having thus "surrendered" his preference.

The minority view is embraced in these propositions:

(1) A creditor holding a preference is put upon his right of election to surrender his preference and prove his claim, or be disqualified from proving it.

(2) A preference found to be unlawful by the final judgment of the court, which the creditor has resisted to the end, has not been surrendered within the meaning of section 57g.

The view of the majority is supported by the fact that Congress, in some of the earlier acts, imposed upon creditors the penalty of loss of the whole or a moiety of their claims by being parties to frauds under the act, and omitted these penal features from the act of 1898, and that by the act of 1903 the right to prove claims was expressly extended to those who were parties to fraudulent conveyances under section 67e. Some sanction to the opinion that the majority view is in accord with the policy of Congress is given by the further fact that Congress has not changed the law since the Keppel Case was decided. We see no escape from the conclusion that the Keppel Case rules the present, notwithstanding the view of the referee that it is to be distinguished on the ground of fraud. We do not understand the ruling to have been put on that ground. The bank in that case, it is true, was found to have acted in good faith. It is also true that the court expressed its opinion that to rule that 57g meant a voluntary surrender would be to punish a creditor who, in good faith, asked the court to decide upon his rights, if it turned out he had misjudged them.

This, it will be noticed, is just what such a ruling would do. This is a far cry, however, from holding that the section is to be construed in favor of a litigant who honestly, although mistakenly, believes in his claim of right, and is to be given the opposite meaning in the case of one who has a better knowledge of the law. No such distinction can be made by the courts without confounding the adage that every man is presumed to know the law. It will be further noticed that the dissenting opinion puts the dissent upon no such ground. It is planted upon the clear-cut propositions that the creditor is put upon his mettle and to show his faith in his claim of right by being given his election

to hold on or to surrender, and that he is not surrendering anything when he holds on to it until it is taken away from him by force.

It may be further noticed that, although the point was neither raised nor discussed, the case involved the proposition that the proof of claim was in time under section 57n.

The second question involved in this review is disposed of by its mere statement. Louis J. Bergdoll made proof of what we will call the $9,000 claim. It was allowed, and two dividends have been paid upon it. Erwin R. Bergdoll, averring himself to be the assignee of Louis J. Bergdoll, now seeks to prove the claim over again. It is manifest that this cannot be done, nor is its second proof necessary to secure whatever rights Erwin R. Bergdoll may have in this claim. The referee apparently has planted his disallowance of the claim on the ground that it belongs, not to Erwin R. Bergdoll, but to Louis J. Bergdoll. The bankrupt estate is in no wise concerned in such dispute, if there were one. The claim, having once been proven, is entitled to dividends. To whom the dividends are to be paid is a question to be disposed of in the "orders to pay" class, and not the "proof of claims" class. Moreover, it was stated at the argument that there was no controversy over the payment of dividends.

The petition for review is allowed, the orders of the referee are vacated, and the referee is directed to proceed in accordance with the views herein expressed.

ASHLAND WATERWORKS CO. v. CITY OF ASHLAND et al.

(District Court, E. D. Kentucky. February 21, 1916.)

1. CONSTITUTIONAL LAW ⇐121—IMPAIRING OBLIGATION OF CONTRACTS.

In 1890 a city in Kentucky granted to defendant's predecessors the right to operate a waterworks plant by an ordinance which provided that after ten years and at the expiration of each period of one year thereafter the city should have the privilege to purchase the plant at a price to be fixed by appraisers. Thereafter Const. Ky. § 157, was adopted. It provides that no city shall be permitted to become indebted in any manner to an amount exceeding in any year the income provided for that year without the assent of two-thirds of the voters at an election to be held for that purpose. The city thereafter elected to purchase the waterworks plant, but the indebtedness which would thereby be incurred would exceed the current income and revenue. *Held*, that the constitutional provision did not impair the obligation of the contract between the city and defendant's predecessors, in violation of the federal Constitution, since the contract imposed on the city no obligation to defendant and its predecessors to exercise the option or privilege of purchase thereby conferred, and the Constitution in no way affected the obligation resting on the city of permitting defendant and its predecessors to exercise the rights granted, and hence such option to purchase could only be exercised in accordance with such section.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 285, 304–311, 342–348; Dec. Dig. ⇐121.]

2. CONSTITUTIONAL LAW ⇐127—IMPAIRING OBLIGATION OF CONTRACTS.

The conferring of power on a city to purchase a waterworks plant was not a contract between the state and city that such power should continue

to exist, and the state could burden it, or take it away entirely, as it saw fit.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 325–341; Dec. Dig. ⇐127.]

3. CONSTITUTIONAL LAW ⇐42—IMPAIRING OBLIGATION OF CONTRACTS.

Even if there was a contract between the state and a city, under which the city had power to purchase a waterworks plant, the proprietor of such plant could not complain that a constitutional provision subsequently adopted, imposing conditions on the exercise of such power impaired the state's obligation thereunder to the city.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. ⇐42.]

4. MUNICIPAL CORPORATIONS ⇐867—INDEBTEDNESS—SUBMITTING QUESTION TO POPULAR VOTE.

A favorable vote by the voters of a city on the question of incurring an indebtedness in a sum not exceeding $175,000 for the purpose of purchasing and acquiring the rights, property, and franchise of a waterworks system did not authorize the city to incur an indebtedness of over $276,000 for such purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. ⇐867.]

5. MUNICIPAL CORPORATIONS ⇐1034—SUITS—PLEADING.

Where a city's power to exercise an option for the purchase of a waterworks system was subject to Const. Ky. § 157, prohibiting the incurring of any indebtedness in excess of the current revenues without the assent of two-thirds of the voters voting at an election held for that purpose, a party suing the city for specific performance of its contract to purchase the system was bound to allege the facts showing that the city had a right to incur the indebtedness which the performance of such contract would create.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2203–2205; Dec. Dig. ⇐1034.]

In Equity. Suit by the Ashland Waterworks Company against the City of Ashland and others. On motion to strike. Bill dismissed.

George B. Martin, of Catlettsburg, Ky., and Holt, Duncan & Holt, of Huntington, W. Va., for complainant.

Proctor K. Malin, Simeon S. Willis, and John T. Diederich, all of Ashland, Ky., for defendants.

COCHRAN, District Judge. This cause is before me on plaintiff's motion to strike from the defendants' answer and counterclaim. That pleading consists of six paragraphs. The motion is to strike all of the paragraphs except the fourth and a certain portion of that paragraph.

I begin with the motion as to the fifth paragraph. This is a suit to enforce specific performance of a contract of purchase of the plaintiff's waterworks in the city of Ashland and vicinity against the defendant city. By an ordinance of July 10, 1890, the defendant city granted to Gardner & McGlasson, their successors and assigns, the right to construct and operate a waterworks plant therein for the term of 20 years from the date of its completion. By section 13 thereof it was provided that at the expiration of 10 years after the completion thereof, and at the expiration of each succeeding period of one year

thereafter, the city should have the privilege to purchase the plant, provided it gave notice of its intention to do so at least 6 months before the expiration of such period of years, at a price to be determined by three appraisers, one appointed by the grantees or their assigns, one by the city, and the third chosen by these two appointees, or, if they could not agree, by the Circuit Judge of some adjoining circuit. It was further provided therein that, in case the city should fail or decline to exercise its option to purchase, the rights and privileges granted should be extended for a further period of 20 years. This ordinance was accepted by the grantees and the plant completed on or about February 1, 1891. The rights under the grant according to the allegations of the bill passed by transfer in 1895 to the Boston Safety Deposit & Trust Company, in 1899 to the Ashland Water Company, and on or about January 1, 1901, to the plaintiff. By an ordinance of date October 4, 1900, the defendant city consented that the Ashland Water Company, the then owner of the plant, might change its method of supplying water to the city and otherwise improve its plant, and it was therein also provided that there was reserved to the city the right and privilege of purchasing the plant as improved, to be exercised at the expiration of 10 years after the ordinance should go into effect, or of every year thereafter during the term of the contract with the city, or of the contract, the price to be fixed by appraisement as provided in section 13 of the ordinance of July 10, 1890.

By an ordinance of date July 3, 1911, the city elected and agreed to purchase the plant, and appointed John W. Hill as one of the appraisers. The plaintiff thereupon appointed Benzette Williams as one, and these two chose A. W. McCallum as the third. An appraisement was made by Williams and McCallum February 14, 1912, by which the price was fixed at $276,829, and the city was to pay 6 per cent. interest thereon from July 3, 1911, and receive the earnings from that date. April 1st the plaintiff notified the city of its readiness to transfer its plant to the city upon payment of the price called for in the appraisement, which by the original ordinance the city had 60 days to pay. The city failing and refusing to make payment, this suit has been brought to enforce specific performance of the contract of purchase thus entered into, and to compel payment of the purchase price so fixed.

[1] The defense set up in the fifth paragraph of the answer and counterclaim is want of power in the defendant city to make and perform the contract of purchase. This want of power arises, as defendant claims, out of sections 157 and 158 of the Kentucky Constitution and a certain provision in the city's charter approved March 26, 1878. No notice will be taken of this provision. By section 157 it is provided that no city shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose, and an indebtedness contracted in violation of the section shall be void. By section 158 it is provided that cities of the class to which defendant city belongs shall not be authorized to incur in-

debtedness to an amount, including existing indebtedness, in the aggregate exceeding 5 per cent. on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, except when the same had been authorized under laws in force prior to, or, when necessary for the completion of and payment for a public improvement undertaken, and not completed and paid for, at the time of, the adoption of the Constitution, which was the 28th day of September, 1891.

By the facts alleged in the fifth paragraph of the answer and counterclaim the purchase price for the plant fixed by the appraisers, to wit, $276,829, and the then existing indebtedness of the city exceeded the amount of indebtedness allowed by section 158 by over $175,000. Hence it prohibited the making and performance of the contract of purchase, if it was effective as to it, unless it came within the exception of the section that an indebtedness in excess of the maximum percentage might be incurred when it had been authorized under laws in force prior to the adoption of the Constitution. I am not prepared to say that it did not come within the exception. Hence I pass this section by and come to section 157.

This section contains no exceptions whatever. It positively prohibits a city from incurring an indebtedness in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters. By the facts alleged in the paragraph under consideration the purchase price fixed by the appraisers largely exceeded the income and revenue for the year to which the contract of purchase was assignable. So to this extent, at least, the defendant city was without power to make and perform that contract, if section 157 is effective as to it. But plaintiff claims that this section of the Kentucky Constitution is not effective as to this contract of purchase, because to give it such effect would be in violation of the provision of the federal Constitution by which each of the states is prohibited from passing a law impairing the obligation of contracts. It makes this out in this way: The ordinance of July 10, 1980, enacted before the adoption of the present Constitution, was a contract between the defendant city and its predecessor. Thereby the city had the privilege and option of purchasing its plant at the time and in the way hereinbefore set forth. In the exercise of this privilege and option it was free and unhampered. It could do as it chose. If section 157 of the Kentucky Constitution applies to the contract, it can exercise it only in accordance with its provisions, and thereby the obligation of the city's contract with it is impaired. It contends that this could be done no more than the power could be taken away from the city to exercise the option and privilege at all.

It must be conceded that the power to add conditions under which the option and privilege might be exercised and the power to take it away entirely stand on the same footing. But can it be said that thereby the obligation of the contract between plaintiff's predecessor and the city is impaired, within the meaning of the federal Constitution? It is to be borne in mind that the provision thereof is, not that

no term in a contract shall be changed or removed by the action of the state, but that no state shall impair the obligation of contracts. The matter which it protects is the obligation contained in a contract. Now, giving section 157 of the Kentucky Constitution the effect claimed for it by defendants does not affect any obligation in the contract in question. Thereby the city was under an obligation to permit Gardner and McGlasson, their successors and assigns, to exercise the rights thereby granted and to pay the rentals thereby provided for. This obligation is to no extent affected in giving section 157 the effect claimed for it. All that it affects is the option and privilege of purchase thereby conferred on the city. It annexes a condition to the exercise of that option and privilege which did not theretofore exist. The city was under no obligation to the grantee, its successors or assigns, to exercise this option or privilege. It was with the city alone whether it would exercise it.

The plaintiff cites and relies on the following authorities in support of its position, to wit: Slade v. Lexington, 141 Ky. 214, 132 S. W. 404, 32 L. R. A. (N. S.) 201; Denver v. New York Trust Co., 187 Fed. 890, 110 C. C. A. 24; Sala v. New Orleans, Fed. Cas. No. 12,246. In the Lexington Case the contract involved was that between the city and the Lexington Hydraulic & Manufacturing Company, by which the latter was to install a water plant adjacent to the city and to furnish wholesome water for domestic and public purposes for a term of 25 years. It was entered into in 1883; i. e., before the adoption of the present Constitution of Kentucky. It contained a provision giving the city the right or option to buy the plant after a certain period for a price to be fixed by three commissioners. It also provided as follows, to wit:

"At the expiration of 25 years from the date of completion and testing of said waterworks, if the city of Lexington does not or has not purchased said waterworks upon above terms, it shall renew the contract with said company for 25 years longer upon terms as mutually agreed on at that time."

The plant was installed in 1885. The 25-year term expired in 1910. The option of purchase had not been exercised, and there was no intention whatever to exercise it. Instead, the city and the company entered into a contract of renewal for an additional period of 25 years upon terms mutually agreed upon, as it had been provided in the original contract it should do. This contract of renewal came within the prohibition of section 157, if it applied thereto. It was held that it did not so apply, because, if it did, it would impair the city's obligation to renew the contract contained in the original contract, and the federal Constitution prohibited such an impairment. The whole contest in that case was around the question whether the city was under an obligation to renew. It was contended on behalf of the taxpayers, who brought the suit to enjoin the performance of the contract, that there was no enforceable contract on the part of the city, and hence it was under no obligation so to do, because the contract was to renew "upon terms as mutually agreed on at that time"—i. e., when the renewal contract was entered into. It was held that, notwithstanding this clause, there was an enforceable contract on the part of the city

to renew, and hence it was under an obligation so to do. This being so, that obligation was protected by the federal Constitution. It is thus seen that the question which we have here was not there involved. Had the city exercised its option to purchase, and the purchase price had been fixed as provided for in the contract, then the case would have presented the question which we have here. But this the city had not done.

In the New Orleans Case the Legislature of Louisiana in 1833 passed an act (Laws 1833, p. 151) incorporating the Commercial Bank of New Orleans. It thereby empowered the bank to construct and operate a waterworks plant to supply water to the city of New Orleans, and provided that at any time after the expiration of 35 years the city might purchase the plant at a price to be fixed by arbitrators and pay the price in its bonds. Pursuant to this act the plant was constructed and put in operation. In 1852 the Legislature of Louisiana passed an act (Laws 1852, No. 71) prohibiting the city from issuing any bonds or incurring any debt, unless same should be authorized by the vote of a majority of the qualified voters of the city, and providing further that no ordinance creating a debt or loan, should be valid unless it provided for full payment of such debt or loan, principal and interest. In 1868, after the expiration of the 35-year period, the city elected to purchase the waterworks, the price was fixed as provided for, and bonds were issued in payment of the purchase price. But there was no submission of the matter to the qualified electors of the city, and the ordinance or resolution under which the purchase was made and bonds issued did not provide for the payment of the bonds, as required by the act of 1852. Thereafter certain of the bondholders, conceiving that the bonds were invalid, because not issued in accordance with the provisions of the act of 1852, brought suit against the city to rescind the contract of purchase and get back the plant. The city defended, and it was held that the act of 1852 had no application, because for it to have application would be in violation of the provision of the federal Constitution prohibiting a state from impairing the obligation of contracts. But the basis of the decision was that the act of 1833 incorporating the bank was a contract between the state and the bank. Thereby the state had contracted with the bank that the city might have the power of purchasing the plant at the expiration of the 35-year period, and hence it was under an obligation to continue to permit the city to exercise such power, and any legislation taking away this power or burdening its exercise was prohibited by the federal Constitution. Judge Woods said:

"It seems to me that the power of the city to issue bonds in payment of the purchase money of the waterworks was clearly given by the charter of the Commercial Bank. It is just as clear that the power of the city to buy the waterworks and to issue its bonds therefor was a provision of the charter of the bank, beneficial to the bank, and that it formed a part of the contract of the state with the bank, expressed in the charter of the bank. The state could not take away from the city the power of purchasing the waterworks without interfering with the charter of the bank in a material particular. It seems to me clear that after the 35 years from the passage of the charter have expired, and the city has, through its proper officers, elected to purchase the waterworks, an act * * * forbidding the issue of the bonds,

or imposing onerous conditions upon their issue, not in force at the date of the charter of the bank, would be a direct and palpable invasion of the chartered privileges of the bank."

And again he said:

"If, therefore, the acts of 1852, 1853, and 1855 were intended to impose conditions upon the issue of waterworks bonds not contained in the charter of the bank, they impaired the obligation of the contract between the state and the bank contained in the charter, and were therefore to that extent unconstitutional and ineffectual."

[2, 3] Here, however, there was no contract between the state and plaintiff's predecessor that the city might exercise an option of purchase, the obligation of which would be impaired by section 157, if it be held to apply here. Nor was there any contract between the state and the city that it might exercise such an option. The most that can be said is that the state had empowered the city to purchase. The conferring of such power, however, is not a contract between the state and the city that it shall continue to exist, and hence the state can burden it, or take it away entirely, as it sees fit. And even if there were any such contract between the state and the city, the plaintiff cannot complain of any violation of the obligation arising therefrom to the city. It can complain only of the violation of an obligation to it.

This leaves us the Denver Case. The city of Denver had power to grant a franchise for the use of its streets by a water company for 20 years only, and it had no power to grant an exclusive franchise at all. April 10, 1890, it granted to the Denver Union Water Company a 20-year franchise under which it constructed a plant to supply the city with water. In section 11 of the grant an option of purchase by the city at the expiration of the franchise was provided for, and in section 12 an option of renewal at a reduced hydrant rental for another 20 years. The city had power to purchase, and to bind itself by the grant to do so at the end of the 20 years. It had power to renew the franchise for 20 years at the end of the first 20 years, but it had not the power to bind itself to renew at the beginning thereof. Immediately upon the expiration of the franchise on April 10, 1910, by an amendment to the city's charter, it was prohibited from either purchasing the plant or renewing the lease, except as therein provided, and it was empowered to construct a plant of its own. Thereupon certain of the bondholders of the water company brought suit to enjoin the city from acting under the amendment, to which it made the water company a defendant. The plaintiffs claimed that the city had elected to purchase under its option. The water company by cross-bill claimed that it had elected to renew. The United States Circuit Court of Appeals for the Eighth Circuit held that it had done neither. It held, however, that by the grant the city contracted to purchase the plant at the end of the 20 years if it did not then renew it, that the amendment impaired the obligation of this contract, and that therefore the plaintiffs were entitled to the relief which they sought.

There is nothing in this decision to support plaintiff's contention here. The defendant city never bound itself to purchase prior to the enactment of the ordinance of July 3, 1911, by which it undertook

to exercise its option to purchase. Before then it merely had an option to purchase. It was under no obligation to do so. Hence there was no obligation for section 157 to impair. A consideration of these three decisions relied on by plaintiff in support of its contention results, therefore, in the conclusion that they do not do so.

The defendants cite two decisions as being against plaintiff's contention, to wit: Knoxville Water Co. v. City of Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353; City of Denver v. New York Trust Company, 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101. That in the last case was a decision by the Supreme Court on writ of certiorari from the decision of the Eighth Circuit Court of Appeals, in the last of the three cases relied on by the plaintiff, whereby it reversed the judgment of the lower court. These two decisions should be considered, so as to bring out their bearing, if any, upon the question in hand.

In the Knoxville Case the city of Knoxville in 1882 granted to the Knoxville Water Company an exclusive franchise as against any other person or corporation. The grant contained a provision to the effect that after the expiration of 15 years, and every year thereafter, the city might have the right to purchase the plant. In 1903, before the expiration of the franchise, the city was empowered by the Legislature to construct and operate a plant of its own, and it was proceeding to carry out this legislation, when the water company sought to enjoin it from further so proceeding, because the legislation was an impairment of the obligation of its grant of an exclusive franchise. It was held that it was not. The ground of the decision was that the construction and operation of a plant by the city itself was not a violation of the agreement that it would not grant a franchise to another person or corporation.

In the Denver Case the Supreme Court reversed the decision of the lower court, on the ground that there was no contract on the part of the city in the grant of 1890 to purchase the plant at the end of 20 years, if it did not then renew the franchise, as that court had held. It held that the city was under no obligation to purchase the plant or to renew the franchise, and hence it had the right to proceed under the amendment.

It is thus seen that neither of these two cases involved the question we have here. And yet it cannot be said that they do not have an indirect bearing. The legislation complained of in each case, empowering the city to construct and operate a plant of its own, made it so that if the city wanted to have such a plant it was not shut up to exercising its option of purchase as it was before its enactment. By reason thereof it was so placed that it need not exercise the option, but might construct a plant of its own; and, in the Denver Case, the right to exercise the option was burdened as provided in the amendment. Had the city exercised its option contrary to the amendment, then the case would have presented the exact question which we have here.

[4] I am therefore constrained to hold that the exercise of the option to purchase, as given to the defendant by the ordinance of July,

10, 1890, was burdened by section 157 of Kentucky Constitution. It could not be exercised otherwise than in accordance with its terms. It appears, however, from the allegation of the fifth paragraph of defendant's answer, that the matter of exercising the option of purchase was submitted to the voters of the city at an election held in 1911, and that more than two-thirds of those voting approved its exercise. The allegation thereof in regard thereto is:

"That an election was held in said city in the year 1911 to take the sense of the voters of said city upon the question as to whether or not said city should incur an indebtedness in a sum not exceeding $175,000 for the purpose of purchasing and acquiring the rights, property, and franchise of the complainant herein, and at said election more than two-thirds of the voters thereof voted in favor of said proposition."

According to this, the question submitted was not the general question whether the plaintiff's plant should be purchased. Indeed, such a question could not have lawfully been submitted. If not forbidden by the Constitution itself, it was forbidden by subsection 34 of section 3490 of Kentucky Statutes, enacted to carry the section into effect as to cities of the class to which the defendant city belongs, in that it provides that the notice of election shall "specify the amount of indebtedness proposed to be incurred." The question submitted was whether the city should incur an indebtedness in a sum not exceeding $175,000 for the purpose of acquiring the rights, property, and franchise of the plaintiff. A favorable vote so to do was not a vote to incur an indebtedness of $276,829, the amount of the purchase price fixed by the appraisers, which, under the allegations of the answer, it was necessary to incur in order to make the purchase under the appraisement.

[5] It follows, therefeore, that the fifth paragraph of the answer is good, and that the motion to strike it out will have to be overruled. I think that, in view of the fact that the exercise of the option was subject to section 157 of the Constitution, it was incumbent on plaintiff, in stating its case, to have alleged facts showing that the city had the right to incur such an indebtedness. The plaintiff's motion to strike will be carried back to the bill, and it will be dismissed.

This relieves me of the necessity of considering the other questions raised by the motion to strike.

UNITED STATES v. JONES.

(District Court, N. D. New York. March 2, 1916.)

1. SEARCHES AND SEIZURES ⇐3—SEARCH WARRANTS—AUTHORITY TO ISSUE—"JUDGE"—"COURT."

United States commissioners are neither judges nor courts, although they at times act in a quasi judicial capacity and exercise the power of a court, in so far as an act of Congress has conferred specific authority or imposed the performance of a special duty, and while they are authorized

to and may issue search warrants, when specially authorized to do so by some act of Congress, they possess no general power in that respect.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. §§ 2, 3; Dec. Dig. ⟸3.]

2. POST OFFICE ⟸47—SEARCH WARRANTS—AUTHORITY TO ISSUE.

Congress having specifically authorized United States commissioners to issue search warrants in certain cases, and having conferred no authority to issue warrants to search and seize letters, writings, etc., used or intended to be used in the execution of a scheme to defraud in the execution of which the mails are used, a United States commissioner had no authority to issue a search warrant for such a purpose.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 65; Dec. Dig. ⟸47.]

3. POST OFFICE ⟸47—SEARCH WARRANTS—AUTHORITY TO ISSUE.

While it would seem that such power ought to exist, no authority resides in or has been conferred upon a District Judge to issue a search warrant in such a case.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 65; Dec. Dig. ⟸47.]

Criminal prosecution by the United States against Wylie B. Jones. On application by the defendant Wylie B. Jones for an order directing the United States attorney for the Northern district of New York to return to him certain letters and papers and copies of letters and pamphlets or circulars belonging to him, and which he claims were seized unlawfully and in violation of his constitutional rights under and by virtue of a search warrant issued by one of the United States commissioners in said district. Motion granted.

Frank J. Cregg, Asst. U. S. Atty., of Syracuse, N. Y., and Dennis B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

Abel I. Smith, Jr., of New York City, and Geo. B. Curtiss, of Binghamton, N. Y., for defendant.

RAY, District Judge. One of the assistant United States attorneys for the Northern district of New York having received through inspectors of the Post Office Department information tending to show that the defendant, Wylie B. Jones, had devised a scheme or artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, and that said Jones had been and then was engaged in the execution of such scheme, and that he had used and was using the post office at Binghamton, N. Y., for the execution of such scheme or artifice by sending and receiving letters, writings, circulars, pamphlets, and advertisements through said post office, and having information that said Jones had in his possession letters received by him in the execution of such scheme and circulars or pamphlets, such as had been used and which were to be used in his possession at his office in said city of Binghamton, thereupon applied to the nearest United States commissioner for a warrant of arrest of said Jones, and also for a search warrant authorizing the search of his said premises or office at the city of Binghamton, and the seizure of the documents referred to, if found. These warrants were placed in the hands of a deputy United States

marshal for said district, who proceeded to the premises described and mentioned in company with a post office inspector and the assistant United States attorney and there made a search. A large number of circulars, documents, letters, and copies of letters answering the general description were found and seized and in legal effect turned over to the custody of the United States attorney for the Northern district of New York, although same have been held in the actual manual custody of the deputy United States marshal awaiting the further order of the court. There was no search of the dwelling house of the defendant, and no seizure at or taking of papers therefrom.

There was no forcible resistance to the execution of this search warrant, and the defendant was not arrested. At that time no indictment had been found. The defendant in no way obstructed the search, but protested against same, and against the taking and carrying away of the papers mentioned. The defendant thereupon on petition applied for and obtained an order to show cause why such papers, documents, etc., should not be returned, and enjoining the use of same until the determination of the order to show cause. While an indictment was subsequently found against the defendant and is now pending, such documents and papers have not been used.

The defendant not only challenges the power and authority of the United States commissioner to issue the search warrant in question, but alleges that the search and taking constituted and constitutes an unlawful, an unwarranted and an unreasonable search and seizure, in violation of his constitutional rights, and that the seizure and use of such documents and papers will be compelling the defendant to furnish or give evidence against himself.

The Fourth Amendment to the Constitution of the United States provides as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides that:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. * * *"

[1] United States commissioners are neither judges nor courts, although they at some times act in a quasi judicial capacity and exercise the power of a court in so far as an act of Congress has conferred specific authority or imposed the performance of a special duty. United States v. Tom Wah (D. C.) 160 Fed. 207, affirmed 163 Fed. 1008, 90 C. C. A. 178; Todd v. United States, 158 U. S. 282, 15 Sup. Ct. 889, 39 L. Ed. 982; Ex parte Hennen, 13 Pet. 230, 10 L. Ed. 138; United States v. Allred, 155 U. S. 591, 15 Sup. Ct. 231, 39 L. Ed. 273; United States v. Clark, 1 Gall. 497, Fed. Cas. No. 14,804;

In re Perkins (D. C.) 100 Fed. 950; United States v. Beavers (D. C.) 125 Fed. 778. These commissioners may do what they are authorized to do, and may issue search warrants when specially authorized to do so by some act of Congress, but they possess no general power in that respect.

[2] United States commissioners may issue a search warrant authorizing an internal revenue officer to search premises when oath is made by such officer that he has reason to believe and does believe that a fraud upon the revenue has been or is being committed upon or by the use of the premises to be searched. 3 U. S. Comp. Stat. 1913, § 6364, page 2865; Act July 13, 1866, c. 184, § 15, 14 Stat. 152. A United States commissioner upon proper oath or affirmation may issue a search warrant authorizing the marshal to enter any house, store, building, boat, or other place named in the warrant, in which it shall appear there is probable cause for believing that the manufacture of counterfeit coin or the concealment of counterfeit money, etc., is being carried on. 4 U. S. Comp. Stat. 1913, § 10343, page 4738; Act Feb. 10, 1891, c. 127, § 5, 26 Stat. 743; Act March 4, 1909, c. 321, § 173, 35 Stat. 1121.

In customs cases by section 3066 of the Revised Statutes of the United States (Comp. St. 1913, § 5769), it is provided that if any collector, naval officer, surveyor, or other person specially appointed by either of them, or inspector, shall have cause to suspect the concealment of any merchandise in any particular dwelling house, store building, or other place, they or either of them, upon proper application on oath to any justice of the peace, shall be entitled to a warrant to enter such house, store, or other place in the daytime only, and there to search for such merchandise, and if any shall be found to seize and secure the same for trial, and all such merchandise on which the duties shall not have been paid or secured to be paid shall be forfeited.

By section 173 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1121 [Comp. St. 1913, § 10343]), it is provided that a judge or United States commissioner may upon proper oath or affirmation within their respective jurisdictions issue a search warrant authorizing any marshal or other persons specially mentioned to enter any house, store building, boat, or other place named in the warrant in which there shall appear probable cause for believing that the manufacture of counterfeit money, etc., is carried on or concealment thereof made, and there search for counterfeit money and appliances for making same, and also to seize and secure the same. Dies, molds, and plates which may be searched for and seized under the provisions of this section are harmless in and of themselves, but are instrumentalities and appliances for the commission of a crime, to wit, the crime of manufacturing counterfeit money, coins, or obligations of the United States.

When a person or persons has devised an artifice or scheme to defraud such as is mentioned in section 215 of the Criminal Code of the United States (Comp. St. 1913, § 10385), and executes same in whole or in part by sending letters, pamphlets, writings, circulars,

or advertisements through the United States mails, such writings, circulars, pamphlets, and advertisements are mere instrumentalities or appliances used and to be used for the commission of an offense against the United States. They serve no legitimate purpose, and are not intended to be used for or to serve any legitimate purpose, and it would seem clear that such circulars, writings, pamphlets, and advertisements ought to be the subject of search and seizure, and that judges and United States commissioners ought to have power in proper cases and on proper proof to issue search warrants authorizing the marshal to search for and seize such papers and documents. However, I find no provision in the statutes anywhere authorizing the issue of a search warrant in such a case by either a judge or a United States commissioner. If it was necessary to specially confer this power in counterfeiting cases by act of Congress, why is it not necessary to confer the power by act of Congress in cases affecting the postal service?

All that the case of Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, really decides is that when a person is accused of the commission of a crime and arrested by an officer without a warrant of arrest, and while so held away from his home other officers of the law without a search warrant go to his home and enter it without permission, no one being at home, and make a search of his rooms and furniture, and find and seize and without the consent of such arrested person take away his letters and envelopes of an incriminating nature and other property found on such premises and in any furniture found thereon used by him, such acts constitute an illegal search and seizure, and the papers and property so seized must be returned, and that the court has power, and it is its duty, under such circumstances, to direct and compel the United States attorney to whom such papers have been delivered to return same to the owner. However, considerable is said in the opinion of the court in that case which throws some light on the questions here involved. Whether the issuing and execution of search warrants in criminal cases is limited to cases where Congress has expressly provided for their issue and execution is a question, and an important question. From the fact that Congress has specifically provided for the issue and execution of search warrants in revenue cases, in counterfeiting cases, and in customs cases only, we may infer that no such power exists in reference to post office depredations and post office fraud cases, such as the use of the United States mails in the execution of a scheme to defraud, in violation of section 215 of the Penal Code of the United States. However, in Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877, the court held:

"1. The power vested in Congress to establish 'post offices and post roads' embraces the regulation of the entire postal system of the country. Under it, Congress may designate what shall be carried in the mail, and what excluded.

"2. In the enforcement of regulations excluding matter from the mail, a distinction is to be made between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined.

"3. Letters, and sealed packages subject to letter postage, in the mail, can be opened and examined only under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."

And in passing on the question the court (96 U. S. at pages 732 and 733, 24 L. Ed. 877) said:

"The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement, a distinction is to be made between different kinds of mail matter, between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution."

We are at liberty to imply from this language contained in the opinion of the court that papers which are instrumentalities for the commission of a crime in violation of the laws of the United States may be seized by virtue of a search warrant issued upon oath and affirmation particularly describing the thing to be seized. It is clear that the learned judge who wrote the opinion in the Jackson Case so understood the law to be. The question, however, was not involved in that case. But, if so, we find here no warrant for holding that a United States commissioner has authority to issue a search warrant authorizing such a search or seizure. Congress seems to have pointed out by statute the particular cases in which a United States commissioner may issue a search warrant. If a United States commissioner has this general power, there would seem to be no necessity for the special enactments to which attention has been called.

In the act entitled "An act to reduce tariff duties and to provide revenue for the government, and for other purposes," approved October 3, 1913 (38 Stat. 195, c. 16, § 4, subd. G, subsec. 3 [Comp. St. 1913, § 5301]), it is provided:

"That any Circuit or District Judge of the United States, within the proper district, before whom complaint in writing of any violation of the two preceding sections is made, to the satisfaction of such judge, and founded on knowledge or belief, and if upon belief, setting forth the grounds of such belief, and supported by oath or affirmation of the complainant, may issue,

conformably to the Constitution, a warrant directed to the marshal or any deputy marshal in the proper district, directing him to search for, seize, and take possession of any such article or thing mentioned in the two preceding sections, and to make due and immediate return thereof, to the end that the same may be condemned and destroyed by proceedings, which shall be conducted in the same manner as * * * in the case of municipal seizure, and with the same right of appeal or writ of error."

The sections referred to are evidently subsection 1 and subsection 2 of paragraph G (Comp. St. 1913, §§ 5299, 5300), and those subsections relate to the importation of obscene books, pamphlets, and certain drugs and medicines, and also to lottery tickets, and also relate to "other articles of indecent or immoral use or tendency." This provision providing for searches and seizures in the cases referred to confers the power to issue the search warrant upon a Circuit or District Judge, and of course excludes United States commissioners.

The statutes of all the states provide in certain cases for the issuing of search warrants as do the statutes of the United States, and specify the cases in which they may issue. In 35 Cyc. 1266, it is said, citing cases:

"Search warrants can only be issued upon probable cause supported by oath or affirmation, *and upon the grounds and in the manner prescribed by statute.*"

Section 4026 of the Revised Statutes (Comp. St. 1913, § 7552) provides as follows:

"The Postmaster General may, by a letter of authorization under his hand, to be filed among the records of his department, empower any special agent or other officer of the post office establishment to make searches for mailable matter transported in violation of law; and the agent or officer so authorized may open and search any car or vehicle passing, or having lately before passed, from any place at which there is a post office of the United States to any other such place, or any box, package, or packet, being, or having lately before been, in such car or vehicle, or any store or house, other than a dwelling house, used or occupied by any common carrier or transportation company, in which such box, package, or packet may be contained, whenever such agent or officer has reason to believe that mailable matter, transported contrary to law, may therein be found."

Section 3990 of the Revised Statutes (Comp. St. 1913, § 7474) provides:

"Any special agent of the Post Office Department, collector, or other customs officer, or United States marshal or his deputy, may at all times seize all letters and bags, packets or parcels, containing letters which are being carried contrary to law on board any vessel or on any post route, and convey the same to the nearest post office, or may, by the direction of the Postmaster General or Secretary of the Treasury, detain them until two months after the final determination of all suits and proceedings which may, at any time within six months after such seizure, be brought against any person for sending or carrying such letters."

[3] These sections show a purpose on the part of Congress to provide for a search in certain cases affecting the postal service, but a careful examination of the statutes fails to disclose any statute conferring power on a United States commissioner to issue a search warrant in such a case as the one now presented and before this court. I am also of the opinion that, while the power ought to exist, no authority resides in or has been conferred upon a District Judge to is-

sue a search warrant in such a case. The post office authorities, especially the inspectors, and also United States attorneys, are now hampered and delayed in their investigations by the absence of such authority, and great delay results and vast expense is incurred in proving that defendants in such cases have had and have in their possession fraudulent circulars and pamphlets with intent to send same through the mails and that some have been so sent. If men will devise and execute schemes to defraud of the character set forth in section 215 of the Criminal Code of the United States, and will in aid of the execution of same use the mails to send circulars and so-called letters containing false and fraudulent statements to their victims, or intended victims, such false documents ought to be treated as mere instrumentalities for the commission of crime, as indeed they are, and made the subject of search and seizure, not only for the protection of the Post Office Department, but the public generally.

If it be competent and constitutional for Congress to enact that the workshop of a counterfeiter may be searched under authority of a search warrant, and the counterfeit money and appliances for making same seized, if found, it seems clear that it is constitutional and competent for Congress to enact that the workshop or storehouse of the one who seeks to gain a livelihood by defrauding his fellow men by means of false and fraudulent representations in the form of circulars or letters written or printed for that purpose, and sent or intended to be sent through the mails in violation of law, shall be subject to search, and such instrumentalities for defrauding the unwary shall be subject to seizure. It seems to me clear that such documents, pamphlets, and letters intended for such a purpose, whether written or printed, *"rightfully belong to the custody of the law,"* and that the law has the right to search for and seize them. Such documents are not within the category of a person's *"private* books or papers." The law suggested, in my judgment, would not be unconstitutional within Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. In that case the customs revenue law condemned by the court required the defendant, or claimant, to produce in court "his *private* books, invoices, and papers," and the court then held:

"It does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment; a compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the amendment. * * * The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty, or forfeiture is equally within the prohibition of the Fifth Amendment. Both amendments relate to the personal security of the citizen. They nearly run into and mutually throw light upon each other. When the thing forbidden in the Fifth Amendment, namely, compelling a man to be a witness against himself, is the object of a search and seizure of his private papers, it is an 'unreasonable search and seizure' within the Fourth Amendment. Search and seizure of a man's private papers to be used in evidence for the purpose of convicting him of a crime, recovering a penalty, or of forfeiting his property, is totally different from the search and seizure of stolen goods, dutiable articles on which the duties have not been paid, and the like, which rightfully belong to the custody of the law."

It will be noted that the court is all the time referring to and speaking of the production, etc., of a person's "*private* papers," and not to papers and documents prepared for the very purpose of being used in cheating and defrauding others in violation of law and violating a law of the United States. The United States has the right to make it a crime to send such documents through the mails, and it has an interest in such documents or circulars to the extent that they shall not be so sent. In fact, it seems to me that when a person engaged in the commission of a crime, prepares instrumentalities for its perpetration, whether such instrumentalities consist of written or printed documents (which ought not to be considered or treated as "private papers"), or tools and implements, same ought to be forfeited to the government and a proper subject of search and seizure. In the opinion in the Boyd Case the court, after speaking of certain authorized searches and seizures, said (116 U. S. 624, 6 Sup. Ct. 1524, 29 L. Ed. 746):

"But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery; whereas, by the proceeding now under consideration, the court attempts to *extort* from the party his private books and papers to make him liable for a penalty or to forfeit his property."

This court is of the opinion that a suitable law on this subject should be enacted. However, after consideration of the statutes and cases, I am of the opinion that the commissioner had no authority to issue the warrant in this case, and that the marshal, in the absence of statutory authority, had no authority to search for and seize the papers in question.

Hence the motion for their return is granted.

UNITED STATES v. SOUTHERN PAC. CO. et al.

(District Court, S. D. California, N. D. February 14, 1916.)

No. 221.

1. WITNESSES ⊂=13—COMPELLING ATTENDANCE—WHERE SUBPŒNA MAY BE SERVED.

A subpœna served without the district and at a place more than 100 miles from the place of holding court has no potency, and a witness attending pursuant to such a subpœna is regarded as attending voluntarily.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 14; Dec. Dig. ⊂=13.]

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2. COSTS ⊂=184—WITNESS FEES—WITNESSES ATTENDING VOLUNTARILY.
Under the statute allowing witnesses for each day's attendance in court or before any officer pursuant to law, $1.50 and 5 cents a mile for going from his place of residence to the place of trial or hearing, and 5 cents a mile for returning, the fees of witnesses who attend voluntarily at the request of the prevailing party may be taxed as costs, as "pursuant to law" does not limit the fees to witnesses attending pursuant to subpœna, but has relation to the word "officer," and restricts the application of the statute to witnesses attending before some officer conducting a hearing in pursuance of law.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 715–736; Dec. Dig. ⊂=184; Witnesses, Cent. Dig. § 55.]

3. COURTS ⊂=89—RULES OF DECISION—PRECEDENTS.
While a precedent long established should not be overthrown for light or trivial reasons, when a judge is convinced that an opinion has been generally discredited and is not founded upon good reasoning, it is his plain duty to disregard it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. ⊂=89.]

4. STATUTES ⊂=225¾, 230—CONSTRUCTION—RE-ENACTMENT OR AMENDMENT SUBSEQUENT TO CONSTRUCTION.
When a law that has been construed by the courts is re-enacted, the re-enactment adopts the construction placed upon the law by the court; and when a legislative body amends a law that has been construed by the courts, and changes its language, it intends to change the rule of decision upon the subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 306, 311; Dec. Dig. ⊂=225¾, 230.]

5. STATUTES ⊂=190—CONSTRUCTION—AMBIGUITY.
The intentions of Congress and the object aimed at is the fundamental inquiry in judicial construction and language capable of more than one meaning is to be taken in that sense which will harmonize with such intention and object and effect the purposes of the enactment, and such construction of apparently conflicting provisions will be adopted as will best promote the harmonious operation of the law as a whole.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. ⊂=190.]

6. STATUTES ⊂=200—CONSTRUCTION—ASCERTAINING INTENT.
In construing a statute to harmonize with the intention of Congress and the object aimed at, words may be rejected and others substituted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 278; Dec. Dig. ⊂=200.]

7. COSTS ⊂=185—WITNESS FEES—MILEAGE.
It is well settled that mileage for witnesses who attend from a distance beyond the reach of a subpœna can only be allowed to the extent of 100 miles.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 739–743; Dec. Dig. ⊂=185.]

At Law. Action by the United States against the Southern Pacific Company and others. On appeal from the taxation of costs by the clerk. Costs retaxed.

E. J. Justice, Sp. Asst. Atty. Gen., and Albert Schoonover, U. S. Atty., of Los Angeles, Cal.

Charles R. Lewers, of San Francisco, Cal., and J. H. Call, of Los Angeles, Cal., for defendants.

TRIPPET, District Judge. The question presented to the court, on appeal from the taxation of costs by the clerk, is whether or not costs may be taxed against the losing party for mileage of witnesses subpœnaed in the Northern district of California to appear before the court at Los Angeles. Mileage for these witnesses was taxed by the clerk from the north line of the Southern district to Los Angeles, where the court was held, a distance of 275 miles. The contention of the defendant is that no mileage should be allowed for these witnesses, or, if allowed, the mileage should be allowed for a distance not exceeding 100 miles from the place where the court was held.

[1] In 1871 Judge Sawyer, in the Circuit Court for the District of California (Spaulding v. Tucker, 2 Sawy. 50, Fed. Cas. No. 13,221), held that a subpœna served without the district and at a place more than 100 miles distant from the place of holding court had no potency, and that a witness who attended from beyond the district, and more than 100 miles distant from the place of holding the court, attended voluntarily. This decision is well supported by authority existing at that time and by many decisions rendered since, and it will be followed in this case.

[2, 3] In the same case Judge Sawyer held that the losing party cannot be taxed with the traveling expenses of witnesses residing either within or beyond reach of a subpœna, who voluntarily attend a trial at the request of the prevailing party. This has been the rule of decision in this district, so far as the court is advised, until the present time, and the court now is asked to adopt another rule of decision. Prudence, indeed, will dictate that a precedent long established should not be overthrown for light or trivial reasons; but when a judge is convinced that an opinion has been generally discredited as a precedent, and that it is not founded upon good reasoning, it is his plain duty to disregard it. The case will first be considered as a precedent. The same question came before Judge Sawyer in the case of Haines v. McLaughlin (C. C.) 29 Fed. 71. In this case Judge Sawyer said:

"In a recent case, however, that distinguished jurist, Mr. Justice Gray, of the Supreme Court, with the concurrence of Mr. Circuit Judge Colt, in the First Circuit, overruled these decisions in U. S. v. Sanborn (C. C.) 28 Fed. 299, and on the authority of this case we are asked to reconsider the rule, as long established in this circuit. Did that case stand alone, I should not hesitate to yield my own impressions, whatever they might be, to authority so eminent. But we have seen that it does not stand alone, and that in three, at least, of the other circuits, the ruling has been different, having the sanction of three eminent justices of the Supreme Court. In U. S. v. Sanborn the court seems to attach some importance to the fact that the rule adopted had long prevailed in that circuit, whatever the case might have been in other circuits. But the case is governed by the same statute, which is applicable to all the circuits. Whichever rule is the proper one should, therefore, be followed in all the circuits, and it is highly important that the point should be authoritatively settled by a decision of the Supreme Court. With the utmost respect for those taking the other view, I shall, for the present, adhere to the rule heretofore established in this circuit; and my associate, for the purposes of this case, will adopt the view of Mr. Justice Gray. If desired, a certificate of opposition of opinion will be made, and it is to be hoped that the case will be taken up for an authoritative decision."

It will thus be seen that Judge Sawyer had grave doubts as to the propriety of his decision in Spaulding v. Tucker, and stated that, for the present, he would adhere to that ruling. The question came before Judge Ross in the case of Lillienthal v. Southern California Railway Company (C. C.) 61 Fed. 622, in 1894. Judge Ross followed the decisions of Judge Sawyer. In his opinion, however, he used the following language:

"Without regard to my individual views, I think I ought to adhere to the construction put upon the statute so long ago by the Circuit Judge for this circuit, and which, so far as I am advised, has prevailed here ever since."

This sentence of Judge Ross indicates most clearly that he did not approve of the reasoning of Judge Sawyer in the cases aforesaid, and it is thought that this expression justifies the court in considering the question an open one. In 1899 the question came before Judge Hawley in this circuit in Hanchett v. Humphrey, 93 Fed. 895. He allowed witness fees under the circumstances presented in this case. The question came before Judge Bean in 1909, in the case of United States v. Southern Pacific Company (C. C.) 172 Fed. 909. He allowed the mileage fees for witnesses under the circumstances presented in this case. It will thus be seen that, in this circuit, the opinion of Judge Sawyer stands discredited as a precedent.

It would appear from the reported decisions that practically all, if not all, the districts in the country, outside of California, allow fees to witnesses who attended voluntarily. The only Circuit Court of Appeals that has dealt with the question, to which the attention of the court has been called, is the case of Marks v. Merrill Paper Co. et al., 203 Fed. 16, 123 C. C. A. 380. In this case fees were allowed witnesses who attended from a distance beyond the reach of a subpœna. Thus it will be seen that the opinion in Spaulding v. Tucker has been generally disregarded as a precedent. As to the reasoning contained in Spaulding v. Tucker, it is plainly faulty. The statute under consideration, in so far as it is material to the discussion, is as follows:

"For each day's attendance in court, or before any officer pursuant to law, $1.50 and 5 cents per mile for going from his place of residence to said place of trial or hearing, and 5 cents per mile for returning."

The gist of the reasoning of Judge Sawyer is contained in the following:

"I think, under the existing statute, to attend 'pursuant to law' is to attend under the obligatory requirements of the law. The party may request, but the law knows no request. It commands or is silent; and a party who attends 'pursuant to law' attends pursuant, or in obedience to, the commands of the law." Fed. Cas. 13,221, p. 900.

That this is faulty reasoning can be easily demonstrated. The statute in force prior to the enactment of the present law is in the Act of Congress approved February 28, 1799, and is as follows:

"Sec. 6. And be it further enacted, that the compensation to jurors and witnesses, in the courts of the United States, shall be as follows, to wit: To each grand and other juror, for each day he shall attend in court, one dollar and twenty-five cents; and for travelling, at the rate of five cents per mile,

from their respective places of abode, to the place where the court is holden, and the like allowance for returning. To the witnesses summoned in any court of the United States, the same allowance as is above provided for jurors." 1 U. S. Stat. at L. 626.

This statute, in so far as the question at issue is concerned, is a re-enactment of the statute of May 8, 1792. 1 U. S. Stat. 277. Under the statute of 1799 the courts held that the losing party could not be taxed with the fee of a witness unless he be regularly summoned by the marshal or his deputy. Dreskill v. Parish, 5 McLean, 241, Fed. Cas. No. 4,076. This case was very properly decided, because the statute said, in so many words, that fees were allowed to witnesses summoned. It had also been held by Judge Story in Prouty v. Draper, Fed. Cas. No. 11,447 (1842), that a witness could be allowed his fees to his residence, although without the state and more than 100 miles from the place of the trial. No reference in this case is made to the statute of 1799 above quoted. The facts do not appear, but in all probability the witness had been summoned to appear, and the question as to whether the summons was effectual was not raised. With this state of the law before Congress, it enacted the legislation now in force. In order that we may understand just what Congress did, the act of 1799 and the act of 1853, in so far as it is necessary to consider them, will now be stated again. It is provided by the act of 1799 that fees shall be allowed:

"To the witnesses *summoned* in any court in the United States."

In the act of 1853 it is provided:

"For each day's *attendance* in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for going from his place of residence to said place of trial or hearing, and five cents per mile for returning."

In amending the law as it did Congress meant to do two things, to wit: To change the rule concerning the allowance of witness fees, and to provide for witness fees before an officer.

[4] The first thing that concerns us in this matter is what Congress meant by striking out the word "summoned" in the law and inserting in lieu thereof the word "attendance." When a law that has been construed by the courts is re-enacted, the re-enactment adopts the construction that the court has placed upon the law. It also is true that when a legislative body amends a law that has been construed by the courts, and changes the language thereof, it intends to change the rule of decision upon the subject. If Congress had intended by this amendment to require that a witness should be summoned in order that fees might be taxed, then the best word in the English language for Congress to have used was the word "summoned," the word that was already in the law. If Congress intended to provide by the amendment that a witness should have fees who had merely attended the trial, regardless of his being summoned, the best word in the English language for Congress to use was the word "attendance." When Congress changed the law, and struck out the word "summoned," and inserted in lieu thereof the word "attendance," it certainly meant to

change the law, especially in view of the interpretation that had been given to the statute prior to the enactment of 1853. If Congress meant by the use of the phrase "in pursuance of law" to declare that witness fees should not be taxed unless a witness was summoned, then Congress used very inappropriate language to express its meaning, and especially is this true in view of the previous legislation and holding of the courts.

For Congress to change the wording of the statute without intending to change its effect would be worse than useless. In this instance it would be an absurd act. The courts must assume that Congress acted intelligently, and intended something other than absurdity by what was done. The first case to which my attention has been called construing the act of 1853 is in accordance with this reasoning, namely, the case of Anderson v. Moe, Fed. Cas. No. 359.

[5, 6] The phrase "in pursuance of law" has nothing to do with the question as to whether or not fees of witnesses who attend voluntarily can be taxed as costs. Some use, however, if possible, should be found for the phrase "in pursuance of law." One class of cases says that "in pursuance of law" modifies the word "attendance," and the effect of it is to require witnesses to be summoned before the fees can be taxed, and the fees for voluntary witnesses cannot be taxed as costs. The holding is that "in pursuance of law" means subpœnaed. Judge Sawyer said this was the only purpose of the phrase. Another class of cases holds that "in pursuance of law" modifies the word "attendance," but decides that a witness who attends voluntarily attends "in pursuance of law," as well as a witness who is summoned. This latter construction gives no effect whatever to the phrase "in pursuance of law," because the sentence would have just exactly that effect if the phrase were left out of it. There are only two circumstances that can be considered in connection with the manner in which witnesses attend. One is where they are summoned, and the other where they come voluntarily. Hence it necessarily follows that, if in both cases the fees can be taxed, the phrase "in pursuance of law" serves no useful purpose. The sentence is ambiguous; else why should the courts have bestowed so much labor upon it, and why this diversity of opinion? When a sentence is ambiguous, it should be construed to avoid absurdity, and to carry out the intention of the legislative act. The intention of Congress and the object aimed at is the fundamental inquiry in judicial construction, and language capable of more than one meaning is to be taken in that sense which will harmonize with such intention and object, and effect the purposes of the enactment. To do this words may be rejected, and others substituted, and such construction of apparently conflicting provisions will be adopted as will best promote the harmonious operation of the law as a whole.

This phrase has a useful purpose in the statute. Prior to the amendment of 1853, the law limited the right of taxation of costs to witnesses summoned *in any court,* and by the amendment the phrase "or before any officer pursuant to law" was added. This is the second purpose that Congress had in amending this law, namely, the provision for the allowance of fees to a witness who attended before

an officer. Congress did not mean by this to allow fees to a witness who attended before just any officer. It did not intend to allow fees to witnesses who attended before a clerk, or commissioner, or other officer, to witness the execution of a deed or pension paper, or land office paper, or many other purposes for which witnesses appear before officers. Congress meant an officer who was conducting a hearing in pursuance of the law, in the administration of justice, such as a master, referee, or commissioner, or other officer taking evidence. The phrase "in pursuance of law" does not modify the word "attendance," but it has relation to the word "officer." It does not modify the word "officer" in a grammatical sense, but is used in connection with it. Attention is called now to the phrase "for going from his place of residence to the place of trial or hearing," as it appears in the act of 1853. In the act of 1799 it will be seen that the word "court" was used, instead of the phrase "the place of trial or hearing" in the act of 1853. Congress evidently intended something by this change. It is believed that the word "court" would have answered all the purposes of the act, if it were only intended to allow fees to witnesses who attended "in court." But Congress intended to allow fees to witnesses who attended before an officer. There is no trial, in the ordinary sense of that word, that occurs before an officer; therefore the word "hearing" was used. It is submitted that the word "trial" would answer all the purposes of providing fees for witnesses who attended "in court," and the word "hearing" (15 A. & E. Ency., 308) is particularly appropriate to apply to witnesses who attend before an officer. The sentence, in order to carry out the evident intention of Congress, should be rendered thus: "For each day's attendance in court or before an officer in a hearing held pursuant to law." The phrase "pursuant to law" modifies, in this rendition of the sentence, the word "held," and does not modify the word "attendance." No other construction can be given to the sentence, and avoid absurdity, and give effect to the changed language in the statute, and especially the phrase "pursuant to law." Mr. Justice Gray, in U. S. v. Sanborn (C. C.) 28 Fed. 299, 302, said:

"The same view applies with increased force to the language of Act Feb. 26, 1853, c. 80, § 3 (10 Stat. 167), repeated in section 848 of the Revised Statutes, by which witness fees are declared to be, 'For each day's attendance in court, or before any officer pursuant to law,' $1.50, and five cents a mile for going 'from his place of residence to the place of trial or hearing,' and five cents a mile for returning; and neither the word 'summoned,' nor any equivalent word, is used, except in a clause added to prevent the multiplication of fees 'when a witness is subpœnaed in more than one cause between the same parties at the same court.' In the phrase 'for each day's attendance in court, or before any officer pursuant to law,' the words 'pursuant to law' would seem to have been inserted, not to restrict or qualify the effect of 'attendance in court,' but rather to limit the attendance 'before any officer' to attendance before such magistrates, commissioners, and other officers as are authorized by law to take testimony."

With Justice Gray sat Judge Colt, who concurred. This is undoubtedly the highest authority on the subject. It is seen that Justice Gray adopted the view above set forth by this court, but he reasons it out in a different way.

In Hanchett v. Humphrey (C. C.) 93 Fed. 895, Judge Hawley uses language in justification of his determination not to follow the opinion in Spaulding v. Tucker, which appeals to me as sound reasoning. His reasoning justifies me in taking the course I am taking here. His reasoning also shows what probably prompted Congress to change the law. The language to which I refer is as follows:

"It is, of course, true that the statutory means of compelling the attendance of witnesses is by subpœna. But what right has the defeated party to complain because the other party caused his witnesses to come without a subpœna, and thereby saved expense? If a subpœna was served, the winning party could recover, not only the mileage of the witnesses, but the costs and expenses incurred in subpœnaing them; and these costs might, in many cases, be much greater than the mileage of the witnesses allowed by the United States statute. The objection to allowance of mileage because no subpœna is served, ground down to the common sense of the question, is that the winning party ought not to collect any disbursements he necessarily incurred by paying the legal fees of the witnesses because he did not go to the further expense of having them subpœnaed. Such reason does not appear to me to be sound. Its tone is not judicial, and its logic is certainly faulty, and the result, if continued, would lead to unnecessary expense to litigants, and ought not to be adhered to any longer. It is time to call a halt. If a mistake has been made, why not correct it, without waiting for an authoritative decision from the Circuit Court of Appeals or from the Supreme Court? The question may never reach either of said courts. Is it not, therefore, better to follow a well-recognized and sound principle of law than to blindly adhere to a precedent simply because it was made in your own circuit?"

[7] Having concluded that the fees for witnesses who attend voluntarily can be taxed as costs, the only question remaining is the mileage. The law is so well settled on reason and authority that mileage for witnesses who attend from a distance beyond the reach of a subpœna can only be allowed to the extent of 100 miles that it is deemed unnecessary to review the decisions upon the subject. The costs, as to mileage, in this case are to be retaxed, and the witnesses allowed mileage for 100 miles only.

I am authorized to say that Judge BLEDSOE concurs in this opinion

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UNITED STATES v. WIGHTMAN.

(District Court, D. Arizona. January 11, 1916.)

No. E–1.

1. INDIANS ⟸10—RIGHTS IN LANDS OF RESERVATION.

The right which Indians hold in the lands embraced within a reservation is that of occupancy, the fee and the right of disposition being in the United States.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 25, 29, 46; Dec. Dig. ⟸10.]

2. INDIANS ⟸12—RESERVATIONS—WATER RIGHTS.

The creation of an Indian reservation does not vest the Indians with the right to the use of the waters thereon, except so far as necessary to carry out the object for which the reservation was created.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 27, 28; Dec. Dig. ⟸12.]

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3. INDIANS ⊂⇒12—RESERVATIONS—WATER RIGHTS.

On the abandonment of a military reservation, a part was added to an existing Indian reservation, and the remainder was opened to settlement and the lands sold. Some 400 to 600 feet within the new boundary of the Indian reservation were certain springs, the water from which had been used for the purposes of the military post, including the irrigation of land thereon, no part of which, however, was within such boundary, and when such land was appraised for sale the water rights were taken into consideration. But about 15 acres of the land on the reservation could be irrigated from the springs. *Held*, that the purchasers of the irrigated lands had a right to the use of the water superior to that of the Indians.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 27, 28; Dec. Dig. ⊂⇒12.]

In Equity. Suit by the United States against Rollo Wightman. Decree for defendant.

Thomas A. Flynn, U. S. Atty., of Phœnix, Ariz., and Samuel L. Pattee and Wm. J. Bryan, Jr., Asst. U. S. Attys., both of Tucson, Ariz.

L. L. Henry, of Globe, Ariz., and John H. Campbell, of Tucson, Ariz., for defendant.

SAWTELLE, District Judge. This case was submitted to the court upon a statement of facts agreed by the parties, or case stated, upon which the court was to render such judgment as the law requires upon the facts stated, leaving no questions of fact to be tried, and presenting nothing but questions of law. The statement is as follows:

This action is brought by the United States, acting through the United States attorney for the district of Arizona, by direction of the Attorney General of the United States, and is brought in behalf of the United States and the Indians residing upon the San Carlos Indian reservation in Arizona.

On the 9th day of November, 1871, a tract of land, the property of the United States, was by executive order reserved and set apart by the United States as an Indian reservation as and for a permanent home and abiding place of the Apache and other bands and tribes of Indians, in the then territory of Arizona, and designated as the White Mountain Indian reservation, situate and being in the then territory of Arizona, the boundaries of which reservation, including a certain tract of land subsequently reserved and set aside by an executive order and added to said reservation and made a part thereof, and designated as the San Carlos division of the White Mountain Indian reservation, were fixed and defined as hereinafter set forth.

That thereafter, to wit, on the 14th day of December, 1872, a tract of land situate and being in the then territory of Arizona and the property of the United States was reserved and set apart by executive order and added to and made a part of said White Mountain Indian reservation, and known and designated as the San Carlos division of the White Mountain Indian reservation, the entire boundaries of which said White Mountain Indian reservation, including the said San Carlos division of the said White Mountain Indian reservation, so as aforesaid added to and made a part of said White Mountain Indian reservation were fixed and defined as follows, to wit:

Starting at the point of intersection of the boundary between New Mexico and Arizona with the southern edge of the Black Mesa, and following the southern edge of the Black Mesa to a point due north of Sombrero or Plumoso Butte; thence due south to said Sombrero or Plumoso Butte; thence in a direction by Piache, Colo., to the crest of the Apache Mountains, following the said crest down the Salt river to Pinal creek, to the top of the Pinal Mountains; thence due south to a point 15 miles south of the Gila river; thence east with a line parallel with and 15 miles south of the Gila river to the

boundary of New Mexico; thence north along said boundary line to the intersection with the southern edge of the Black Mesa, the place of beginning.

That said tract of land is now and ever since said last-mentioned date has been used as an Indian reservation, and as the home and abiding place of said Indians, saving and excepting certain parcels thereof that from time to time have been set apart under authority of the United States for other purposes; but that said parcels so set aside did not include any part of the land upon which is located the springs hereinafter referred to as Goodwin Springs, or any part of the land hereinafter described as being within said reservation and susceptible to irrigation from said springs.

That in and upon said reservation, and upon which, if surveyed, would be in approximately the S. W. ¼ of the N. E. ¼ and the N. W. ¼ of the S. E. ¼ of section 26, township 4 S., range 22 E., G. & S. R. B. & M., and within the boundaries of said reservation, a number of springs of water, commonly known as Goodwin Springs, rise to the surface, from which springs there is a constant flow of water in large and substantial quantities, though the amount of such flow varies from time to time according to the season. Said springs are situated variously from 400 to 600 feet from the eastern boundary of said reservation, and the surface ground surrounding said springs is such that the natural flow of the waters arising from said springs is toward the easterly boundary line of said reservation, all of the waters therefrom flowing to and upon and over lands adjoining the said reservation, to wit: Lots Nos. 1, 4, and 5 of section 26, and lot No. 3 and the N. W. ¼ of the N. W. ¼ of section 25, township 4 S., range 22 E., G. & S. R. B. & M.

That large portions of the land embraced within the boundaries of said Indian reservation are well fitted and adapted for pasturage, and the feeding and grazing of stock, and since the establishing of the said reservation, and long prior to the acts of the defendant complained of in this action, the United States and the said Indians have had and still have large numbers of cattle and horses grazing upon the lands within said reservation, being and situate along and bordering upon the said Goodwin Springs, and some of the waters of the said springs were used by the plaintiff and the Indians aforesaid for watering of horses and cattle.

That other portions of the land within said reservation, and bordering on and adjacent to said Goodwin Springs, are arable and irrigable, and adapted to and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of grass, grain, and vegetables, but that such portions are of dry and arid character, and in order to make them productive large quantities of water are required for their irrigation.

That the lands surrounding said Goodwin Springs within said Indian reservation, which are susceptible to irrigation from said springs, had never been, prior to the commencement of this suit, in cultivation by means of water from said springs, except during the period when this land was occupied by the United States military forces in like manner as referred to herein. About 15 acres of land within said reservation are susceptible of cultivation and irrigation by means of the water from said springs.

That Indians living on said reservation have had and still have cattle and horses grazing upon said lands and within said reservation, being situate and bordering upon the said Goodwin Springs, and that the waters of said springs were used by the plaintiff and the Indians aforesaid for the watering of said cattle and horses, and said cattle and horses of the said Indians now water, and in all times in the past have watered, at said springs.

That for many years prior to the year 1872 the said lands upon which the said springs are situated, and the lands hereinafter described as being lands belonging to the defendant, were within a certain military reservation of the United States, known and designated as Camp or Ft. Goodwin military reservation; that in or about the year 1872 the said lands upon which the said springs are situated were, by an executive order of the President of the United States, included in and made a part of the said San Carlos Indian reservation; that in or about the year 1872 a certain military reservation of the United States, known and designated as the Ft. Thomas military reservation, was established, and the lands hereinafter described as being lands be-

longing to the defendant, save and except lot 1 of section 26 in township 4 S., range 22 E., were included and became a part of said Ft. Thomas military reservation; that said Ft. Thomas military reservation was abandoned by the United States in or about the year 1884.

During all of the times the said lands were used by the United States as a military reservation, and prior and subsequent to the time when the lands upon which said springs are situated were included within said Indian reservation, the waters from said Goodwin Springs were used upon said lots 1, 4, and 5, of section 26, and lot No. 8 and the N. W. ¼ of the N. W. ¼ of section 26, for domestic, culinary, and agricultural purposes, and by the use thereof there was during all such time raised upon said lands crops of grain, grass, and vegetables. Said crops were raised by the United States military forces then occupying said military reservation, and were used and consumed for government and army purposes. Said lot 1 in said section 26, not having been included in said Ft. Thomas military reservation, was, after the abandonment of said Camp Goodwin military reservation, settled upon by one Reynolds, and during the period from 1872 until subsequent to the abandonment of said Ft. Thomas military reservation, continuously used water flowing from said springs for the irrigation, cultivation, and raising of crops thereon.

That upon abandonment of said military reservation the said above-described lands, together with other lands within said reservation, were thrown open to settlement and entry under the laws of the United States, and that, pursuant to the laws of the United States relating to lands on abandoned military reservations, the value of said lands were appraised, the appraisers thereof fixing the value of said above-described lands with reference to the value of said waters from said Goodwin Springs for use upon and in irrigating said lands, which had been and could thereafter be used and applied upon the said lands as a means of irrigating said lands and the raising of crops thereon, a portion of the lands being appraised at a value of $15 per acre, and a portion thereof at a value of $5 per acre; that William Forbes paid the government the sum of $15 per acre for said lot No. 1 in said section 26, being a portion of the land the defendant is now, and has at all times mentioned herein, been irrigating by and with water from said Goodwin Springs, which amounts of $15 and $5 per acre, in accordance with said appraisement, this defendant has partially paid and will be required to pay to the government of the United States as a consideration to obtain full title to the lands hereinafter described, upon which the defendant made homestead entry under the laws of the United States, and upon which final proof has been made since the commencement of this action, while lands within such military reservation not having any water rights, and upon which the waters from said Goodwin Springs had not and could not be used or applied for irrigation purposes, were appraised at a value of 10 cents per acre, and were thrown open for entry and offered for sale by the United States at the value of $1.25 per acre.

That the homestead entry of the defendant was numbered 03541 in the United States land office at Phœnix, Ariz., and was made on the ——— day of November, 1906, he being then and at all times qualified to make such entry and obtain title from the United States. The lands embraced within such entry are lots 4 and 5 of section 26, and lot 8 and the N. W. ¼ of the N. W. ¼ of section 25, township 4 S., of range 22 E.

That prior to the said entry of the defendant certain lands now owned by him, to wit, lot 1 in section 26, township 4 S., range 22 E., were, on the 2d day of November, 1896, purchased from the United States by one William Forbes, to whom patent therefor was issued on the 19th day of April, 1897, and that said lands, together with the water rights appurtenant thereto, were afterwards conveyed to the defendant; that prior to the defendant's homestead entry certain persons had from time to time settled upon or made entries of the lands afterwards entered by the defendant and had used the water from said springs thereon, but had abandoned or relinquished the lands so settled upon or entered by them and ceased to occupy the same. Said persons sold and executed instruments of conveyance to the defendant of all their rights to the waters of said springs and the right to use the same claimed by them. Certain of said persons had made and recorded locations of claims to the waters of said springs.

That since the abandonment of said military reservations the defendant and the various persons who settled upon and made entries upon said lands, and who purported to convey their rights and interest to the defendant, have continuously used the waters from said Goodwin Springs upon said lands for a beneficial use thereon and for the irrigation and raising of crops thereon; that in or about the year 1896, the defendant's grantors constructed at a point east of the boundary line of said Indian reservation a reservoir, and in or about the year 1910 defendant enlarged said reservoir, so that it has a capacity of approximately 200 acre feet of water; that in the year 1912 defendant also sunk certain wells near the boundary of said reservation, but without said reservation, and has since pumped waters from said wells, and since the construction of said reservoir has caused the water from said springs, at seasons other than cropping seasons, and the surplus waters pumped from said wells and certain flood waters, to be conducted to said reservoir and there stored to be subsequently used in irrigating said lands. In the construction of said reservoir defendant has expended large sums of money.

At all times herein mentioned the waters flowing from said springs have been conducted through ditches or canals, in order to conserve the same, to and upon the lands now owned by the defendant. During the years 1910 and 1911 the defendant entered upon said Indian reservation and constructed a new ditch from said springs for the purpose of better conserving and of conducting said waters upon said lands so occupied by him, and also cleaned, repaired, and improved the then existing ditches and canals thereon for the same purpose, with no substantial injury or damage to the said lands within the said Indian reservation, and to no greater extent than for many years prior thereto had been done, and has since, by means of said ditches and canals, conducted said waters to and upon his said lands and has used the same thereon as aforesaid.

That on August 28, 1911, the irrigable land on the reservation upon which said springs are situated was, by the superintendent, assigned, in writing, to an Indian known as C. F. 65, or Skatizza, whose English name is George Wright; that said Indian fenced said lands and put in a crop of wheat thereon; that defendant would not permit said C. F. 65, or George Wright, to use any of the waters of Goodwin Springs, and that as a result his crop was a failure; that on June 18, 1912, said Indian, in writing, abandoned said land.

That on June 17, 1913, said lands on which said Goodwin Springs are located were assigned to Mrs. Alice Bossett, an Apache Indian woman of the San Carlos division of the White Mountain reservation. That the Indian office has agreed to build a house on said lands for said Mrs. Bossett, on the reimbursable plan authorized by act of Congress; i. e. by permitting her to pay for said house in four annual payments.

That, unless restrained by this honorable court, defendant will continue to use the said waters upon the said lands for a beneficial purpose; that without the right to use the water from said springs upon said lands and irrigate the same therewith, crops cannot be raised thereon, and the said homestead entry and said lot No. 1 of section 26 are of little value, and the said defendant would lose his labor and money expended in improving and bringing under cultivation a considerable portion thereof and the purchase price paid therefor; that with the right to the use of such water from said springs to irrigate said homestead entry and lot No. 1 are of great value.

That neither the defendant nor any of the prior occupants on any of the lands now owned by him took any steps to secure the right to construct ditches or canals or to secure the right of way therefor upon or over any part of said Indian reservation under any act of Congress or regulation of the Department of the Interior relating thereto.

Three questions arise on these facts, and will be discussed in the order in which they were presented at the oral argument:

[1] I. What is the character of the rights possessed by Indians in the land embraced within Indian reservations?

This question has been settled by repeated decisions of the Supreme

Court of the United States. In the case of Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440, that court said:

"The right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. * * * The right of the United States to dispose of the fee of lands occupied by the Indians has always been recognized by this court from the foundation of the government."

Numerous cases are cited as affirming this doctrine. See also Lone Wolf v. Hitchcock, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299; and Spaulding v. Chandler, 160 U. S. 395, 16 Sup. Ct. 360, 40 L. Ed. 469.

[2] II. Are the waters on an Indian reservation reserved for the use of the Indians?

Counsel for the government contend that, so far as reservations created by treaty are concerned, this question has been settled by the Supreme Court in the case of Winters v. United States, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340, and also that the rights of the Indians are the same no matter how the reservation may have been created. Counsel refer to the Winters Case as the principal authority with respect to water rights on Indian reservations and the right of the government in such waters.

The decision in that case is based solely on the agreement with the Indians and the implications which the court draws from the facts surrounding the creation of the Ft. Belknap reservation, and it is expressly stated therein that the reservation as a whole would be made unfit for the purposes for which it was created and incapable of maintaining the Indians if the waters of the Milk river were diverted as was done by the defendants. The bill in that case alleges that long prior to the diversion of the waters by the defendants the United States and the Indians had diverted 11,000 miners' inches of water, and used them beneficially on lands within the reservation, and that by means of such diversion and use of waters the United States "has been enabled by means thereof to train, encourage, and accustom large numbers of Indians residing upon said reservation to habits of industry, and to promote their civilization and improvement," and it was alleged with detail that all the waters were necessary for these purposes. It is thus expressly alleged that the United States and the Indians had actually used and appropriated the waters before the defendants had. It is clear that the use of the waters was necessary to the objects of the creation of the reservation, and it is a fair implication that the government and the Indians intended to reserve all the means necessary to that end.

[3] In the case at bar, the prior use of the water from the springs was devoted to the use of the United States and its soldiers on the military reservation, and it is nowhere alleged that the entire flow from the springs is necessary to the objects for which the reservation was created. On the contrary, the facts are that the waters of the springs are a negligible quantity as compared with the other springs on the reservation. Manifestly, then, the use of these waters is in no just sense necessary to the objects for which the reservation was created, and their use on lands outside the reservation neither defeats

nor impedes the fulfillment of the purposes which actuated the creation of the reservation here involved. The United States cannot be held to have reserved waters which it had never used for Indian reservation purposes, and which are physically incapable of supplying irrigation to an amount of land in the reservation sufficient to support more than one or two people, which, in effect, would be a denial or subordination on the part of the United States of the use to which the United States had itself applied the waters on lands outside the reservation.

Again, no just object of the creation of the reservation will suffer by devoting the waters to such use as will make them of most benefit to the users, and it is plain that the lands inside the reservation will not permit the full use of these waters. The view that the Winters Case, supra, turned solely on the agreement with the Indians, is strengthened by an examination of the brief of counsel for the United States, when they say on page 573 of 207 U. S. (28 Sup. Ct. 207, 52 L. Ed. 340):

"Under the just and reasonable construction of this agreement with the Indians, considered in the light of all the circumstances and of its express purpose, the Indians did not thereby cede or relinquish to the United States the right to appropriate the waters of Milk river necessary to their use for agricultural and other purposes upon the reservation, but retained this right, as an appurtenance to the land which they retained, to the full extent in which it had been vested in them under former treaties."

This view was sustained by the Supreme Court of the United States, and is the sole basis out of which the equities in favor of the Indians arise. The decision is not an authority that the mere creation ex vi termini reserves to the Indians, or to the United States for their benefit, the beneficial use of all waters flowing within the reservation. There is no treaty right of the Indians involved in this case, and there are no equities growing out of such treaty or agreement in the case. The United States certainly had the right to devote waters rising within the reservation to the use of people living outside the reservation, and the Indians could not complain.

Again, the lands on which the springs rise were, before they were placed in the Indian reservation, a part of the military reservation, and the waters were then used on the lands of the defendant, which were within the military reservation. Can it be said that, after that use had been permitted by the government, it intended to abandon its policy to open abandoned military reservations to settlement, and to devote these waters to a lesser use, to a use not essential to full enjoyment by the Indians of all advantages flowing from the establishment of the reservation, and to deprive the settlers to whom it had, in compliance with its laws, sold the lands embraced within the military reservation?

It is not alone a question of the *power* of the United States to devote these waters to the exclusive use of the Indians, but it is a question of whether it has *exercised the power*. The only act relied on by the government to reach this result is the placing of the lands on which the springs arise within the Indian reservation, and it seems to me

that this falls far short of evidencing such an intention or showing such a purpose.

III. Has the defendant any derivative right to the use of the waters superior to that of the government?

The same officers of the government charged with the protection of the Indians also execute its land laws, for both are under the charge of the Secretary of the Interior, and his action in approving the sale of the land with water rights is of equal dignity and binding force on the government as the demand now made by his subordinate with his approval for the use of the waters by the Indians. It is as much the policy of the United States to have abandoned military reservations settled up as it is to provide a reservation for the Indians. It is shown that 15 acres of land within said reservation are susceptible of cultivation and irrigation by means of the waters from said springs; but it will hardly be contended that the use of these waters for agricultural purposes is essential to the comfort or welfare of the Indians on the reservation.

It seems to me, under all the facts of the case, that it would be inequitable to permit the said waters to be diverted from defendant's lands and used upon the 15 acres of land within the reservation, and therefore a judgment will be entered for the defendant.

UNITED STATES v. WEST SIDE IRRIGATING CO.

(District Court, E. D. Washington, S. D. January 29, 1916.)

No. 228.

1. CORPORATIONS ⟸513—CONTRACTS—AUTHORITY OF OFFICERS—PLEADING WANT OF AUTHORITY.

Want of authority in the officers of a defendant corporation to execute or authorize the execution of a contract relied upon by plaintiff as entitling it to the relief sought was a special defense, to be specially pleaded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2017–2027, 2031–2034, 2036–2045; Dec. Dig. ⟸513.]

2. ESTOPPEL ⟸95—SILENCE—AUTHORITY OF OFFICERS.

The Secretary of the Interior having refused to approve a reclamation project, unless conflicting claims of appropriators of water from a river were adjusted, an irrigation company, diverting water from such river, executed an agreement limiting its claim to specified quantities. Though all of the stockholders knew of the contract, they did not disavow the authority of the officers to execute it, but maintained silence respecting the matter for almost two years, during which the government proceeded with the work and with a vast outlay of money, in the belief that all disputes had been settled. *Held* that, by failure of the stockholders to disavow the unauthorized acts of the corporate officers and give notice of disavowal to the government, they and the corporation were estopped to question the authority of the officers or the validity of the contract.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 285–287; Dec. Dig. ⟸95.]

3. WATERS AND WATER COURSES ⟸158—CONTRACTS—LIMITING DIVERSION—CONSTRUCTION.

When a reclamation project was under consideration, the Secretary of the Interior refused to approve the plan unless conflicting claims to wa-

ter from a river were adjusted, and local committees were appointed to obtain such an adjustment, at the instance of one of which committees an irrigation company signed an instrument reciting that a preliminary investigation showed that all the low-water flow of the river had been appropriated, that it would be necessary to store surplus waters of the flood season, and that no irrigation project by the government could be recommended as feasible unless the water to which each user was entitled was definitely agreed to, and providing that the company limited its claim to water to 80 cubic feet per second during certain months. *Held*, that as the object of the government was to fix the quantity of the water diverted from the river, and not the quantity actually used for irrigation purposes, the water was to be measured at the intake of the company's canal, where it was diverted from the river, and not at the various points where it was diverted from the canal by the various owners of land irrigated by the company.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 184, 186–188; Dec. Dig. ⟸158.]

4. WATERS AND WATER COURSES ⟸158—CONTRACTS LIMITING DIVERSION—CONSIDERATION.

Where parties having or claiming rights in the water of a river undertook for reasons satisfactory to themselves to compromise and settle their rights, such settlement and compromise was an adequate consideration for an agreement limiting the quantities of water to be claimed by them.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 184, 186–188; Dec. Dig. ⟸158.]

5. WATERS AND WATER COURSES ⟸152—RESTRAINING DIVERSION OF WATER.

The government, like an individual, can appropriate only so much water as it applies to beneficial uses, and can only restrain a diversion which operates to its prejudice.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. ⟸152.]

In Equity. Suit by the United States against the West Side Irrigating Company. Decree for complainant.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., E. W. Burr, Sp. Asst. U. S. Atty., of North Yakima, Wash.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendant.

RUDKIN, District Judge. The West Side Irrigating Company was organized and created under the laws of the territory of Washington on the 5th day of June, 1889, for the purpose of constructing ditches and flumes to convey water from the Yakima river to irrigate lands and water stock in the West Kittitas valley, Kittitas county, Washington Territory. The original incorporators and stockholders were farmers owning lands under the line of the proposed canal, whose chief object was to obtain a supply of water to irrigate their farms and for stock and domestic purposes. The corporation thus formed has no income and pays no dividends. Each stockholder is entitled to divert and use the water conducted through the canal in proportion to the amount of his capital stock, and contributes to the expense of maintaining and repairing the canal in the like proportion. In other words, the corporation is a mere agency to construct, maintain, and repair the canal, and to conduct and distribute water through the same for the use and benefit of its stockholders. Construction work on the canal

commenced immediately after the incorporation, and was completed within a couple of years thereafter; but the ditch has been cleaned and repaired, and no doubt to some extent enlarged, since then. No measurements have ever been made or taken by the defendant company of the volume of water conducted through the canal; but it now claims that it requires 4,000 inches of water, measured according to the system or module employed by it, to properly irrigate the lands underlying the canal and owned by its stockholders.

During the year 1905 the government had under contemplation the construction of storage reservoirs and irrigation works in the Yakima valley under Act Cong. June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. 1913, §§ 4700–4708), commonly known as the "Reclamation Act," and had withdrawn or appropriated all of the then unappropriated waters of the Yakima river and its tributaries under the act of the Legislature of the state of Washington of March 4, 1905 (Laws 1905, p. 180), entitled, "An act relating to the appropriation of waters of the state for irrigation purposes, granting to the United States the right to exercise the power of eminent domain in acquiring lands, water and other property for rights of way, and for reservoirs and other irrigation works, granting to the United States certain rights in state lands and * * * waters of the state, relating to water users' associations, and declaring an emergency." The Secretary of the Interior refused to approve the plan commonly known as "the Tieton and Sunnyside projects," or to enter upon the construction of irrigation works or storage reservoirs in the Yakima valley, except upon compliance with certain conditions among which were the following:

"First. The adjustment of all conflicting claims of those who are appropriating water from the Yakima river or any other body of water, for irrigation power, or any other purpose.

"Second. The determination of all suits now pending to prevent the diversion of water from the Yakima river to the Yakima Indian reservation, and any and all other litigation that in any way tends to embarrass or restrict the appropriation of the waters from said river or any other body of water needed for the irrigation of the lands under said proposed projects."

The attitude of the government was explained to the water users of the Kittitas and Yakima valleys by officers or representatives of the Reclamation Service, and local committees were appointed to obtain a satisfactory settlement and adjustment of all claims to water from the Yakima river and its tributaries to meet the demands and requirements of the Secretary of the Interior. At the instance of one of these committees the defendant company signed the following agreement:

"The West Side Irrigating Company to Public.

"Between the Appropriator Taking Water from the Yakima River and Its Tributaries.

"Whereas, the Reclamation Service of the United States has been requested to investigate the water resources of the Yakima watershed with a view to the further development and increase of irrigation therein, under the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388), known as the Reclamation Act; and whereas, the officers of the Reclamation Service in a preliminary investigation have found that in all the low-water flow of the Yakima river and its tributaries has been appropriated and is now

being diverted by the various canals within said watershed, and that in order to irrigate additional lands within said watershed it will be necessary to store the surplus waters of the flood season; and whereas, no irrigation project to be undertaken by the United States within the said watershed can be recommended as feasible unless the quantity of water to which each present user from the Yakima river and its tributaries is entitled be first definitely ascertained and agreed to; and whereas, the undersigned claim certain quantities of water from the Yakima river and its tributaries, and are willing to limit their claim to the said waters to the quantities of water designated in the following schedule:

Schedule.

Cubic Feet Per Second.

April to August, inclusive	September	October
80	80	34

"Now, therefore, in order to avoid litigation, to encourage the storage of water in the Yakima watershed, and to secure the indirect benefit derived from further irrigation through federal enterprise, each subscriber to this agreement or to a copy thereof, differing only as to the quantities of water specified, agrees to limit and hereby does limit its respective rights of appropriation from said Yakima river and its tributaries to the above-specified amounts: Provided, that it is hereby understood and agreed that the limitation of water rights as herein specified is made as a compromise, in order to secure the benefits above referred to, and shall not bind any party hereto in any event, unless the determination to construct storage and irrigation works by the United States under the Reclamation Act shall be announced by the Secretary of the Interior within two years from the date upon which he is furnished with properly authenticated copies of the agreements of this form duly executed by or on behalf of such proportion of the claimants of the waters of the Yakima river and its tributaries as shall be satisfactory to the Secretary of the Interior.

"In witness whereof, the undersigned has caused these presents to be executed in its corporate name, by its president, and attested by its secretary, and its corporate seal to be affixed, by authority of its board of directors, heretofore duly made and entered this 21st day of October, 1905.

"The West Side Irrigating Company,
"By Mitchell Stevens, Vice President."

The determination to construct storage and irrigation works in the Yakima valley was announced soon after the execution of the above agreement, and well within the two years specified, and the government has expended upwards of $8,000,000 in the construction and maintenance of such works since that time. The present suit was instituted to restrain the defendant from diverting water from the Yakima river in excess of the quantity set forth in this so-called limiting agreement, and the case is now before the court for final hearing on testimony taken before a commissioner appointed for that purpose.

It is conceded throughout the testimony that the defendant has diverted water from the river in excess of 80 cubic feet per second of time, and it asserts the right to do so upon three grounds: First, because the limiting agreement was ultra vires and void; second, because

the water should be measured at the several points where it is diverted from the canal by the different stockholders or users, and not at the intake of the canal, or at least that such was the understanding of the defendant; and, third, that the defendant at all times claimed the right to divert and use 4,000 inches of water measured according to the system or module adopted by it; that it was represented to the defendant that 80 cubic feet per second was the equivalent of the 4,000 inches thus measured, while in truth and in fact the 4,000 inches, as measured by the defendant, is the equivalent of upwards of 90 cubic feet per second; and it is claimed that the difference between the 80 cubic feet per second, measured at the intake, and the 4,000 inches as measured by the defendant at the points of delivery to the different stockholders, is 24.6 cubic feet per second. In other words, the defendant claims and asserts the right to divert from the river 104.6 cubic feet per second, while the government claims that it is limited to 80 cubic feet per second.

[1, 2] 1. The defense of ultra vires, or, more properly speaking, the defense that the execution of this limiting agreement was without the scope of authority of the officers who executed it and authorized its execution, cannot prevail at this time. In the first place, the authority of these officers is not directly challenged by the answer, and want of authority is a special defense, which must be specially pleaded. But in any event, and regardless of the pleadings, all the stockholders had notice of the execution of the contract soon after it was signed, and it then became their imperative duty to either abide by the contract or promptly disavow the unauthorized acts of the corporate officers, and bring notice of such disavowal home to the government, or to some authorized officer of the government. But instead of so doing a called meeting of the stockholders was held on the 2d day of January, 1906, for the purpose of discussing and considering the contract, and after full discussion a motion was adopted "that no action be taken to relinquish any water at the present time." The corporation, its officers, and stockholders maintained a discreet, if not an intentional, silence concerning this action for almost two years, and permitted the government to proceed with its work and with its vast outlay of money in the belief that all water disputes had been settled and adjusted in accordance with its requirements. That the defendant and its stockholders, under these circumstances, should now be estopped to question the authority of the officers or the validity of the contract, does not, in my opinion, admit of question. 10 Cyc. 1076; Indianapolis Rolling Mill v. St. Louis, etc., Rd., 120 U. S. 256, 7 Sup. Ct. 542, 30 L. Ed. 639; Penn. Ry. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 381, 9 Sup. Ct. 770, 33 L. Ed. 157; Construction Co. v. Fitzgerald, 137 U. S. 109, 11 Sup. Ct. 36, 34 L. Ed. 608; Augusta, T. & G. R. Co. v. Kittel, 52 Fed. 63, 73, 2 C. C. A. 615.

[3] 2. The contention that the water should be measured at the many points where diverted from the canal for use by the stockholders, instead of at the intake of the canal, where the water is diverted from the river, or that the officers and stockholders of the defendant could have so understood, does not impress me. The question of the settlement and adjustment of the conflicting claims to water from the

Yakima river and its tributaries was under discussion for months. As early as April 1, 1905, the following motion was adopted at a meeting of the stockholders of the defendant company:

"Motion by W. A. Stevens, seconded by J. N. Burch, that the stockholders of the West Side Irrigating Company make claim to the government Reclamation Bureau to 4,000 inches of the waters of the Yakima river, and the board of trustees to notify Splawn and Ellison to make their claims to water to flow through the company's canal, and in case they do not make their claim the board of trustees to claim 1,000 inches for Splawn and Ellison."

It may here be stated by way of explanation that the claims of Splawn and Ellison are in no wise connected with the present claim of the defendant company. The object and purpose of the government was to ascertain and fix the quantity of water diverted from the river, not the quantity actually used for the purpose of irrigation. Water lost by seepage or evaporation while flowing through the canal was as much lost to the government as the water actually used for the purpose of irrigation. True, no doubt, some of the seepage water found its way back into the river; but that is equally true, though perhaps to a less extent, of water actually used for irrigation. But the main point is that the purpose of the government was unquestionably to fix the amount of the diversion at the point of diversion. No man of average intelligence could have understood otherwise, and a reading of the record convinces me that the officers and stockholders of the defendant company measure up to that standard.

[4] 3. The 80 cubic feet per second is conceded to be the equivalent of 4,000 inches measured under a 4-inch pressure, and I feel that I am well within the record in stating that the latter unit has almost become the standard of measurement in the locality in question. Such is the unit prescribed, in numerous decrees of the courts of Kittitas county, extracts from which are appended to the government's brief, and not denied by the defendant. Furthermore, it was testified at the trial that the defendant's module of measurement was the same as that prescribed in one of these decrees. The officers and stockholders of this company are not as ignorant of the ways of the world and of water measurements as they now profess to be. They have lived in the midst of irrigation, and have been surrounded by, if not actually involved in, litigation over water rights, for years. The company had its origin in litigation over the waters flowing in the tributaries of the Yakima river, and its records repeatedly refer to inches of water and other matters showing a general knowledge of water measurements. And, without discussing the subject further, I will only add that the record convinces me that the officers and stockholders of this company are fully competent to understand and appreciate their rights and abundantly able to protect them.

Furthermore, the purpose of this agreement was not to fix or establish existing rights, but to fix and prescribe the rights which the defendant company would have and exercise in the future. The defendant was under no obligation to sign the agreement or to relinquish any rights it might have, and the government was under no obligation to take up irrigation works in the Yakima valley. Both parties, how-

ever, had or claimed rights in the waters of the river, and they undertook for reasons satisfactory to themselves to compromise and settle these rights. This settlement and compromise was an adequate consideration for their agreement, and their course was in full accord with the policy of the law. Such an agreement should not be set aside, except for cogent reasons, established by clear and convincing proof. I know that promises made in aid of public improvements are lightly made and lightly regarded, and are too often followed by repentance and repudiation; but this does not detract from their legal obligation, or relieve courts of the necessity of enforcing them in a proper case.

[5] For the reasons thus stated, I am satisfied that the plaintiff is entitled to the relief prayed for in the complaint whenever the diversion of a greater quantity of water from the river will interfere with or prejudice the rights of the government. But as said in a recent case pending in this court:

"The government, like an individual, can appropriate only so much water as it applies to beneficial uses, and can only restrain a diversion which operates to its prejudice." U. S. v. Union Gap Irrigation Co. (D. C.) 209 Fed. 274.

In that case a diversion after the 1st of July of each year was restrained; the court finding that prior to that time no prejudice would result to the government. It may be that in exceptional years the date thus fixed will be too late; but the decree should be definite and certain, and probably that date could be fixed upon arbitrarily, the court reserving the right to modify the decree whenever exceptional circumstances require a modification. This question can be determined, however, when the final decree is submitted for the approval of the court.

Let a decree be prepared accordingly.

UNITED STATES v. SCHALLINGER PRODUCE CO.

(District Court, E. D. Washington. October 5, 1914.)

1. INDICTMENT AND INFORMATION ⟸52—VERIFICATION OF INFORMATION.

While an information filed by the United States attorney under the sanction of his official oath, and without verification, would be sufficient in certain cases, an information not so filed, but expressly stating upon its face that it was made upon the oath of the several parties whose affidavits were annexed, was not sufficient, unless the affidavits could be considered.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163–168; Dec. Dig. ⟸52.]

2. INDICTMENT AND INFORMATION ⟸52—VERIFICATION OF INFORMATION.

Notaries public have no authority under the laws of the United States to administer any oaths in connection with criminal prosecutions, and hence an information, expressly stating that it was made upon the oath of parties whose affidavits were annexed, was defective, where three of the affidavits were taken before notaries public, and the fourth, standing alone, was of no avail.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163–168; Dec. Dig. ⟸52.]

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3. INDICTMENT AND INFORMATION ⟸52—VERIFICATION OF INFORMATION—"CRIMINAL PROCEEDING."

Though a corporation cannot commit certain crimes, and may not be arrested or imprisoned, a proceeding against it for the violation of a criminal statute is a "criminal proceeding," with all the incidents of such a proceeding, and an information therein is defective, if made upon the oath of parties named in annexed affidavits taken before notaries public.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163–168; Dec. Dig. ⟸52.

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

Criminal proceeding by the United States against the Schallinger Produce Company. On motion to quash the information. Motion granted.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and F. L. Stotler, Asst. U. S. Atty., of Colfax, Wash, for the United States.

Wakefield & Witherspoon, of Spokane, Wash., for defendant.

RUDKIN, District Judge. Section 2 of the act of Congress of June 30, 1906 (34 Stat. 768, c. 3915), declares:

"That the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any state or territory or the District of Columbia to any other state or territory or the District of Columbia, or to a foreign country, or who shall receive in any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court. * * *" Comp. St. 1913, § 8718.

Section 3 declares:

"That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any territory of the United States, or which shall be offered for sale in unbroken packages in any state other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any state, territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country." Comp. St. 1913, § 8719.

Section 4 declares:

"That the examination of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid." Comp. St. 1913, § 8719.

Section 5 declares:

"That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any state, territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings, to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided." Comp. St. 1913, § 8720.

Section 12 (Comp. St. 1913, § 8728) declares, among other things, that the word "person," as used in the act, shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations.

The information filed in this case by the United States attorney under the foregoing provisions recites that the information is filed with leave of court first had and obtained, and—

"gives the court here to understand and be informed, upon the oath of Abraham L. Knisely and Duncan A. McIntyre, of Fred Nelson, and of Daniel N. Walsh, whose affidavits are hereto attached and made a part hereof as follows, to wit. * * *"

The information then charges that the defendant a corporation organized under the laws of the state of Washington, with its principal office and place of business in the city of Spokane, did, on or about the 22d day of November, 1912, contrary to the provisions of the foregoing act, ship and deliver for shipment in interstate commerce from the city of Spokane, state of Washington, to the city of Cœur d'Alene, in the state of Idaho, consigned to Nelson Bros. at Cœur d'Alene, in the state if Idaho, certain cases containing eggs, and that the article of food so shipped was misbranded.

To the information are attached the four affidavits therein referred to. The first two were taken before a notary public in the state of Oregon, the third before a notary public in the state of Idaho, and last before the clerk of the District Court of the United States for the Northern District of West Virginia. The defendant has appeared specially and moved to quash the information, on the grounds, first,

that the affidavits thereto attached fail to show probable cause for the prosecution and are insufficient to support the information; and, second, because the information does not charge a crime under the act of Congress in question.

[1] At common law an information might be filed by the Attorney General simply on his oath of office and without verification; and it has generally been held in this country, following the common-law rule, that verification of an information by the prosecuting officer is unnecessary, unless required by some statutory or constitutional provision. There is no law of the United States requiring verification of informations by the prosecuting officer, but a verification of some kind is no doubt indispensable under the fourth amendment to the Constitution, where a warrant of arrest is sought or applied for. See Weeks v. United States, 216 Fed. 292, 132 C. C. A. 436, L. R. A. 1915B, 651, decided by the Circuit Court of Appeals for the Second Circuit June 18, 1914, where this question is fully considered. Inasmuch as this prosecution is against a corporation, where no warrant of arrest is applied for or can be issued, I am of opinion that an information filed by the United States attorney under the sanction of his official oath, and without verification, would be sufficient. But the information under consideration was not so filed, for it expressly states upon its face that it is upon the oath of the several parties named in the annexed affidavits. Unless I am at liberty to consider these affidavits, therefore, the information has no sanction whatever.

[2] As already stated, the three principal affidavits were taken before notaries public in other states, and the fourth, standing alone, is of no avail. The question therefore arises: Can these affidavits, taken before notaries, be considered by the court? I am of opinion that they cannot. In United States v. Curtis, 107 U. S. 671, 673, 2 Sup. Ct. 507, 509, 27 L. Ed. 534, the court said:

"So that the underlying question is whether the notary public, whose commission is from the state, was, at the respective dates of the oaths taken by Curtis, authorized by the laws of the United States to administer such oaths. This question we are constrained to answer in the negative. We are not aware of any act of Congress which gave such authority to notaries public in the different states at the several dates given in the indictment. The Assistant Attorney General insists that such authority may be found in section 1778 of the Revised Statutes, which declares: 'In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any state or territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any state, district, or territory, or any of the commissioners of the Circuit Courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace.' The authority of the notary to administer these oaths to Curtis cannot be derived from that section, unless at the dates in question they could, under the laws of the United States, have been taken before justices of the peace in Missouri. But the latter officers had no such authority by any federal statute to which our attention has been called, or which we are able to find. Section 1778, so far as notaries public are concerned, embodies the substance of similar provisions in the acts of September 16, 1850 (chapter 52), and July 29, 1854 (chapter 159), and section 20 of the act of June 22, 1874 (chapter 390). But nothing in these acts, even if they remained in force

after the adoption of the Revised Statutes, supports the authority exercised by the notary public who administered these oaths to defendant.

"Counsel for the United States further insists that a proper construction of section 1778 will authorize a notary public in *any* State to administer oaths to officers of national banking associations, when making reports to the Comptroller of the Currency, if justices of the peace may lawfully do so in this District. But in our judgment no such interpretation of that provision is admissible. What Congress intended by that section was to give notaries public in their respective states the same authority, in the administration of oaths, as is given, under the laws of the United States, to justices of the peace in the same states, and to notaries public in this District the same authority, in administering oaths, which, under the laws of the United States, might be exercised by justices of the peace in this District. We have seen, however, that to justices of the peace, in the several states, such authority had not been given by any provision in the Revised Statutes, or by any act of Congress prior to their adoption. Nor can any support for the indictment be derived from the act of August 15, 1876 (chapter 304), which declares 'that notaries public of the several states, territories, and the District of Columbia, be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do.' The power of commissioners of the Circuit Court did not, at the passage of that act, extend to the taking of oaths to reports by officers of national banks. They could take affidavits when required, or allowed in any civil cause in a Circuit or District Court (Rev. Stat. § 945 [Comp. St. 1913, § 1571]; Act Feb. 20, 1812, c. 25; Act March 1, 1817, c. 30); or administer oaths where, in the same state, under the laws of the United States, oaths in like cases could be administered by justices of the peace (Rev. Stat. § 1778); or they could take evidence, affidavits, and proof of debts in proceedings in bankruptcy (Rev. Stat. §§ 5003, 5076; Act March 2, 1867, c. 176; section 3 of the act of July 27, 1868, c. 258; section 20 of the act of June 22, 1874, c. 390). But the authority of commissioners did not extend to such oaths as were administered to Curtis."

[3] It follows from this decision that a notary public has no authority under the laws of the United States to administer any oaths in connection with criminal prosecutions. The United States attorney frankly conceded this on the argument, but contended that inasmuch as this is a prosecution against a corporation, commenced by summons, it must be deemed to be a civil action. To this proposition I cannot yield assent. All persons, whether natural or artificial, stand upon an equal footing before the criminal laws of the country. True, a corporation, by reason of its inherent nature, cannot commit certain crimes, and may not be arrested or imprisoned; but a proceeding against it for the violation of a criminal statute is, and must be, in its very nature, a criminal proceeding with all the incidents of such a proceeding until the Legislature has declared otherwise.

Believing, therefore, that the information in itself is insufficient, because not under the sanction of the official oath of the United States district attorney, and that I may not consider the affidavits of notaries thereto attached, the motion to quash must be granted; and it is so ordered.

NEW YORK COAL CO. v. SUNDAY CREEK CO. et al.

(District Court, S. D. West Virginia. February 9, 1916.)

1. COURTS ⇐255—UNITED STATES COURTS—JURISDICTION.
Jurisdiction in an inferior federal court is limited by the acts of Congress affirmatively conferring it, and the powers of all such courts are to be sought in the acts of Congress.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 792, 794, 805; Dec. Dig. ⇐255.]

2. REMOVAL OF CAUSES ⇐12—COURT TO WHICH CAUSE MAY BE REMOVED—"PROPER DISTRICT."
Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010), authorizes the removal from state courts of suits of which the United States District Courts are given original jurisdiction. Section 29 (section 1011) provides that the party entitled to remove such a suit, except suits removable on the ground of prejudice or local influence, may file a petition for the removal in the District Court in the district where such suit is pending. *Held* that, where the only ground of jurisdiction was a diversity of citizenship, an action brought by a Maine corporation against a New Jersey corporation and a West Virginia corporation in a court of Ohio, where both defendants were doing business, and where the cause of action arose, could not be removed by the West Virginia corporation to the District Court for one of the districts of West Virginia, as the "proper district" within section 28 is the district in which the suit is pending, especially as the clerk of the state court would not be within the territorial jurisdiction of any other District Court and could not be reached by its process.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. ⇐12.
For other definitions, see Words and Phrases, Second Series, Proper District.]

At Law. Trespass on the case by the New York Coal Company against the Sunday Creek Company and another. On motion by plaintiff to remand to a state court. Cause remanded.

Louis G. Addison, O. E. Harrison, and T. J. Keating, all of Columbus, Ohio, for plaintiff.

Marshal & Fraser, of Toledo, Ohio, and W. O. Henderson, of Columbus, Ohio, for defendants.

KELLER, District Judge. This action was originally brought in the court of common pleas of Franklin county, Ohio, by plaintiff, a corporation organized under the laws of the state of Maine, against the Continental Coal Company, a corporation organized under the laws of the state of West Virginia and doing business in the state of Ohio, and Sunday Creek Company, a corporation organized under the laws of the state of New Jersey and also doing business in the state of Ohio. The Sunday Creek Company was served with process and appeared in the state court, and subsequently the Continental Coal Company appeared for the sole purpose of filing a petition for removal of the case to the District Court of the United States for the Southern District of West Virginia, that being the state and district of its incorporation and residence. The state court granted the peti-

tion, and the defendant Continental Coal Company has filed in this court a certified copy of the record in the case, and it is now before me upon a motion, by the plaintiff, to remand the case to the court of common pleas of Franklin county, Ohio, for lack of jurisdiction in this court to entertain the cause upon the petition for removal; its motion to remand being couched in the following language:

"United States District Court for the Southern District of West Virginia.

"New York Coal Company, a Corporation, Plaintiff, v. Sunday Creek Company, a Corporation, and Continental Coal Company, a Corporation, Defendants.

"Motion to Remand.

"Now comes the plaintiff, New York Coal Company, by its attorneys, and appearing especially for the purpose of this motion only, saving and reserving any and all objections it has to the manifold imperfections in the mode, manner, and method of the removal papers, and expressly denying that this court has jurisdiction of this cause or of the plaintiff herein, respectfully moves the court to remand this cause to the common pleas court of Franklin county, Ohio, from whence it was removed, for the reason that this suit does not involve a controversy and dispute properly within the jurisdiction of this court, and that it appears from the face of the record herein and from the petition filed in the common pleas court, from which said cause was removed, that the plaintiff is a citizen and resident of the state of Maine, and that the defendant Sunday Creek Company is a citizen and resident of the state of New Jersey, and that the defendant Continental Coal Company is a citizen and resident of the state of West Virginia, and this court cannot acquire jurisdiction of this cause by removal."

This motion raises a question which I had supposed was finally settled in its favor by the decisions of the Supreme Court of the United States. Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164.

[1, 2] Jurisdiction in an inferior federal court is limited by the acts of Congress affirmatively conferring it, and the powers of all such courts are to be sought in the acts of Congress. The statute providing for the removal of causes has been in substantially its present form and language since the year 1887. Prior to the decision in Re Wisner, supra, authoritatively settling the doctrine, that a cause pending in a state court of a neutral state cannot be removed to the federal court sitting in such state over the objection of the plaintiff, no one, so far as I am aware, had ever thought, or ever claimed, that a suit so pending in the state court of a neutral state could be removed into the federal court of some other state; and it has been *since* the effect of the decision in the case of In re Wisner has been apprehended that this later interpretation of the removal statute has been set up, in the effort to uphold the absolute right, so called, of a nonresident defendant, sued in a state court, to remove the controversy to a federal court, viz. to the federal court of the district of his own residence.

To my mind, not only is there no reason for such construction, but such construction is utterly opposed to the only reasons upon which removals are authorized by the statute, and to the clear language of the statute itself. What are the reasons upon which removals of causes are permitted from state to federal courts? They are of two

classes—the first dependent upon the nature of the controversy, and the second on the citizenship and residence of the parties. In the first class of cases, where the cause of action arises out of a right created by a federal law or treaty, the defendant (with one single anomalous exception now embodied as such in the Judicial Code) may remove the cause from the state to the federal court, without regard to his citizenship or residence, upon the theory that, the cause of action arising under federal law or treaty, it is manifestly proper that, upon the demand of either party, it should be tried in the federal court.

In the other class of cases the reasoning proceeds upon the theory that the nonresident defendant (who alone may remove) is, or at least may be, at a disadvantage in the state court as compared with the resident plaintiff. It is to be remembered that the original jurisdiction of federal courts arising out of diversity of citizenship is not *general,* but, on the contrary, is limited to two specific districts, namely, that of the residence of the plaintiff and that of the residence of the defendant, or defendants, if there be more than one and they reside in the same district. There is, of course, the further limitation upon actual jurisdiction that legal service can be had upon all the parties within the jurisdiction. When all these conditions can be fulfilled, and then only, can it be said that a United States court has *complete* jurisdiction of a controversy, conferred by statute, in a cause where the only ground of jurisdiction is a diversity of citizenship existing between the parties.

It is true that a qualified jurisdiction in other districts arising by consent of the parties—or its equivalent, the waiver of objections—has been sustained in numerous cases by the Supreme Court of the United States, both in cases originally brought in the federal court and in other cases removed to such courts; but none of these cases gives any support in favor of a jurisdiction, without such consent or waiver, in any other than the two districts pointed out by statute, and none of the cases on removal gives any warrant in favor of jurisdiction in any other territorial district than that in which the suit was pending in the state court.

Recurring to the reason for permitting removals in the case of diversity of citizenship, let me ask how it can possibly apply in the instant case? The plaintiff is a corporation of Maine, one of the defendants is a corporation of West Virginia, and the other a corporation of New Jersey; and the suit was brought in the state court of Ohio, where both defendants are doing business, and where the contract of lease, whose covenants are alleged to have been broken by defendants to the damage of the plaintiff, is being executed.

Can it be said that the underlying reason for removal (adverted to in the discussion in both Senate and House of Representatives in 1887 when the present law was passed) exist in this case? Is the plaintiff, a nonresident landowner, likely to be more highly favored in the courts of the state of Ohio than the defendants, who have been actually there operating the mines and personally acquainted and in touch with the citizens of the community? I think not. They all stand on a parity as nonresidents of the state.

Again, the construction of the statute here contended for would give rise to no end of controversy, and practical futility, all of which is unwarranted by any language of the statute or fair inference from what is contained therein. In the present case, let us suppose that the state court had refused the prayer of the petition to remove this case, and the clerk of the court had declined to furnish an exemplification of the record in the state court. In what manner could this court, assuming that it had jurisdiction, compel the certification of the record from the state court, as provided for in section 39 of the Judicial Code (Comp. St. 1913, § 1021), which punishes the refusal on the part of a clerk by fine and imprisonment by the District Court of the United States to which said action or proceeding was removed? The clerk of the state court is not within the territorial scope of the jurisdiction of this court and could not be reached by its process.

The provision of the Judicial Code in relation to the jurisdiction of courts and the removal of causes thereto from a state court were taken bodily from the act of 1887 (24 Stat. 552, c. 373), as corrected by the act of August 13, 1888 (25 Stat. 434, c. 866), and in those acts the only provision for removal was to the District (then Circuit) Court of the district in which the suit was pending in the state court. I take the position that the law passed by Congress in 1887, and corrected and amended August 13, 1888, is a harmonious whole, and that the *proper* district referred to in section 2 of the act, now embodied in section 28 of the Judicial Code, is exactly the same district as that referred to in section 3 of the act, now embodied in section 29 of the Judicial Code, viz. the district in which the suit may be territorially pending in the state court, from which it is sought to be removed.

The language of the act of 1887, as corrected by the act of August 13, 1888, in so far as it provides for the removal of a suit from a state court to a court of the United States "for the proper district" is precisely the same as it was in the act of March 3, 1875 (18 Stat. 470, c. 137), and the procedure for removal provided by the act of March 3, 1887, as corrected by that of August 13, 1888, was precisely the same as that provided by section 3 of the act of March 3, 1875, except as to the right of removal, which has been restricted by the later acts. In other words, the act of March 3, 1875, provided for the removal "of such suits into the Circuit Court to be held in the district where such suit is pending"; and no one, under the provision of that act, ever contended for the right to remove a case from a state to a federal court of some other state.

I fail to see, in the face of the definite provision declaring where any such removal shall be had, any permission to remove a case from a state court to any other court than the one so pointed out. It must be true that jurisdiction upon removal must be affirmatively conferred, as well as original jurisdiction, and I regard the words "proper district" as entirely tantamount to the phrase found in the later section of both acts, "district where such suit is pending."

I am aware that this view of the jurisdiction of removal has been rejected by Judge Ray, of the Northern district of New York, in Park Square Automobile Station v. American Locomotive Co., 222

Fed. 979, and by Judge Toulmin, of the Southern district of Alabama, in Stewart v. Cybur Lumber Co., 211 Fed. 343; but my views being in harmony with those expressed by Judge Hanford in Puget Sound Sheet Metal Works et al. v. Great Northern Railway Co., 195 Fed. 350, by Judge Rose in St. John v. United States Fidelity & Guaranty Company, 213 Fed. 685, wherein the statute is exhaustively discussed, by Judge Hand in St. John v. Taintor, 220 Fed. 457, by Judge Geiger in two cases of Pavick v. Chicago, M. & St. P. Ry. Co. and Klawa v. Same, 225 Fed. 395, and still later by Judge Sanborn in Eddy v. Chicago, etc., Railway Co., 226 Fed. 120, I content myself with citing those cases.

A strong argument has been made by counsel for the plaintiff upon the point that under the laws and decisions of the state of Ohio the two defendants occupied the relation of principal and surety under the contract sued upon, and that hence the cause was not separable within the purview of the federal statute, and the time having expired for the filing of the petition for removal by the Sunday Creek Company, there could, in no event, be a removal of the cause. It seems to be unnecessary to discuss this point, as I take the view that in no event could this cause be removed to the Southern district of West Virginia, and I therefore omit any discussion of the point so raised by counsel for the plaintiff.

For the reasons assigned, an order may be entered remanding this case to the court of common pleas of Franklin county, Ohio, from which it was sought to be removed.

THE NEW YORK CENTRAL NO. 18.

THE OVERBROOK.

(District Court, E. D. New York. January 7, 1916.)

1. COLLISION ⟸63—TUGS WITH TOWS—COMMON FAULTS.

Two tugs, one crossing with tows from Jersey City to the New York side of the Hudson, and the other making up her tow of two car floats, which she had just brought from a slip on the New York side, with a strong ebb tide, both *held* in fault for a collision between the tows.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 79; Dec. Dig. ⟸63.]

2. COLLISION ⟸37—RULES FOR PREVENTING—STARBOARD HAND RULE.

The starboard hand rule applies to a boat approaching on a crossing course, so as to pass other boats in motion and affected by the tide, even though they do not seem to be navigating in a definite direction.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 34-36; Dec. Dig. ⟸37.]

3. COLLISION ⟸67—MOVING AND STATIONARY VESSELS—ALLOWANCE FOR EFFECT OF TIDE.

If a tow, being approached by another boat, is looked upon as stationary, the approaching boat must keep off, so as to give sufficient clearance, in view of the drift of the tide.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 85, 86; Dec. Dig. ⟸67.]

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4. COLLISION ⊂⊃68—MOVING AND DRIFTING VESSELS—VOLUNTARY MOVEMENT OF DRIFTING BOAT.

A drifting boat, with power available, is responsible for any effect of her movements undertaken while drifting, unless a signal therefor be given in time.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 85½; Dec. Dig. ⊂⊃68.]

In Admiralty. Suit for collision by Peter Aldrich, owner of the canal boat Mamie Aldrich, against the steam tug New York Central No. 18, with the tug Overbrook impleaded. Decree against both tugs.

Nelson Zabriskie, of New York City, for libelant.

Harrington, Bigham & Englar, of New York City (T. C. Jones, of New York City, of counsel), for claimant of the New York Central No. 18.

Burlingham, Montgomery & Beecher, of New York City (Chauncey I. Clark, of New York City, of counsel), for claimant of the Overbrook.

CHATFIELD, District Judge. On December 12, 1914, the canal boat Mamie Aldrich, with a cargo of coal, was in tow of the tug boat Overbrook, on a trip from Jersey City to Gansevoort street on the New York side of the Hudson river. The Overbrook had one boat lashed to her port side, and two boats on the starboard; the Mamie Aldrich being the outside boat. When just below Franklin street (Pier 24, North River), at about 10:15 a. m., with a strong ebb tide, a collision occurred on the starboard side of the Mamie Aldrich, which came in contact with the port corner of the car float No. 34. This float had been drawn out from the slip between Piers 23 and 24, by the New York Central tug No. 18, which at the time of the collision was getting in a position to proceed up and across the Hudson river to Weehawken.

The captain of the No. 18 testifies that a line ran from the bow of No. 34 to the bow of another float, No. 35, and that he brought the floats out of the ship, one after the other, by backing the tug out into the river. When float No. 35 was halfway out of the slip, the force of the ebb tide carried her downstream, and the No. 18, coming around to the lower side, pushed the stern of the float No. 34 up and out in the river. The tug, continuing to shove the No. 34 against the tide, gradually swung around, so that the starboard side of the tug was against the No. 34. In this position her lines were fastened, and then the tug, with the float No. 34, dropped back with the tide along the side of No. 35, while the lines of No. 35 were carried up on No. 34, until the floats were lashed side by side.

Both pilots place the collision at a distance of some 500 feet from the ends of the pier, and at a point almost opposite Pier 23. It is apparent, from an examination of the exhibits, that if the floats dropped back to a point where their sterns were below Pier 23, they must have been withdrawn entirely from the slip, in order to clear the pier, and that if the floats were in the positions represented by the diagrams, tug No. 18 and float No. 34 must previously have been, not only further out in the river, but entirely across the course of the Overbrook

and her barges, at the time when the tug No. 18 began to fall back with the float No. 34, so as to drop alongside of No. 35. Furthermore, it is apparent from an examination of Exhibit No. 1 that no collision from the effect of the ebb tide could have occurred between the side of the Mamie Aldrich and the port forward corner of car float No. 34, unless the float No. 34 was moving out into and up the river, or was swinging around down the river, as the case may be.

It would be a physical impossibility for the tug No. 18 to get immediately behind the Mamie Aldrich with the No. 34 alongside of the Mamie Aldrich, unless the tug No. 18, with its floats, had overtaken the Aldrich tow, or unless the bow of No. 34 had moved out and down the river after the Aldrich had passed up the river alongside the No. 18. There is no claim that the Aldrich floated back and ran upon the corner of the float No. 34.

There is also a conflict in the testimony, in that the captain of the Overbrook testifies that the two floats had been fastened alongside of each other at the time of collision, and that the No. 18 was proceeding out and up the river, while the captain of the No. 18 testifies that he had not made up his tow.

As the tug No. 18 would seem to have had sufficient power to move the tow up the river, if she had gotten under way with her floats in towing position, and as there would be no logical explanation of such a collision if the No. 18 was ready to proceed ahead while the Aldrich was still overtaking, it would seem that the testimony of the witnesses for the No. 18, that the floats had not yet been fastened together and that the tug was not yet ready to proceed, is the more likely story.

Upon this conflict of fact the case was submitted as essentially involving a question of law. The Overbrook contended that although she was proceeding on a course up the river and toward the New York shore, and although this would place the No. 18 and her tow upon the starboard hand of the Overbrook, no signal was necessary, so long as the Overbrook maintained a course which would allow her to pass safely. The Overbrook further contends that the starboard hand rule does not apply to boats which were not navigating up to the time when, as the Overbrook contends, they suddenly drifted downstream and out into the stream, under the force of the No. 18, in pushing the float No. 34 up against the float No. 35.

The No. 18, on the other hand, which had blown a slip whistle when coming out, but which gave no other navigation signal until an alarm was blown just before the collision, contends that it was not bound to give any signal to the Overbrook and that the Overbrook was the burdened vessel. The No. 18 admits that it had no course in the sense of navigation, but it also denies that it moved out into the river so as to require it to give a navigation signal. It further argues that the Overbrook, which was navigating, must keep away so as to avoid danger from any proper change of position or movement of the No. 18, even though that be not of sufficient extent to require the No. 18 to give notice of what she was doing. Britain S. S. Co. v. J. B. King Transp. Co., 131 Fed. 62, 65 C. C. A. 300.

[2, 3] No case has been cited to show that that rule of navigation, known as the starboard hand rule, does not apply to a boat which is ap-

proaching on a crossing course, and which must pass other boats in motion and affected by the tide, even though they do not seem to be navigating in a definite direction at the time. The effect of the tide itself would give sufficient movement to the No. 18 and her tow to require the Overbrook to keep off, if the course of the Overbrook intersected the path of drift within an area where danger of collision was apparent. If the Overbrook, however, looked upon the tow of the No. 18 as stationary, or already across the Overbrook's course, and if the Overbrook intended to pass as close as possible behind the boats as they drifted with the tide, then the Overbrook did not keep away to a sufficient distance to give safe clearance.

On either theory, she is clearly responsible for at least a share in this collision, and having been brought in by the No. 18, under allegations of fault, decree must go against the Overbrook, unless the No. 18 was also at fault. But, in order to determine whether the tug No. 18 is also responsible in any degree for the collision, we must consider the rule of law applicable to the No. 18, and it will be necessary to determine the exact facts of the No. 18's situation at the time of the accident.

It has already been determined that the collision must have occurred before the No. 18 had both boats in a towing position and had gotten under way. The general weight of testimony supports a finding that the bow of the No. 35 and the stern of the No. 34 had come even with each other, and that the lines fastening the floats at this point had been or were being made fast. An examination of the diagrams and of the testimony of the captain would indicate that at this time he was exerting some force with his engines, so as to send the No. 34 ahead and to force her bodily up the river against the ebb tide. He would thus be closing the gap between the lower ends of the floats and at the same time would prevent further drifting down the river. But in so doing he would be changing from a course under the influence of the tide and of his engines while making up his tow to a course against the tide and substantially across the course of the Overbrook, which at that time must have reached a point where the Aldrich was very close to the corner of the barge No. 34.

[4] If the boats did not move ahead, the tide would then swing the outer and upper end of No. 34 down the river and toward the Aldrich. Hence, instead of continuing upon a course or maintaining a position where the Overbrook could safely pass, the No. 18 undertook to proceed ahead through the water, without giving warning to the Overbrook, and at a time when the No. 18 had no right to assume that the Overbrook was respecting the starboard hand rule, to the extent of keeping entirely out of the way. The No. 18, therefore, was responsible for the effect of her movement and should have continued to drift down the river until the Overbrook had passed, unless there was time to signal to the Overbook as to what the No. 18 intended to do.

This makes it necessary to find that the No. 18 in some way worked ahead further out in the river, or swung downstream, into collision. Even if the Overbrook was mistaken when she saw the No. 18 and

float No. 34 fall back along No. 35, and if the Overbrook thereupon went in too close to the barge No. 34, nevertheless the No. 18 did not respect the situation which she created when she ceased her character of a drifting object, and when she attempted to change her position by the force of her engines, without signaling to the Overbrook, which was then in such close proximity that alarm signals followed almost immediately.

The damages will therefore be divided.

LOEWE et al. v. UNION SAVINGS BANK OF DANBURY.

(District Court, D. Connecticut. February 8, 1916.)

Nos. 1801, 1802, 1805, 1807.

1. ATTACHMENT ⟸178—PROPERTY SUBJECT TO ATTACHMENT—NECESSITY THAT DEBT BE "DUE."

Gen. St. Conn. 1902, § 880, provides for attachment when a debt is due a defendant in a civil action, and that from the date of leaving copy of the writ with the debtor any debt due from such garnishee shall be secured to pay any judgment recovered. Section 931 provides that, if judgment be rendered for plaintiff in any action by foreign attachment, all effects in the hands of the garnishee at the time of the attachment, or debts then due to defendant, shall be subject to the judgment. Section 3340 provides that the net income of any savings bank in excess of one-eighth of 1 per cent. of its deposits may be semiannually divided among its depositors; and sections 3441 and 3442 refer to this as a dividend, and provide that in declaring dividends the directors shall have power to discriminate between depositors, etc. *Held*, that where savings bank deposits were attached, and thereafter and before final judgment the depositors assigned the dividends or interest accruing on the deposits and which were declared after the attachment, the assignee and not the attaching creditors was entitled to such dividends, since for a debt to be "due" under the Connecticut decisions there must be an existing obligation for which the garnishee would be liable to the defendant in an action in the nature of debt or assumpsit, and savings bank depositors have no legal remedy to enforce the payment of interest until dividends are declared by the directors.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 528–534; Dec. Dig. ⟸178.

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

2. GARNISHMENT ⟸115—INTEREST—LIABILITY OF GARNISHEE.

In Connecticut, unless a garnishee, in the absence of an express contract to pay interest, has mingled money attached in his hands with his own, he cannot be required to pay interest on it; but, if he has, the interest may be attached as an incident to the debt.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 234; Dec. Dig. ⟸115.]

At Law. Separate actions in the nature of scire facias by D. E. Loewe and others against the Union Savings Bank of Danbury, against the Norwalk Savings Society, against the South Norwalk Savings Bank, and against the Savings Bank of Danbury. Order denying certain relief sought.

See, also, 222 Fed. 342; 226 Fed. 294.

Daniel Davenport, of Bridgeport, Conn., and Walter Gordon Merritt, of New York City, for plaintiffs.

John R. Booth, of Danbury, Conn., for Union Savings Bank of Danbury.

John H. Light, of Norwalk, Conn., for Norwalk Savings Society and South Norwalk Savings Bank.

J. Moss Ives, of Danbury, Conn., for Savings Bank of Danbury.

William F. Tammany, of South Norwalk, Conn., and Martin J. Cunningham, of Danbury, Conn., for United Hatters of North America.

THOMAS, District Judge. These are actions in the nature of scire facias, brought pursuant to section 931 of the General Statutes of Connecticut, Revision of 1902, to enforce attachments by mesne process in the original actions upon which these actions are founded. The attachments were made pursuant to the provisions of section 880 of the General Statutes of Connecticut, Revision of 1902, and covered certain funds on deposit with these defendants—savings banks incorporated under charters from the Connecticut General Assembly.

[1] Before the rendition of final judgment in the original action in which the attachments were made, the defendants assigned to the United Hatters of North America, a voluntary association, the dividends or interest accruing on said deposits and which were declared after the attachment, and by virtue of said assignments said United Hatters of North America claim to be the owner of said dividends.[1] The association has appeared to defend these actions pursuant to an order heretofore entered herein under section 937 of the General

[1] It was stipulated between counsel that the transfers of the accounts of the defendants in the Savings Bank of Danbury were all made substantially as follows:

"Bethel, Conn., Nov. 9, 1903.

"Treasurer of the Savings Bank of Danbury:

"Pay John Phillips, Sec., or bearer, the whole amount standing to my credit, and charge the same on my deposit book No. 29989.

"Frederick E. Benedict.

"Witness: Michael Crowe."

"$819.23. Danbury, Conn., April 18th, 1904.

"Savings Bank of Danbury:

"Pay Martin Lawlor, Sec'y, etc., or order, eight hundred and nineteen and $^{23}/_{100}$ dollars, or so much as may be due on my deposit book, No. 27808.

"Theodore G. Bright.

"Witness: G. Fred Lyon."

And that the deposits in the Union Savings Bank of Danbury, the Norwalk Savings Society, and the South Norwalk Savings Bank were all transferred as follows:

"$502.92. Danbury, Ct., Dec. 14, 1903.

"The Union Savings Bank of Danbury, Conn.:

"Pay to John Phillips, Sec'y, or order, five hundred and two and $^{92}/_{100}$ dollars, and charge my account No. 20562.

"[Sign here] Fred S. Blackburn.

"Witness: H. C. Shalvoy."

And that each transfer was accompanied by delivery of the deposit book of the defendant making the transfer.

Statutes of Connecticut, Revision of 1902 (see 226 Fed. 294), and has filed an answer in which it is alleged that the dividends or interest accruing and declared subsequent to the original attachment were not held by the attachment, but passed to it and became its property by virtue of the assignments. So the sole question in this proceeding is whether the interest or dividends which have accumulated in the hands of the several banks, and which would belong to the depositors but for the assignments, now belong to the judgment creditor by virtue of the original attachment, or to the assignee of the fund by virtue of the assignments which were made after the attachments.

Section 880 of the General Statutes, Revision of 1902, provides that where a *debt is due* from any person to the defendant in a civil action the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least 12 days before the session of the court to which it is returnable with such debtor of the defendant, and that from the date of leaving such copy any *debt due* from such garnishee shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover. The liability of the garnishee is further defined in section 931 of the General Statutes of Connecticut, Revision of 1902, so as to include:

"All the effects in the hands of the garnishee at the time of the attachment, or *debts then due* from him to the defendant"

—excepting that in the case of a debt, legacy, or distributive share the liability of an executor, administrator, or trustee garnisheed shall extend to and include any debt, legacy, or distributive share *"due or to become due."*

So the question in the present case is as to the meaning of the words "debt is due" in section 880, and the words "debts then due" in section 931, and the answer to this question will furnish the answer to the proposition of law here involved. The meaning of these words has several times been before the Supreme Court of Errors of Connecticut for judicial ascertainment and definition. While it has always been the policy of the courts of Connecticut to liberally construe the statute, and not to restrict its application to *liquidated* debts, they have, nevertheless, at all times insisted that, in order that the debt sought to be attached should be "due," there should be an existing obligation for which the garnishee would be liable to the defendant in an action in the nature of assumpsit or debt. Thus, in Fitch v. Waite, 5 Conn. 117, 122, it was held that:

"The moment of service is the precise period when a debt is attached, and if it be then existing it is secured by the process; but if it does not then exist no lien is created, as the operation of an attachment, from its nature, is immediate, and not prospective. A future liability is not attachable, for the conclusive reason that it is not a debt due."

To the same effect is Coburn v. City of Hartford, 38 Conn. 290, where it was held that there must be an "existing debt" when the attachment is made, although it might be payable in the future. Again, in Holcomb v. Town of Winchester, 52 Conn. 447, 52 Am. Rep. 609, it was held:

"That the word 'debt,' as used in the law of garnishment (as the process is elsewhere usually termed), includes only legal debts, or causes of action for which debt or assumpsit may be maintained."

Such also is Sand Blast File Sharpening Co. v. Parsons, 54 Conn. 310, 313, 7 Atl. 716, where the court said that the word "due," as used in the foreign attachment statute, imported an existing obligation and that where there is a condition precedent to the liability there is no existing indebtedness which can be garnisheed.

Another instructive case is Cunningham Lumber Co. v. N. Y., N. H. & H. R. R. Co., 77 Conn. 628, 60 Atl. 107. That was the case of a written contract for labor and materials which made no provision as to the time of payment and in which nothing was due until the contract was performed. It was held that there was nothing to attach until the contract was performed.

And in the very recent case of Ransom v. Bidwell, 89 Conn. 137, 140, 93 Atl. 134, there is a definite recognition of the principle that the obligation of the garnishee must be certain as to the *liability to pay* although the *amount* of the indebtedness is one which can be fairly investigated and determined in an action of scire facias based upon the attachment already made.

[2] In line with the precedents cited are Woodruff v. Bacon, 35 Conn. 97, Candee v. Skinner, 40 Conn. 464, Phœnix Insurance Co. v. Carey, 80 Conn. 426, 68 Atl. 993, and Cox v. Cronan, 82 Conn. 175, 176, 72 Atl. 927, 135 Am. St. Rep. 268. The general conclusion of law to be drawn from these decisions is that, unless a garnishee (in the absence of an express contract to pay interest) has mingled the money attached in his hands with his own, he cannot be required to pay interest on it; but, if he has, the interest may be attached as an incident to the debt.

And this brings us to the vital question involved: Were these banks (in the absence of an express contract to pay interest) under *legal obligation* to pay these depositors interest on their deposits as an incident of the deposit, and was there any legal remedy open to the depositors at the time of the attachments to enforce such obligation? In my opinion each of these questions must be answered in the negative. Savings banks, as they exist in Connecticut, are held to be incorporated agencies of the depositors for their benefit, and a person making a deposit in a savings bank becomes substantially a part owner of all the assets of the bank. This was held in Osborn v. Byrne, 43 Conn. 155, 160, 21 Am. Rep. 641, where it was said that a savings bank is an incorporated agency for receiving and loaning money on account of the owners; it has no stock and no capital, and is merely a place of deposit, where money can be left to remain or be taken out at the pleasure of the owner, and that—

"the depositors in savings banks bear the same relation to each other and to the assets of the bank that stockholders in other monetary institutions do to each other and to the property of the bank."

A like view of the subject is taken in Coite v. Society for Savings, 32 Conn. 173, Bunnell v. Collinsville Savings Society, 38 Conn. 203.

9 Am. Rep. 380, and Price v. Society for Savings, 64 Conn. 362, 366, 30 Atl. 139, 42 Am. St. Rep. 198.

Interest was not due the depositors of the banks named as garnishees until declared, either under their charters or the statutes of Connecticut limiting the rate of dividends payable to depositors. Revision of 1902, §§ 3440, 3441, and 3442. These sections, which were enacted for the protection of depositors—Bank Commissioners v. Watertown Savings Bank, 81 Conn. 261, 70 Atl. 1038—are as follows:

"Sec. 3440. *Dividends.* The net income of any savings bank, in excess of one-eighth of one per cent. of its deposits, actually earned during the six months last preceding, and no more, may be semiannually divided among its depositors. No dividend shall exceed a rate of four per cent. per annum, except as provided in section 3441.

"Sec. 3441. *Surplus.* No savings bank shall make any dividend, except as provided in section 3440, until its surplus shall have accumulated to an amount equal to three per cent. of its deposits. Such surplus shall be kept as a contingent fund; but no savings bank shall carry to its contingent fund more than ten per cent. of its deposits; and any surplus beyond that amount shall be divided among the depositors entitled to such dividends, in sums of not less than one per cent. of its deposits.

"Sec. 3442. *Discrimination in Dividends.* In declaring dividends the directors of savings banks shall have power to discriminate between deposits of one thousand dollars or less, and those over that sum. Such discrimination shall not exceed one per cent. per annum, and if, at any time, a discrimination becomes necessary, it shall be made in favor of those deposits which are less than one thousand dollars."

This interest is in the nature of a dividend; in fact, it is a dividend, and is expressly treated as such by the statutes quoted, and until declared in the way pointed out by the statutes (in the absence of a contract) it is not a debt which may be collected by legal proceedings in the nature of assumpsit or debt. The only remedy of a depositor for the unlawful neglect of the trustees of a savings bank to declare a dividend which had been earned would clearly seem, as in the case of a corporation with capital stock, to be an equitable proceeding to compel the trustees to declare a dividend, as distinct from and separate from the fund upon which it is declared, and until that is done it cannot and does not become the individual property of the depositor. This principle is clearly recognized in Lippitt v. Thames Loan & Trust Co., 88 Conn. 185, at page 207, 90 Atl. 369, the case of a receivership of a trust company with a savings bank department, where in the course of the opinion the court said:

"As we understand the facts of this case, the several savings department depositors have not made their deposits upon a special contract to pay them a stated rate of interest. If our understanding be correct, the savings department depositors are not entitled to interest or to dividends upon their deposits beyond the last declaration of dividend."

Clearly, in the light of the authorities cited, the attaching creditors acquired no more or greater rights than the depositors held at the time of the attachments. If, through defalcation, or unfortunate investments, or depreciation of securities, the assets of a savings bank become so impaired that the trustees could not legally declare the dividends, the depositors would share in the loss, and would have no remedy either in law or equity to compel the payment of dividends (au-

thorities supra), and if in such case they would be without a remedy, I fail to see how the attaching creditors acquire any rights by virtue of these attachments. The liability to pay the dividend was clearly subject to a condition precedent.

My conclusion therefore is that all interest accruing after the attachments belongs to the assignee by virtue of the assignments, and not to the attaching creditors.

Let an order be drawn in accordance with this opinion.

THE METTACOMET.

(District Court, D. Massachusetts. August 12, 1915.)

No. 1029.

1. SEAMEN ⊂⊃18—WAGES—EXTRA—MEMBERS OF FISHING CREW—LIABILITY OF VESSEL.

The extra wages due a cook on a fishing vessel, where all hands ship on the lay, but the cook is to receive an "extra" of a certain sum per day or month, are a preferred charge against the catch, and in the absence of any different agreement the vessel is not liable therefor, where there was no catch.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 76–82; Dec. Dig. ⊂⊃18.]

2. PARTNERSHIP ⊂⊃32—SEAMEN ON LAY—LIABILITY FOR ADVANCES TO MASTER —"PARTNER."

Where the owner of a vessel lets her to a master for a fishing voyage on a lay by which the master and crew are to pay all running expenses, and the master ships his own crew, they are not partners with the master in the enterprise, so as to be liable with him for advances made to him by the owner for running expenses.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 34; Dec. Dig. ⊂⊃32.

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

In Admiralty. Suit by R. H. Holmes against the schooner Mettacomet. Decree for respondent.

Richard H. Wiswall and John R. Lazenby, both of Boston, Mass., for libelant.

J. M. Marshall, of Gloucester, Mass., for claimant.

MORTON, District Judge. This is a libel in rem to recover from the fishing schooner Mettacomet wages alleged to be due to the libelant. The case was heard in open court.

One Manuel Simmons was the managing owner of the Mettacomet. In November, 1913, he let one McDonald take her, as master, for a bluefishing voyage in Southern waters on the one-fifth lay. This lay is the same as the more common one-quarter lay, except that the vessel takes only one-fifth of the gross catch, instead of one-quarter thereof. McDonald was to ship his own crew; the owners had nothing to do with that. The master and crew were to pay all running expenses of the vessel. McDonald shipped two or three men

in Gloucester, and then brought the schooner to Boston, where he shipped the rest of the crew, including the libelant, who was shipped as cook. The agreement between him and the master was entirely oral, and was only that he should receive "as good a lay as any cook going out of the dock." This he claims amounted to a "share" in the catch and fixed wages of $1 a day in addition; and I so find. The arrangement is sometimes referred to as "a share and an extra." It is customary in the fishing business for cooks to be paid in that way; and this custom was known to Simmons. The amount of the "extra" varies with the size of the vessel and the length and character of the trip in contemplation. The ordinary "extra" for a vessel the size of the Mettacomet would not amount to more than $20 a month. The owners had no knowledge of the terms on which the master engaged the cook, and no authority to interfere as to them.

The Mettacomet left Boston about November 13, 1913, and arrived back about May 5, 1914. She caught practically no fish during the voyage, not nearly enough to pay the operating expenses. McDonald drew on Simmons from time to time for advances of money in order to pay for food, gasoline, etc. Such trips, which are called "broken trips," or "brokers," while not uncommon, are by no means unknown in the fishing business.

[1] The claim of Holmes here in question is to recover from the vessel or her owners his wages of $1 per day, agreed upon between him and the master. On successful trips the cook's wages, or "extras," are paid as a bill from the part of the catch which belongs to the master and crew before the apportionment of their shares. It is clear that as between the vessel or her owners, on the one side, and the master and crew, on the other, the latter are bound to pay the wages here claimed; indeed, this is not denied by the libelant. His contention is that the vessel or her owners are liable for his wages only when the catch is not enough to pay them.

It was decided by the Circuit Court of Appeals for this circuit in The Carrier Dove, 97 Fed. 111, 38 C. C. A. 73, that the shares of the crew were in effect wages, and were recoverable from the vessel when the master absconded with the proceeds of the catch. It is urged that the principle there established covers this case. The ground upon which that decision ultimately rests is that the vessel was responsible for the misconduct of the master, to whom she had been let by her owners. In this case there is no question of any misconduct; it turns, as it seems to me, upon the agreement between Holmes and the master. The libelant testified that on previous voyages, when there had been no catch, he had always been paid by the skipper; "if he wants to hold his cook, he must pay him." McDonald testified that Holmes—

"was supposed to get wages when we got our share. I expected he was to be paid from the catch, same as I was. None of the crew were to get anything unless fish were caught."

There was never any express agreement between the libelant and McDonald as to the payment of his "extra," if no catch should be made.

The libelant asserted that there was a custom for the owners of the vessel to pay the cook's wages, or "extra," on "broken trips." The evidence, however, certainly fails to establish any such custom. In a few instances, where the owners evidently desired to retain the services of the cook for succeeding trips with the vessel, they have paid his money wages. In other cases, where the master desired to secure the services of the cook for succeeding trips with him, he paid the cook's money wages out of his own pocket. Where the crew remains the same on succeeding trips as on the "broken trip," advances made by the owners for supplies on the "broken trip" are sometimes deducted from the share of the catch coming to the crew on the succeeding trips. See comment by Lowell, J., The Carrier Dove (D. C.) 93 Fed. 979. There is no custom decisive of the question at issue, or well enough recognized to be read into the agreement between Holmes and McDonald under which Holmes shipped. It seems to me the cook's "extra" is in effect a preferred share, to be paid out of the catch; that Holmes' wages, both share and extra, were, like those of the rest of the crew, contingent upon a catch being made, and that he shipped upon that understanding and agreement; and I accordingly so find. It follows that he is not entitled to recover from the vessel, and that the libel must be dismissed. This disposes of the principal case.

[2] In the claim and answer of the owners, they assert a bill against Holmes for his pro rata share, with the master and with the rest of the crew, of the advances made by the managing owner at the request of the master for food and supplies during the trip. The claimant's contention is that the master and crew, including Holmes, were partners and joint charterers of the Mettacomet for the trip in question. This contention is not, I think, borne out by the facts. The arrangements for the charter of the vessel were made between the managing owner and McDonald. The crew had not yet been engaged, and had nothing to do with them. In this respect the facts are very similar to those of The Carrier Dove, ubi supra, in which it was held that the crew were not charterers, nor partners with the master, but "were hired fishermen, whose wages were dependent on the success of the fishing in which they engaged." Webb, J., 97 Fed. 112, 38 C. C. A. 73.

It follows that the claimants are not entitled to repayment from Holmes of any part of the sums advanced to the master.

UNITED STATES v. ABRAMS et al.

(District Court, D. Vermont. February 23, 1916.)

No. 294.

1. CUSTOMS DUTIES ⇐121—VIOLATION OF CUSTOMS LAWS—STATUTORY PROVISIONS.

Tariff Act Aug. 5, 1909, c. 6, § 28, subsec. 9, 36 Stat. 97, provides that if any owner shall enter or introduce into the commerce of the United States any imported merchandise by means of any fraudulent or false

invoice, affidavit, letter, or paper, or by means of any false statement, by means whereof the United States may be deprived of the lawful duties accruing thereon, such person shall be fined or imprisoned. *Held*, that any fraudulent or false invoice, affidavit, letter, or paper, or any false statement, regarding the value of imported merchandise, whether required by statute or not, is a violation of this section.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 261; Dec. Dig. ⊂⊃121.]

2. CUSTOMS DUTIES ⊂⊃134—VIOLATION OF CUSTOMS LAWS—INDICTMENT.

A count in an indictment charged that defendants unlawfully imported from Canada into the United States certain imported merchandise subject to a duty to be computed on the then value, at a valuation much lower than its actual value, by means of a false statement, a fraudulent invoice, and a false affidavit, for the purpose of defrauding the United States; that defendants caused such merchandise, of which they were then the owners, to wit, a specified quantity of Indian baskets, to be passed through the customs house, and did so pass it and introduce it into the commerce of the United States by means of such statement, invoice, and affidavit which represented the value of such merchandise to be $41.04, and no more, when in fact its value was $62; and that defendants did such acts knowing the statement, invoice, and affidavit to be false. *Held*, that this was sufficient to charge a violation of Tariff Act Aug. 5, 1909, § 28, subsec. 9.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 336–339; Dec. Dig. ⊂⊃134.]

Criminal prosecution by the United States against Morris N. Abrams and another. Heard on demurrer by defendant Joseph S. Abrams to each count of the indictment. Demurrer overruled.

See, also, 230 Fed. 313.

Vernon A. Bullard, U. S. Atty., of Burlington, Vt.

Curie, Smith & Maxwell, of New York City (Thomas M. Lane, of New York City, of counsel), for defendant.

HOWE, District Judge. Subsection 9 of section 28 of the Tariff Act of August 5, 1909 (36 Stat. 97) provides:

"That if any * * * owner * * * shall enter or introduce, * * * into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, * * * by means whereof the United States shall or may be deprived of the lawful duties, * * * accruing upon the merchandise, * * * embraced or referred to in such invoice, affidavit, letter, paper, or statement, * * * such person shall * * * be fined * * * or be imprisoned * * *"

It is not claimed that there is any material difference between any of the 30 counts in the indictment, except as to time and place, quantity, and value of the goods imported. Each count of the indictment charges:

"* * * that on, etc., at, etc., [the defendants] did unlawfully import from the Dominion of Canada, and enter and introduce into the commerce of the United States, certain imported merchandise which was subject to the payment of a duty to be computed on the then value of said merchandise, at a valuation much lower than the actual value of said goods, by means of a false statement, a false and fraudulent invoice of said goods, and a false affidavit * * * presented * * * to the United States customs officer, * * * all for the purpose of defrauding the United States; * * * that

the [defendants] did * * * cause all of said merchandise, of all of which they were then and there the *owners*, to wit, 49 5/12 dozen of Indian baskets, to be passed through the custom house at Island Pond, and did so pass the same through the custom house and introduce the same into the commerce of the United States, * * * by means of said false statement, false and fraudulent invoice and affidavit, which * * * stated and represented the value of said merchandise to be $41.04 and no more, when in truth and in fact the then value of said merchandise was a much greater sum than the sum mentioned in said statement, false invoice, and false affidavit, to wit, the sum of $62.00; that the [defendants], being then and there the owners and importers of all of said goods and well knowing said false statement, false and fraudulent invoice, and false affidavit to be false, * * * did all of said acts above mentioned. * * *"

[1] Without regard to the provisions of the other subsections of section 28, requiring, in case the imported merchandise was obtained by purchase, a true and full statement of the time when, the place where, the person from whom, the same was purchased, and *the actual cost thereof;* and in case it was obtained in any other manner than by purchase, *the actual market value or wholesale price thereof,* at the time of the exportation to the United States, in the principal markets of the country from whence exported, subsection 9 requires honesty and prohibits dishonesty in whatever is written or said to the government regarding the value of the imported merchandise, and if its "then value," "actual value," "value," "true and accurate value," is falsely stated by the owner, as alleged in each count of the indictment, subsection 9 is violated. This section prohibits *any* fraudulent or false invoice, affidavit, letter, paper, or any false statement, written or verbal, whether required by statute or not. Whenever any fraudulent or false invoice, affidavit, letter, paper, or any false statement, written or verbal, is made regarding the value of imported merchandise, this section is violated.

[2] It is alleged in each count of the indictment: (1) That the defendants owned the merchandise; (2) its kind and quantity; (3) that the defendants entered and introduced it into the commerce of the United States by means of a false and fraudulent invoice, statement, and affidavit; (4) well knowing that such invoice, statement, and affidavit were false; and (5) that they did this for the purpose of cheating and defrauding the United States; and facts showing that the invoice, statement, and affidavit were false and fraudulent in stating the value of the imported merchandise are sufficiently stated. The allegation in the third count is that:

The defendants stated the value of the merchandise to be "$41.04, and no more, when in truth and in fact the then value of the said merchandise was a much greater sum, * * * to wit, the sum of $62, * * * and that [the defendants], * * * well knowing such false statement, false and fraudulent invoice, and false affidavit to be false, did all of the acts above mentioned * * * for the purpose of cheating and defrauding the United States. * * *"

All of the other counts contain the same allegations, except that the quantity and value of the imported merchandise therein described is stated in different amounts. Each count of the indictment clearly charges a violation of subsection 9.

Therefore the demurrer is overruled, and each count of the indictment is adjudged sufficient.

UNITED STATES v. ABRAMS et al.

(District Court, D. Vermont. February 23, 1916.)

No. 294.

1. CRIMINAL LAW ⊜393—EVIDENCE—ARTICLES WRONGFULLY OBTAINED FROM ACCUSED.

Const. U. S. Amend. 4, provides that the right of the people to be secure against unreasonable searches and seizures shall not be violated. Amendment 5 provides that no person shall be compelled in any criminal case to be a witness against himself. Relying upon a promise or threat by customs officers that it would be better for him if he gave them what they wanted, defendant permitted them to take and carry away from his place of business certain invoices, documents, and other papers. *Held*, that the delivery of the papers under this promise or threat was involuntary in law, and the taking thereof was a violation of defendant's constitutional rights, and the papers were not admissible in evidence against him on a criminal trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871–874; Dec. Dig. ⊜393.]

2. SEARCHES AND SEIZURES ⊜7—RETURN OF PAPERS TAKEN.

The District Court has authority to order a return of papers in the possession of the district attorney and other officers of the court which have been obtained from a defendant by officers of the government while acting under color of their office.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. ⊜7.]

Criminal prosecution by the United States against Morris N. Abrams and another. Heard on the petition of defendants to require the district attorney to deliver certain papers to them filed December 13, 1915, and amended petition filed January 27, 1916, and ex parte affidavits filed December 6, 1915, and February 2 and 17, 1916. Petition granted.

See, also 230 Fed. 310.

Vernon A. Bullard, U. S. Atty., of Burlington, Vt.

Curie, Smith & Maxwell, of New York City (Thomas M. Lane, of New York City, of counsel), for defendants.

HOWE, District Judge. [1] It fairly appears from the petitions and affidavits that Carl H. Chandler, a customs agent, and Jeremiah Dillon, a deputy collector, entered the defendants' place of business at New London, Conn., on or about the 24th of March, 1913, and informed the defendant Morris N. Abrams that they were such officers of the government; that Mr. Dillon then said to this defendant that it would be better for him if he gave Mr. Chandler what he wanted; that then Mr. Chandler, without any further conversation and without this defendant's consent, took from the defendants' desk a number of invoices, documents, and other papers, and carried them away, promising to return them after they were compared with the invoices entered at the Vermont custom house; that Mr. Dillon called at the defendants' place of business again, and this defendant, relying upon what was said to him at the time of the first visit, turned over to him 24 more invoices, to be forwarded to Mr. Chandler at Boston,

Mass., to be used and returned as the others were to be; that although nearly three years have elapsed, none of the papers have been returned in accordance with this promise, but that they have come into the hands and under the control of the United States district attorney; that this defendant surrendered none of the papers, except in response to and relying upon what Mr. Dillon said; that the papers have not only been used before a grand jury to obtain this indictment against the defendants, but are now retained by the district attorney to be used as evidence of crime against the defendants in the trial of this case; and that this defendant was not informed by the officers that his papers were being searched, seized, or obtained to be used as evidence against him.

Mr. Dillon told this defendant that it would be better for him if he gave Mr. Chandler what he wanted, and relying upon this promise or threat he allowed the officers to carry away his papers, although he used his best efforts on the first occasion to persuade the officers to allow him to retain a certain invoice of goods which had not been checked up at that time; but the most he was able to accomplish in this regard was to obtain a promise from them that they would send him a copy of the invoice (which they did) to use in checking up the goods therein described.

None of the papers were voluntarily delivered to the officers. They were all obtained by the promise or threat that it would be better for this defendant if he gave Mr. Chandler what he wanted. This promise or threat influenced this defendant to part with his papers, and makes their delivery involuntary in the eye of the law. Bram v. United States, 168 U. S. 532, at page 542, 18 Sup. Ct. 183, 42 L. Ed. 568. The delivery of these papers may well be likened to a confession, which is incompetent, because not voluntarily made. In Bram v. United States, supra, the court said at page 542 of 168 U. S., at page 187 of 18 Sup. Ct. (42 L. Ed. 568):

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'

"But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.

"A brief consideration of the reasons which gave rise to the adoption of the Fifth Amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the amendment was but a crystallization of the doctrine as to confessions, well settled when the amendment was adopted, and since expressed by the text-writers and expounded by the adjudications, and hence that the statements on the subject by the text-writers and adjudications but formulate the conceptions and commands of the amendment itself. In Boyd v. United States, 116 U. S. 616 [6 Sup. Ct. 524, 29 L. Ed. 746], attention was called to the intimate relation existing between the provision of the Fifth Amendment securing one accused against being compelled to tes-

tify against himself, and those of the Fourth Amendment protecting against unreasonable searches and seizures; and it was in that case demonstrated that both of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

Thus it clearly appears that if, after Dillon had told this defendant that it would be better for him to give Chandler what he wanted, the defendant had made a declaration to Chandler, stating the contents of the papers, that such a declaration would not have been admissible in evidence against him because of the influence which had been used to obtain it. This would be a violation of the Fifth Amendment, as was held in Bram v. United States, supra. Do the same reasons and rules apply to obtaining from a defendant papers which contain evidence of crime as would apply in obtaining an oral admission of crime from him? The same reasons and rules should and do apply, and the fact that the evidence thus obtained is written makes no difference. The defendant's constitutional rights are as much violated in the one case as in the other. The taking of the papers from this defendant without his consent was also a seizure of them that was unreasonable and contrary to the spirit of the Fourth Amendment. United States v. Wong Quong Wong (D. C.) 94 Fed. 832; Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

[2] The right of this court to order a return of papers in the possession of the district attorney and other officers of the court, which have been obtained by officers of the government, while acting under color of their office, is fully recognized and established in Weeks v. United States, supra, and the opinion therein by Mr. Justice Day is exhaustive on this subject, and nothing appears to be necessary or proper here but to refer to and follow it.

Therefore the conclusion is that the papers in question were taken from the defendants by officials of the United States, acting under color of their office, in violation of the defendants' constitutional rights, and, having made a seasonable application for their return, an order will be made that the district attorney return them to the defendants forthwith.

In re POWELL.

(District Court, S. D. Georgia. February 26, 1916.)

1. BANKRUPTCY ⟸399—EXEMPTIONS—OBJECTIONS TO ALLOWANCE—EVIDENCE.

Civ. Code Ga. 1910, § 3380, provides that a debtor shall lose the benefit of his exemption if he is guilty of willful fraud in concealing assets. A bankrupt in September, 1913, made a financial statement showing assets amounting to $8,950 and no liabilities; in October, 1914, he made another statement showing assets of $8,500 and liabilities of only $2,000. His schedules in bankruptcy, filed in January, 1915, showed liabilities of almost $6,000 and assets of about $3,000. *Held*, that the statements and schedules made a prima facie case of concealment on the part of the bankrupt, and cast upon him the burden of showing that the statements were false when made, or of explaining what became of his assets, and in the absence of such explanation it would be conclusively presumed that he was concealing a portion of his assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

2. BANKRUPTCY ⟸400—EXEMPTIONS—OBJECTIONS TO ALLOWANCE—EVIDENCE.

On objections to the allowance of an exemption to a bankrupt on the ground that he had concealed assets, financial statements made prior to bankruptcy were competent evidence as admissions on the bankrupt's part as to his net worth at the time they were made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. ⟸400.]

In Bankruptcy. In the matter of C. L. Powell, bankrupt. On petition to review order of referee allowing an exemption to the bankrupt. Matter referred back to the referee.

Hardeman, Jones, Park & Johnston, of Macon, Ga., and H. A. Peacock, of Albany, Ga., for objectors.

D. H. Redfearn, of Albany, Ga., for bankrupt.

LAMBDIN, District Judge. The trustee and certain creditors filed objections to the allowance of an exemption to the bankrupt, and to an order granted by the referee overruling the objections and approving the exemption, the objectors filed the petition, which is now before me, asking for a review of this order.

The court is of the opinion that the referee was correct in overruling all the objections filed by the objectors, except the objections which were based upon the concealment of assets as shown by the mercantile statements previously made by the bankrupt to R. G. Dun & Co. and the M. C. Kiser Company, compared with what appeared in his schedules—as to which matters the court is in doubt.

The statement made by the bankrupt to R. G. Dun & Co. on September 20, 1913, showed total assets of $8,950 and no liabilities, and the statement made to M. C. Kiser Company on October 29, 1914,

about two months before he went into bankruptcy, showed total assets of $8,500 and liabilities of only $2,000, leaving a net worth of $6,500; whereas, his schedules filed on January 6, 1915, showed liabilities of $5,927.72, and assets of only $3,187.13. It would seem, from the report of the referee and the briefs of counsel, that these statements, in accordance with the ruling of the court in the Peacock Case, reported in 30 Am. Bankr. Rep. 179,[1] were considered almost entirely with reference to the question as to whether the bankrupt had by means of these statements secured merchandise from creditors for which he had not paid, and not with reference to the question as to whether or not the bankrupt had concealed and withheld money or property from his trustee, contrary to the provisions of section 3380 of the Code of Georgia of 1910, which provides that the debtor shall lose the benefit of his exemption if he is guilty of willful fraud in concealing part of his property from his creditors.

[1, 2] The court, therefore, directs a rehearing of the matter as to this last-named question, to wit, as to whether, as shown by said statements, compared with his schedules in bankruptcy, the bankrupt was guilty of fraudulently concealing and withholding a part of his property from his trustee and creditors. There is no other evidence in the record which would tend to show that the bankrupt did not surrender all of his property to his trustee. But, if the two above-mentioned statements were true and correct statements of his financial condition at the times they were made, then there was a tremendous shrinkage in his assets between said times and the time he went into bankruptcy, and this shrinkage has not been satisfactorily explained. If only the Kiser Company statement were involved, the mind of the court would be satisfied to approve the finding of the referee, because it appears from the evidence that the bankrupt was partially intoxicated when he made the statement, and therefore it would be possible that the statement was incorrect on that account. Yet the bankrupt does not deny that the statement made to R. G. Dun & Co. was correct, and, if it was correct, then he should explain the great shrinkage in and disappearance of his assets to the satisfaction of the referee and the court; otherwise, it would be conclusively presumed that he was concealing a portion of his assets. These statements are competent evidence, as showing an admission on the bankrupt's part that at the times he made them his net worth was as set forth in same. The introduction of these recent statements and the schedules which he subsequently filed, therefore, makes out in favor of the creditors a prima facie case of concealment on the part of the bankrupt, and consequently the burden is cast upon the bankrupt, either to show that the statements were false when made, or else to explain what became of his assets; otherwise, the conclusion would follow that he was concealing a part of his assets. The court has read and re-read the evidence in the case carefully, and its mind is not satisfied on this question, but is of the opinion that very probably the referee and counsel did not give full consideration to the question above suggested. See opinion rendered by me a few days ago in Re Frank T. Hardy, Bankrupt, 229 Fed. 825.

[1] 203 Fed. 191.

It is therefore ordered that the matter be referred back to Hon. R. J. Bacon, the referee, to hear further evidence, and to give further consideration to the question as to whether in view of the above-named two statements, compared with the schedules filed by the bankrupt, there has been a fraudulent withholding and concealment by him of a portion of his assets. Of course, if any direct evidence can be furnished as to any money or assets that have been withheld from the trustee by the bankrupt, such new evidence would be admissible at the hearing.

THE WISSOE.

(District Court, D. Massachusetts. September 21, 1915.)

No. 1080.

SALVAGE ⇐16—AID TO BURNING VESSEL—NATURE OF SERVICE.

A lighter, which was under contract with a city to act as a fireboat when called upon, *held* to have acted in that capacity when she went to the assistance of a burning vessel in the harbor, but entitled to salvage for the work of her master and crew, who voluntarily performed services not required by the contract.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 29; Dec. Dig. ⇐16.]

In Admiralty. Suit by Thomas E. Reed and others against the gasoline screw yacht Wissoe. Decree for libelants.

Edgar S. Taft, of Gloucester, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

MORTON, District Judge. This is a libel to recover compensation for salvage services rendered to the Wissoe. The facts are as follows:

The Wissoe, a gasoline motorboat, caught fire in the outer harbor of Gloucester, which is within the city limits. Her master and crew were taken off by the life saving crew, and she was towed out of the channel and anchored some little distance offshore. An effort was made by the officer of the life saving crew to get the fireboat from Gloucester, but by mistake land apparatus was sent. A second effort was made to get the fireboat, which resulted in a telephone message being sent by an onlooker to the office of the libelants, the owners of the fireboat. This message notified them that a vessel was on fire in the outer harbor and that the assistance of the fireboat was desired. In response thereto, the fireboat Phillip proceeded at once to the Wissoe. Before reaching her, she received on board several men of the life saving crew. By the efforts of her own crew, assisted by these members of the life saving crew, the fire on the Wissoe was extin-

guished, and she was saved from what would otherwise have been total destruction. The value of the Wissoe was $2,000. She had on board about 200 gallons of gasoline. In order to extinguish the fire, it was necessary for the Phillip to approach her so closely as to be in danger if the gasoline tanks should explode. The libelant Reed, who was in command of the Phillip, was cautioned, both by the officer of the life saving crew and also by the master of the Wissoe, not to approach her as closely as he did. The value of the Phillip, including her fire-fighting apparatus, was about $10,000. This property was to some extent imperiled by the salvage work, and the men engaged in it were exposed to some danger.

The Phillip is a steam lighter owned by the libelants. Several years before the incident in question, her owners had made a contract with the city of Gloucester which provided, in substance, that the city of Gloucester should install fire-fighting apparatus on the Phillip; that the Phillip should at all times be kept by the libelants manned and in readiness to get under way; that she should respond to certain fire alarm signals, and should go, whenever ordered by the chief of the fire department of the city of Gloucester, to assist in extinguishing fires within the city limits. No bell signal was sounded, and no order was given to the Phillip by the fire chief in this instance. Her owners assert that they were not obliged by their contract with the city to render assistance to the Wissoe, and that they are therefore entitled to salvage. If such an order had been given, it would clearly have been the duty of the Phillip to proceed to the Wissoe and there place herself at the disposition of the Gloucester fire department. It was no part of the duty of the owners or crew of the Phillip actively to assist in extinguishing fires beyond operating her apparatus, although they had done so on previous occasions, nor to incur peril, either to the Phillip or to themselves, except in obedience to express and reasonable orders.

It is plain that no salvage is recoverable for services which were required by or performed under the contract. The mere absence of the bell signals or order therein specified does not, it seems to me, establish that the Phillip was acting in a private, rather than a public, capacity. Her owners, learning of a fire in Gloucester harbor which it would be their duty to attend upon signal or order, might, without waiting therefor, proceed to the fire. In so doing, they would plainly be acting in furtherance of the purposes and general obligations of the contract. I accordingly find that the Phillip attended the fire in question as a public fireboat.

Having arrived there, she found nobody connected with the fire department to give further orders. Her owner, Reed, thereupon took command of the situation, and proceeded, on his own initiative, with the assistance of some of the life saving crew, to extinguish the fire. He was certainly not required to do this by the contract; the libelants had fully performed their obligations thereunder by going to the fire. It is not shown that they intended to render gratuitous service; they

were endeavoring to fulfill their obligations under the contract in an alert and helpful manner. Their act in proceeding to the fire without waiting for formal orders is not a sufficient reason for holding that their service in excess of what was contemplated by the contract was gratuitous. It was salvage service, and no sufficient reason appears for denying compensation for it. The Blackwall, 10 Wall. 1, 19 L. Ed. 870.

The excess, or salvage, service constituted a comparatively small part of the total service rendered. It did, however, involve some risk both to the persons and property engaged in it, which the libelants were under no obligation to incur. Under the contract, the libelants, if they had been ordered to the fire, would have been entitled to $15 an hour from the city for the 2½ or 3 hours during which the service lasted. They took their chance of not getting this by not waiting for orders, and are not legally entitled to it as against the city of Gloucester. As things turned out, no injury was sustained by the Phillip or any of her crew, and the extra service consisted simply in using the fire-fighting apparatus. In The Evolution (D. C.) 199 Fed. 514, a tug going to the assistance of a vessel which had broken away from her anchorage in Boston outer harbor was awarded $50 salvage, about one-twelfth of the value of the vessel. The tug incurred no danger, and the commercial rate for the service rendered would have been about $6. In this case the property is worth about three times as much, and appreciable risk was incurred. Under all the circumstances, I think the libelants are entitled to an award of $150.

Decree for libelants for $150.

ALLEN et al. v. RHODES.

(Circuit Court of Appeals, Eighth Circuit. February 5, 1916.)

No. 4193.

1. CORPORATIONS ⊜104—STOCK SUBSCRIPTIONS—LIABILITY—ESTOPPEL.
Subscribers to the stock of a corporation, who were directors and attended meetings as such, or who attended and participated in stockholders' meetings, or who paid the first assessment on stock subscriptions and thereby recognized the existence of the corporation, were estopped to defend a suit by a receiver to recover the unpaid subscriptions on the ground that the full amount of the capital stock had not been subscribed in good faith.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 454; Dec. Dig. ⊜104.]

2. CORPORATIONS ⊜562—STOCK SUBSCRIPTIONS—LIABILITY TO CREDITORS.
Though only a small part of the capital stock of a corporation was subscribed, where the subscribers organized the corporation by electing directors and other officers, entered into contracts, held directors' and stockholders' meetings for nearly five years, and some of them paid an assessment on the subscriptions, there was a de facto if not a de jure corporation, and a receiver could collect the unpaid subscriptions for the purpose of paying bona fide creditors, even though the subscribers could not be held liable to the corporation for the payment of their subscriptions until the stock was fully subscribed in good faith.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2265, 2266, 2268–2271; Dec. Dig. ⊜562.]

3. CORPORATIONS ⊜34(6)—STOCK SUBSCRIPTIONS—LIABILITY TO CREDITORS.
If debts are incurred by a de facto corporation, even if it has never been legally organized, subscribers, standing by and making no objections, will be estopped from pleading the nonexistence of the corporation, when sued for the benefit of creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 92, 96; Dec. Dig. ⊜34(6).]

Smith, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Nebraska; Page Morris, Judge.

Suit by Walter H. Rhodes, successory receiver of the Omaha, Decatur & Northern Railway Company, against A. W. Allen and others. From a decree in favor of complainant, certain defendants appeal. Affirmed.

The appellee, as the successory receiver of the Omaha, Decatur & Northern Railway Company, a corporation organized under the laws of the state of Nebraska, brought this suit against the appellants to recover unpaid assessments on their subscriptions to the capital stock of the railway company. The facts are practically undisputed, the case having been submitted on an agreed statement of facts, and are as follows:

On January 20, 1903, ten persons signed and acknowledged articles of incorporation, under the laws of the state of Nebraska, of the Omaha, Decatur & Northern Railway Company, and filed the same with the secretary of state, as required by the laws of that state, on January 21, 1903. The purpose of the corporation was to construct an electric railroad through certain counties in the state of Nebraska.

On February 24, 1903, the stock books were opened and subscriptions made for 1,106 shares of the stock. Among these subscriptions was one made by F.

W. Bement for 980 shares, of the par value of $98,000, each share being of the face value of $100. The other shares were subscribed by the defendants, who were appellants in the court below. The subscription by F. W. Bement, it is claimed, was not in good faith, as he had no means and did not intend to pay for the same, but was to receive them for his services as the promoter of the enterprise. These services were to be that he was to finance the company, sell the stock, place the bonds, and secure the money to build the railroad. For this he was to receive the 980 shares of stock as fully paid up.

A meeting of the stockholders was held on April 16, 1903, when directors were elected. On April 25th, the board of directors thus elected, held a meeting, at which by-laws for the company were adopted and officers elected. At that meeting an assessment of 10 per cent. payable at once was made, and paid by some of the defendants, but not paid by others, nor Bement. Directors' and stockholders' meetings were held after the organization a number of times, the last on November 26, 1907, after which date it does not appear any further meetings were held.

The full amount of the stock was never subscribed during the time the corporation was in existence. At a meeting of the directors held on August 24, 1903, the board made an assessment of 15 per cent. On January 5, 1905, the board made another call of 80 per cent., declaring that 20 per cent. had heretofore been called, although the record showed that 25 per cent. had been called, so that an assessment of 75 per cent. would make the stock entirely paid up, when paid; but neither of these two assessments were paid by any of the stockholders.

Contracts were entered into by the board of directors with different parties for services to be performed, among them with Clifford C. Peirce and Lester F. Wakefield, the latter being employed as chief engineer of the company. Afterwards Peirce and Wakefield instituted suit against the railway company in the Circuit Court of the United States for the District of Nebraska, for money due them for their services, and on March 31, 1908, they secured judgment against the railway company for $3,000, interest, and costs; an execution was issued thereon, and returned unsatisfied on the 10th day of July, 1908, whereupon they filed a creditors' bill in the Circuit Court of the United States for the District of Nebraska, for themselves, and all other creditors of the railway company, praying for the appointment of a receiver, to collect the assets and apply them to the payment of their judgment and the claims of such other creditors, as make themselves parties to the action.

At a hearing Lester R. Slonecker was, on the 4th day of July, 1908, appointed receiver of the railway company, and he resigning on December 21, 1908, the plaintiff, Rhodes, was appointed as successory receiver, and qualified as such. Later an order was entered by the court in that case, requiring the creditors to present and file their claims with the receiver, and that they be referred to a special master, who was to pass upon them. On the 29th day of September, 1909, the special master filed a report, in which he reported the allowance of claims of eight creditors, amounting to a total of $5,600.72, with interest thereon; that the only assets which came to the hands of the receiver were the unpaid assessments on the subscriptions to the capital stock. This report was by the court approved and thereupon, by authority of the court, this bill was filed against the defendants to collect the amount due from them respectively on their subscriptions.

Answers were filed by the defendants, but the only serious defense made was that, as the full amount of the capital stock of $1,000,000 was never subscribed, except a small amount, viz., $12,600, the subscription of Bement being frauduient, with no intention of being paid, that the corporation never had a legal existence and therefore they are not liable.

Upon final hearing a decree was rendered by the court against the defendants, 69 in number, for the amounts respectively due from each of them on their subscriptions. The decree further provided: "Complainant have execution against each of the above-named defendants individually, against whom judgment is rendered, for his proportionate share of the corporate debts, complainant's claim, interest, costs, receiver's and counsel's fees, in the total sum of $9,490, to November 15, 1913, and in the event that complainant is unable

to collect from each of the aforesaid individual defendants upon the said execution, his proportionate share of the said complainants' claim, corporate indebtedness, he shall so report the same to this court, and the court will thereupon order additional executions to be issued against each of the said defendants, from time to time, and his proportionate share of the said corporate indebtedness, costs, interest and fees, so remaining unpaid until the full amount of complainants' claim and the corporate debt, with interest and costs, are fully paid: Provided, that no execution for an amount in excess of the amount hereinbefore adjudged to be due from each of the defendants shall be ordered."

From this decree this appeal was prosecuted by 43 of the 69 defendants against whom judgment had been rendered by the decree.

H. C. Brome and Clinton Brome, both of Omaha, Neb., for appellants.

Edward M. Martin, of Omaha, Neb., for appellee.

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

TRIEBER, District Judge (after stating the facts as above). Assuming that the agreement with Bement made his subscription fraudulent and void, the question to be determined upon this appeal is whether, owing to the fact that only $12,600 of the capital stock of the railway company, which was to be $1,000,000, was subscribed in good faith, the corporation had such existence as to make those who did subscribe liable to creditors of the company for the unpaid portions of their subscriptions.

The authorities are conflicting whether subscriptions made to a corporation, when the full amount of the capital stock has not been subscribed, or, if subscribed, some of the subscriptions are not in good faith, are collectible by the corporation, when the statutes of the state, under which the corporation was formed, are silent on the subject and the articles of incorporation do not contain such a provision. Neither the statutes of Nebraska nor the articles of incorporation make it a condition precedent that they are to become effective only when the full amount of the capital stock is subscribed in good faith. But assuming, without deciding, that, until the entire capital stock is subscribed in good faith, the subscribers cannot be held liable to the corporation for the payment of assessment calls on their subscriptions, the question is whether that rule applies to an action by a receiver appointed on behalf of judgment creditors of the corporation.

[1] The appellants James R. Anderson, H. V. Byram, C. E. Barlow, Geo. M. Byram, G. H. Busse, P. B. Gordon, Richard Lewis, and James P. Latta were directors and attended meetings as such. The following appellants attended and participated in stockholders' meetings of the corporation: I. N. Holman, J. R. J. Mitten, H. G. Byram, C. E. Barlow, James McAllister, Charles Phipps, George Byram, Eugene L. Byram, G. H. Busse, J. E. Butts, P. B. Gordon, William B. Gregg, Richard Lewis, and Thos. Ashley. The following appellants paid the first assessment, and thereby recognized the existence of the corporation: James R. Anderson, J. E. Henry, J. R. J. Mitten, W. B. Watson, J. M. Conneally, Chloe R. Canfield, Eugene L. Byram, L. H. Deman, A. K. Sears, and Nels P. Larson. These appellants are clearly

estopped, and as to them the decree must be affirmed, regardless of what conclusion we may reach as to the liability of the other appellants. 7 Ruling Case Law, p. 235; Planters', etc., Packet Co. v. Webb, 144 Ala. 666, 39 South. 562; Lincoln Park Chapter v. Swatek, 204 Ill. 228, 68 N. E. 429.

[2] The record shows that, although but a small part of the capital stock of the corporation was subscribed, the subscribers organized the corporation by electing directors and other officers, entered into contracts, held directors' and stockholders' meetings for nearly five years, the first meeting being held on February 24, 1903, and the last on December 26, 1907, and that some of the subscribing defendants paid the first call of 10 per cent. These acts certainly make it a de facto corporation, if not de jure, and being a de facto corporation the subscribers to the stock are liable to creditors of the corporation for unpaid subscriptions. Tulare Irrigation District v. Shephard, 185 U. S. 1, 13, 22 Sup. Ct. 531, 536 (46 L. Ed. 773). It was there held:

"From the authorities, some of which are above cited, it appears that the requisites to constitute a corporation de facto are three: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise. * * *. Being a de facto corporation, the general rule is that none but the state can call its existence in question."

And the court held that, being a corporation de facto, a holder of its bonds could recover on them. See also Harrill v. Davis, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153, decided by this court.

In 5 Thompson on Corporations (2d Ed.) § 5183, it is said:

"The rule is believed to be without exception that a stockholder sued by or on behalf of the creditors after the corporation has become insolvent is estopped to question the legal existence of the corporation of which he was a stockholder."

And in section 5184 the same author states:

"A stockholder cannot urge as a defense that the corporation was irregularly or illegally organized, since his liability is an incident to the liability of the corporation, and the corporation would, in most cases, be estopped to set up such a plea. It is enough that the corporation is a corporation de facto"—citing numerous authorities, which sustain the text.

And this seems to be the rule in the state of Nebraska, as established by the decisions of the Supreme Court of that state. In Lusk v. Riggs, 70 Neb. 713, 97 N. W. 1033, it was held that where the articles of incorporation have not been filed with the secretary of state, as required by the statutes of the state, the corporation, although having acted as such, would not be held liable, nor could it enforce its contracts; but upon a rehearing this decision was set aside, and the rule, recognized in other states, followed that, being a de facto corporation, persons who dealt with it as such cannot question its legal existence, nor can the corporation plead that it was never legally organized. 70 Neb. 718, 102 N. W. 88. The same rule is laid down in 10 Cyc. 494, 495.

A leading case on that subject is Minor v. Mechanics' Bank, 1 Pet. 46, 65, 7 L. Ed. 47. In that case only $320,000 out of $500,000 of the capital authorized by the charter was subscribed in good faith, but the

court did not regard this deficiency in the subscriptions as at all affecting the status of the corporation or the validity of its operations. In Aspinwall v. Butler, 133 U. S. 595, 10 Sup. Ct. 417, 33 L. Ed. 779, it was said:

"There was no express condition that the individual subscriptions should be void if the whole $500,000 was not subscribed; and, in our judgment, there was no implied condition in law to that effect. Each subscriber, by paying the amount of his subscription, thereby indicated that it was not made on any such condition. It is not like the case of creditors signing a composition deed to take a certain proportion of their claims in discharge of their debtor. The fixed amount of capital stock in business corporations often remains unfilled, both as to the number of shares subscribed and as to payment of installments; and the unsubscribed stock is issued from time to time as the exigencies of the company may require. The fact that some of the stock remains unsubscribed is not sufficient ground for a particular stockholder to withdraw his capital."

To the same effect is Scott v. De Weese, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822. In the Minor Case it was also held that a fraud between some of the original subscribers and commissioners, whereby their subscriptions were not made bona fide, but with the intention of not paying for the stock, could not be set up to the injury of creditors, who did not participate in nor have notice of the fraud. Cole v. Satsop R. R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858; Farnsworth v. Robbins, 36 Minn. 369, 31 N. W. 349; Morrison v. Dorsey, 48 Md. 468; Musgrave v. Morrison, 54 Md. 161.

[3] If debts are incurred by a de facto corporation, even if it has never been legally organized, the subscriber, standing by and making no objections, will be estopped from pleading the nonexistence of the corporation, when sued for the benefit of creditors. Homan v. Steele, 18 Neb. 652, 26 N. W. 472; Hudson v. Greenhill Seminary, 113 Ill. 618; International Fair Association v. Walker, 83 Mich. 386, 47 N. W. 338. In the last cited case there had only been a preliminary agreement to form the corporation, and it was held:

"The object sought to be accomplished by this preliminary agreement was a lawful one; the promises contained in this preliminary agreement were mutual, and the acts done and the moneys expended were in reliance upon these original subscriptions; and there could be no difficulty in enforcing this agreement at the common law."

In Gress v. Knight, 135 Ga. 60, 68 S. E. 834, 31 L. R. A. (N. S.) 900, it was well said:

"When a person becomes a stockholder of a corporation, be becomes a part of it. Its agents are in a sense his agents. They go out and deal with the public. If through their dealings debts are incurred, assuming both the stockholder and the creditor to be innocent and that one must suffer, the former, who put it in the power of the agents to do the wrong, should suffer rather than third parties, who dealt with such agents."

There is no pretense that any fraud has been practiced on any of these appellants, who probably were influenced to subscribe to the stock of the corporation by the belief that it would greatly benefit them by affording them cheap and rapid transportation. During the entire time the corporation was alive, none of them ever objected to any acts of the directors, nor asked to be relieved of their subscriptions. The debts

which have been allowed against the corporation have been found by a court of competent jurisdiction to be bona fide and justly due to the parties, for services rendered in good faith, under contracts with the corporation, and we see no reason why the subscribers to the stock should now be permitted to escape the consequences of their own acts, whether due to carelessness or ignorance.

The decree is right, and is affirmed.

SMITH, Circuit Judge (dissenting.) I cannot concur in the foregoing opinion. It is true it is alleged in the bill that on February 24, 1913, stockbooks were opened; but this was an issue, and there is no evidence to sustain the allegation. These are but trifles. The total subscriptions to the stock were only about 1¼ per cent. of the capital provided for in the articles of incorporation. One of the conditions precedent to the subscriber's liability which is implied from his contract of subscription is that relating to the amount of capital stock which must be taken before the liability attaches. It is a general and well-settled rule, subject to a few qualifications only, that where the capital stock of a corporation is fixed it is implied in every contract of subscription as a condition precedent to liability thereunder that all the capital stock must be subscribed. This has been expressly held in Nebraska. Livesey v. Hotel Co., 5 Neb. 50; Hale v. Sanborn, 16 Neb. 1, 20 N. W. 97; Hards v. Platte Valley Improvement Co., 35 Neb. 263, 53 N. W. 73. And this is practically the universal rule. 7 Ruling Case Law, p. 231; Thompson on Corporations, par. 529; 10 Cyc. 491. And according to the weight of authority subscriptions of persons who were insolvent at the time when they became subscribers should not be counted. 7 Ruling Case Law, p. 234.

The general rule that the liability of a subscriber attaches only on performance of the implied condition precedent that all the capital stock be subscribed is subject to the exception that he is liable for preliminary expenses, notwithstanding the failure to perform that condition; but he cannot be held liable for calls made or assessments levied to advance the general objects and purposes of the charter until all the stock be taken. Expenses of a preliminary nature necessarily incurred to obtain knowledge on the subject of the undertaking, as by making surveys or for the purpose of forwarding the subscription and extending the public patronage, etc., rest on a different footing. Those expenses are necessarily contemplated by the subscriber, and an assessment levied to collect funds for these purposes is binding, though part of the capital stock remains unsubscribed; Covington, Coal Creek & Jacksonville Plank Road Co. v. Moore, 3 Ind. 510; Salem Mill Dam Corp. v. Ropes, 23 Mass. (6 Pick.) 23; Same v. Same, 26 Mass. (9 Pick.) 187, 19 Am. Dec. 363; Central Turnpike Corporation v. Valentine, 27 Mass. (10 Pick.) 142; Littleton Mfg. Co. v. Parker, 14 N. H. 543; Anvil Min. Co. v. Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232; Milwaukee Brick & Cement Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838; Schloss et al. v. Montgomery Trade Co.,

87 Ala. 411, 6 South. 360, 13 Am. St. Rep. 51, note to 93 Am. St. Rep. 379. And where a subscriber attends meetings and votes his stock for purposes which involve an outlay such that an assessment is necessarily contemplated as these acts are done, with a knowledge that the capital stock has not been subscribed, this amounts to a waiver of the condition that it must be, and the subscriber is liable.

Again, acting as an officer or director of a corporation, attending meetings as such, or participating in proceedings to carry on the business for which the corporation is created, where done before the capital stock is all taken and in knowledge of this fact, impliedly waives any right to insist that the subscription of all such stock is a condition precedent of one's liability. 7 Ruling Case Law, p. 235; note to Gettysburg National Bank v. Brown, 93 Am. St. Rep. 382, and cases there cited. Neither that the liabilities in question were for preliminary expenses nor that there was such a waiver as just referred to is alleged in the bill, but it is alleged in general that:

"On and between the said 20th day of January, 1903, and the 26th day of November, 1907, the incorporators, and later the stockholders, directors, and officers, of said Omaha, Decatur & Northern Railway Company held meetings, entered into contracts, caused surveys to be made, employed agents and servants, and in general transacted the business for which said corporation was formed, and each of the defendants is now estopped from denying the incorporation and legal existence of said Omaha, Decatur & Northern Railway Company."

It is very doubtful whether this constitutes a substantial allegation of estoppel; but, it having not been assailed in any form, I shall assume it does, and this dissent is not from the holding that a part of the defendants are estopped. There is no evidence that any notice was given of the first stockholders' meeting at all. At that meeting, exclusive of Bement, there were only 25 stockholders present, representing 38 shares, or about one-third of 1 per cent. Twenty-seven of the subscribers had no notice, for aught that appears, of any meeting to organize the corporation, never held any office or took part in any way in anything that was done by the company. It seems clear to me that they were not estopped.

It fairly appears that possibly some of the expenses allowed were for preliminary expenses, but it does not appear that all of the expenses were of that character. That is, it is conceded by the appellant in his brief that Wakefield, of Wakefield & Peirce, who recovered judgment for $3,000, was chief engineer of the railway company, and it may well be guessed that the claim in whole or in part was for surveying, which would be a proper preliminary expense for which all the defendants would be liable. It more clearly appears that the claim of H. H. Bowes was for attorney's fees, which would not be a proper preliminary expense. There is nothing to indicate whether the balance of the claims allowed were for preliminary expenses or otherwise.

It is held that the 27 stockholders who never did anything but sign the subscriptions for stock, with the implied condition precedent that they were not to be liable until $1,000,000 had been subscribed, became liable to substantially the full amount of their subscriptions with-

out any allegation that the claims filed were for preliminary expenses, and with no substantial proof to that effect, is a violation of the fundamental rules applicable in such matters, and in justice the case ought to be reversed as to them at least.

Considerable is said in the forgoing opinion upon the failure of these 27 during the intervening years to bring an action to rescind. They had no right to maintain an action to rescind as there was no fraud. That broadly distinguishes this case from the case of Gress v. Knight, 135 Ga. 60, 68 S. E. 834, 31 L. R. A. (N. S.) 900. Nor is it of any avail to say that these men stood by and saw the debts contracted. There is not a syllable of evidence that they ever knew that the company was organized, or ever "stood by" while these debts were contracted.

The opinion practically overrules all the cases cited on preliminary expenses, because, if these men who never did anything, and who are not shown to have known anything about what was being done, are liable, not only for preliminary expenses, but for all others, then the whole doctrine of preliminary expenses is a senseless and useless one.

Fully believing that the judgment should be reversed, at least as to the 27 who are not shown to have had anything to do with the corporation, I cannot but dissent from the foregoing opinion.

UTAH POWER & LIGHT CO. v. UNITED STATES.
UNITED STATES v. UTAH POWER & LIGHT CO.

(Circuit Court of Appeals, Eighth Circuit. November 24, 1915.)

Nos. 4506, 4507.

1. WATERS AND WATER COURSES ⊂=4—PUBLIC LANDS—ACQUISITION OF WATER RIGHTS—ELECTRIC POWER COMPANIES.

Act May 11, 1898, c. 292, § 2, 30 Stat. 404 (Comp. St. 1913, § 4938), providing that rights of way acquired over public lands under Act March 3, 1891, c. 561, §§ 18–21, 26 Stat. 1101 (Comp. St. 1913, §§ 4934–4937), by irrigation companies for canals and ditches may be used for water transportation "for the development of power as subsidiary to the main purpose of irrigation," did not supersede or in any way affect Act May 14, 1896, c. 179, § 2, 29 Stat. 120 (Comp. St. 1913, § 4944), which requires the consent of the Secretary of the Interior to the acquiring by power companies of rights in public lands or forest reservations for the purpose of generating, manufacturing, or distributing electric power.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 1; Dec. Dig. ⊂=4.]

2. WATERS AND WATER COURSES ⊂=5—FOREST RESERVATIONS—ACQUISITION OF WATER RIGHTS.

Act Feb. 1, 1905, c. 288, § 4, 33 Stat. 628 (Comp. St. 1913, § 4947), granting rights of way for dams, reservoirs, etc., in forest reserves "for municipal or mining purposes * * * under such rules and regulations as may be prescribed by the Secretary of the Interior," is to be construed in connection with prior acts in pari materia, and rights thereunder can only be acquired under such reasonable rules and regulations as may be prescribed by the Secretary, who is clearly authorized to impose conditions on the grant. Such act conferred no rights upon a power com-

pany which, prior to its passage, had as a trespasser and without right entered upon public lands later included in a forest reservation, appropriated water therefrom, and constructed thereon its electrical plant.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇐5.]

3. EMINENT DOMAIN ⇐46—PUBLIC LANDS—AUTHORITY AND CONTROL OF CONGRESS—ACQUISITION OF PRIVATE RIGHTS.

Under Const U. S. art. 4, § 3, vesting in Congress power to dispose of and make all needful rules and regulations respecting the property belonging to the United States, and the express provisions of the Enabling Act and Constitution of Utah, disclaiming on the part of the people of the state all right and title to the unappropriated public lands of the United States therein, and providing that until its title is extinguished such lands shall remain subject to the disposition of the United States, private rights in such lands cannot be acquired under the state's power of eminent domain, but only by virtue of some act of Congress.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 91–93; Dec. Dig. ⇐46.]

4. ESTOPPEL ⇐62(2)—UNITED STATES—UNAUTHORIZED APPROPRIATION OF PUBLIC LANDS.

The doctrine of equitable estoppel cannot be invoked against the United States, so far as to validate the unauthorized appropriation of public lands on the mere ground of occupation and improvements made and the presumption that the United States had knowledge thereof.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 152; Dec. Dig. ⇐62(2).]

5. PUBLIC LANDS ⇐8—UNLAWFUL USE—RECOVERY OF DAMAGES.

On recovery by the United States of public lands unlawfully appropriated to private use, but the right to which use could have been acquired under the statutes by complying with the regulations and conditions prescribed by the Secretary of the Interior and paying for the same, the United States is entitled to recover as damages the reasonable value of such use by defendant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 8, 148; Dec. Dig. ⇐8.]

Appeal from the District Court of the United States for the District of Utah; J. A. Marshall, Judge.

Suit in equity by the United States against the Utah Power & Light Company. Decree for complainant, and both parties appeal. Affirmed on defendant's appeal, and reversed on the appeal of the United States. See, also, 208 Fed. 821; 209 Fed. 554, 126 C. C. A. 376.

William W. Ray, U. S. Atty., of Salt Lake City, Utah, and J. F. Lawson, Asst. Sol. for Department of Agriculture, of Ogden, Utah, for the United States.

Graham Sumner, of New York City (R. A. Wilbur, of Salt Lake City, Utah, on the brief), for the defendant.

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

VAN VALKENBURGH, District Judge. This case comes before us for the second time. The United States brought its bill of complaint against the Utah Power & Light Company, defendant below, by which it sought perpetually to enjoin said defendant from main-

taining, in whole or in part, an alleged unlawful and tortious possession and occupancy of certain public lands in Cache county, state of Utah, now forming a part of the Cache National Forest, and also prayed that the defendant be compelled to account for and make corresponding pecuniary payment therefor to the plaintiff.

Appellee is a corporation organized for the purpose of supplying electrical power to all who may desire to purchase and use it. Since December, 1900, it, and its predecessor in interest, have been engaged in the continuous operation of certain hydro-electrical power works, situated on the Logan river in the county and state aforesaid. These works comprise a reservoir and a flume or conduit for conveying the flow of water from the reservoir to the power works, pressure pipes, and power house station, all equipped with the necessary machinery and apparatus. The reservoir, flume, and conduit are situated wholly upon and within the lands of the United States. Appellee claimed to have acquired whatever rights it possessed under and by virtue of the customs, laws, and decisions of the state of Utah, as recognized and confirmed by section 9 of the act of Congress of July 26, 1866 (14 Stat. 253, c. 262), appearing as section 2339 of the Revised Statutes (U. S. Comp. St. 1913, § 4647). In opposition to this the government claimed that Congress has since made specific and comprehensive provisions defining the procedure by which, and the extent to which, the use of the public lands may be granted and acquired for the purposes of generating, manufacturing, and distributing electric power; that this legislation withdraws such uses from the terms of section 2339 of the Revised Statutes. The legislation referred to is that of May 14, 1896 (29 Stat. 120, c. 179 [U. S. Comp. St. 1913, § 4944]). A motion to dismiss, substituted under the new equity rules for demurrer, was filed by appellee. This motion was sustained by the trial court, which entered a decree dismissing the bill. 208 Fed. 821. Upon appeal, the decree below was reversed and the case was remanded for further proceedings in accordance with the views expressed in the opinion of this court. 209 Fed. 554, 126 C. C. A. 376. Thereupon, in the district court, the defendant filed an answer denying some of the allegations of the bill of complaint, and alleging new matter which it conceived to disclose an equitable defense. The government interposed a motion to strike this answer from the files, and for a decree against the defendant upon the ground that the answer and each separate defense stated therein were insufficient in law. This motion was sustained. Title to the lands in question was adjudged and decreed to be quieted and confirmed in the United States as against all claims, demands and contentions of the defendant. From this decree the defendant below appeals. The trial court, however, refused to decree an accounting and damages, as prayed for in the bill, and from this action the government has taken a cross-appeal.

Counsel for the Utah Power & Light Company, which, for convenience, will hereinafter be designated as the defendant, now contend:

(1) That whatever may have been the effect of the act of 1896, upon the law theretofore existing, nevertheless the act of 1898, superseded the act of 1896 and reinstated sections 2339 and 2340 of the Revised

Statutes (Comp. St. 1913, §§ 4647, 4648) with respect to rights of ways for canals and reservoirs for the generation of electric power.

(2) That defendant's predecessors acquired an express grant of rights of way for the reservoir and flume or conduit under section 4 of the act of 1905 (Comp. St. 1913, § 4947).

(3) That the land of the plaintiff (United States of America) within the state of Utah is subject to the laws of that state, and its power of eminent domain to take and use property for a public purpose; that the laws of the state of Utah authorized the defendant and its predecessors to construct and maintain the reservoir and flume or conduit upon the plaintiff's land for a public purpose, and the federal Congress had no power by the act of 1896, or any other act, to withdraw its land from the operation of such laws or to prevent the construction or maintenance of such reservoir, flume or conduit.

(4) That new facts alleged in the answer constitute a defense in the nature of equitable estoppel against the plaintiff.

Defendant also reasserts that the act of Congress of 1896 was not intended to supersede or modify sections 2339 and 2340 of the Revised Statutes, nor displace the laws of the state of Utah, nor prevent the construction or maintenance of reservoirs or water conduits upon the public land. Counsel announced, however, that they would not reargue, on this appeal, any points decided on the former appeal, and inasmuch as we are satisfied with the conclusions there reached, neither time nor space will be consumed in unnecessary re-statement of the views heretofore announced. A fuller discussion of the facts and principles involved in the issues presented on the last appeal will be found in the reported opinion above cited. The points now urged by defendant will be considered in the order of their statement.

[1] 1. That the act of May 11, 1898, superseded the act of 1896 and reinstated sections 2339 and 2340 with respect to rights of way for canals and reservoirs for the generation of electric power. This act of 1898 provided that the act entitled "An act to amend an act to permit the use of the right of way through public lands for tramroads, canals, and reservoirs, and for other purposes," approved January 21, 1895, be amended by adding thereto the following two sections:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within the limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses. [Comp. St. 1913, § 4943.]

"Sec. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation." 30 Stat. 404 (Comp. St. 1913, § 4938).

It will be observed that the first of these sections affects only lands not within the limits of any park, forest, military, or Indian reservations. It authorizes a mere permission by the Secretary of the Interior, and obviously adds nothing to the power conferred by the act of 1896, which, in express terms, permits rights of way for the purposes of generating, manufacturing or distributing electric power. The second section is, in effect, amendatory of the act of 1891. That act, confessedly, was restricted to purposes of irrigation and dealt only with rights of way over the public lands to be used for such purposes. It was uniformly held that locations under it could not be approved where it appeared that the right of way was desired for any other purpose than irrigation, and, by its terms, the grant was limited "to any canal or ditch company formed for the purpose of irrigation." 18 L. D. 573; 20 L. D. 154; 21 L. D. 63; 28 L. D. 474–476. In the latter decision, Mr. Justice Van Devanter, then Assistant Attorney General to the Secretary of the Interior, rendered an opinion in which he says:

"The act of May 11, 1898, purports to be an amendment of the act of 1895, and section 1 relates only to the public lands not within the limits of any reservation. Section 2 is in effect amendatory of the act of 1891, and relates to all lands coming within the purview of that act, which embraced both public lands and reservations of the United States. It provides that the rights of way granted under the act of 1891 may be used for purposes of a public nature and for water transportation, domestic purposes and for the development of power. This section does not purport to make any new grant, but simply permits the rights of way granted by the act of 1891 to be used for other purposes than that of irrigation. No new class of grantees is described in this section, and to determine who may be entitled to a right of way it is necessary to turn to the act of 1891. There the grantees are described as 'any canal or ditch company formed for the purpose of irrigation.' If it had been intended to enlarge the class of grantees some apt language similar to that of the first section would have been used in this second section of the act of 1898. The controlling idea was still, as in the act of 1891, irrigation."

In the Kern River Company Case, 38 L. D. 302, it was further held:

"A right of way under the act of March 3, 1891, may be acquired only by a company formed for the purpose of irrigation; but a right of way secured under that act may, under the act of May 11, 1898, be used for purposes of a public nature as subsidiary to the main purpose of irrigation. * * *

"While the act of 1898 extended and enlarged the uses which might be made of the rights of way so acquired (under the act of 1891), that act made no provision whatever for the recognition of any other class of grantee, but merely specified the additional purposes for which the rights of way might be used."

Later, in 1910, the attention of the President was directed to the case of the Ramona Power & Irrigation Company for a right of way over lands in the state of California under the provisions of the act of March 3, 1891, in order to obtain an expression of his views as to the policy which should be adopted in cases of applications for rights of way under the act of 1891, as amended by the act of May 11, 1898, where the primary and principal use of the right of way is sought for the purpose of irrigation, but where there is involved a development of electrical power or energy for the purpose of pumping water to lands from streams, reservoirs or wells. The President expressed himself, in the case submitted, as of the opinion that the application should be granted

upon the express condition that the right of way is sought and approved for the main purpose of irrigation, and that the power uses are subsidiary to and mainly for the purpose of serving and carrying out irrigation. 39 L. D. 309. The decisions of the Land Department referred to cover the period from 1894 to 1910. They consecutively antedate the act of 1898, and extend through a period contemporaneous with its enactment and the administration of its provisions. As such, they are entitled to respectful consideration by the courts (United States v. Finnell, 185 U. S. 236–244, 22 Sup. Ct. 633, 46 L. Ed. 890; Midway Company v. Eaton, 183 U. S. 602–609, 22 Sup. Ct. 261, 46 L. Ed. 347); but further than this, as a matter of independent judgment, we concur fully in the views expressed by the officials of the Interior Department. The first section of the act of 1898 has no application in any event, and the second section does not enlarge the class of grantees entitled to the benefits of that act, but merely specifies the additional purposes for which the rights of way, acquired under that act by eligible parties, may be used. Therefore, this act of May 11, 1898, neither enlarges the act of 1891 in such manner as to supersede the act of 1896, nor reinstates sections 2339 and 2340 of the Revised Statutes in so far as those sections have been affected by the act of 1896.

[2] 2. Defendant next asserts that its predecessors acquired an express grant of rights of way for its reservoir and flume or conduit under section 4 of the act of February 1, 1905. This was an act primarily framed to provide for the transfer of forest reserves from the Department of the Interior to the Department of Agriculture. Section 4 (Comp. St. 1913, § 4947) reads as follows:

"That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the state or territory in which said reserves are respectively situated."

Defendant's position is that this section makes an unqualified grant in the public domain described, which is self-executing and indefeasible during the period of beneficial use. It is stated by counsel that the rules and regulations referred to could not defeat this grant, nor is the right of way in any sense dependent upon them; that the function of the rules and regulations is to control the method of construction and use so as to prevent damage to the forest, etc.; that section 4 of this act was passed to rebut any presumption or claim that rights of way for the storage and conveyance of water could not be acquired upon the forest reserves.

Assuming that this last statement is true, it by no means follows that the rules and regulations contemplated might not prescribe the method and terms of acquisition. While such rules and regulations could not defeat the grant, they obviously could operate to execute and condition it.

Conceding, without deciding, that the term "municipal" is alone enough to cover and embrace all the domestic and other beneficial uses

enumerated in prior acts relating to the same subject, still, in view of the specific and distinctive enumeration of such uses, which the Congress had thought necessary to adopt in such previous legislation, this term can hardly be accorded such a broad significance, unless this act be regarded as a supplement to, rather than a substitute for, what went before; and such it undoubtedly was. There is no reason whatever to regard this act as a departure from the governmental policy on this subject, as evidenced by legislation, beginning at least with the act of 1891 and developing steadily in the direction of governmental control and conservation of the resources of the nation; but, on the contrary, it was more logically a progressive step in the same direction. It follows that all these acts are in pari materia, and should be construed accordingly. At the time defendant's predecessors entered upon the lands in question, they formed no part of the forest reserves of the United States. Prior to the passage of this act, in the view taken by this court, defendant had acquired no vested right in such part of the public domain. It was, in point of law, a mere trespasser, and could not, as against the plaintiff, establish a right by making wrongful entry.

"The mere settlement upon public lands and making improvements thereon without taking some steps required by law to initiate the settler's right thereto, is wholly inoperative as against the United States." Russian-American Co. v. United States, 199 U. S. 570, 26 Sup. Ct. 157, 50 L. Ed. 314; Lake Superior Co. v. Finan, 155 U. S. 385, 15 Sup. Ct. 115, 39 L. Ed. 194; Frisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668.

The naked terms of the grant did not operate without more to transform an unauthorized entry into a lawful and permanent right of possession. This statute was not self-executing. Rights under it, as disclosed by previous legislation of like nature, must be acquired under such reasonable rules and regulations as may be prescribed by the Secretary of the Interior. This is the only construction permissible under the express terms of the statute itself. The act of February 1, 1905, contains other provisions confirmatory of this view. In addition to the rights granted under section 4, section 2 (Comp. St. 1913, §§ 4947, 5093) authorizes the exportation of wood pulp manufactured from timber in the district of Alaska.

Section 5 (Comp. St. 1913, § 5142) provides:

"That all money received from the sale of any products *or the use of any land or resources of said forest reserves* shall be covered into the treasury of the United States and for a period of five years from the passage of this act shall constitute a special fund available, until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement, and extension of federal forest reserves."

It was not intended that this part of the public domain should longer be appropriated and used without return to the government, absent express permission by Congress. United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563. Finally, appellant has made no application, and received no permission, either under the act of 1898 or the act of 1905. It can claim no rights under acts with which it has not complied. Mills v. Stoddard et al., 8 How. 345, 12 L. Ed. 1107; United States v. Utah Power & Light Company (C. C. A.) 209 Fed. 562, 126 C. C. A. 376. It will be seen, by reference to the opinion, that both

these acts were before this court on the former appeal. It was not thought then, and is not thought now, that they were intended to, or do, impair the governmental policy announced in the act of 1896.

[3] 3. But the defendant insists that the land of the plaintiff within the state of Utah is, in any event, subject to the laws of that state and its power of eminent domain; that those laws authorize the defendant and its predecessors to construct and maintain its reservoirs and flume or conduit upon the plaintiff's land. It bases its contention upon the generally accepted propositions that each state of the union is an independent sovereign and has all the rights and powers of such, except as they may be restricted or limited by the federal Constitution, whereas the government of the United States is said to be one of delegated, limited and enumerated powers; that the right of eminent domain is an attribute of sovereignty; that section 3 of article 4 of the federal Constitution, providing that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," is not a grant of power by the states to the United States, but is, however, a grant of power to Congress as a branch of the federal government. The reasoning upon which this conclusion is based is thus stated in the brief:

"The states never had the power to control or dispose of property of the United States (except that each state had the right to take property within its jurisdiction for a public purpose). The territory of the United States was not within the states. As soon as this was ceded to and became the property of the United States, the power of control and disposition necessarily passed to the United States. There was no occasion in the Constitution for any express grant to the United States of power to control and dispose of its own property. Such power existed as soon as the new political entity was created by the Constitution. This clause is, however, a grant of power to Congress. It designates Congress as the branch of the federal government which can exercise the power of control and disposition which the United States holds inherently as the owner of the property."

An inconsistency in this argument is at once apparent. If section 3 of article 4 of the federal Constitution is not to be interpreted as a grant of power by the states to the United States, for the reason that the states never had power to control or dispose of the property of the United States, and could not, therefore, presumably grant away a power which they did not possess, it is, by the same token, difficult to perceive how that clause can, nevertheless, be regarded as a grant of power to Congress. It was also suggested at the argument that the land in question was not embraced within any territory in contemplation by the framers of the Constitution. This entire line of argument is special pleading, false in premise, and unsound in logical sequence. The government of the United States is in a sense one of delegated, limited and enumerated powers, and such powers as are not delegated to it by the Constitution, nor prohibited by the Constitution to the states, are reserved to the states respectively, or to the people. But the clause in question is no less a delegation of express power to the federal government because it is abstract and general rather than concrete and specific. The states were forming for themselves and their successors a central government which should be supreme within a

defined jurisdiction. This clause is sufficiently broad to cover not only conditions then existing, but all future expansion and development. It is a distinction, without a difference, to say that it embodied a grant to the Congress, but not to the government itself. The Supreme Court has held that it is a grant of power to the United States of control over its property. Kansas v. Colorado, 206 U. S. 89, 27 Sup. Ct. 655, 51 L. Ed. 956; Light v. United States, 220 U. S. 523–537, 31 Sup. Ct. 485, 55 L. Ed. 570; United States v. Utah Power & Light Company, 209 Fed. loc. cit. 557, 126 C. C. A. 376, and cases cited.

It is true that in some of the earlier decisions the validity of the exercise of the right of eminent domain by a state over the lands of the United States has received apparent recognition. United States v. Railroad Bridge, 6 McLean, 517, 531, 533, Fed. Cas. No. 16,114; United States v. City of Chicago, 7 How. 185, 12 L. Ed. 660; Illinois Cent. R. Co. v. Chicago, B. & N. R. Co. (C. C.) 26 Fed. 477; Union Pac. Ry. Co. v. B. & M. R. R. Co. (C. C.) 3 Fed. 106; Union Pac. Ry. Co. v. Leavenworth, N. & S. Ry. Co. (C. C.) 29 Fed. 728; Jones v. Florida C. & P. R. Co. et al. (C. C.) 41 Fed. 70. This view is predicated upon the assumption that while government lands are not reserved or held for specified national purposes, the United States occupies the position of a mere individual proprietor, with rights and remedies neither less nor greater. An examination of the cases cited, however, discloses that the peculiar facts with which they dealt, as well as the limitations stated in the opinions written, greatly modify the scope of the doctrine stated; and the later cases leave little doubt that the Supreme Court has not recognized, and will not recognize, the limited control of Congress over the territory and property belonging to the United States, for which defendant contends. The public lands of the United States are held by it, not as an ordinary individual proprietor, but in trust for all the people of all the states to pay debts and provide for the common defense and general welfare under the express terms of the Constitution itself. It matters not whether the title is acquired by cession from other states, or by treaty with a foreign country, whether the lands are located within states or in territories, they are held for these supreme public uses when and as they may arise. The Congress has the exclusive right to control and dispose of them, and no state can interfere with this right or embarrass its exercise. United States v. Gratiot, 14 Peters, 526, 10 L. Ed. 573; Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565; Irvine v. Marshall, 20 How. 558, 15 L. Ed. 994; Gibson v. Chouteau, 13 Wall. 92–99, 20 L. Ed. 534.

"The means employed by the government of the Union are not given by the people of a particular state, but by the people of all the states; and being given by all, for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." Van Brocklin v. State of Tennessee, 117 U. S. 151–155, 6 Sup. Ct. 670, 672, 29 L. Ed. 845.

Moreover, the act enabling the people of Utah to form a Constitution and state government imposes the condition that the people inhabiting said proposed state forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof. In the Constitution of Utah, subsequently adopted, this provision was incorporated in terms. It is urged that insistence upon these terms, when the new state of Utah was admitted, implies that the exclusive control of Congress was conceived not to exist in the absence of such an express reservation; but the better view is that the expression in the Enabling Act, and in the Constitution of the new state, was but declaratory of a constitutional power known to exist, and was inserted to forestall all possible contention. Van Brocklin v. Tennessee, 117 U. S. 167, 6 Sup. Ct. 670, 29 L. Ed. 845; Stearns v. Minnesota, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed. 162. It is idle to insist that the provisions of the Utah Enabling Act and Constitution do not interfere with defendant's contentions. In the brief counsel say:

"They did not provide that the land should remain 'at the sole and entire disposition of the United States,' but merely provided that it should remain 'subject to the disposition of the United States.'"

This is a distinction without a substantial difference. The acquisition of a perpetual easement under the alleged power of eminent domain is such an appropriation as amounts to an invasion of the constitutional power of Congress.

"The power to tax" (as the power to take) "involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The states have no power, by taxation or *otherwise*, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." Van Brocklin v. State of Tennessee, 117 U. S. 155, 156, 6 Sup. Ct. 670, 673, 29 L. Ed. 845.

The United States does not and cannot hold property as a monarch may for private or personal uses; it cannot hold as a private proprietor for other than public objects. Van Brocklin v. State of Tennessee, 117 U. S. 158–161, 6 Sup. Ct. 670, 29 L. Ed. 845. "All the public lands of the nation are held in trust for the people of the whole country." United States v. Trinidad Coal Co., 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640; Light v. United States, 220 U. S. 523–537, 31 Sup. Ct. 485, 55 L. Ed. 570.

The United States can prohibit absolutely or fix the terms on which the property may be used. As it can withhold or reserve the land it can do so indefinitely. Light v. United States, 220 U. S. loc. cit. 536, 31 Sup. Ct. 485, 55 L. Ed. 570; Stearns v. Minnesota, 179 U. S. 243, 21 Sup. Ct. 73, 45 L. Ed. 162. In Coe v. Errol, 116 U. S. 517–524, 6 Sup. Ct. 475, 477, 29 L. Ed. 715, Mr. Justice Bradley said:

"We take it to be a point settled beyond all contradiction or question that a state has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States."

And in Van Brocklin v. Tennessee, 117 U. S. loc. cit. 165, 6 Sup. Ct. 670, 29 L. Ed. 845, Mr. Justice Gray quotes approvingly the following language of Mr. Douglas in which Mr. Webster concurred:

"The title of the United States can be divested by no other power, by no other means, in no other mode, than that which Congress shall sanction and prescribe. It cannot be done by the action of the people or Legislature of a territory or state."

To hold otherwise—

"would tend to create a conflict between the officers of the two governments, to deprive the United States of a title lawfully acquired under express acts of Congress, and to defeat the exercise of the constitutional power to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States."

The rights of the states in the shores and beds of navigable waters below high-water mark bear no analogy to the claim of defendant here. In such cases the government asserts not title, but control over navigation. United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 33 Sup. Ct. 667, 678, 57 L. Ed. 1063. The distinction is clearly drawn by the Supreme Court in Van Brocklin v. Tennessee, 117 U. S. 167, 168, 6 Sup. Ct. 670, 29 L. Ed. 845:

"Upon the admission of a state into the Union, the state doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high-water mark, vest in the state, and not in the United States. New Orleans v. United States, 10 Pet. 662, 737 [9 L. Ed. 573]; Pollard v. Hagan, 3 How. 212 [11 L. Ed. 565]; Goodtitle v. Kibbe, 9 How. 471 [13 L. Ed. 220]; Doe v. Beebe, 13 How. 25 [14 L. Ed. 35]; Barney v. Keokuk, 94 U. S. 324 [24 L. Ed. 224]. But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other states, or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,' has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no state can interfere with this right, or embarrass its exercise. United States v. Gratiot, 14 Pet. 526 [10 L. Ed. 573]; Pollard v. Hagan, 3 How. 212 [11 L. Ed. 565]; Irvine v. Marshall, 20 How. 558, 563 [15 L. Ed. 994]; Gibson v. Chouteau, above cited."

It has been thought advisable and necessary to carry this discussion to somewhat unusual length because of the importance of the question involved, the earnest insistence of counsel upon the right asserted, and the absence of an express ruling by the Supreme Court thereon. In United States v. City of Chicago, 7 How. 185, 12 L. Ed. 660, the proposition was not decided because "open to some debate" and "not necessary to a disposition of the case." In Van Brocklin v. Tennessee, supra, it was announced:

"When that question shall be brought into judgment here, it will require and will receive the careful consideration of the court."

In Siler et al. v. Louisville & Nashville R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753, it was said that:

"Where a case in this court can be decided without reference to questions arising under the federal Constitution, that course is usually pursued and is not departed from without important reasons."

The same considerations moved this court upon the last appeal to refrain from making an express determination of this point, although then suggested, as being unnecessary to a disposition of the case. Now, however, the question is squarely presented and we answer it without hesitation. In our opinion, the public lands involved were not subject to state power of eminent domain, either directly or indirectly, without the consent of the United States; and to sustain its contention, the defendant must point to some express grant by the government, or at least to subsisting legislation from which the grant may be inferred, or by which its claims have been recognized and preserved. United States v. Utah Power & Light Co. (C. C. A.) 209 Fed. loc. cit. 559, 126 C. C. A. 376. In this view, it is unnecessary to consider whether there has been any effective exercise of the power claimed.

[4] 4. We come now to the defense of equitable estoppel. This is predicated upon the view that with respect to its proprietary interests a sovereign is subject to the principles of equitable estoppel in the same manner and under the same circumstances as a private individual or corporation. By its amended answer defendant alleges that its works were constructed at very great expense, and with the presumed knowledge of the plaintiff through its agents and representatives; that for nine years plaintiff neither objected to nor protested against the use of its land; that to enjoin the maintenance and operation of the works will cause serious loss to the defendant and great inconvenience to the public.

It should be observed, in passing, that while the decree below quieted title in complainant and embraced an injunction against the defendant, nevertheless this situation was the direct result of defendant's insistence upon the rights for which it now contends. The bill of complaint did not seek to expel the defendant from the public domain, but prayed that it should be enjoined from maintaining its alleged unlawful possession and occupancy without the permission of plaintiff, and without first complying with the laws of the United States, and the rules and regulations promulgated by the Secretary of Agriculture relating to national forests, and further that defendant be required to make pecuniary payment to the plaintiff for use and occupation. The government has not refused a right of way over its lands for the beneficial uses in question. The issue of interrupted service and great inconvenience and hardship to defendant's customers, and to the public generally, is not legitimately in this case, although persistently urged. The government has shown no disposition to deal unjustly with the states nor with their citizens in this respect, and it is not to be expected nor presumed that it will do so. United States v. Utah Power & Light Co., 209 Fed. 554–559, 126 C. C. A. 376; Stearns v. Minnesota, 179 U. S. 223–243, 21 Sup. Ct. 73, 45 L. Ed. 162. The only question here presented is whether a public service corporation, assuming to act in the name of the state of Utah, shall receive a free and permanent right of way and capitalize that gratuity for private gain,

or whether the United States shall control the disposition of its property and receive fair compensation as other landed proprietors for the use thereof. If the exigencies of this particular community are such that the interests of the people demand public grants and concessions for their necessary comfort and convenience, no doubt such will be made, as they always have been made, by government, state and national, but they must flow from congressional action and not from individual appropriation.

It is well settled that an unauthorized or wrongful entry upon public lands, and the making of improvements thereon, without taking the steps required by law to initiate a legal right thereto, is wholly inoperative as against the United States. Russian-American Co. v. United States, 199 U. S. 570, 26 Sup. Ct. 157, 50 L. Ed. 314; Frisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668; Lake Superior, etc., Co. v. Finan, 155 U. S. 354, 15 Sup. Ct. 115, 39 L. Ed. 194; United States v. Trinidad Coal & Coking Co., 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640. Long acquiescence does not legalize an unwarranted appropriation. Camfield v. United States, 167 U. S. 527, 17 Sup. Ct. 864, 42 L. Ed. 260. And failure to object does not confer any vested right as against the government. Light v. United States, 220 U. S. 523–535, 31 Sup. Ct. 485, 55 L. Ed. 570; Steele v. United States, 113 U. S. 130, 5 Sup. Ct. 396, 28 L. Ed. 952; Wilcox v. McConnel, 13 Pet. 513, 10 L. Ed. 264.

It is equally well settled, and is, in fact, conceded, that laches is not imputable to the government, and, as stated in United States v. Kirkpatrick, 9 Wheat. 720–735, 6 L. Ed. 199:

"This maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities."

The defendant admits the soundness of this principle, but makes a distinction between laches, or mere delay, and equitable estoppel as resulting from the showing made by its answer, to which reference has been made. Reliance is placed in great measure upon New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, in which it was held:

"A failure to pursue statutory remedies is not always fatal to the rights of a party in possession, and if full and adequate compensation is made to the plaintiff, sometimes the possession of the defendant will not be disturbed."

In that case the municipality was undertaking a large work with a view of supplying its citizens with water. It had been engaged in this work for two years and had nearly completed its dam. Before the case was brought the plaintiffs and the city had been trying to agree upon the amount of compensation, and the former were seeking compensation for the injuries they would sustain, and were not insisting upon their alleged right to an abandonment of the work. In such case it was held that the city might well assume that payment of a just

compensation would be accepted in lieu of the right. The power of eminent domain was conceded. The plaintiffs were held to be estopped from insisting upon an abandonment of the work inasmuch as adequate compensation might be ascertained and decreed.

Our attention is also directed to the decisions of this court in State of Iowa v. Carr (C. C. A.) 191 Fed. 257, 112 C. C. A. 477, and Hemmer v. United States (C. C. A.) 204 Fed. 898, 123 C. C. A. 194, wherein it was held that in a suit in equity the claims of the United States appeal to the conscience of the chancellor with the same, but with no greater or less, force than those of a private individual under like circumstances, and are determinable by the same rules and principles. In the former of these cases one Samuel Carr and others brought suit against one Charles R. Hannan, etc., to quiet the title to certain land on the Iowa shore of the Missouri river. The state of Iowa intervened and sought to establish its claim to a part of this accreted tract on the ground that it was appurtenant to an island on the Iowa part of the river bed, and, in fact, was the Iowa part of the abandoned bed of the river. In opposition to this claim complainants set up long continuous adverse possession; that the land was an accretion to their own lands, to which they held title from the United States; and further that the state had long acquiesced in their title and possession and had recognized it affirmatively by the levy and collection of taxes upon the disputed land as the property of the complainants. For more than 20 years the plaintiffs and their grantors were in undisturbed possession of the land under claim of title. They expended large sums of money on its improvement. The state, with full knowledge of the situation, listed the property as theirs and levied and collected taxes from them.

In Hemmer v. United States, supra, one Henry Taylor, an Indian, entered 160 acres of land in South Dakota, made his final proof, paid for the land, and obtained his final receiver's receipt under the act of Congress of March 3, 1875 (18 Stat. 420, c. 131, § 15 [Comp. St. 1913, § 4611]), which provided that any Indian who was the head of a family, or who had arrived at the age of 21 years, and had abandoned, or should thereafter abandon, his tribal relations, should be entitled to the benefits of the homestead law, but that the title to the land he should acquire should be inalienable for five years from the date of his patent therefor. In 1884, after he had completed his five years of residence and occupation of his homestead, and thus had completely earned it, a law was passed providing that the government would hold such land in trust for 25 years instead of 5. By mistake, the patent, which was issued to him, contained this provision of the later act. Afterwards the title passed from Taylor to Hemmer. The United States brought suit in equity against the immediate and remote grantees of Taylor, for the purpose of setting aside all the conveyances under which they held, upon the ground that this homestead was inalienable for 25 years after the date of the patent issued under the act of 1884 (Act July 4, 1884, c. 180, 23 Stat. 96 [Comp. St. 1913, § 4612]). In the course of the opinion the doctrine was restated that in such a suit the claims of the government appeal to the conscience of the chancellor with the same, but with no greater or less, force than those of a private individual under

similar circumstances. However, the court held that the act of 1884 did not repeal, amend or modify any of the provisions of the earlier act, and did not extend from 5 years to 25 years the restriction on alienation; that Taylor had fully complied with the prior act, had all rights under it and that Hemmer stood in his shoes. Under this holding, the disposition of the case did not depend upon the doctrine of equitable estoppel quoted.

Nevertheless, there can be no doubt that situations may be and are presented where both state and nation enter courts of equity as suitors under conditions which place them upon an equal footing, in this respect, with the private citizen; that where the relations existing are such as to convey actual knowledge of and acquiescence in asserted claims under conditions which would make the subsequent denial of such claims inequitable, the doctrine of equitable estoppel as distinguished from mere laches may be invoked even against the government. The cases just cited are examples of such, but their doctrine cannot be so far extended as to validate the unauthorized appropriation of the public lands upon the mere ground of occupation and improvements made, the knowledge of which is presumed to be brought home to the government through "fiscal operations so various, and agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses if the doctrine of laches can be applied to such transactions." The doctrine of equitable estoppel has no application here.

[5] It remains to consider the contention of the government upon its cross-appeal, viz. that the courts should have decreed an accounting and damages as prayed. We are unable to perceive why that contention is not sound, and this notwithstanding the lands have not been injured and would not, perhaps, have been otherwise leased or used by the government during the same period. United States v. Bernard (C. C. A.) 202 Fed. 728–731, 121 C. C. A. 190; St. Louis v. Western Union Telegraph Company, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810. It would seem further that the charge imposed by the regulations should fairly and reasonably measure the value of such use. Congress clearly has the power to prescribe the terms upon which it will permit the lands of the United States to be used or otherwise disposed of; and the authority to make such rules conferred upon executive officers is not a delegation of legislative power.

"A provision in an act of Congress as to the use made of moneys received from government property clearly indicates an authority to the executive officer authorized by statute to make regulations regarding the property to impose a charge for its use." United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; Cosmos, etc., Co. v. Gray Eagle Oil Co., 190 U. S. 301, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064.

By the act of 1896 the Secretary of the Interior is expressly authorized to permit the use of such rights of way under general regulations to be fixed by him. It follows that the decree of the trial court quieting and confirming the title to the lands in question, as against all claims, demands and contentions of the defendant, and enjoining said defendant from further operating the said works without the permission of the plaintiff, and from further maintaining its unlawful and tortious

possession and occupancy within the Cache National Forest without the permission of plaintiff, and without first complying with the laws of the United States and the rules and regulations promulgated by the Secretary of Agriculture relating to national forests, must be affirmed, but the cause will be remanded to the district court for an accounting for the reasonable value of use and occupation and for such other proceedings as may be necessary in accordance with the views herein expressed.

UTAH LIGHT & TRACTION CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 24, 1915.)

No. 4370.

1. WATERS AND WATER COURSES ⟸5—ACQUISITION OF WATER RIGHTS—CONSTRUCTION OF STATUTES.

The provisions of Rev. St. §§ 2339, 2340 (Comp. St. §§ 4647, 4648), confirming rights to the use of water and to the maintenance of canals and ditches on the public lands acquired and which became vested in accordance with local customs and laws, were broad enough to include reservoirs, dams, flumes, pipes, and tunnels; and a corporation which constructed such structures on public lands while those sections were in force is protected in their use, whether or not they had been put into operation, but no right to maintain power houses or transmission lines for electric power on public land could be acquired thereunder, and the right to any further acquisition terminated on the passage of Act May 14, 1896, c. 179, § 2, 29 Stat. 120 (Comp. St. 1913, § 4944), which substituted for such vested easement system the system of obtaining permits from the Secretary of the Interior.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⟸5.]

2. CORPORATIONS ⟸28(2), 29(2)—VALIDITY OF ORGANIZATION—COLLATERAL ATTACK.

Where there is a bona fide attempt to create a corporation and an assumption and exercise of corporate functions, a failure or omission to comply with the provisions of a statute which falls short of justifying a direct proceeding by the state to forfeit the charter, and in the absence of such a proceeding, does not necessarily bar the corporation from asserting its property rights in the courts, and as a rule its legal existence cannot be questioned collaterally.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 78, 79, 2504; Dec. Dig. ⟸28(2), 29(2).]

Appeal from the District Court of the United States for the District of Utah; J. A. Marshall, Judge.

Suit in equity by the United States against the Utah Light & Traction Company. Decree for the United States, and defendant appeals. Reversed in part.

See, also, 209 Fed. 554, 126 C. C. A. 376.

Graham Sumner, of New York City (R. A. Wilbur, of Salt Lake City, Utah, with him on the brief), for appellant.

William W. Ray, U. S. Atty., of Salt Lake City, Utah, and J. F. Lawson, Asst. Sol. for Department of Agriculture, of Ogden, Utah, for the United States.

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

VAN VALKENBURGH, District Judge. This is a companion case to United States of America v. Utah Power & Light Company, 230 Fed. 328, — C. C. A. —, and involves an appeal from the decree of the District Court enjoining the appellant, hereinafter called the defendant, from maintaining and operating its power house, reservoir, pipe lines and transmission lines upon certain land of the appellee, hereinafter called the plaintiff, in Big Cottonwood canyon, Salt Lake county, Utah. These structures are parts of certain hydro-electric power works constructed by the predecessors of the defendant. They are used to generate electric power for the purpose of operating the street car system and electric light system in Salt Lake City, and for sale to various persons and corporations for light, heat and power. These works include two power plants, called the upper or stairs plant and the lower plant. The upper plant was practically completed prior to May 14, 1896, but was not put into operation until June 2, 1896. The lower plant was completed and put into operation on or about December 3, 1896. Of the upper plant, the power house, a portion of the reservoir, and most of the pipe line connecting them are on land of the plaintiff. The remainder of the reservoir and pipe line are on the land of the defendant. Of the lower plant the diverting dam and a portion of the flume are on property of the plaintiff, but the power house, the pipe line and the remainder of the flume are on the land of the defendant. Near the upper power house are two small cottages and outbuildings, claimed by defendant to be necessary for the use of employés engaged in attending to the plant. Defendant further claims that the ground occupied by the power house and cottages is no more than is necessary for the maintenance of the plant; that the use of this land is necessary for the successful operation of the plant and the generation of electric power. A transmission line, necessary for transmitting power from the power house to Salt Lake City, was constructed upon land of the plaintiff in 1895. The upper power plant and the transmission line were constructed by the Big Cottonwood Power Company, which conveyed them, on August 31, 1897, to the Union Light & Power Company, which, in turn, conveyed them, on December 30, 1899, to the Utah Power & Light Company, by which latter company they were conveyed, on January 2, 1904, to the Utah Light & Railway Company, the original defendant. The lower plant was constructed by the Utah Power Company, which still, technically, owns and operates it. However, the entire capital stock of the Utah Power Company was purchased, prior to August, 1901, by the Consolidated Railway & Power Company, and sold, on January 2, 1904, to the Utah Light & Railway Company, the original defendant. Subsequently to the entering of the decree in the trial court all the properties, rights, privileges, powers and franchises, and all and every interest of the Utah Light & Railway Company became vested in the Utah Light & Traction Company, defendant herein; and by order of court the latter company was substituted

for the original defendant. There is practically no dispute respecting the facts stated, the contentions of the parties being confined to the legal effect of such facts.

The plaintiff filed its bill praying the same relief as in Utah Power & Light Company v. United States, heretofore decided. The defendant by its answer interposed the same defenses as in that companion case; and, in addition thereto, the following, deemed to be peculiar to the instant case:

(1) The act of Congress of 1896 did not supersede sections 2339 and 2340 of the Revised Statutes, if at all, until general regulations thereunder had been fixed by the Secretary of the Interior.

(2) Rights of way for the structures upon the plaintiff's land vested prior to May 14, 1896.

(3) The act of Congress of 1896 did not apply to the structures involved in this action.

The defenses common to both cases have been resolved by this court against the defendant in the case of Utah Power & Light Company v. United States, and reference is made to the opinion therein filed for the reasoning upon which that decision was based. We, therefore, address ourselves to the three special defenses above enumerated.

[1] It is not claimed that the defendant sought to acquire any rights under the act of May 14, 1896. Whatever title it has, therefore, must find support in legislation prior to that date, to wit: Sections 2339 and 2340, and Act March 3, 1891, c. 561, 26 Stat. 1095. Sections 2339 and 2340 were limited to rights of way for the construction of ditches, canals, and reservoirs in connection with rights to the use of water for mining, agriculture, manufacturing or other purposes. Defendant is practically limited to these two sections, because its predecessors, through which it claims, were not canal or ditch companies formed for the purpose of irrigation and acquired no rights under Act March 3, 1891, either originally or as expanded by Act May 11, 1898, c. 292, 30 Stat. 404. Of course, sections 2339 and 2340 did not themselves embody a grant, but merely confirmed, to the extent specified, such rights as were recognized and acknowledged by the local customs, laws, and the decisions of courts of the state. The rights of way embraced in these acts are confined to ditches, canals, and reservoirs, but we think those terms are broad enough to include dams, flumes, pipes, and tunnels as analogous or incidental to, and discharging the functions of, such reservoirs, ditches and canals. None of the legislation, to which reference has been made, prior to Act May 14, 1896, either in letter or in spirit contemplates the use of ground within the public lands for other uses and purposes.

The object of Act May 14, 1896, as heretofore determined (209 Fed. 554, 126 C. C. A. 376), was to substitute the permit system, therein provided, for the vested easement system, theretofore recognized, as the trial court properly decided; but we believe the defendant was entitled to whatever rights it had acquired by appropriation and construction prior to the enactment and approval of that act of substitution. These rights are entirely independent of and discon-

nected with the rights to the water itself, which did not vest, under the local law, until the water had been applied to a beneficial use. Therefore, rights of way for such reservoirs, canals and ditches, and for dams, flumes, pipes and tunnels of like or equivalent character and uses, which were constructed and practically completed prior to May 14, 1896, vested in defendant's predecessors whether put into operation in connection with the beneficial use of the water or not. Inasmuch, however, as the act itself was intended to and did terminate the system of such vested easements over the public lands and substituted revocable permits therefor, the former system must be held to have ended with the passage of the act and not with the promulgation of detailed regulations thereunder. It is aslo apparent that such prior rights, as may have become vested in defendant by appropriation prior to the enactment of the law of 1896, could not extend to power houses, cottages and transmission lines as distinguished from reservoirs, dams, canals, ditches, flumes, pipes and tunnels constructed for the storing and transmission of the water itself. Whitmore v. Coal Company et al., 27 Utah, 284, 75 Pac. 748; Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207.

[2] With respect to the lower plant, or any part thereof, the government interposes the objection that the Utah Power Company, when it attempted to acquire its holdings and when it was constructing this lower plant, was not a legal corporation, since it had not filed its articles or made any other filing in the office of the secretary of the territory of Utah, as required by law; that it was, therefore, incapable of holding or acquiring any real estate in Utah or any interest therein and hence was not qualified to acquire any rights under sections 2339 and 2340 of the Revised Statutes. It appears, however, that there was a bona fide attempt to create a corporation and an assumption and exercise of corporate functions sufficient to constitute a corporation de facto. In such cases the legal existence of the corporation cannot, as a general rule, be called into question collaterally. Marsh et al. v. Mathias et al., 19 Utah, 350, 56 Pac. 1074. Any failure or omission by a corporation to comply with the provisions of a statute which falls short of justifying a direct proceeding by the state to forfeit its charter, and in the absence of such proceeding by the state, does not necessarily bar it from asserting its property rights in the courts. Jackson v. Crown Point Mining Co., 21 Utah, 1, 59 Pac. 238, 81 Am. St. Rep. 651; Booth & Co. v. Weigand, 30 Utah, 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693. Here, however, the defendant owns the entire capital stock of the operating company; this it acquired from the Utah Light & Railway Company, the original defendant. There is no contention that these latter companies are without standing before the court, and the government, by this action, seeks through them, as the beneficial owners, to enforce its claim against the said Utah Power Company. Under such circumstances, we do not think this objection by the government should receive recognition.

It is not intended herein, nor is it deemed necessary, to make specific directions respecting the structures of defendant upon plaintiff's land involved in this controversy. Such matters can be satisfactorily re-

solved only after a fuller hearing in the trial court. Enough has been said to indicate the principles which we think should govern such a determination. It is apparent that while in the trial court the general rights of the parties were properly adjudged, nevertheless, with respect to some of its works constructed and completed prior to the act of 1896, defendant may have acquired, and probably did acquire, certain vested rights which are denied to it by the decree entered. To this extent, that decree must be reversed and the cause remanded for further proceedings in accordance with this opinion and that in the companion case heretofore decided.

NORTHERN PAC. RY. CO. v. NORTH AMERICAN TELEGRAPH CO.

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

No. 4347.

1. EMINENT DOMAIN ⟸47(1)—PROPERTY IN RIGHT OF WAY—SURPLUS USE—CONDEMNATION.

A stranger corporation, which has no right, property, or interest in a valuable right to the surplus use of its right of way for telegraph and railroad purposes, which a railway company has acquired and owns, may not take that valuable right to such surplus use from it by condemnation without making compensation therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107, 109, 110, 116–120; Dec. Dig. ⟸47(1).]

2. RAILROADS ⟸73(4)—PROPERTY IN RIGHT OF WAY—SURPLUS USE.

A railway company, which has become the owner of a railroad, which it is operating, and of a right of way appurtenant thereto, has the exclusive right to the use of that right of way for telegraph purposes, as well as for railroad purposes, and if, after the application of so much of the use thereof as the maintenance of its own railroad and telegraph requires, there remains a surplus use of that right of way, either for telegraph or for railroad purposes, it may lease or permit that use, or any part of it, for a valuable consideration, for any purpose which does not interfere with its operation of its own railroad and telegraph, and its discharge of its duties to the public to so operate them. This right of a railroad company to lease or permit the surplus use of its right of way or of its property is its private property, and may be valuable property.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 182; Dec. Dig. ⟸73(4).]

3. EMINENT DOMAIN ⟸128(1)—CONDEMNATION OF RIGHT OF WAY FOR TELEGRAPH OVER RAILROAD RIGHT OF WAY—ELEMENTS OF COMPENSATION—EVIDENCE.

In proceedings by a telegraph company to condemn right of way for its line over the unused portion of the right of way of a railroad company, the compensation to which the railroad company is entitled is not limited to the damages it will sustain in the operation of its railroad, but includes also the value to it of the use taken, for telegraph as well as for railroad purposes; and where the right to such use has been and may be leased for a substantial rental, evidence to show its rental value is admissible as a basis for determining what is just compensation for its taking.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 349; Dec. Dig. ⟸128(1).]

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4. COURTS ⊜89—OPINIONS—AUTHORITY.

An opinion in a particular case founded on its special circumstances is not applicable to cases under circumstances essentially different.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. ⊜89.]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Condemnation proceeding by the North American Telegraph Company against the Northern Pacific Railway Company. From the judgment, defendant brings error. Reversed.

The Northern Pacific Railway Company complains of the rejection of all evidence of the value of the right which the telegraph company is seeking to take from it by condemnation to use one side of the railway company's right of way for a line of telegraph, and of the exclusion of the value of the right to such use as an element of damages from the consideration of the jury, which assessed the just compensation for the taking or damage to such right. The railway company had a right of way for railroad and telegraph purposes from White Bear, which is about 10 miles from St. Paul, to Duluth, and from White Bear to Stillwater. About 150 miles of this right of way is on the main line of the railway company from St. Paul to Duluth and is of great value. On one side of the railroad upon this right of way the railway company had constructed and was using its telegraph line in the operation of its railroad and the conduct of its business. It did not need to use the other side of its right of way for its own telegraph purposes, and about the year 1900 it leased to the telegraph company for 10 years for specified rentals the right to this surplus use of its right of way for the telegraph line of the telegraph company, and that company exercised that right under this lease and paid the rentals there fixed voluntarily during the 10 years. At the end of that term it instituted this proceeding permanently to condemn and take from the railway company this right which it had theretofore leased. There was a jury trial of the question of the amount which the telegraph company should be required to pay as just compensation for the taking, at which the court excluded from the jury any consideration, as an element of the railway company's damages, of the value of this right to the use of its right of way for this telegraph line, and restricted the recovery of damages to those arising from the interference with the mere operation of the railroad and with the physical condition of the land subject to its right of way.

Emerson Hadley, of St. Paul, Minn. (C. W. Bunn, of St. Paul, Minn., on the brief), for plaintiff in error.

Edward T. Young, of St. Paul, Minn. (O'Brien, Young & Stone, of St. Paul, Minn., on the brief), for defendant in error.

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

SANBORN, Circuit Judge (after stating the facts as above). [1] It is indispensable to a fair discussion and just decision of this case that the real question at issue be clearly perceived and kept constantly in mind. That question is: May a stranger corporation which has no right, property or interest in a valuable right to the surplus use of its right of way for telegraph and railroad purposes which a railway company has acquired and owns, take that valuable right to such surplus use from it by condemnation without making compensation therefor? That this is the actual question at issue will appear from a reference

to a few indisputable rules of law and from a brief review of the course of the trial below.

The proceedings in this case must be governed by the declaration of section 13 of article 1 of the Constitution of Minnesota that "private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured," and the provisions of section 6246, General Statutes of Minnesota 1913, that "any public service corporation shall have the right to obtain by condemnation, under the right of eminent domain, any land, or any right over, through, or across the same, or any easement therein, necessary for the convenient prosecution of its enterprise; and any telegraph or telephone company may in the same manner acquire the right to construct its lines over, along, and upon the right of way and lands of any railway company upon making just compensation therefor to such company; but such right shall at all times be subject to the right of the railway company to use its right of way and lands for railway purposes, and said telegraph or telephone lines shall be so located, constructed, and maintained as not to interfere with the usual operation of such railway."

It will be noticed that, while this section limits the extent of the right of the surplus use of the railway company's right of way which the telegraph company may take by condemnation, so that it may not interfere with the operation of the railroad, the section does not undertake to appraise or limit the value of this right which may be so taken. Much less does it indicate that such right is without value, or that its taking will cause no damage to the railway company, but, on the other hand, it clearly shows that the Legislature must have been of the opinion that this right was of value and that its taking or destruction might cause damage, for the section permits its taking only "upon making just compensation therefor" to the railway company.

[2] A railway company, which has become the owner of a railroad which it is operating and of a right of way appurtenant thereto, has the exclusive right to the use of that right of way for telegraph purposes as well as for railroad purposes. If after the application of so much of the use thereof as the maintenance of its own railroad and telegraph requires there remains a surplus use of that right of way either for telegraph purposes or for railroad purposes, it may lease or permit that use, or any part of it, for a valuable consideration for any purpose which does not interfere with its operation of its own railroad and telegraph and its discharge of its duties to the public so to operate them. This right of a railroad company to lease or permit the surplus use of its right of way, or of its property, is its private property and it is often very valuable property. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 51 Fed. 309, 315, 317, 321, 2 C. C. A. 174; Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 585, 16 Sup. Ct. 1173, 41 L. Ed. 265; American Telephone & Telegraph Co. v. St. Louis, I. M. & Southern Ry. Co., 202 Mo. 656, 101 S. W. 576, 585, 586; Hartford Fire Ins. Co. v. Chicago, etc., Ry. Co., 175 U. S. 91, 93, 20 Sup. Ct. 33, 44 L. Ed. 84; James Quirk Milling Co. v. Minneapolis & St. Louis R. R. Co., 98 Minn. 22, 26,

107 N. W. 742, 116 Am. St. Rep. 336; Western Union Telegraph Co. v. Penn. R. R. Co., 195 U. S. 540, 570, 25 Sup. Ct. 133, 141 (49 L. Ed. 312, 1 Ann. Cas. 517). In the case last cited the Supreme Court said that the constitutional protection of private property from taking for public use without just compensation applied as well to private property of a railroad company devoted to a public use, that:

"There is no difference whatever in principle arising from the difference in the uses. A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in New Mexico v. U. S. Trust Co., 172 U. S. 171, 183 [19 Sup. Ct. 128, 133 (43 L. Ed. 407)]. We there said that if a railroad's right of way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property.' * * * A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given."

In Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co., 51 Fed. 309, 315, 2 C. C. A. 174, the Union Pacific Company made a contract of lease for 999 years of the surplus use of some of its railroad tracks extending over many miles and some of its railroad facilities at Omaha at a rental of $45,000 per annum, and this court and the Supreme Court sustained that contract. In Mason City & Ft. Dodge R. Co. v. Union Pacific R. R. Co. (C. C.) 124 Fed. 409, 412, 414, 415, the court compelled the Union Pacific Company to permit the Mason City & Ft. Dodge Railway Company to avail itself of the surplus use of some of the Union Pacific's railroad tracks and other railroad facilities at Omaha and between that city and South Omaha, but required the Ft. Dodge Company to pay a reasonable compensation for the right to that use, and its decree was affirmed in this court (Union Pacific R. Co. v. Mason City & Ft. Dodge R. Co., 128 Fed. 230, 64 C. C. A. 348), and in the Supreme Court (Union Pacific R. Co. v. Mason City & Ft. Dodge R. Co., 199 U. S. 160, 26 Sup. Ct. 19, 50 L. Ed. 134).

There can be no doubt, therefore, that the right of a railroad company to let or permit the surplus use of its right of way to another for telegraph purposes or for railroad purposes is its private property and that it may be valuable property.

[3] At the trial below Mr. Clapp testified that he was and had been superintendent of telegraph for the Northern Pacific Railway Company for 2½ years and that for 17 years he had been working for different telegraph and telephone companies, that he had been engaged in acquiring and leasing or permitting rights of way for telegraph and telephone lines by railway companies upon their rights of way and knew what the practice was in the matter of leasing such rights, that such leases went through his hands, that they were continually coming up for his consideration, that there were about 60 such leases covering the placing of poles and wires longitudinally on parts of the right of way of the Northern Pacific Company, that it was not practicable to put another telegraph or telephone line on the same side of the right

of way of the railway company on which the telegraph company sought to maintain its line in this case, that there was a demand for telegraph and telephone lines between White Bear and Duluth, that there was no going price or market value for permanent rights to the surplus use of the right of way of the railway company for a telegraph or telephone line, but that there were permits in existence for at least 68 telegraph or telephone lines on parts of the right of way of the Northern Pacific Company, and that he thought he could tell the value of the leasehold right to put a telegraphic pole line similar to that sought by the telegraph company on the right of way of the railway company; but the court refused to permit him to answer the question, "State the market value of such right of way?" and sustained objections to offers made by counsel for the railway company to prove the market value of a right of way similar to that sought to be taken in this case and to an offer to prove what other parties were paying for such rights of way in the market generally. There was uncontradicted evidence that many temporary leases of such rights of way had been made, that many such were in existence, that the Northern Pacific company uniformly leased its right to the surplus use of its right of way for a telegraphic pole line along portions of its right of way for $4 per mile per annum for the pole line and $1 per mile per annum for each wire, and that 68 leases had been voluntarily taken by companies at that rate, and that the right to the surplus use of the railroad company's right of way for the telegraph line of the telegraph company here sought was as valuable as any the company owned.

Mr. Cooper testified that he had been the land commissioner of the railway company since 1904, that he had had large experience in the sale and in the leasing of rights of way for telegraph and telephone purposes, that he believed that the price charged by the railway company for leases for pole lines for telegraph purposes was the reasonable and just value of the use leased, that the capitalization at 4½ per cent. interest of that price, to wit, $4 per annum per mile for the pole line and $1 per mile per annum for each wire, amounted to $24,677, and that he was of the opinion that that was the fair value of the right to the surplus use of the right of way of the railway company for the line of telegraph the telegraph company sought.

Mr. Lusk testified that he was the attorney for the Chicago Great Western Railroad Company for 10 years, that he was one of the receivers of the St. Louis & San Francisco Railroad Company, that he was one of the commissioners who, prior to the trial of the question of damages before the jury, found the damages to the Northern Pacific Railway Company from the taking by the telegraph company of the railway company's right to the surplus use of the right of way for the telegraph line of the telegraph company to be $17,449, and that the reason why he thought that was the value of the right sought to be taken and the amount of the damage to the railway company was "because they could lease, in my judgment, to other parties for that amount without any question, I think so, for telephone or telegraph." The telegraph company offered no evidence upon the value of this right, and consequently there was no evidence in conflict with the

testimony which has been recited as to the value of the right about to be taken by the telegraph company, nor as to the loss which would be entailed upon it by depriving it of that right.

There can be no doubt that here was competent evidence ample to sustain a finding by a jury or a court that the value of the right of the railway company to the surplus use of its right of way for telegraph purposes which the telegraph company was seeking to take from it in this proceeding and the damages to the railway company from the taking of this right was more than $10,000. For the testimony was conclusive that there was no market value for a sale or a lease of a permanent right to the use of the railway company's right of way for a telegraph line such as was here sought by the telegraph company, that there was a market rental value of temporary leases of such rights and that the telegraph company had taken one and had paid the rental for it for 10 years. Now, where real property about to be taken by condemnation has no market value, the amount of rent, or of income it has produced, and is producing, and is capable of producing, and the opinions of men who have had experience in dealing in it and have knowledge of its value, are competent and material evidence to determine what is just compensation for its taking; in other words, what damages will be inflicted by that taking? Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; Montgomery Co. v. Bridge Co., 110 Pa. 54–58, 20 Atl. 407; Sanitary District of Chicago v. Pittsburgh, etc., Ry. Co., 216 Ill. 575, 584, 75 N. E. 248, 251, 252. In the case last cited the trial court admitted evidence of the income that had been derived from the property taken. The Supreme Court of Illinois sustained that admission and said:

"The Constitution and the law require that the owner of property shall receive such compensation that he will be as well off after the taking as he was before. To do that it is necessary to determine what the property is worth to the owner, and unless he receives what it is worth to him he does not receive just compensation. It is matter of common knowledge that such property as this and devoted to such a use is not bought and sold in the market or subject to sale in that way, and that such property has no market value. * * * One of the important considerations in ascertaining the value of property which has no market value is its productiveness and capabilities for yielding profits to the owner."

To the same effect are St. Louis, K. & A. Ry. Co. v. Chapman, 38 Kan. 307, 16 Pac. 695, 5 Am. St. Rep. 744; Lewis on Eminent Domain, § 706.

While the evidence which has been recited crept into this case, the court refused to permit the railway company to prove what the telegraph company had paid to it for the use of its right of way for its telegraph line under its lease for 10 years, or what others were paying for like privileges, and at the close of the trial it charged the jury that in finding the damages to the railway company from the taking of this right they must not consider what the railway company had been receiving for the right to this surplus use of its right of way for telegraph purposes, or what it was receiving for this or other like rights from other companies, or any other fact or testimony tending to show

the value of this right which the telegraph company was taking, or the damage to the railway company for its taking, and that they must limit the damages they were to find to those resulting to the railway company from the construction and maintenance of the telegraph line in the mere operation of its railroad and the maintenance of the proper condition of the land subject to its right of way, such as the increased expense of mowing the grass and of burning old ties caused by the construction and maintenance of the telegraph line.

From this review of the evidence and the proceedings at the trial it clearly appears that there was competent evidence and rejected offers of competent evidence that the value of the right to the surplus use of the railway company's right of way for telegraph purposes which the telegraph company sought to take for its telegraph line was of the value of more than $10,000, that the maintenance of its telegraph line would prevent any other telegraph line on that side of the railway company's right of way and would thereby inflict a loss of more than $10,000 upon the railway company, that the court instructed the jury that they must not consider or allow for the railway company anything whatever on account of the value of this right which the telegraph company was taking, nor on account of the loss the railway company would sustain by the appropriation to itself by the telegraph company of this right, and that the real question in this case is: May a stranger corporation, which has no right to, or property or interest in, a valuable right to the surplus use of its right of way for telegraph and railroad purposes, which the railway company has acquired and owns, take that valuable right to such surplus use by condemnation without making any compensation whatever therefor?

It is not easy to conceive of a course of reasoning which will lead to an affirmative answer to this question, while that which results in a negative answer seems conclusive. Take the case in hand. The railway company is the owner of its right of way for telegraph purposes and for railroad purposes. It has the right to the use of all of this right of way for those purposes, and if there be a surplus use above that necessary or convenient for the operation of its own railroad and telegraph it has the right to permit or lease that surplus use for a pecuniary consideration. This railway company's right to that surplus use of its right of way for telegraph purposes which the telegraph company is seeking to take from it by condemnation appears from the evidence introduced and offered to have a value of more than $10,000, and its taking will inflict upon the railway company a loss of more than $10,000. The telegraph company is a stranger to the railway company and has no right, title, or interest in its right of way or in the surplus use of it. That right of way and all its use for telegraph and railroad purposes, both the surplus use thereof and the use thereof necessary for its own railroad and telegraph, are the exclusive private property of the railway company, which "cannot be invaded without guilt of trespass" and "cannot be appropriated in whole or in part except upon payment of compensation." 195 U. S. 570, 25 Sup. Ct. 141, 49 L. Ed. 312, 1 Ann. Cas. 517. Therefore this right of this railway company to that surplus use of its right of way for a tele-

graph line which is of the value of more than $10,000 according to the evidence in this record, and the taking of which will inflict a loss and damage upon it of more than that amount, may not be lawfully taken from it by the telegraph company by condemnation without paying the railway company the fair value of that right; in other words, the amount of the loss inflicted upon the railway company by the taking.

But counsel for the telegraph company maintain that the weight of authority sustains an affirmative answer to the question under consideration and permits the taking by the telegraph company of this right to the surplus use of the railway company's right of way for the telegraph line of this telegraph company without making any compensation to the railway company for its value to the railway company, or for the railway company's loss by the taking, and they cite in support of their contention Chicago, Burlington, etc., R. R. Co. v. Chicago, 166 U. S. 226, 248, 250, 17 Sup. Ct. 581, 41 L. Ed. 979; State v. St. Paul, M. & M. Ry. Co., 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, affirmed in 214 U. S. 497, 29 Sup. Ct. 698, 53 L. Ed. 1060; Chicago, B. & Q. R. Co. v. Board of Supervisors, 182 Fed. 291, 294–297, 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117; Morris & E. R. Co. v. City of Orange, 63 N. J. Law, 266, 43 Atl. 730, 47 Atl. 363; Postal Telegraph Cable Co. v. Oregon Short Line R. Co. (C. C.) 104 Fed. 623, 626, which was affirmed in 111 Fed. 842, 848, 49 C. C. A. 663; St. Louis & C. R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382, 390, 392; Postal Telegraph Cable Co. v. Oregon Short Line R. Co. (C. C.) 114 Fed. 787, 792; Postal Telegraph Cable Co. v. Oregon Short Line R. Co., 23 Utah, 474, 65 Pac. 735, 738, 740, 90 Am. St. Rep. 705; Louisville & Nashville R. Co. v. Postal Telegraph Cable Co., 143 Ga. 331, 85 S. E. 110, 112, citing Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co., 120 Ga. 268, 48 S. E. 15, 19, 1 Ann. Cas. 734.

This proposition is so startling and its effect so seemingly unjust that it demands careful study and serious consideration of the facts and opinions in the cases cited. Upon a careful examination of these cases it appears that in none of them did the courts examine, consider or decide that a stranger telegraph company could lawfully take from a railway company the latter's right to the surplus use of its right of way for telegraph purposes which the proof in the case showed had been utilized by the railway company, had produced substantial income and had substantial value to the railway company, without paying the value of that right to the railway company. The cases cited are cases in which, upon other facts and usually in the absence of any proof of the productiveness or value to the railway company of the right to the surplus use of its right of way taken the courts have used a general expression which the court below applied to the facts of this case and then supplemented with the express exclusion from the jury of the consideration of all evidence of the value of the right taken and of the amount of the loss inflicted by that taking. This is the general expression referred to:

"The compensation which a telegraph or telephone company must pay for the right of constructing and maintaining its lines upon a railroad right of way is the amount of decrease in the value of the use of such right of way for railroad purposes necessarily and reasonably resulting from its use by the telegraph or telephone company."

It is plain that when this declaration is applied to a case in which the right to the surplus use of the right of way taken for the telegraph line has not been proved to have been productive or to be of any value to the railway company the declaration is not prejudicial to it, and it is also clear that when the term in this declaration "right of way for railroad purposes" is given its broad and general signification of right of way for telegraph purposes as well as for railroad purposes, for as we have seen the telegraph purposes of a railroad right of way are adjuncts and appurtenances of its railroad purposes and a railroad company has as exclusive a right to the use of its right of way for telegraph purposes as it has for railroad purposes, the declaration is not erroneous. But do the authorities sustain the contention that when the term "railroad purposes" in this declaration is restricted in meaning to the mere purposes of operating a railroad and keeping in proper physical condition the lands subject to its right of way, and the declaration is applied to a case in which the surplus use of the railway company's right of way for telegraph purposes which is being taken has been proved to have been productive of substantial income and to be of a value to the railway company of at least $10,000, and the declaration is accompanied with the instruction to the jury that in assessing the damages for the taking they may not consider any element of this value or of the loss of it by the railway company, this is a sound and just rule of law?

[4] As the facts upon which the opinions in the cases cited rest are materially different from those in the case at bar, it is indispensable to a just appreciation of these decisions and of the opinions in these cases, and of their bearing upon the crucial question in the case at bar, that in their examination and discussion these familiar rules announced by Chief Justice Marshall be borne constantly in mind:

"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); King v. Pomeroy, 121 Fed. 287, 294, 58 C. C. A. 209, 216; Evans v. Victor, 204 Fed. 361, 367, 122 C. C. A. 531, 537.

Let us apply these rules to the opinions in the cases cited by counsel for the telegraph company.

The authority upon which counsel seem to place the most reliance is Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 248, 250, 17 Sup. Ct. 581, 590 (41 L. Ed. 979). In that case the city of Chicago was condemning the right to an easement for a street across the right of way of the railroad company. The railroad company sought to recover as damages the value of the land at the crossing subject to its

right of way, as land. The railroad company was not to be prevented by the street crossing from using its right of way for both railroad and telegraph purposes and there was no evidence that its right to its surplus use of its right of way for telegraph or railroad purposes at the proposed crossing ever had produced any income, or that it was of any value to the railroad company, or that the use of the crossing by the city would deprive it of any valuable use for either railroad or telegraph purposes. In this state of the case the court held that the railroad company could not recover the value of the land under its right of way as land because it did not own it. It declared that the general rule was as held in Boom Co. v. Patterson, 98 U. S. 403, 408, 25 L. Ed. 206, that compensation "is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future," but that there could be no recovery on account of the effect of the crossing on mere imaginary or speculative uses to which the right of way had never been applied, and further that under the facts of that case, in view of the police power of the city to establish streets, to fix their grades and to require railroad companies who take their franchises subject to this police power, to conform the grades of their railroads to the necessities of the crossings of such streets, and in the absence of any evidence of the value of any right to use its right of way for telegraph purposes or railroad purposes of which the railroad company would be deprived, or which would be damaged by the street crossing, the rule that "the measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for the purposes of the street" was not erroneous. How different the facts in the case at bar. The telegraph company in this case has no police power, and it seems clear from the opinion in the Chicago Case that if there had been proof that the crossing would deprive the railroad company of a right to the surplus use of its right of way for telegraph or for railroad purposes which it had exercised and had received substantial income from for 10 years, and which was worth $10,000 to it, the Supreme Court would have held that its case fell under the general rule declared in Boom Co. v. Patterson, and that it was entitled to recover the value of such right as damages. Because there was no evidence in that case of the value of any such right that existed and had been exercised by the railroad company and that would be taken or destroyed by the crossing, the court in that case neither considered, held, nor decided that a stranger corporation without police power could condemn and take the right of a railroad company to the surplus use of its right of way for either telegraph or railroad purposes which was worth $10,000 without making any compensation therefor, or any analogous doctrine.

The cases of State v. St. Paul, M. & M. Ry. Co., 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, affirmed in 214 U. S. 497, 29 Sup. Ct. 698, 53 L. Ed. 1060, Chicago, B. & Q. R. Co. v. Board of Supervisors, 182 Fed. 291, 294–297, 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117, and Morris &

E. R. R. Co. v. City of Orange, 63 N. J. Law, 266, 43 Atl. 730, 47 Atl. 363, which merely hold that a railroad company may not recover of a city or county for the taking of an easement for a crossing of its right of way for a street or public drain the value of the land taken under its right of way for the crossing as land, and that such a city or county may, in the case of the condemnation of such an easement for a crossing, by means of its police power compel a railroad company to bear the expense of such changes in the grade and roadbed of its railroad as are rendered necessary by such crossings without payment of such expense for the reason that every railroad company takes its franchise subject to the police power of the state, the county and the city, and subject to its duty to make such changes whenever the city or county, in the exercise of that power, establishes such crossings, do not rule the case at bar nor decide or touch the question whether or not a telegraph company may take from a railroad company by condemnation the right to the surplus use of its right of way for telegraph purposes for a telegraph line which is worth $10,000 and has been producing a substantial income without making any compensation therefor. They do not rule this case or touch this question (1) because there was no evidence in those cases that the city or county was taking or destroying any valuable right to the surplus use of the railroad company's right of way for either telegraph or railroad purposes, and (2) because this telegraph company has no police power by virtue of which it can compel the railroad company to bear any such expenses as those specified in these cases or to suffer any such loss as the telegraph company seeks to inflict upon it here.

The next case cited by counsel is Postal Telegraph Cable Co. v. Oregon Short Line R. Co. (C. C.) 104 Fed. 623, 626, which was affirmed in 111 Fed. 842, 848, 49 C. C. A. 663. But the decision and the opinions in that case fail to rule or touch the question here at issue because there was no evidence in that case that the right to the surplus use of the right of way for telegraph purposes for the line there sought had any value or had ever brought any income, and of course in the absence of evidence of such value no question of compensation for that value could have arisen or have been decided. Judge Beatty found that the right to the surplus use which the telegraph company sought to take was not used for any purpose, was so much idle property and had no actual value. 104 Fed. 625; 111 Fed. 848, 49 C. C. A. 663. If there had been proof that the value of this right was at least $10,000, as in the case at bar, the instant question might have arisen, but it neither arose nor was decided.

Another citation is that of St. Louis & C. R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382, 390, 392. But there was no competent evidence offered or introduced of the value of the surplus use of the right of way for the telegraph line sought in that case, and for that reason the question at issue in this case did not arise. Nevertheless, the opinion of the court indicates that if such evidence had been offered it would have been received and the value thus proved would have been allowed as damages. The railroad company sought as one element of its damages the value of the land between the poles over

which the wires were to be strung. In disallowing this element the court said:

"The measure of damages, therefore, suffered by the railroad company is not the value of the land embraced within the right of way between the poles and under the wires; but the measure of damages is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph company for its purposes."

This measure includes as damages to the railroad company the value of the use of the right of way for telegraph purposes as well as for railroad purposes, and, when there is no proof of any value of such use for telegraph purposes, necessarily leaves the measure of damages the diminution of the value of the right of way for the purposes of the operation of the railroad only. In that case the railroad company had made a lease before the condemnation proceedings of its right of way to another telegraph company for a telegraph line and the court below had rejected evidence of the rents received under that lease. The Supreme Court sustained that ruling on the express grounds that the particular lease made was "void upon grounds of public policy as being in restraint of trade and as creating a monopoly," and that the lease gave the use of the telegraph line to the railroad company for the purpose of moving its trains and managing its own business, and there was no proof or offer to prove the value of this latter use. 173 Ill. 538, 51 N. E. 392. There were no such objections to the proof of the value of the right to the use sought in the case at bar, and it is plain from the opinion of the Supreme Court of Illinois that that court would have admitted the proof and allowed the value presented in this case as an element of the damages to the railroad company. If that court had been of the opinion that such proof was never admissible and such value was never allowable as an element of such damages it would have said so and it never would have ruled out the evidence upon or mentioned the objections which it sustained to the offer of the proof of the value of the rents received under the void lease in that case.

Postal Telegraph Cable Co. v. Oregon Short Line R. Co. (C. C.) 114 Fed. 787, 792, is a case in which Judge Knowles assessed the damages for the taking of the right to the surplus use of the right of way of the railroad company for telegraph purposes for a line of telegraph at a nominal amount, $1 per mile; but it is evident that there was no evidence that the right to this surplus use taken had any actual value and that the instant question was not presented or considered, for the judge said:

"The evidence in this case does not establish clearly that the defendant would suffer any peculiar or special damage by the taking, and hence what is considered a nominal damage merely can be awarded."

In the case at bar the evidence introduced and that rejected disclosed the fact that the railroad company would suffer special damage to the extent of at least $10,000 from the taking.

Postal Telegraph Cable Co. v. Oregon Short Line R. Co., 23 Utah, 474, 484, 65 Pac. 735, 738, 740, falls in the same category. "The

land," said the court, "which respondent seeks to condemn is not now used for any purpose. Practically it is now idle property, and the new use promises to be one of public utility." There was undoubtedly no evidence that the right to the surplus use for telegraph purposes which was about to be taken by the telegraph company had ever been utilized by the railroad company, or that it had any value in that case, and the remarks of the court in the opinion were made with reference to and are applicable to that state of facts alone. They cannot be deemed authoritative in a case in which the railroad company has utilized and has been deriving a substantial income from its right to the surplus use of its right of way for telegraph purposes which is being taken for a decade and where there was evidence of the substantial value of that right to the railway company.

The last case cited by counsel for the telegraph company is Louisville & Nashville R. Co. v. Postal Telegraph Cable Co., 143 Ga. 331, 85 S. E. 110, 112, a case in which the Supreme Court of Georgia, citing Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co., 120 Ga. 268, 48 S. E. 15, 19, 1 Ann. Cas. 734, held that the rent which the railroad companies had received for the premises and which they might lose by the condemnation of the right to the surplus use of their right of way for a telegraph line should not be considered by the jury in assessing their damages. These two Georgia cases contain the only decisions which tend to sustain the theory of the telegraph company, and they rest on the premise that a railroad company is restricted to the use of its right of way for railroad and telegraph purposes to the sole purpose of the operation of its own railroad. They deduce from that premise the conclusion that it cannot have any property of value in its right to rent or to permit to others the surplus use of its right of way either for railroad or for telegraph purposes, a premise which has been shown to be unsound and contrary to the decision of the Supreme Court of the United States in Union Pacific Ry. Co. v. Chicago, etc., R. Co., 163 U. S. 564, 585, 16 Sup. Ct. 1173, 41 L. Ed. 265, by the opinion in that case and by the opinions in the other cases cited in the earlier parts of this opinion. Because these two decisions are founded upon this false premise and because their application to the facts of the case at bar would tend to deprive the railroad company of its undoubted right to the surplus use of its right of way for telegraph purposes which the evidence in the present record shows to be of the value of $10,000 without any compensation in violation of the fundamental rule of law that private property shall not be taken for public use without just compensation, they are not persuasive and ought not to be followed. All the cases cited by the telegraph company have now been reviewed and from this review it appears that in none of them, except the two Georgia cases, was the question in the case in hand either considered or decided, because in none of them was there any substantial proof or offer of competent proof of the value of the right to the surplus use taken, or of the fact that it had theretofore been utilized and had brought substantial income to the railroad company. They all fall under the rule that an "opinion in a particular case, founded on spe-

cial circumstances, is not applicable to cases under circumstances essentially different." Brooks v. Marbury, 24 U. S. (11 Wheat.) 78, 90 (6 L. Ed. 423).

On the other hand, the opinion of the Supreme Court of Illinois in St. Louis & C. R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382, 390, 392, which has been reviewed above, shows that in its view the true measure of damages is the diminution of the value of the use of the railway company's right of way by the taking, not the mere diminution of the value of its right of way for the sole purpose of operating its own railroad, but the diminution of its value for any and all purposes for which the railway company has the right to use it, including its right to let or permit the surplus use of its right of way for telegraph purposes or for railroad purposes.

In Texas Midland R. Co. v. Southwestern Tel. & Tel. Co., 57 S. W. 312, 313, the Court of Appeals of Texas declared that the measure of damages for taking a part of the surplus use of the right of way of a railroad company for a telephone line was the decreased value to the railroad company of its right of way for its purposes.

In American Tel. & Tel. Co. v. St. Louis, I. M. & S. Ry. Co., 202 Mo. 656, 101 S. W. 576, 585, 586, a case which involved the exact question presented in this case, the right of a stranger corporation to take from a railroad company without compensation its right to the surplus use of its right of way for telegraph or telephone purposes, the Supreme Court of Missouri reversed the court below which had refused to allow as damages the value of the right to the use sought to be taken and said, among other things:

"That plaintiff, moving in the orbit of a delegated sovereign right for a public use, may condemn an easement in defendant's easement because of public policy is one thing; to take away property rights under a judicial pronouncement that they are of no value is quite a different thing. The public is by no means interested in plaintiff's taking defendant's property rights for nothing. The same public policy that allows plaintiff to intrude itself, sub modo, and by compulsion absorb some of defendant's property rights, recognizes that plaintiff should make full recompense (i. e., 'just compensation'), not only for the property taken, but for the damage ensuing, if any. * * * The testimony does show that it would not be practicable to have more than one line of poles, with their appurtenant aerial cross-arms and wires, on any one side of the main track. As said, the Western Union Telegraph Company now occupies one side of the right of way. If plaintiff is allowed to occupy the other, and put its poles at such distance from the track as to not endanger railroading, and such a distance from the edge of the right of way as to reduce to a minimum its own danger from falling trees and limbs off the right of way, then it will occupy the only remaining position on defendant's right of way now unoccupied and suitable for a telegraph and telephone line. In this condition of the proof it results that, given plaintiff's easement, then the right of defendant (if of any value) to construct another telegraph and telephone line is gone. If we assume that defendant has no need for another line and would not build it, shall we also assume that the place plaintiff proposes to occupy has no rental or permit value—that defendant could not rent such privilege to another telegraph company in connection with its railroad business? It was in evidence that defendant rented a corresponding privilege under some running arrangement to the Western Union at a substantial remuneration. We must not be understood as holding that the terms of this contract are admissible in evidence as tending to show the rental value on the other side of the right of way. The terms of

that contract were complex and singular, involving a swapping of services and accounts and tending (it is said) to create a monopoly. They throw no light on the issue here further than the mere fact of the existence of a renting contract tended to show there was somewhat of a market for such privilege. Suppose defendant repent of its sin of granting a monopoly to the Western Union, and determines to sin no more, shall it be debarred the right to permit another line? That a railroad company, as long as it does not disarm itself of the power to live up to its duties, as a public service corporation, may build and maintain or may rent a permit to build and maintain a telegraph line on each side of its right of way, ought not to be doubted; such use being an adjunct of railroading. This right is a property right, and under the evidence here we cannot say it was of value only in name. To get at defendant's damage, it is proper to put the whole environment before the jury, and adopt the same common-sense methods employed by private individuals under similar circumstances."

This seems to be a reasonable view of this matter and the reason of the case and as careful a study of the decisions as we have been able to make have led to these conclusions.

The railway company by virtue of the ownership of its right of way had the right to use the portion thereof necessary for the operation of its railroad for the maintenance and operation of a telegraph line. It had a like right to lease or permit the right to the surplus use of its right of way for telegraph purposes and to collect and have reasonable remuneration therefor. There was competent and substantial evidence that it had utilized this latter right and had derived a substantial income from the right which the telegraph company was seeking to take from it for the period of 10 years and that the value of this right was more than $10,000. The telegraph company has the right to take and is taking this right by condemnation for its own use. It cannot lawfully so take or damage this right without making compensation for such taking and damage and it cannot make just compensation without paying to the railway company the value of the right to the surplus use of its right of way for telegraph purposes which it proposes to take, together with any other damages caused to the railway company by the taking. The true measure of damages in such a case is the difference between the value of the use of the railway company's right of way by it for telegraph, telephone, railroad and other purposes for which it may lawfully use it before, and the value of that use after, the proposed taking, and the ordinary rules of evidence govern the competency and materiality of evidence of these damages and of the value of the right taken.

Many of the questions presented in this case were disputed, not only between the litigants, but also among the courts, and the court below was led in this conflict of authorities erroneously to exclude evidence of, and the consideration by the jury of, the value to the railway company of its right to the surplus use of its right of way for telegraph purposes which the telegraph company was taking.

The judgment below must be reversed and the case tried again; and it is so ordered.

KINKEAD v. J. BACON & SONS et al.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1916.)

No. 2827.

1. BANKRUPTCY ⊂=440—REVIEW OF PROCEEDINGS—APPEAL OR PETITION TO REVISE—"PROCEEDING IN BANKRUPTCY."

Under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608), giving Circuit Courts of Appeals jurisdiction to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy, an order fixing the compensation of a referee involved a "proceeding in bankruptcy," and was reviewable by petition to revise, and not by appeal.

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

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

2. BANKRUPTCY ⊂=446—REVIEW OF PROCEEDINGS—PETITION TO REVISE—SCOPE OF REVIEW.

On petition to revise an order fixing the compensation of a referee in bankruptcy, the Circuit Court of Appeals is limited to a consideration of the questions of law arising out of the facts found or conceded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊂=446.]

3. BANKRUPTCY ⊂=368—FEES OF REFEREE.

Bankr. Act, § 40a (Comp. St. 1913, § 9624), provides that referees shall receive a commission of 1 per cent. on all moneys disbursed to creditors by the trustee. *Held* that, where a trustee continued the business of the bankrupt, using leased premises for that purpose, the rent paid by him was an expense of carrying on the business, and not a disbursement to a creditor, and the referee was not entitled to a commission thereon, though, had the trustee not continued to occupy the premises, the rent could still have been collected, and would have been a debt to the extent at least of effecting a prior lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂=368.]

4. BANKRUPTCY ⊂=368—FEES OF REFEREE—"AMOUNT TO BE PAID TO CREDITORS."

Bankr. Act, § 40a, provides that referees shall receive a commission of 1 per cent. on all moneys disbursed to creditors by the trustee, or one-half of 1 per cent. on "the amount to be paid to creditors" upon the confirmation of a composition. Section 12b (Comp. St. 1913, § 9596) authorizes the confirmation of a composition after it has been accepted in writing by a majority in number of the creditors representing a majority in amount of the claims, and after the consideration to be paid by the bankrupt to his creditors and the money necessary to pay debts which have priority and the cost of the proceedings has been deposited in such place as shall be designated by and subject to the order of the judge. *Held* that, where a composition was accepted, and certain creditors, who filed an acceptance thereof reciting that the offered percentage of claims was payable in cash, also filed at the same time a waiver of the deposit by the bankrupt of such percentage so far as their claims were concerned, the amount to be paid to creditors was the full amount which creditors were to receive by virtue of the composition agreement, and the referee's commissions were to be computed on this amount, and not on the amount actually deposited by the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂=368.]

5. BANKRUPTCY ⟸378—COMPOSITIONS—DEPOSITS—WAIVER.
The deposit required by Bankr. Act, § 12b, before confirmation of a composition agreement, is for the sole benefit of the creditors concerned, and they may waive the actual deposit of money or securities.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 601; Dec. Dig. ⟸378.]

6. BANKRUPTCY ⟸387—FEES OF REFEREE.
After the confirmation of a composition, the entry of an order releasing a bankrupt from liability to pay the specified percentage of certain claims, for the sole purpose of defeating the referee's claim to compensation, did not affect the amount of his compensation.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 603–605, 607–616; Dec. Dig. ⟸387.]

7. BANKRUPTCY ⟸368—FEES OF REFEREE.
That claims which were being pressed for allowance at and before the acceptance of a composition offer, and were actually allowed before the composition proceedings were certified by the referee, were not allowed until after the acceptance of the composition offer, did not affect the amount of compensation to be allowed to the referee.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⟸368.]

8. BANKRUPTCY ⟸446—REVIEW OF PROCEEDINGS—COLLATERAL ATTACK.
On petition to revise an order fixing the compensation of a referee in bankruptcy, the refusal of the referee to permit the withdrawal of claims, after they had been voted in favor of accepting a composition offer, for the purpose of lessening to that extent the referee's compensation, would not be reviewed, where a direct review had not been asked, and it had only been brought before the court collaterally, by way of response to the referee's petition for compensation.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⟸446.]

9. BANKRUPTCY ⟸368—FEES OF REFEREE—APPORTIONMENT.
Under Bankr. Act, § 40b (Comp. St. 1913, § 9624), providing that, when a case is transferred from one referee to another, the judge shall determine the proportion in which the fee and commissions shall be divided between the referees, the fact that moneys deposited by a bankrupt under a composition agreement were actually disbursed by the successor of a referee, whose term of office expired after the acceptance of the composition, did not entitle such successor to the full amount of the commission.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⟸368.]

10. BANKRUPTCY ⟸447—REVIEW OF PROCEEDINGS—PETITION TO REVISE—SCOPE OF REVIEW.
On a petition to revise an order fixing the compensation of a referee in bankruptcy in matters of law, the appellate court could not make or direct a complete apportionment of commissions between two referees, in advance of such action by the District Court; it not appearing how completely the nonappealing referee had intended to disclaim his right to participate in further commissions, if allowed.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 930; Dec. Dig. ⟸447.]

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

In the matter of J. Bacon & Sons, bankrupts. On a motion by Robert C. Kinkead, former referee, for the allowance of compensation and for the apportionment thereof between him and George Du Relle, the present referee, an order was made granting the petitioner insufficient relief, and he appeals and files a petition to revise. Appeal dismissed, and order affirmed in part, and reversed and remanded in part, with directions.

H. H. Nettelroth, of Louisville, Ky., for appellant.

Wm. Marshall Bullitt, of Louisville, Ky., for appellees J. Bacon & Sons.

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

KNAPPEN, Circuit Judge. [1, 2] Review of an order fixing the compensation of a referee in bankruptcy. The case is here both on appeal and on petition to revise in matter of law under section 24b of the Bankruptcy Act. In our opinion, the case involves a "proceeding in bankruptcy," and so is reviewable only under section 24b. Davidson v. Friedman (C. C. A. 6) 140 Fed. 853, 72 C. C. A. 553; Barnes v. Pampel (C. C. A. 6) 192 Fed. 525, 113 C. C. A. 81. The appeal is therefore dismissed and the case heard on the petition to revise. We are thus limited to a consideration of the questions of law arising out of the facts found or conceded. Duryea Power Co. v. Sternbergh, 218 U. S. 299, 302, 31 Sup. Ct. 25, 54 L. Ed. 1047; In re Stewart (C. C. A. 6) 179 Fed. 222, 228, 102 C. C. A. 348; In re Holden (C. C. A. 6) 203 Fed. 229, 233, 121 C. C. A. 435.

On July 13, 1914, J. Bacon & Sons, a merchandising corporation of Louisville, Ky. (one of 23 corporations controlled by or associated with the H. B. Claflin Company of New York), was adjudged bankrupt. It owed only about $50,000 of merchandise claims, but was liable on notes aggregating more than $2,300,000 held by various parties—much of the latter being paper of the H. B. Claflin Company. At the request of the general creditors, the bankrupt's business was carried on by the trustee until the confirmation of the offer of compromise later mentioned, occupying for the purpose premises under lease to the bankrupt at an annual rental of $30,600.

On March 5, 1915, about 8½ months after bankruptcy, as a result of the efforts of the note holders' committee appointed by the creditors of the 24 associated corporations (including the H. B. Claflin Company), the bankrupt offered in writing (filed with the referee) a composition "at 35 per cent. of the claims of its creditors, *allowed or to be allowed,* except those entitled to priority." [1] A meeting of the creditors of J. Bacon & Sons to consider the offer was called for March 17th. The offer was on that day accepted in writing by merchandise creditors whose claims aggregated $30,373.60, and by the note holders' committee representing notes amounting to $2,326,067.67. The offer of composition was thus accepted by a majority of creditors in both number and amount of claims.

[1] All italics in this opinion are ours.

The note holders' committee, by writing filed contemporaneously with its offer of acceptance of the composition, waived "the deposit to the credit of the judge * * * of the 35 per cent. composition offer made by said bankrupt, so far as said creditors' claims [so represented by the note holders' committee] are concerned." March 31, 1915, the referee certified the composition proceeding to the District Judge, further reporting the fact of deposit by the bankrupt of $30,000 only, and its refusal to make further deposit, and stating that so far as the referee was advised no reason was apparent why the composition should not be confirmed. Meanwhile, on March 22d (after the acceptance of the composition offer by the statutory majority of creditors) the note holders' committee moved to withdraw claims aggregating $512,610.20, which had already been voted by it in favor of the acceptance of the offer of composition; the referee denied the motion.

On April 24th the composition was confirmed. The referee, whose term of office had expired March 29th, then moved the court to allow his compensation under the Bankruptcy Act as claimed in his certificate of the proposition of composition, including 1 per cent. ($306) on one year's rent under the lease before mentioned, $186.55 expenses of administration (not opposed), $169.43 of miscellaneous fees (not opposed), and $4,159.35, as one-half of 1 per cent. upon $831,870.40, which was 35 per cent. of the claims of creditors.

Upon objection of the bankrupt and the note holders' committee, the court disallowed the commission claimed on confirmation of the composition, except as respects the $30,000 actually deposited with the referee (allowing to the referee's successor the entire of that commission—$150), and allowed the commission on rentals only to the amount of $27.15, being 1 per cent. of the amount of rent paid previous to the authority given the trustee to conduct the business. This review involves the propriety of the referee's charge for commissions on (a) the entire amount payable to creditors under the composition offer, and (b) one year's rentals (except to the extent on which the commission of $27.15 was allowed).

[3] The referee's claim to commission on rentals paid may be shortly disposed of. The asserted right depends upon whether the rental is to be treated as a disbursement by the trustee to a creditor of the bankrupt, and so entitling the referee to commission under section 40a of the act, or as a mere expense of carrying on the business.

We think that to the extent it was rejected by the District Judge it was clearly of the latter class. True, under the Kentucky statute the lessors had a lien upon the bankrupt's personalty upon the leased premises for one year's rent (Courtney v. Trust Co. [C. C. A. 6] 219 Fed. 57, 134 C. C. A. 595); but the trustee had nevertheless the right to the use of the premises by virtue of the lease (Courtney v. Trust Co., supra, 219 Fed. at page 67 [134 C. C. A. 595]), and so long as he paid the rent, and had such use, it is immaterial that even in the absence of such use the rent could have been collected, and would have been a prior debt to the extent at least of effecting a prior lien. The

situation after the referee's term of office expired is not materially different, for until the composition was confirmed the trustee continued to carry on the business, and after the confirmation possession was presumably restored to the lessee.

[4, 5] The referee's right to a commission upon an amount equaling 35 per cent. of the claims of creditors depends upon the construction to be given section 40a of the act, which allows referees, "as full compensation for their services," a deposit fee of $15, plus 25 cents for every proof of claim filed for allowance, and "from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition." The District Judge held that the clause "the amount *to be paid to creditors* upon the confirmation of a composition" means only the amount actually paid the creditors out of moneys provided for that purpose *through deposit by the bankrupt.* The case turns upon the correctness or incorrectness of this construction. No authoritative decisions on this question have been cited, and we have found none.

Section 12b of the Bankruptcy Act permits the filing of application for confirmation when the composition has been accepted by a majority of creditors in number and amount, "and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge." This in the ordinary case means a deposit *somewhere* sufficient to pay in full the costs of the proceedings and debts having priority (and so payable in full), together with whatever the creditors are to receive by virtue of the composition. But the "consideration to be paid by the bankrupt to his creditors" may or may not be cash. A bankrupt usually does not have enough ready money of his own to carry out a composition. The "consideration to be paid" may be the bankrupt's notes, secured or even wholly unsecured, or his mere promise to pay in the future a given amount. 2 Loveland on Bankruptcy (4th Ed.) p. 1264. It is common knowledge that compositions sometimes contemplate the taking by creditors of stock or securities under a reorganization, as in the arrangement under consideration in Re Kinnane (D. C.) 221 Fed. 762.

It is, we think, also clear that such "consideration" need not be actually deposited with the court. True, the statute requires that it "be deposited in such place as shall be designated by and subject to the order of the judge," thus plainly permitting a deposit of notes or other evidences of debt, secured or unsecured, with any approved depositary. But this deposit is for the sole benefit of the creditors concerned, and there can, we think, be no doubt of the power of such creditors to waive actual deposit of money or securities. This waiver *of deposit* was made. But a mere waiver of deposit was not a waiver of the payment by the bankrupt to the creditors of the amount agreed to be paid under the composition. On the contrary, the note holders' committee's acceptance of the composition offer (filed contemporane-

ously with the "waiver of deposit") accepted in express terms "the offer of composition at 35 per cent. to be made herein by * * * the above named bankrupt * * * and *payable in cash"*; and the waiver itself was limited to "the deposit of money necessary to apply for the confirmation of said composition." Beyond doubt the creditors in question, notwithstanding their waiver of deposit, could enforce such payment in cash by the bankrupt. The latter's discharge by virtue of the composition proceedings would destroy the remedy in bankruptcy, but not the debt for the consideration to be paid under the composition. Bankr. Act, § 14c; Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664.

We think the meaning of the term "amount to be paid to creditors," on which the commission of one-half of 1 per cent. is to be computed, means the amount which creditors are to receive by virtue of the composition agreement. The amount offered by the bankrupt and accepted by the creditors became, upon confirmation, "the amount to be paid creditors." This construction not only seems logically to result from the consideration to which we have already referred, but receives additional confirmation when consideration is given to the difference between the language "on *all moneys disbursed* to creditors by the trustee" (on which the 1 per cent. commission is to be computed in the case of a fully administered estate) and the *"amount to be paid to creditors,"* on which one-half of 1 per cent. is to be paid in case of composition—not requiring complete administration. The authorities [2] respecting the application of the 1 per cent. commission, which relates to fully administered estates, have little pertinency here. Again, the suggestion that the amount to be paid to creditors means only the amount actually paid out by the court loses its force when it is considered that an actual disbursement or supervision of disbursement by the referee personally is not required as a condition for the allowance of either commission given by section 12b. His commission would be the same were that disbursing supervision performed by the District Judge, as it might be. See General Order in Bankruptcy No. 29 (89 Fed. xii, 32 C. C. A. xii). The statute merely makes a universal, and thus somewhat arbitrary, rule for payment of compensation. The construction we have put upon section 40a breeds no conflict with section 72 of the act, which forbids the referee to receive or be allowed "in any form or guise" any compensation except that expressly authorized and prescribed by the act. We think the commission as here applied is expressly authorized and prescribed by the act. It is notorious that in many cases the statutory fees for specific items of service furnish inadequate compensation for the entire administrative work involved. The commissions cover all work whose compensation is not specifically provided for. This case well illustrates such fact; for it appears that the referee has done a large

[2] Bray v. Johnson et al. (C. C. A. 4) 166 Fed. 57, 91 C. C. A. 643; In re Columbia Cotton Oil Etc. Co. (C. C. A. 4) 210 Fed. 824, 127 C. C. A. 374; In re Meadows (C. C. A. 2) 211 Fed. 948, 128 C. C. A. 446; In re Breakwater Co.'s Estate (C. C. A. 3) 224 Fed. 333, 140 C. C. A. 19.

amount of work, for which the statutory fees ($196.58), independently of the commission in question, afford but trifling compensation.[3]

[6, 7] We are therefore of opinion that the referee was entitled to a commission of one-half of 1 per cent. on the amount "to be paid by the bankrupt to creditors," regardless of the fact that payment was not made directly by the bankruptcy court, and that this "amount to be paid" includes the sums to which the note holders were entitled by virtue of the composition proceedings, to bring about which they have employed the machinery of the act and the processes of the court. In reaching this conclusion we have ignored, as did the District Judge, the order entered by the note holders' committee on May 5, 1915, in terms releasing the bankrupt from all liability to pay the 35 per cent. composition offered and previously accepted. This entry was made not only after the composition was confirmed, but obviously for the sole purpose of defeating the referee's claim to compensation. We also regard as of no moment (as apparently did the District Judge) the fact that the note holders' claims were not actually allowed until after the acceptance of the composition offer by creditors, including the note holders. The claims were being pressed for allowance at and before the acceptance of the composition offer, and were actually allowed before the composition proceedings were certified by the referee. The note holders are thus not in position to raise the point referred to.

We may add that the record furnishes no reason to apprehend that the note holders have lost the power to get the benefit of the composition percentage. The testimony is undisputed that the chairman of the note holders' committee is president of a new corporation (formed previous to the composition proceedings) which owns the capital stock of the bankrupt. On the latter's objection the court excluded testimony offered by the referee (evidently deeming it immaterial) that the bankrupt's capital stock was so purchased by the note holders' committee at a sale of the H. B. Claflin Company's assets, in pursuance of a plan of reorganization under which such note holders would receive notes of the new corporation for 85 per cent. of their debt, 15 per cent. to be paid in cash, the remainder to be secured by capital stock of the bankrupt company. The referee's uncontroverted affidavit of April 26th (from which the quotation contained in the fore-

[3] The District Judge in his findings of fact treats as true (although regarding immaterial) the statement of the referee, in his report recommending composition, that, during the entire period between July 13, 1914, and March 30, 1915, when his term of office expired, he "was required to, and did, perform services as referee in said matter almost daily, with the exception of Sundays and a few days when the undersigned was absent from said district; that the aforesaid services by the undersigned, as referee, were required by reason of the fact that the conduct of the business of said bankrupt was being continued pursuant to the request of the creditors of the bankrupt; that matters were continually arising on said proceeding which required action by the undersigned, as referee; and that the undersigned, as referee, examined and countersigned approximately 6,000 checks, aggregating in amount $900,000, which were drawn by said receiver or trustee to pay the expenses of the conduct of said business during the aforesaid period."

going footnote was taken; the affidavit having been filed, and not merely tendered) contains statements tending to the same general effect; and the referee testified upon hearing of the application for commission (also without dispute) to admissions of representatives of the bankrupt of the fact of such purchase and ownership of stock by the note holders' committee. We are not called upon, in the absence of appropriate assignments, to consider whether the excluded testimony was rightfully rejected, or whether the findings should have covered the propositions referred to. It seems enough to say that no question is raised by the record or by the opinion or findings of the district judge as to the ability of the note holders to protect themselves.

The conclusion we have reached makes it unnecessary to consider the question of "constructive disbursement" discussed by counsel.

[8] We are disposed to think the bankrupt not entitled to complain of the denial of the application of the note holders' committee for leave to withdraw the claims amounting to $512,610.20, to which we have before referred.

The request (although made before the composition proceeding was certified to the District Judge) was not presented until after the claims had been voted in favor of accepting the composition offer; the withdrawal asked was for the purpose of lessening to that extent the referee's compensation; the District Judge has not considered the question, and a direct review by the court of the referee's ruling has not been asked. The only attempt to bring it before the court was collaterally, by way of response to the referee's petition for compensation.

[9, 10] As to the apportionment between the referee and his successor: It follows from what we have said that the fact that the successor referee made the disbursement of the moneys actually deposited by the bankrupt did not entitle the successor to the full amount of the commission thereon. We are asked by petitioner to apportion on this review the entire commissions allowed between the two referees. How completely the successor has intended to disclaim the right to participate in further commission, if allowed, is not entirely clear. As we are not considering the case on appeal, but merely upon revision in matters of law, we cannot on this review make or direct such complete apportionment. We assume that the District Judge will determine the apportionment under section 40b of the act, taking into account the proportionate labor and service performed by the two referees in the administration of the estate, in case the successor claims any interest in the further commission.

The order complained of will be affirmed so far as concerns the commission upon rentals, and reversed as respects the commission under section 40a, and the record remanded to the District Court with directions to allow the referee's commissions upon the basis prescribed herein, and to take further proceedings not inconsistent with this opinion. The petitioner will recover his costs of this court.

OHIO MOTOR CAR CO. v. EISEMAN MAGNETO CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1916.)

No. 2652.

1. BANKRUPTCY ⊜64—ACTS OF BANKRUPTCY—ESTOPPEL.

In September, 1912, a suit was commenced in a state court in which a receiver of a motor car company was appointed. On October 9th, the receiver was ordered to give notice to creditors to present their claims before January 9, 1913. On November 19, 1912, the receiver reported an offer of $40,000 for the company's property subject to a mortgage, and notice was thereupon given to creditors and a hearing granted on December 2d. On December 11th the sale was ordered. On April 21, 1913, an order was made for the payment of a dividend of 15 per cent., which practically closed the receivership proceeding. In October, 1912, a bankruptcy petition, alleging the receivership and a preferential transfer as acts of bankruptcy, had been filed, and in February another creditor was permitted to file an intervening petition; but neither creditor objected to the receivership proceeding, and nothing further was done in the bankruptcy proceeding until May, 1914, when an order was made reciting the withdrawal of the petitioning and intervening creditors and a demand by the company for the dismissal of the petition. Thereafter 5 creditors, who had acquiesced in the receivership and been paid the dividend, out of 349 creditors, intervened and adopted the original petition, except admitting that they were estopped to urge the receivership as an act of bankruptcy. *Held*, that they were equally estopped to rely upon the preferential payment as an act of bankruptcy, as they were chargeable with notice of the bankruptcy proceeding, and of the acts of bankruptcy alleged, and when they learned, at the time the sale was ordered, that the assets would fall far short of satisfying the company's indebtedness, they were put to their election, and, after acquiescing in the proceedings in the state court and obtaining their proportionate share of the proceeds of the sale, they could not change their attitude from an assenting to an antagonistic course respecting the receivership.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 97; Dec. Dig. ⊜64.]

2. BANKRUPTCY ⊜467—ACTS OF BANKRUPTCY—ESTOPPEL.

Though a trial by jury had been demanded in the bankruptcy proceeding, it could not be presumed that an application to the bankruptcy court to have the hearing upon the question of adjudication expedited or an application to the state court to stay proceedings in that court would have been denied, and hence the course adopted by such intervening creditors was not necessary.

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

3. BANKRUPTCY ⊜391(3)—STAYING PROCEEDINGS IN STATE COURTS.

In obedience to the rule of comity, an application to stay proceedings in a state court in possession of property through a receiver, because of the pendency of bankruptcy proceedings, should first be presented to the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649–654; Dec. Dig. ⊜391(3).]

4. BANKRUPTCY ⊜391(3)—STAYING PROCEEDINGS IN STATE COURTS.

In view of the paramount character of the Bankruptcy Law, the jurisdiction of the bankruptcy court, when properly invoked, is exclusive as respects the administration of the affairs of insolvent persons and corporations, and insolvency proceedings pending in state courts may be enjoined within four months after their commencement, especially as Rev. St. § 720, providing that an injunction shall not be granted to stay

proceedings in any court of a state, expressly excepts cases where the injunction is authorized by any law relating to bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649–654: Dec. Dig. ⊂⊃391(3).]

5. BANKRUPTCY ⊂⊃464—APPEAL—ASSIGNMENTS OF ERROR—NECESSITY.

Under rule 11 of the Sixth circuit (150 Fed. xxvii, 79 C. C. A. xxvii), relative to the filing and form of assignments of error, which provides that errors not assigned according to that rule will be disregarded, but that the court at its option may notice a plain error not assigned, the error in adjudging a party a bankrupt on the petition of creditors, who were estopped to set up the act of bankruptcy relied on, was of such a character that it should be noticed, though not properly assigned.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃464.]

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

Petition in bankruptcy by the Eiseman Magneto Company and others against the Ohio Motor Car Company. From a decree adjudging the defendant bankrupt, it appeals. Reversed with directions.

A receivership suit in a state court, and shortly afterwards a bankruptcy suit in the court below, were commenced against appellant; and, broadly stated, the controlling question arising on this appeal is whether creditors, who without objection to the proceedings participate in the distribution of their debtor's assets in the receivership suit, can thereafter in the bankruptcy suit abandon the effect of appointment of the receiver as an act of bankruptcy and rightfully insist that the debtor be adjudged a bankrupt for alleged preferences set out as acts of bankruptcy.

1. *Receivership Suit.*—September 25, 1912, the Diamond Rubber Company of New York commenced an action against the Ohio Motor Car Company, in the court of common pleas of Hamilton county, Ohio, on behalf of itself and all other creditors, including the stockholders of the corporation, alleging, among other things: That plaintiff was the owner of defendant's past-due promissory note for $6,000, upon which payment had been refused; that the property of defendant at a fair valuation exceeded its liabilities in the approximate amount of $200,000; that it was abundantly solvent, but unable to convert its assets into money to meet its maturing liabilities, or to borrow enough money to carry on its business for the time being. After further stating the usual grounds for appointment of a receiver in such circumstances, the ordinary prayer in that behalf was set out. The company appeared by answer on the same day, alleging that it had assets in excess of its liabilities, admitting the allegations of the petition, and joining in the prayer for appointment of a receiver. The court made a consent order on the same day, reciting that the cause was heard upon the petition and answer, "the proofs and motion for a receiver," finding that "the facts are as alleged in the petition," and appointing Edward G. Schultz receiver. The receiver was in terms empowered to take immediate possession and control of the property, and to carry on and operate the business of defendant; also to purchase and pay for material and supplies, employ labor, and, if necessary, borrow money. The receiver accepted the appointment, gave an approved bond, and entered into possession. Appraisers were shortly afterward appointed. October 9th the receiver was ordered to give to the creditors public notice of his appointment and of the fact that they should present their claims to him for allowance on or before January 9, 1913, or be forever barred from participating in the distribution of the assets, but this period was subsequently extended 30 days.

In October, 1912, proceedings were begun looking to the sale of the property and obtaining bids for purchase at either public or private sale. November 18th appraisement was filed fixing valuation of the assets at $211,881.54.

The receiver having reported the best obtainable offer to purchase the property at private sale to be $40,000 in cash and the assumption of a mortgage of $25,000 upon the property, and having, pursuant to order of the court, notified all the creditors of the offer and that it would be heard at a time stated, he was upon hearing directed to execute a deed of conveyance of the real estate, and a bill of sale of the chattel property, except cash on hand, bills receivable, and choses in action; and this order was carried out. The total sum received for the assets of the company, except some outstanding accounts, was $74,650.10. The amount of the outstanding accounts is not given, though it is to be inferred that their value is inconsiderable.

April 21, 1913, an order was made providing for payment of costs and expenses of the receivership, and also of a dividend of 15 per cent. upon all claims not in controversy; two claims presented by the Fifth-Third National Bank of Cincinnati, and one claim by the Miami Valley National Bank of Hamilton, Ohio, were in dispute, were materially reduced, and then allowed; and as so reduced a like dividend was ordered to be paid on them. These transactions seem for all practical purposes to have closed the receivership proceeding.

2. *Bankruptcy Suit.*—October 28, 1912, three creditors filed in the court below a petition in bankruptcy against the Ohio Motor Car Company, setting out their several claims as creditors, with the ordinary averments, and in substance three alleged acts of bankruptcy: (1) Stating in three paragraphs, differing in form, though in effect substantially the same, that respondent, being insolvent, through agreement with the Diamond Rubber Company, caused its property to be placed in possession of a receiver under the laws of Ohio, applied for a receiver for its property under the same laws, and through such agreement caused and permitted its property to be transferred to a receiver with intent to deprive its creditors of the right to have the corporate assets administered in bankruptcy, and so caused the property to be transferred with intent to hinder and delay its creditors; (2) that on May 1, 1912, respondent, while insolvent, made and executed an intended preference through a chattel mortgage in the form of a bill of sale for 11 automobiles, to secure $11,552.18 owing by respondent to the Miami Valley National Bank, that the bank did not take "open, notorious, and exclusive possession of the automobiles," and that the mortgage was not filed until September 25, 1912; (3) that, while insolvent, defendant did, within four months next preceding the filing of the petition in bankruptcy, transfer "two or more automobiles" to the same bank, with intent to prefer, etc. The prayer is that defendant be adjudged a bankrupt. November 18, 1912, respondent filed an answer, denying the commission of the acts alleged, or that it was insolvent, and demanding trial by jury.

February 18, 1913, Ernst A. Roden was permitted to file an intervening petition, alleging that he was a creditor, and adopting the allegations of the petition as to insolvency and the commission of the acts of bankruptcy therein alleged. He was directed to be made a party, with his name inserted in the original petition as one of the petitioning creditors. May 14th, following, an order was made reciting the withdrawal of the petitioning and intervening creditors and a demand of respondent to dismiss the petition, and directing that the clerk mail to each of the creditors a specified notice; a complete list of creditors having theretofore been filed with the court. May 21st an affidavit was filed showing that this order was complied with by mailing the required notices to 349 creditors. The notices so mailed informed the creditors of the withdrawal of the petitioning and intervening creditors, and of the particular time fixed for hearing the matter of dismissal, June 2d. On that day the Troy Carriage Sunshade Company filed objection to dismissal. June 7th five other creditors presented a petition for leave to intervene in the action and be made parties thereto, setting up their several claims amounting to $1,185.92, and stating, among other things: That the claims were past due and unpaid, "with the exception of the 15 per cent. thereof which has been paid by the receiver"; that they adopt the allegations of the original petition, "except that your petitioners are advised and believe that by reason of their acceptance and credit upon their respective claims

as above set forth of the sum of fifteen (15%) per cent. paid by said receiver in the state court, your petitioners are estopped from and do now abandon any claim to adjudication upon the ground of the appointment of said receiver having constituted an act of bankruptcy"; and praying to be permitted to intervene, to be made parties complainant, and to have their rights adjudicated. June 10th an order was made reciting that the cause was heard on motion of the respondent and E. A. Roden, intervening petitioner, to dismiss, and on the new petition of intervention, and denying the motion to dismiss, but allowing the parties, whose petition was filed June 7th, to intervene, making them parties and granting leave to respondent to answer. June 24th respondent filed an amended and supplemental answer, reciting the proceedings had in the receivership suit, attaching as an exhibit a transcript of the docket and journal entries of the common pleas court in that suit; alleging that the interveners acquiesced and participated in the receivership proceedings, accepted the dividend paid by the receiver on their claims filed with and allowed by him, and that their conduct in such receivership proceedings operated as an estoppel in respect of each and all the alleged acts of bankruptcy; denying all the allegations of the petition not expressly admitted; and demanding that the matters be inquired into by a jury. The right of trial by jury was subsequently waived in writing, and the cause was heard and disposed of by the court. January 7, 1914, an order was made reciting that the cause was heard upon the intervening petition of the "National Carbon Company et al." (filed June 7, 1913), and the answer of the respondent, and adjudging respondent bankrupt. Motion for a new trial was subsequently overruled, and respondent appeals.

Pogue, Hoffheimer & Pogue, of Cincinnati, Ohio (Province M. Pogue and Harry M. Hoffheimer, both of Cincinnati, Ohio, of counsel), for appellant.

Henry Bentley and W. B. Mente, both of Cincinnati, Ohio, for appellees.

Before WARRINGTON and DENISON, Circuit Judges, and McCALL, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). [1] It is to be observed that the receivership proceeding was begun in the state court September 25, 1912, and practically concluded April 21, 1913, and that the bankruptcy proceeding was commenced in the court below October 28, 1912; but, aside from the filing of the answer and allowance of a single intervention, nothing was done in the case until May 14, 1913. At that time an order was made, reciting that the petitioners and intervener had withdrawn their application in bankruptcy and that respondent was demanding dismissal, directing that notice of these facts be given to all the creditors and fixing June 2d to hear the matter of dismissal. It is to be inferred from the proof of the execution of this order that there were 349 creditors. It was not until the day fixed for the hearing that any creditor appears to have objected to the dismissal. On that day one corporate creditor, having a claim for $456.45, filed an objection; and on the same day the only person who had then intervened moved for his dismissal and that of the cause itself. On June 7th, however, 5 creditors sought to intervene for the purpose of prosecuting the two acts of preference alleged in the original petition. They admitted estoppel as to, and so abandoned, any claim to adjudication "upon the ground of the appointment of said receiver having constituted an act of bank-

ruptcy." Concededly these creditors, as well as all the other creditors, filed their claims in the suit and participated in the distribution made of respondent's assets in the state court. According to the record, no step of importance was taken in the state court after appointment of the receiver, until seasonable notice and opportunity to be heard had been given to the creditors. Although the present petitioning creditors were not made formal parties to the receivership suit, they seem, at least through their counsel, to have appeared at such hearings and acquiesced in the orders that followed; certainly none of the creditors appears to have objected to any of the orders. The significance of such a situation as this cannot escape attention. The conduct of all the creditors was calculated to induce each to believe that the rest were assenting to the orders made in the state court. Further, the fact that 343 of the 349 creditors are, so far as appears here, still satisfied with the results of the course they pursued in the state court, justifies an inference that the creditors then believed their interests would under the existing conditions be as well subserved in the receivership suit as in the bankruptcy proceeding—if, indeed, they would not be better subserved, in view of the additional expense of maintaining the bankruptcy proceeding. There was nothing in the law to forbid the creditors to adopt such a course; but whether the law also sanctions their subsequent adoption of an opposed course is a different matter.

Every creditor so taking the benefits of the receivership suit was chargeable with notice of the bankruptcy proceeding and of the acts of bankruptcy alleged. This is because of the representative character of a bankruptcy suit; it is for the benefit of all the creditors. This characteristic, of course, pervades the Bankruptcy Act. It was, for instance, in virtue of section 59f (which authorizes creditors other than the original petitioners "at any time" to "enter their appearance and join in the petition"), that the interveners were permitted to join in the petition, although more than four months had elapsed after the acts of bankruptcy were alleged to have been committed. In re Stein, 105 Fed. 749, 751, 45 C. C. A. 29 (C. C. A. 2d Cir.); In re Romanow (D. C.) 92 Fed. 511, 512; In re Mammouth Pine Lumber Co. (D. C.) 109 Fed. 308, 310; In re Mackey (D. C.) 110 Fed. 355; 1 Loveland (4th Ed.) 388, note 7; Collier (9th Ed.) 779. And see In re Haff, 136 Fed. 78, 81, 82, 68 C. C. A. 646 (C. C. A. 2d Cir.). Furthermore, in the present instance the interveners admitted knowledge of the bankruptcy suit and of the acts of bankruptcy there charged, since they averred in their petition of June 7, 1913, that "petitioners are familiar with, adopt, and approve the allegations of the principal petition herein as to the insolvency of the respondent and the commission of the acts of bankruptcy as therein alleged." It is not suggested, and it would scarcely be claimed, that the acts of bankruptcy charged, one as well as another, could not be waived by the creditors; and the question at last is whether in effect they have not done so.

The express waiver, the abandonment, contained in the intervening petition was in recognition of the rule laid down by this court in Si-

monson v. Sinsheimer, 95 Fed. 948, 954, 37 C. C. A. 337, 344, where it was held that a man will not be allowed to complain of an act of bankruptcy, such as the making of an assignment for the benefit of creditors, if he induced the act—

"or after its commission he so acted with regard to it that he gave others the right to act on the faith of its validity so far as his subsequent conduct would affect it. On the one hand, it would be gross inequity to allow him to subject the debtor to judgment for an act he induced; and, on the other, it would be equally unjust to allow him to repudiate, as invalid, a transaction, when by his conduct he had induced others to change their position on the faith of its validity."

See, also, In re Romanow, supra, 92 Fed. at page 511; Clark v. Henne & Meyer, 127 Fed. 288, 297, 62 C. C. A. 172 (C. C. A. 5th Cir.); Moulton v. Coburn, 131 Fed. 201, 203, 66 C. C. A. 90 (C. C. A. 1st Cir.); Depres v. Galbraith, 213 Fed. 190, 192, 193 (C. C. A. 8th Cir.); Utz & Dunn Co. v. Regulator Co., 213 Fed. 315, 317, 130 C. C. A. 17 (C. C. A. 8th Cir.); Lowenstein v. Henry McShane Mfg. Co. (D. C.) 130 Fed. 1007, 1008; In re Gold Run Mining & Tunnel Co. (D. C.) 200 Fed. 162, 163; In re Commonwealth Lumber Co. (D. C.) 223 Fed. 667, 672, 673.

True, the acts of bankruptcy complained of in those cases were either assignment or receivership proceedings; and counsel for appellant concede that no kindred case has been found where any act of bankruptcy, other than acts such as these, was involved. This might be controlling, if it were not for the doctrine that fraud itself may be waived. We may say in passing, however, that one, if not both, of the acts of preference alleged would seem to have proved practically harmless. We think it safe to say upon the present record that the Miami Valley National Bank, as well as the Fifth-Third National Bank, made a loan to the adjudged bankrupt (under the corporate name it then bore—Jewel Carriage Company) upon the faith of the company's promise to transfer to the bank certain automobiles by bill of sale or chattel mortgage to secure the loan; that the transactions as to both banks were carried into execution. But concededly the lien of the Fifth-Third Bank was so far preserved as not to be questioned here, while as to that of the other bank the District Judge found:

"The admitted transfer of the automobiles was not effective, either as a sale or pledge. * * * No possession passed, and the company continued to deal with the automobiles as its own."

It would therefore seem that the Miami Bank lost the substantial portion of the loan and the entire subject of the intended pledge; for (1) we do not discover that the bank received anything for the automobiles, though (2) it is alleged in the amended answer of the Motor Company, without denial (the fact, however, not otherwise distinctly appearing), that the loan was included in the claim of the bank which was disputed, and ultimately reduced and allowed, and upon which the 15 per cent. dividend was paid; and this is in accord with the natural inference that the bank would prove its claim for all the lawful loans it held against the Motor Company.

In the view we take of the case, however, it is not necessary to pass upon the alleged acts of preference. Granting that either or both of these acts were committed, it is difficult to see why the conduct of the intervening creditors should admittedly estop them from claiming adjudication upon the first act of bankruptcy charged and should be totally without effect as to the others. The creditors were put to an election of the course they should pursue the moment they saw the difference between the appraisement of the property and the price at which it was proposed to sell it. The receiver reported the offer November 19, 1912; notice was thereupon given to the creditors, and a hearing granted December 2d. It was not until December 11th that the sale was ordered; and it is to be remembered that the time as originally fixed for filing creditors' claims in the receivership suit did not expire until January 10, 1913, and, as extended, until February 10th. Upon such return and hearing the creditors knew, if they did not know before, that the assets would fall far short of satisfying the indebtedness, even though the subjects of the alleged preferences were included; still they took no action in either of the courts, state or federal, to prevent the consummation of the sale. On the contrary, they sought and accepted their proportionate shares of the sales proceeds. Such conduct gives emphasis and evidential weight to the very silence of the great body of creditors who are not here urging adjudication. It cannot be that it is the purpose of the Bankruptcy Act to foster and encourage such a change, not to say repudiation, as the interveners now present. The equitable objects of the statute are unmistakable; and apart from every other consideration, the change in position now sought to have sustained is unjust to the other creditors.

It is not a sufficient answer to say that any recovery would be for the common benefit of all the creditors. The apparent adherence of the main body of the creditors to their original course is repellant of such an answer. This situation is unlike that arising on the initial proceedings, where the attitude of creditors other than those petitioning is unimportant, and where no question can arise whether the acts of the petitioning creditors have misled the others. It is not claimed, and it is not seen how it rightfully could be, that the other creditors would have taken the course they did in the state court, if they had known that the present interveners did not mean what their conduct then fairly indicated. Above all, a change in attitude from an assenting to an antagonistic course, under conditions anything like these, has never been sanctioned by any decision to which our attention has been called.

[2-4] Furthermore, it was not necessary that the creditors should adopt the course they did in the state court. Either the original petitioners or the present interveners, in spite of respondent's demand for trial by jury, might have applied in the court below to have the hearing upon the question of adjudication expedited. This does not appear to have been done. It is not to be presumed that such an application would have been denied. They might have applied for an order to stay the sale of the property in the state court, or any other step proposed to be taken in that court. Since the property was in

possession of a receiver appointed by the state court, the application should in the first instance, in obedience to the rule of comity, have been presented to the state court, and it cannot be presumed that the application would have been denied. Carling v. Seymour Lumber Co., 113 Fed. 483, 491, 51 C. C. A. 1 (C. C. A. 5th Cir.); In re Knight (D. C.) 125 Fed. 35, 45, 46. An application so made and denied could not have been employed as an estoppel against further action in the bankruptcy proceeding, since the object would have been to prevent the sale or distribution in the state court. Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 642, 643, 37 C. C. A. 210 (C. C. A. 6th Cir). That decision points the distinction that was made in the Simonson Case, before cited.

Further, in view of the paramount character of the Bankruptcy Law, the jurisdiction of the bankruptcy court, when properly invoked, is exclusive as respects the administration of the affairs of insolvent persons and corporations. The inhibition of section 720 of the Revised Statutes against the issue of injunctions to stay proceedings in a state court, or to take possession of the property, distinctly excepts cases where the injunction is authorized by the bankruptcy law. In re Watts & Sachs, 190 U. S. 1, 27, 30, 23 Sup. Ct. 718, 47 L. Ed. 933. Orders of injunction, where necessary, as to insolvency proceedings pending in state courts, have been of frequent occurrence in bankruptcy courts (New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881, 888, 91 C. C. A. 559 [C. C. A. 4th Cir.]; In re Gutwillig, 92 Fed. 337, 338, 34 C. C. A. 377 [C. C. A. 2d Cir.]; Davis v. Bohle, 92 Fed. 325, 328, 329, 34 C. C. A. 372 [C. C. A. 8th Cir.]; In re Knight, supra); but of course such orders must be sought in respect of proceedings commenced in the state court within the four months period (New River Coal Land Co. v. Ruffner Bros., supra; In re Farrell, 176 Fed. 506, 512, 100 C. C. A. 63, and citations [C. C. A. 6th Cir.]). If the report and hearing upon the offer of sale in the instant case be included, the evidence offered here was then available for all purposes of the adjudication. It follows that the present petitioning creditors had abundant opportunity to protect their interests in the court below, if they had chosen to resort to the remedies open to them. They had the choice, however, both of forums and laws for enforcing such rights as they then desired to have determined; and we do not see why they should not now be precluded from denying that they voluntarily made a final selection of the state tribunal and state laws.

It is true the question is attended with difficulty, but it is believed the safer rule is to hold litigants to the logical consequences of what must be concluded to have been their voluntary action. It is not meant to say that a creditor's action is voluntary where a course adopted by him in a state court is taken in ignorance of certain acts, such as fraudulent transfers, of the debtor. It has been held that where, in such a case, no rights of others have been prejudiced by the conduct of the creditor, he may join in a bankruptcy proceeding to secure his rights (In re Curtis, 94 Fed. 630, 633, 36 C. C. A. 430 [C. C. A. 7th Cir.]); but it is fairly to be implied from the reasoning of the court

in that case that, if the creditor's action in the state court had been taken with knowledge of such transfers, he would upon the theory of election of remedies have been precluded from resorting later to a bankruptcy proceeding. While the theory of preclusion is not of controlling importance, it was doubted in the Simonson Case, 95 Fed. 954, 37 C. C. A. 344, whether the doctrine of election of remedies was applicable. It is enough to say here that these creditors are estopped from prosecuting the proceeding in bankruptcy.

[5] While the assignments fail to set out the error considered, the question was presented at the argument and has been discussed in the briefs, and the error is of such a character that we think it should be noticed under the option reserved in the concluding clause of rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii).

The decree must be reversed, with costs, and with direction to dismiss the petition.

WM. EDWARDS CO. v. LA DOW. TRACY & AVERY CO. v. SAME. ALBERT F. REMY CO. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1916.)

Nos. 2802, 2804, 2806.

1. APPEAL AND ERROR ⟸4—PROPER MODE OF REVIEW—APPEAL OR WRIT OF ERROR—"ACTION AT LAW."

Actions by a trustee in bankruptcy to recover alleged preferential payments were actions at law, and properly so brought, and review could be had only upon writ of error, and not by appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8–11, 16, 20; Dec. Dig. ⟸4.

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

2. JURY ⟸14(2)—RIGHT TO JURY TRIAL.

In actions by a trustee in bankruptcy to recover alleged preferential payments, defendants had a right to a jury trial, and a reference was unauthorized, unless such right was either expressly or impliedly waived.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 67; Dec. Dig. ⟸14(2).]

3. APPEAL AND ERROR ⟸924—RECORD—ASSUMPTIONS.

Where, in actions at law, an order of reference to a master commissioner did not show affirmatively that defendants were present when it was made, or expressly assented thereto; and the record threw no light on the subject, it would be assumed that they were not present, or, if present, did not assent expressly or by implication.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 3726, 3727; Dec. Dig. ⟸924.]

4. JURY ⟸28(10)—RIGHT TO JURY TRIAL—WAIVER.

Where a defendant, who did not assent to a reference, expressly objected on the hearing before the master to the consideration of the cause by the master, and insisted upon its right to have the cause tried by a jury, and on the hearing on exceptions to the master's report appeared only to protest the jurisdiction of the court, it did not waive its right to a jury trial by failing to take formal exceptions to the order of reference.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 185; Dec. Dig. ⟸28(10).]

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5. EQUITY ⇐403—ORDER OF REFERENCE—SCOPE OF REVIEW BY COURT.
An order referring an action to a master commissioner thereby appointed to take testimony, hear the cause, and report all the matter and findings therein to the court for further proceedings, contemplated a finding by the master upon the facts and the law, with the right reserved to the parties to file exceptions thereto, and with power in the court to review and reconsider on such exceptions all the findings of law and of fact, and for that purpose to examine and weigh the evidence, and enter judgment according to the result of such re-examination.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 875–878; Dec. Dig. ⇐403.]

6. JURY ⇐25(2)—RIGHT TO JURY TRIAL—WAIVER.
Notwithstanding Rev. St. § 649 (Comp. St. 1913, § 1587), providing that issues of fact in civil cases may be tried by the court without a jury whenever the parties file a stipulation in writing waiving a jury, parties are presumed to have waived a jury, even in the absence of a written stipulation, when they were present at the trial in person or by counsel and made no demand for a jury, as that section was designed to enable the parties to make agreements in vacation, and to prevent either party demanding a jury unexpectedly at the trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 155, 156; Dec. Dig. ⇐25(2).]

7. JURY ⇐11(3)—RIGHT TO JURY TRIAL—STATUTORY PROVISIONS.
Rev. St. § 566 (Comp. St. 1913, § 1583), requiring that actions at law in the District Courts be tried by jury, has no application to the District Courts as now organized.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 21; Dec. Dig. ⇐11(3).]

8. JURY ⇐28(10)—RIGHT TO JURY TRIAL—WAIVER.
Defendants, who attended proceedings under a reference, both before the master and before the District Court on exceptions to the master's report, without objection or protest, waived their right to a jury trial, especially where another defendant protested, and insisted upon its right to a jury trial, but the defendants in question remained silent and did not join in such protest.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 185; Dec. Dig. ⇐28(10).]

9. APPEAL AND ERROR ⇐1008(2)—FEDERAL COURT—SCOPE OF REVIEW—TRIAL WITHOUT A JURY.
Rev. St. § 649 (Comp. St. 1913, § 1587), provides that issues of fact may be tried by the court without a jury whenever the parties file a stipulation in writing waiving a jury. Section 700 (Comp. St. 1913, § 1668) provides that, when an issue of fact in a civil case is tried and determined by the court without a jury according to section 649, the rulings of the court in the progress of the trial may be reviewed on writ of error or appeal, and that when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. *Held* that, where a jury trial is waived orally or by personal attendance upon the trial without objection, and without the filing of written stipulation, rulings of the court upon the trial are not reviewable, and where parties waived a jury trial by attending proceedings under a reference without objection or protest, the only question reviewable was whether the facts found by the District Court sustained the judgment entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3957, 3964; Dec. Dig. ⇐1008(2).]

10. APPEAL AND ERROR ⟸750(4)—ASSIGNMENT OF ERROR—MATTERS REVIEWABLE.

In an action by a trustee in bankruptcy to recover alleged preferential payments made prior to the amendment of 1910 (Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838), an assignment of error that the judgment was not sustained by the evidence and was against the evidence did not raise the objection that there was no finding that the bankrupt intended a preference.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3079; Dec. Dig. ⟸750(4).]

11. APPEAL AND ERROR ⟸753(1)—FEDERAL COURTS—ASSIGNMENT OF ERROR—MATTERS REVIEWABLE.

Rule No. 11 of the Sixth Circuit (150 Fed. xxvii, 79 C. C. A. xxvii) requires the filing of assignments of error, and provides that errors not assigned according to that rule will be disregarded, but that the court at its option may notice a plain error not assigned. In an action by a trustee in bankruptcy to recover alleged preferential payments made prior to the amendment of 1910, the judgment contained a finding that the bankrupt was hopelessly insolvent at the time of the preferential payments, and the opinion of the District Court stated that the evidence left little doubt but that the transaction was on the part of the bankrupt in conscious fraud of his creditors, and that it operated as a great fraud on other creditors, as well as a preference for the defendants. *Held* that, though there was no express finding that the bankrupt intended to give a preference, the court would not exercise its option as to considering a plain error not assigned, as such express finding would naturally and presumably have been made, had attention been called to the fact that the alleged preference antedated the amendment of 1910.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3086, 3087; Dec. Dig. ⟸753(1).]

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Three actions by Jesse E. La Dow, trustee in bankruptcy of F. H. Miller, against the Wm. Edwards Company, against the Tracy & Avery Company, and against the Albert F. Remy Company. Judgments for plaintiff (221 Fed. 471), and defendants bring error. Appeals dismissed, judgment in the first mentioned action reversed, and cause remanded, and judgments in the other two actions affirmed.

Klein & Harris, of Cleveland, Ohio, and Mabee & Anderson, of Shelby, Ohio, for plaintiff in error Wm. Edwards Co.

John H. Coss, of Mansfield, Ohio, and Mabee & Anderson, of Shelby, Ohio, for plaintiff in error Tracy & Avery Co.

C. H. Huston, of Mansfield, Ohio, and Mabee & Anderson, of Shelby, Ohio, for plaintiff in error Albert F. Remy Co.

Louis D. Barr and Van C. Cook, both of Mansfield, Ohio, for defendant in error.

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

KNAPPEN, Circuit Judge. [1] These actions are separate suits at law brought each against one of the plaintiffs in error to recover alleged preferential cash payments. The court referred the causes to a master commissioner to take testimony and report. The commissioner

(who heard the cases together) reported in favor of the plaintiffs in error. Upon exceptions taken by the trustee, the district court reversed the master commissioner and entered judgment in favor of the trustee against the respective plaintiffs in error. The cases are brought here both by writ of error and by appeal, and have been heard together. As the causes are clearly at law, and were properly so brought (Stearns Salt & Lumber Co. v. Hammond [C. C. A. 6] 217 Fed. 559, 133 C. C. A. 411), review can be had only upon writ of error. The appeals are accordingly dismissed.

At the threshold we are met by the contention of plaintiffs in error that the court below had no jurisdiction to refer the cases to the master commissioner, or to take further proceedings therein, for the reason that the order of reference was made without their consent and without waiver of trial by jury.

[2, 3] Defendants had an undoubted right to have the suits against them tried by jury, and unless such right has been either expressly or impliedly waived the reference of the cases to the master was unauthorized; for the order of reference to the master does not show affirmatively that either of the defendants was present when the order was made or expressly assented thereto, and the record itself throws no further light on the subject. We therefore think we should assume that such presence was not had, or, if had, assent not given either expressly or by implication.

[4] Upon the hearing before the master the Edwards Company expressly objected to the consideration of the cause by the master, and insisted "upon its rights to have the cause tried by a jury in the manner usual in such cases"; and the judgment entry in the District Court, upon the hearing of the trustee's exceptions to the master's report, recites defendant's appearance "by counsel only to protest the jurisdiction of the court, which said protest the court overruled."

In our opinion the Edwards Company not only seasonably asserted its right to a jury trial, but, so far as the record shows, has done nothing amounting to a waiver; for we think it clear that it waived no rights by failing to take formal exceptions to the order of reference previously made; and it participated in the proceedings before the master only under protest, and upon the hearing before the court apparently not at all. We are therefore constrained to reverse the judgment in No. 2802, and to remand the record for further proceedings.

As to the other defendants the situation is materially different. Both appeared before the master and participated in the trial without protest or objection of any kind to his jurisdiction. They also appeared by counsel before the District Court on the hearing of the trustee's exceptions to the master's report and participated therein. So far as the record shows, neither made any objection or protest of any kind to the reference and proceedings thereunder until after the reversal of the master's judgment by the court, and the entry of judgment accordingly.

The ultimate questions are, first, whether such appearance and participation without objection in the proceedings both before the master and the court amounted to a waiver of the right to trial by jury under

section 649 of the Revised Statutes (Comp. St. 1913, § 1587), which authorizes a trial without a jury "whenever the parties, or their attorneys of record file with the clerk a stipulation in writing waiving a jury"; and, second, the extent to which the proceedings are reviewable. The provisions of this section are by section 291 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1167 [Comp. St. 1913, § 1268]) made applicable to the District Court. Eastern Oil Co. v. Holcomb (C. C. A. 8) 212 Fed. 126, 128, 128 C. C. A. 642; Nashville Interurban Ry. Co. v. Barnum (C. C. A. 2) 212 Fed. 634, 638, 129 C. C. A. 170; Philadelphia Casualty Co. v. Fechheimer (C. C. A. 6) 220 Fed. 401, 405, 136 C. C. A. 25.

The order referring the causes to the master commissioner is printed in the margin.[1]

[5-7] The meaning and effect of this order are important. We think it contemplated a finding of the master upon the facts and the law, with the right reserved to the parties to file exceptions thereto, and with power in the court to review and reconsider on such exceptions all the findings of law and of fact made by the master, and for this purpose to examine and weigh the evidence reported to the court by the master, and to enter judgment according to the result of such reexamination. Shipman v. Ohio Coal Exchange (C. C. A. 6) 70 Fed. 652, 654, 17 C. C. A. 313. Notwithstanding section 649 provides for waiving a trial by jury only by stipulation in writing, it would have been entirely competent for the parties to consent to be bound by the order of reference made by oral agreement in open court. Dundee Mortgage, etc., Co. v. Hughes, 124 U. S. 157, 160, 8 Sup. Ct. 377, 31 L. Ed. 357. The language of the section relating to the filing of stipulation with the clerk of the court was designed merely to enable the parties to make agreements in vacation, and to prevent either party demanding a jury unexpectedly at the trial. Kearney v. Case, 12 Wall. 275, 283, 284, 20 L. Ed. 395. It is the general and well-settled rule that parties are presumed to have waived a jury, even in the absence of written stipulation, whenever it appears that they were present at the trial in person or by counsel and made no demand for a jury (Kearney v. Case, supra; Gilman v. Ill. & Miss. Tel. Co., 91 U. S. 603, 614, 23 L. Ed. 405; United States v. Harris, 106 U. S. 629, 635, 1 Sup. Ct. 601, 27 L. Ed. 900; Perego v. Dodge, 163 U. S. 160, 166, 16 Sup. Ct. 971, 41 L. Ed. 113); for section 566 of the Revised Statutes (Comp. St. 1913, § 1583), requiring that actions at law in the District Courts

[1] "This cause coming on for hearing upon the motion of the plaintiff for a reinstatement of said cause, and the court being fully advised in the premises, do grant the same, and it is ordered that this cause be reinstated on the docket of this court. This cause coming on further to be heard upon the motion of the plaintiff for an order of the court referring the same to a master commissioner, and the court being fully advised in the premises and for good cause shown, do sustain said motion; it is therefore ordered that this cause be referred to L. H. Bean, who is hereby appointed for that purpose, and who shall forthwith upon being duly qualified, proceed to take testimony and hear said cause, and report all the matter and findings therein to this court for further proceedings."

be tried by jury, has no application to the District Courts as now organized.

[8] If, as we have seen, it would have been competent for plaintiffs in error to have waived the right to trial by jury, by consenting in open court to the original making of the order of reference, it was equally competent for them to so consent by attending the proceedings under the reference, both before the master and the district court, without objection or protest. The very fact that the Edwards Company made protest before both tribunals emphasizes the presumption of consent and acquiescence from the silence of the other two plaintiffs in error, presumably present when such protest was made. We think parties should not be permitted to play fast and loose with the court, to speculate upon the chances of a favorable decision under the reference, and after final decision against them for the first time question the jurisdiction of the court to so act. We think the Tracy & Avery and Remy Companies must be held to have waived the right to a jury trial.

[9] As to the scope of this review: While it is competent for the parties to waive the right to jury trial otherwise than by stipulation in writing, where such waiver is effected either by express oral consent or by personal attendance upon the trial without objection, yet where such waiver is accomplished without the filing of written stipulation, rulings of the court upon the trial are not reviewable. Kearney v. Case, supra; Gilman v. Ill. & Miss. Tel. Co., supra; Dundee Mortgage, etc., Co. v. Hughes, supra; Ladd & Tilden Bank v. Lewis A. Hicks Co. (C. C. A. 9) 218 Fed. 310, 314, 134 C. C. A. 106. In this case, as the waiver of jury trial was not a submission to the decision of the court without a jury within the provisions of sections 649 and 700 of the Revised Statutes of the United States (Comp. St. 1913, §§ 1587, 1668), but amounted to a consent that the case be disposed of as a reference, and with only the rights reserved to the parties which we have previously stated, the only question open to our consideration upon writ of error is whether the facts found by the District Court sustain the judgment entered. Shipman v. Ohio Coal Exchange, supra, at page 654 of 70 Fed., 17 C. C. A. 313; Shipman v. Straitsville Mining Co., 158 U. S. 356, 361, 15 Sup. Ct. 886, 39 L. Ed. 1015. The case differs from Philadelphia Casualty Co. v. Fechheimer, supra, in that there a jury was expressly waived by written stipulation.

The findings of the court in each of the three cases as incorporated in the respective judgments, are printed in the margin of this opinion.[2]

[2] "That on the 4th day of January, 1910, and for months prior thereto, said F. H. Miller was hopelessly insolvent, and that defendant in the exercise of ordinary care and prudence, was charged with such knowledge of insolvency at the date of the sale of the assets of said F. H. Miller, to wit, January 4, 1910, and prior thereto; and that while so insolvent said bankrupt paid to defendant, and defendant received and accepted of said bankrupt the sum of $——— on said date in payment of its claim, which payment was a preference to the exclusion of other creditors of the same class, and contrary to the provisions of law; and that the defendant ——— is hereby indebted to the plaintiff, Jesse E. La Dow, trustee, in the sum of $———, inclusive of interest at 6 per cent. to February 4, 1915."

The language of the judgment is as follows:

"It is therefore considered and adjudged and ordered that plaintiff, Jesse E. La Dow, trustee, recover from the defendant, ———, said sum of $———, together with interest at the rate of 6 per cent. per annum from February 4, 1915, and also his costs taxed at $———, and the defendant pay its own costs taxed at $———, for which judgment and costs execution is awarded unless payment be made to him on or before March 20, 1915. To all of which rulings, judgment and order defendant at the time excepted.

[10, 11] Treating the findings contained in the judgment entry as the findings of fact contemplated by the rule above stated, they are seen to lack an express finding that the bankrupt intended to give a preference, which intention before the amendment of 1910, was necessary to its invalidity (Kimmerle v. Farr [C. C. A. 6] 189 Fed. 295, 299, 111 C. C. A. 27); and the transaction here in question (as well as, in fact, the bankruptcy) occurred before the amendment of 1910 was effective. But there is no assignment of error directed to the proposition that the facts found do not support the judgment. The nearest approach is assignment No. 7,[3] which plainly is not addressed to the proposition we are considering, and we do not feel it our duty to exercise the option given by our rule No. 11 (150 Fed. xxvii, 79 C. C. A. xxvii) to consider "a plain error not assigned." The judgment entry contains an express finding that the bankrupt "was hopelessly insolvent" at the time of the preferential transaction in question, and the court's opinion contains the statement that "the evidence leaves the court in little doubt but that the transaction was on the part of the bankrupt in conscious fraud of his creditors. That it operated as a great fraud on other creditors as well as a preference for the three who got paid their accounts in full, there is likewise no doubt." In view of these two statements in findings and opinion respectively, an express finding of intent on the debtor's part to create a preference would naturally and presumably have been made had attention been called to the fact that the alleged preference antedated the amendment of 1910.

The judgments in Nos. 2804 and 2806 are affirmed with costs; the judgment in No. 2802 is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

[3] "(7) The judgment of the court is not sustained by the evidence and is against the weight of all the evidence."

BRAMBLE v. BRETT.

In re STALCUP.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1916.)

No. 4472.

1. BANKRUPTCY ⊂=317—ASSIGNMENTS FOR CREDITORS—RIGHT TO COMPENSATION AND EXPENSES.

Rev. Laws Okl. 1910, § 218, requires assignments for the benefit of creditors to be acknowledged. Section 221 requires the making and filing of an inventory. Section 223 requires the assignment to be recorded and the inventory filed with the register of deeds. Section 225 provides that an assignment is void against creditors and purchasers and incumbrancers in good faith and for value, if the assignment is not recorded and the inventory filed within 20 days. Section 227 requires a bond to be given within 30 days. Section 1154 provides that, except as thereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, etc., as between the parties thereto. Section 1181 requires every acknowledgment to be under the seal of the officer taking it. *Held*, that an assignment for the benefit of creditors, acknowledged before a justice of the peace, who had no official seal, was nevertheless valid as between the assignor and the assignee, and as against creditors not objecting thereto, and where no creditor objected, and the time for recording the assignment and filing the bond and inventory had not expired when the assignor forcibly ejected the assignee and took possession of the property, and on his voluntary petition procured an adjudication in bankruptcy, the assignment was not invalid, so as to deprive the assignee of his right to payment for his services and expenses.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 493–495 Dec. Dig. ⊂=317.]

2. BANKRUPTCY ⊂=317—ASSIGNMENTS FOR CREDITORS—RIGHT TO COMPENSATION AND EXPENSES.

An assignee for the benefit of creditors, or trustee for creditors, who in good faith, prior to the filing of a petition in bankruptcy, protected and preserved property to the benefit of the bankrupt's estate, under an assignment or trust deed, valid while he was acting under it, was entitled to payment of his legitimate expenses, and to compensation for his services and for the services of his attorney, out of the property so preserved.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 493–495; Dec. Dig. ⊂=317.]

3. BANKRUPTCY ⊂=249 — ADMINISTRATION OF ESTATE — MINGLING PROPERTY WITH OTHER PROPERTY.

A trustee in bankruptcy, who knowingly appropriated to the benefit of the estate property which he knew was not the property of the bankrupt, but of a trustee for creditors carrying on the bankrupt's business prior to the bankruptcy, and who mingled it or its proceeds with the proceeds of the bankrupt's property, so that they could not be distinguished, was bound in justice and equity to pay the preceding trustee the value of such property out of the proceeds of the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 347; Dec. Dig. ⊂=249.]

4. BANKRUPTCY ⊂=458—ASSIGNMENTS FOR CREDITORS—CLAIM OF ASSIGNEE.

A trustee in bankruptcy, before selling merchandise purchased by B., a trustee for the creditors of the bankrupt, who carried on the bankrupt's business prior to bankruptcy, knew that the merchandise was not part of the bankrupt's property. The party selling the merchandise to B. demanded the merchandise from the trustee, while B. made no such

demand, but filed a claim for compensation for his services and reimbursement for his expenses, including the cost of such merchandise. *Held* that, on appeal from an order disallowing such claim, it was not too late for B. to assert his equitable claim to such merchandise, and it would be presumed that he would pay the party from whom he purchased it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 918; Dec. Dig. ⊂⊃458.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

In the matter of J. W. Stalcup, bankrupt. From an order disallowing a claim of H. W. Bramble, opposed by J. F. Brett, trustee, the claimant appeals. Reversed and remanded, with directions.

D. H. Wilson, of Vinita, Okl., for appellant.

J. F. Brett, of Muskogee, Okl. (Pfendler & Brown and Hartsell & Mack, all of Muskogee, Okl., on the brief), for appellee.

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

SANBORN, Circuit Judge. This is an appeal from an order disallowing a claim against the estate of a bankrupt made by a trustee for creditors to recover expenses incurred and services rendered by him before the bankruptcy, upon this state of facts: On November 12, 1914, Stalcup, an insolvent merchant, met his creditors and pursuant to an agreement among them made a trust deed of substantially all his property to H. W. Bramble, the claimant and appellant, in trust, to take possession of and sell his merchandise in the regular course of business, to replenish the stock from the proceeds of the sales, to collect his book accounts, to pay from the proceeds of the sales dividends pro rata, to pay all his creditors and in case such creditors should not be paid in full by March 12, 1915, then to advertise and sell all the remaining property, to distribute the proceeds, after paying expenses of administration, among the creditors pro rata, and to turn over the surplus, if any, to Stalcup. On November 12, 1914, Bramble took possession of the property and of this trust deed, made an inventory thereof, and on November 21, 1914, while he was proceeding to sell some of the merchandise in the regular course of business, Stalcup forcibly evicted him from the premises and took possession of the property. Thereupon Bramble immediately employed an attorney and obtained a restraining order from a court forbidding Stalcup to interfere with his management of the property, when, on November 25, 1914, on the voluntary petition of Stalcup, he was adjudged a bankrupt and the property passed into the custody of the bankruptcy court. To that court Bramble presented a petition to be allowed and paid out of the proceeds of the estate of the bankrupt, before their distribution to creditors, $116.10 for his services as trustee before the bankruptcy, $100 for the services of his attorney, the expenses of taking the inventory and running the business, and $483.87 for merchandise which he had purchased from the Ratcliff-Sanders Grocer Company to replenish the stock. The referee and the District Court denied his petition and refused to allow him

anything, upon the ground that the trust deed was a general assignment for the benefit of creditors and was void as to creditors on account of its failure to conform to the laws of the state of Oklahoma.

[1] The reasons why it is insisted the trust deed did not conform to the laws of the state of Oklahoma and was consequently void as to creditors are that it was an assignment for the benefit of creditors, and (a) that it was acknowledged before a justice of the peace who had no official seal, when it could be legally acknowledged by an officer having an official seal only. Revised Laws of Oklahoma 1910, § 1181. But no acknowledgment was requisite to its validity between the assignor and the assignee (Revised Laws of Oklahoma, c. 4, §§ 218, 223, 224, and sections 1154 and 4036), and being valid between them it was valid against all the creditors who did not object to it, and the evidence is conclusive that no creditor made any objection to it while Bramble was acting under it. Conceding that the assignment might have been avoided by an objecting creditor, it was not void. There was nothing in it to which the debtor, the trustee and every creditor might not lawfully have bound himself by his agreement or consent. It was, therefore, valid between the assignor and assignee and voidable, but not void, as to creditors. As to the latter it was valid until avoided by them, not void until validated by them, and as no creditor avoided it or took any steps to avoid it while Bramble was in possession of the property and acting under it he ought not to be deprived of the expenses he incurred or the compensation he earned while he was acting in good faith thereunder.

But counsel say that the trust deed was void (b) because it was not recorded, and it is true that the laws of Oklahoma required it to be recorded (chapter 4, §§ 218, 223), but it seems that the penalty of invalidity for failure to make the record does not fall unless the record is not made and the inventory required in the statute is not filed within 20 days after the date of the assignment (section 225); (c) because no inventory was filed, but no penalty fell for the failure to file the inventory until 20 days after November 12, 1914 (sections 221, 225), and all the expenses of Bramble were incurred and all his services were rendered within 15 days after that date; (d) because no bond was filed with the proper officer, but no penalty fell for the failure to file a bond until 30 days from the date of the assignment (section 227), and all the dealings of Mr. Bramble with the property were concluded before that date. The result is that because, until after Bramble was evicted from the property and until after the adjudication of bankruptcy was made, it was in the power of Bramble to comply with the laws of Oklahoma, because it was competent for the debtor Stalcup, the trustee Bramble and the creditors by consent or agreement to bind themselves to all the terms of the trust deed and to a waiver of all the requirements of the statutes of Oklahoma regarding the execution, record, inventory and bond in the case of an assignment for the benefit of creditors, and no creditor had objected to or challenged the validity of this trust deed while Bramble was acting under it, and because during the time he was thus acting it was still possible to comply with all the

requirements of the statutes of Oklahoma before any penalty for failure to comply could fall, the trust deed was not void, but valid until avoided by the adjudication in bankruptcy. Until that time while the trust deed was doubtless voidable by objecting creditors because by its terms it hindered and delayed the collection of their claims, it was voidable only, and, as no creditor had attacked it, it was valid, and Bramble was warranted in proceeding to execute the trust he had accepted under it. It was valid until avoided, not void until validated, and, as long as he was acting under it, it was not avoided.

[2] There was no fraud or evil intent; no intent to evade the bankruptcy law in the making of the trust deed or the administration of the property under it. It was made by the assignor and accepted by the assignee and by the creditors in good faith to enable the assignee to administer the property and pay the debts of the assignor. It provided a just and commendable way to prevent the sacrifice of the business, the good will and the property of the debtor and to secure the claims of his creditors. The trustee in good faith took possession of the property and proceeded to discharge his duty under the trust deed. He made an inventory of the property, he kept it secure from robbery or misappropriation until the assignor forcibly dispossessed him and then he employed an attorney, commenced legal proceedings and obtained a restraining order from the court to enable him to recover the possession of and to protect the property. Under these circumstances it is the opinion of the court that the care and services of Bramble were a benefit to the estate of the bankrupt and that he is entitled to the payment to him by the trustee in bankruptcy in preference to the creditors of Stalcup of the sum of $113.01 on account of his running expenses incurred under the trust deed, to $25 on account of the services of his attorney, to $25 on account of his own services and to the sum of $838.86 on account of the merchandise he purchased as trustee from Ratcliff-Sanders Grocer Company which the trustee in bankruptcy knowingly appropriated and the proceeds of which he mixed with those of the proceeds of the property of the bankrupt and used for the benefit of his estate, making in all $1,001.87. He should be charged with $46.02, which he admits he received, leaving the balance due to him $955.85. Let this amount with legal interest from January 1, 1915, be paid to the claimant, H. W. Bramble, out of the proceeds of the estate of the bankrupt in preference to dividends to creditors. An assignee or trustee who has in good faith protected and preserved property to the benefit of the estate of a bankrupt under an assignment or trust deed valid while he was acting under it is entitled to payment of his legitimate expenses and to compensation for his services and for the services of his attorney out of the proceeds of the property he has preserved which subsequently comes to the trustee in bankruptcy. Randolph v. Scruggs, 190 U. S. 533, 537, 539, 23 Sup. Ct. 710, 47 L. Ed. 1165; Summers v. Abbott, 122 Fed. 36, 39, 58 C. C. A. 352, 355; In re Chase et al., 124 Fed. 753, 759, 760, 59 C. C. A. 629, 635, 636.

[3, 4] And a trustee in bankruptcy who knowingly appropriates to

the benefit of the estate of the bankrupt property which he knows was not the property of the bankrupt, but was that of a preceding trustee, and who mingles it or its proceeds with the proceeds of the property of the bankrupt so that they may not be distinguished, ought in justice and equity to pay to the preceding trustee the value of such property out of the proceeds of the estate of the bankrupt which has received the benefit thereof. Smith v. Mottley, 150 Fed. 266, 80 C. C. A. 154; In re J. M. Acheson Co., 170 Fed. 427, 429, 95 C. C. A. 597, 599, and cases there cited. The answer to the suggestion that the Ratcliff-Sanders Grocer Company, the vendor of the merchandise to Bramble, trustee, demanded this merchandise of the trustee in bankruptcy, and Bramble, the trustee, did not make such demand, is that the evidence convinces that, as the trustee in bankruptcy knew that this merchandise was not a part of the property of the bankrupt before he sold it, it is not too late for Bramble as trustee to assert his equitable claim now, or even after the decision of this case. The court will presume that he will pay the Grocer Company for the merchandise for which he owes it upon his receipt of the money therefor, and it will be less expensive and more beneficial to the creditors of the estate to receive the adjudication of the rights of these parties and a disposition of this entire matter now than to leave it in a condition for continuing litigation upon a new claim presented by Bramble or by the Grocer Company.

The decree below is accordingly reversed, and the case is remanded, with directions to render a decree granting the petition of H. W. Bramble and directing the trustee in bankruptcy to pay to him $955.85 and legal interest thereon from January 1, 1915, out of the proceeds of the estate of the bankrupt before distributing those proceeds in dividends to the creditors.

OLD COLONY TRUST CO. v. CITY OF TACOMA.

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

No. 2601.

1. COURTS ⟸366(1)—FEDERAL COURTS—STATE STATUTES—CONSTRUCTION.
Construction of state statutes by the highest appellate court of the state is binding on federal courts sitting in such state.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⟸366(1).]

2. COURTS ⟸365—FEDERAL COURTS—JURISDICTION—COMITY.
Federal courts sitting in the state should defer to decisions of the state courts applying principles of law to local conditions.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. ⟸365.]

3. ELECTRICITY ⟸4—FRANCHISES—CONSTRUCTION.
Where a street railroad company was granted by ordinance a franchise to transmit electric current for furnishing power and heat, but the ordinance declared that the grantee should have no right to supply electric current for lighting purposes, the city being engaged in furnishing light, the denial of the right to transmit current for lighting purposes

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

was not merely the withholding of a franchise for that purpose, but was a ground for forfeiture; other sections of the ordinance declaring that the rights granted should be void upon failure of the grantee to perform all conditions specified.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. ⊂⊃4.]

4. STREET RAILROADS ⊂⊃24(13)—FRANCHISE—CONSTRUCTION—FORFEITURE—"PERFORM."

A provision of a street railroad company's franchise that failure of the grantee to perform any and all of the conditions in the ordinance specified and mentioned should be ground for forfeiture is not limited to affirmative duties imposed on the grantee, and the franchise may be forfeited for the doing of prohibited acts; the word "perform" meaning to execute the provisions, commands, or requirements of.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 50–54; Dec. Dig. ⊂⊃24(13).

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

5. MUNICIPAL CORPORATIONS ⊂⊃285—FRANCHISES—AUTHORITY OF.

Tacoma Charter 1896, containing a prohibition against the grant to any person or corporation of a franchise to sell electricity within the city so long as the city may be engaged in the public duty of supplying light, is not abrogated by Laws Wash. 1903, p. 360, § 1, authorizing the city to grant a franchise for the construction of lines for transmitting electric power and to fix the terms and conditions under which such franchise may be exercised; the statute not prohibiting the city from making it a condition of the franchise that the grantee will not furnish electricity for lighting.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 757; Dec. Dig. ⊂⊃285.]

6. ELECTRICITY ⊂⊃4—FRANCHISE—MONOPOLIES.

As Const. Wash. art. 1, § 12, prohibiting monopolies, expressly excepts municipal corporations, a city, in granting a franchise to transmit electric current, may prohibit the grantee from transmitting current for lighting purposes, to enable the city to preserve its monopoly of the lighting business.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. ⊂⊃4.]

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Suit by the Old Colony Trust Company, as trustee, against the City of Tacoma. From a decree dismissing the bill (219 Fed. 775), complainant appeals. Affirmed.

The Tacoma Railway & Power Company, a corporation of the state of Washington, received in the year 1905 from the city of Tacoma a franchise for a period of 25 years, authorizing it to erect poles and lines for the purpose of transmitting and selling electric current, to be used for power and heating purposes and for lighting street cars, but providing that it should not "furnish power to be used for lighting or generating electricity for lighting," and also providing that the city might by special permit grant said corporation the right to furnish electric current for lighting purposes, subject to the provisions of the city charter and the laws of the state, such permit, however, to be revocable at any time at the option of the city. The ordinance provided that the franchise should become null and

void, and absolutely of no effect, upon the failure of said grantee "to perform any and all of the conditions in this ordinance specified and mentioned" for a period of 30 days after notice served upon said grantee, and that the city will, if said failure is not corrected before the expiration of 30 days, "consider this franchise null and void and absolutely of no effect"; and it further provided that, in the event of forfeiture of the franchise on account of the breach of any of the conditions therein, the grantee should also forfeit and surrender to the city all poles, lines, wires, or other property that may be located or constructed in pursuance thereof within the city of Tacoma, unless the same were removed within 60 days. Another section of the ordinance gave the city the right at any time, on 30 days' notice to the grantee, to repeal, change, or modify the grant, if the franchise granted was not exercised in accordance with the provisions of the ordinance, which provision was declared to be cumulative and additional to that already provided.

In December, 1908, the Railway & Power Company entered into a contract with the Northern Pacific Railway Company, wherein it obligated itself to furnish to the latter company at its depot and shops all the electric power that it used for power purposes, and for lighting purposes, for a period of 10 years from the date of the contract. On April 2, 1913, the city passed a resolution revoking the permit which it had theretofore granted to the Railway & Power Company to furnish electric current for lighting purposes, and providing that from and after April 15th of that year the Railway & Power Company should cease to furnish any current for that purpose. On April 21st the council passed a resolution directing the commissioner of public works to notify the Railway & Power Company that, in case of its failure to comply with the terms and conditions of the ordinance before the expiration of 30 days after service of notice, the city would consider the franchise null and void. The notice was served on April 23d. The Railway & Power Company, having failed to comply with the notice, commenced on May 22d of that year an action to enjoin the city from repealing the ordinance of 1905, or from declaring the same null and void, or from asserting a forfeiture. The city answered, setting up the facts hereinabove adverted to, and thereafter the court adjudged that the franchise granted to the Railway & Power Company had been forfeited by its act in continuing to furnish the Northern Pacific Railway Company with power for lighting, and that the Railway & Power Company was no longer entitled to exercise any privileges thereunder, except to remove its poles, etc., within the time fixed by the ordinance. On appeal to the Supreme Court of the state, the judgment was affirmed (Tacoma R. & Power Co. v. Tacoma, 79 Wash. 508, 140 Pac. 565); the court holding that the condition in the franchise that the Railway & Power Company should not furnish electricity for lighting purposes was a valid one, and that the city had power so to limit the franchise, that the limitation was not abrogated by the Public Service Commission Law (Laws 1911, p. 543), and that the refusal of the Railway & Power Company to discontinue furnishing power to the Northern Pacific Railway Company for lighting purposes warranted the court in adjudging a forfeiture.

Thereafter came the Old Colony Trust Company, the appellant herein, a corporation of the state of Massachusetts, into the United States District Court with a bill against the city of Tacoma, the appellee herein, praying the court to enjoin the appellee from asserting a forfeiture of the franchise, and from asserting title to the electric plant operated thereunder, alleging that the franchise and power line were subject to the lien of a mortgage, executed to the appellant as trustee by the Railway & Power Company, to secure bonds in the amount of $1,300,000, and setting forth the proceedings in the suit in the state court, and alleging that the appellant was not a party to that litigation, and had no notice or knowledge thereof, or of any act of the appellee for the purpose of forfeiting said franchise; and the bill set forth certain negotiations that were had between the appellant and certain officers of the city shortly prior to the adoption of the resolution of forfeiture by the city, by which, it is alleged, it was arranged and agreed between the city and the appellant that the question of the right of the latter to serve the Northern Pacific Railway Company should be tested by an injunction suit to be brought

by the city, and that no action would be taken by the city for the purpose of forfeiting the franchise of the appellant, and that in reality the resolution of April 21st was adopted for the purpose of carrying out the understanding between the parties that a test suit be had to determine the right of the appellant to furnish the Northern Pacific Railway Company power for lighting purposes; and the bill alleged that, the appellant not having been a party to the proceedings in the state court and having had no knowledge thereof, the result of the judgment therein is to deprive the appellant of its property without due process of law. The appellant prayed for an injunction restraining the city from taking any step to forfeit the franchise. Upon the final hearing in the court below, the appellant's bill was dismissed.

James B. Howe, of Seattle, Wash., and John A. Shackleford, of Tacoma, Wash., for appellant.

T. L. Stiles, City Atty., and Frank M. Carnahan, Asst. City Atty., both of Tacoma, Wash., for appellee.

Before GILBERT and MORROW, Circuit Judges, and RUDKIN, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] In the case before the state Supreme Court there were three principal questions: First, whether the condition of the ordinance that the Railway & Power Company should not furnish electricity for lighting purposes was a valid one—that is to say, whether the city had the power so to limit the franchise; second, whether the provision so limiting the franchise was abrogated by the Public Service Commission Law (Laws 1911, p. 543); and, third, whether the refusal of the Railway & Power Company to discontinue furnishing power to the Northern Pacific Railroad Company for lighting purposes warranted a judgment of forfeiture. The answers to the first two of these questions depended upon the construction of state statutes, and the decision of the Supreme Court of the state thereon is conclusive upon a federal court.

[2] While the third question did not depend upon the construction of a state statute, it involved the application of principles of law to local conditions, and the ruling of the state court should be controlling in a federal court. Blaylock v. Incorporated Town of Muskogee, 117 Fed. 125, 54 C. C. A. 639; Claiborne County v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260.

The appellant contends that the court below erred in denying it relief, and in refusing to restrain the forfeiture of the mortgaged property because of an act done by the mortgagor after the execution of the mortgage without the knowledge of the mortgagee, and under the belief of the latter that the litigation in the state court constituted a test case only for determining whether the mortgagor had or had not the right to do the acts in question. The court below found that the evidence was insufficient to show "by the clear and convincing proof necessary" that the officers of the city wrongfully or intentionally misled the officers of the Power Company, or made statements of such a nature as to warrant the latter in assuming that the resolution declaring a forfeiture would be disregarded.

We find no ground to disturb that conclusion. The commissioner of light and water of the city of Tacoma is not shown to have had authority to bind the city by any statement to the Railway & Power Company, and while it does not appear whether or not the city attorney had such authority, the evidence is insufficient to show that he became a party to any understanding by which the litigation was to be a friendly suit for the purpose of determining rights, and with no view upon the part of the city to a forfeiture of the franchise. No effort was made by the Railway & Power Company to obtain any concessions from the city council. The company seems to have relied upon the strength of its own contention that the city had no authority to limit the franchise as it did, and that in any view the limitation was abrogated by the statute of 1911, and upon its belief that in any event the city would not resort to so harsh a measure as the forfeiture of the franchise. That confidence in its position seems to have influenced the company to disregard the two resolutions of the city council, and to continue to furnish current for lighting after the expiration of the 30-day period.

[3] We find no merit in the contention that the denial of the right of the Railway & Power Company to transmit current for lighting purposes was intended only to constitute a withholding of a franchise for that purpose, and that the prohibition against furnishing electricity for lighting purposes was not intended to constitute a condition for the forfeiture of the franchise granted for the other two purposes mentioned, namely, electricity for heating and power, but was merely intended to negative any possible claim on the part of the grantee that the current which it was authorized to transmit could be disposed of for lighting purposes. It is sufficient in answer to this contention to point to the plain provisions of the ordinance, one section of which grants the franchise to transmit electric current for furnishing power and heat, but provides that the grantee shall have no right to supply electric current for lighting purposes, and another section of which declared that the rights granted shall be null and void and absolutely of no effect "upon the failure of the grantee to perform any and all of the conditions in the ordinance specified."

[4] Nor can we assent to the proposition that the franchise is not subject to forfeiture except for failure to perform some affirmative act in the ordinance mentioned. The language of the ordinance is: "Upon the failure of the grantee to perform any and all of the conditions in the ordinance specified." To perform all of the conditions specified is to abide by all the conditions expressed, to conform to the requirements of the ordinance, whether it be to do a specified act, or to refrain from doing a specified act. "To perform is to execute the provisions, commands, or requirements of." 30 Cyc. 1392.

[5, 6] We have given careful consideration to the appellant's contention that the charter of the city did not prevent the city council from granting a franchise for the sale of electric power for lighting purposes, and this for the reason that the charter adopted in March, 1896, containing the perpetual prohibition against the grant to any person or corporation of a franchise to sell electricity within the

city, so long as the city was engaged in the public duty of supplying light, was abrogated by the statute of 1903, one section of which authorizes the city to grant a franchise for the construction of lines for transmitting electric power, and to fix the terms and conditions under which such franchise may be exercised.

We are unable to perceive any conflict between the charter and the statute, so far as the question of a franchise for furnishing light is concerned. But, if we assume that the statute supplants the charter, we find nothing in the terms of the statute which would prohibit the city from making the precise contract which it made with the Railway & Power Company. The city had the authority to grant franchises for the transmission of electric power, and whether or not it was bound by its charter to deny the right to transmit power for lighting purposes, it at least had the authority to withhold that right at its will, and we see no reason why it could not, even under the act of 1903, insert a reservation which would create in its own favor a monopoly of the business of furnishing light within the city limits. The provision of the state Constitution, directed against monopolies (article 1, § 12), makes an express exception of municipal corporations.

The decree is affirmed.

HEWITT v. GREAT WESTERN BEET SUGAR CO. et al.

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

No. 2610.

1. JUDGMENT ⊂=425—VACATING—EQUITABLE RELIEF—NONCONFORMITY TO PLEADINGS.

Plaintiff held a mortgage on the property of a corporation. In a suit to which he was not a party, a receiver of the corporation's property was appointed and issued receiver's certificates. In a suit thereafter brought by plaintiff to foreclose his mortgage, a decree was entered which adjudged such certificates to be a lien on the property prior to all other liens. The decree was affirmed by the Supreme Court of the state on the ground that plaintiff had full opportunity in the foreclosure suit to contest the certificates and have their right to priority litigated, but apparently had not taken any steps to contest them or put their priority in issue. *Held*, that the judgment in such suit could not be set aside or vacated on the ground that it was outside the issues made by the pleadings, and it was a bar to a subsequent suit to set it aside on that ground, and on the ground that the receiver's certificates were invalid, since it was final and conclusive, not only as to all matters actually litigated and determined in the former action, but also as to every ground of recovery or defense which might have been presented and determined therein, and according to the settled rules of procedure the relative rank of all liens on the incumbered property should have been litigated in the foreclosure suit upon issues tendered by plaintiff therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 803; Dec. Dig. ⊂=425.]

2. JUDGMENT ⊂=460—EQUITABLE RELIEF—PLEADING—REFERENCE TO REPORTED CASE.

Where, in a suit to set aside a judgment of a state court, the bill described the suit in the state court and the issues involved, and set forth the date of the judgment and the volume and page of the Reports

wherein it was reported, the court was authorized to refer to the reported decision and read it in connection with the allegations of the bill, for the purpose of determining what was at issue and decided therein, as if a copy thereof had been appended as an exhibit to the bill; the court not thereby taking judicial notice of a proceeding of the state court, but taking notice of that which was brought to its attention by proper pleading.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879, 880, 882–891; Dec. Dig. ⟸460.]

3. JUDGMENT ⟸948—PLEADING JUDGMENT AS DEFENSE—AVAILABILITY ON DEMURRER.

The defense of estoppel and res judicata may be presented on a demurrer, where upon the allegations of the bill it clearly appears that such defense exists.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787–1783; Dec. Dig. ⟸948; Pleading, Cent. Dig. §§ 445½, 497.]

4. MORTGAGES ⟸529—FORECLOSURE—OBJECTIONS TO SALE—WAIVER.

Where a party to a suit to foreclose a mortgage objected to the confirmation of the sale on certain grounds, he could not set up other objections in a suit for equitable relief from the sale, which were not discovered by him subsequent to the time of making the objections to the confirmation, as he then had the opportunity to present all of his objections, and it was his duty to do so, and he was deemed to have waived any objections which he knew and did not present.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1537–1548; Dec. Dig. ⟸529.]

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

Suit by Henry Hewitt, Jr., against the Great Western Beet Sugar Company and another. Decree for defendants, and plaintiff appeals. Affirmed.

The appellant, in his bill in the court below, alleged in substance that on January 30, 1907, the Great Western Beet Sugar Company, a corporation of Idaho, owning reservoirs and an irrigation system, mortgaged its property to the appellant to secure notes in the sum of $80,000, and that on the same date the mortgage was duly recorded; that on August 4, 1908, the appellant filed his suit to foreclose said mortgage in the district court for the Fourth judicial district of the state of Idaho, but that before said foreclosure suit was filed the Idaho Fruit & Lands Company, Limited, a corporation, filed an action in said state court against the Great Western Beet Sugar Company and others, to determine the alleged interest of the plaintiff in that suit in and to the irrigation systems of the defendant therein, in which suit a receiver was appointed, and the court on the trial thereof rendered judgment for the defendant therein, which judgment, on appeal to the Supreme Court, was affirmed; that the appellant herein was not made a party to said suit so brought by the Idaho Fruit & Lands Company, nor was he served with notice of process therein, nor did he have knowledge of the pendency thereof; that while said suit was pending the receiver issued receiver's certificates to the amount of $17,675; that by the failure to make the appellant herein a party to the action brought by the Idaho Fruit & Lands Company he, the appellant, was prevented from attacking the validity or priority of said certificates, which certificates, he alleges, were excessive, false, fraudulent, and issued for illegal claims; that in the said foreclosure suit, brought by the appellant, numerous cross-complaints were filed by lienholders and others, and on July 21, 1910, the court decreed that the mortgage be foreclosed, and the appellant have judgment against the Great Western Beet Sugar Company in the sum of $109,275, the lien of the judgment to relate back to January 30, 1907; that

notwithstanding that the question of the validity or priority of the receiver's certificates was not made an issue in the pleadings in said foreclosure suit, and was not raised during the trial of that suit, the court of its own motion, wrongfully and in excess of its jurisdiction, made a finding and entered a decree in said cause that the receiver's certificates were a lien prior to all other liens against said property, including the appellant's lien; that the appellant appealed from that decree to the Supreme Court of the state, urging, among other grounds, that the finding and the decree were illegal and void, for the reason that the appellant had not been made a party to the suit in which said certificates were issued, nor served with notice of process therein, and that the appellant had had no opportunity to contest the validity or priority of said certificates, and that the decree so making and declaring said certificates to be a prior lien was void, illegal, and without effect; that on September 26, 1911, said Supreme Court affirmed the decree of the district court by a decision reported in 20 Idaho, 235, 118 Pac. 296, but that said decree is null and void; that, in pursuance of said decree, said District Court having made an order directing the property to be sold, the appellant petitioned the Supreme Court for a writ prohibiting said sale on the grounds presented by him on said appeal, but on December 19, 1911, the writ was denied by said Supreme Court, its decision being reported in Hewitt v. Walters, 21 Idaho, 1, 119 Pac. 705, Ann. Cas. 1913C, 35; that on the sale which was had on January 5, 1912, one L. G. Bradley wrongfully and fraudulently, and without any authority or instruction from the appellant, represented himself to be the agent of the appellant, and fraudulently pretended to have authority from him to bid on his behalf at said sale; that the property was struck off to one Watkins for $56,546.79, the court having fixed that sum as the minimum bid, although the property was worth upwards of $500,000. And the bill alleges that the sale was had in pursuance of an unlawful, fraudulent connivance and conspiracy between the then receiver of the property and said Watkins, who purchased the same; that they stifled competition and kept prospective bidders away from the sale; that the appellant duly objected to the confirmation of said sale upon the identical grounds urged on his appeal to the Supreme Court in the foreclosure suit, and in his petition for a writ of prohibition, and on the further ground that said sale was taking his property without due process of law; that the district court overruled appellant's objections, whereupon the appellant appealed to the Supreme Court of Idaho, and on July 15, 1912, that court, upon a hearing, affirmed the order of the district court, which decision is reported in Re Great Western Beet Sugar Co., 22 Idaho, 328, 125 Pac. 799, 43 L. R. A. (N. S.) 671; that none of the proceeds of said sale was received by the appellant; and the appellant prays for a decree that the judgment foreclosing the said mortgage be declared null and void, that it be set aside, and that a new decree and sale be entered.

Leon W. Behrman, of Portland, Or., and Frank C. Hesse, of Astoria, Or., for appellant.

W. E. Sullivan and L. L. Sullivan, both of Boise, Idaho, for appellees.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant contends that the decree rendered by the state court of Idaho upon his suit to foreclose his mortgage is void, for the reason that the trial court went outside the issues in the case and determined that the receiver's certificates constituted a lien prior to that of the appellant. It does not appear in the present bill, which is brought to set aside the decree of the state court and the proceedings had thereunder, that the certificate holders were not made parties to the suit in the state court. They were proper parties, and we may

assume that they were parties from the fact that the state court decreed them a first lien on the mortgaged property. Taking the allegation of the bill in the case which is now before us to be true, that those certificates had been made a first lien in a prior suit to which the appellant herein was not a party, and of which he had no notice, it would follow that his rights were not concluded thereby, and that he still had the right thereafter to contest that question. He had full opportunity to do so in his foreclosure suit. Instead of doing so, he seems to have proceeded upon the theory that those certificates were absolutely void and might be ignored. But they were not void. If the lien thereof was not prior to the appellant's mortgage, it was at least second thereto. From the decree of the state court, wherein the certificates were adjudged to constitute a first lien, the appellant took his appeal to the Supreme Court, and there, according to the allegations of the bill herein, he presented to that court all the objections to the validity of the decree appealed from which are now presented to this court. In deciding the case on appeal (Hewitt v. Great Western &c. Sugar Co., 20 Idaho, 235, 118 Pac. 296) the court said of the action of the court below:

"That the court had power and authority to appoint a receiver of the property of the Great Western Beet Sugar Company, and for its care, preservation, and protection, when proper facts authorizing the same were presented to the court, there can be no question, and such appointment is not contested in this case. * * * The appellant, however, claims that the priority given to the certificates issued by the receiver should not have been allowed in this case, as a prior lien against the mortgaged property, and that appellant had had no opportunity to contest such allowance. Whether the appellant was a party to the suit in which such receiver was appointed does not clearly appear from the finding, but there can be no question but that in the present suit the appellant had full opportunity, if he saw fit, to contest such receiver's certificates, and have litigated and determined by the trial court in the present suit the question as to whether such certificates should have been allowed. And there is nothing in the record to show that the appellant, at any time during the trial, made any contest or presented any matter to the trial court, or gave any reason why the court should not allow such certificates and make them a prior lien upon the mortgaged property. Certainly, when the question came before the trial court in the present case the appellant had his day in court, and could have contested these certificates and their priority, and fully litigated and offered such proof as he had, and given such reasons as existed in the law why the court should not allow the same; but the record does not disclose that the appellant took any steps to contest these liens or in any way put in issue their priority."

The judgment in that case is a bar to the present suit, and it cannot be set aside or vacated on the allegations contained in the bill. In Black on Judgments, § 367, it is said:

"Nor can a court of equity set aside a judgment, rendered by a court which had jurisdiction, on the ground that it was not warranted by the pleadings."

The same is said in 23 Cyc. 1004, citing Allen v. Allen, 97 Fed. 525, 38 C. C. A. 336, Preston v. Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777, and other cases.

The question of the relative rank of all liens on the incumbered property not only might have been litigated, but, according to the settled rules of procedure, should have been litigated, in the foreclosure

suit upon issues tendered by the plaintiff therein. The judgment which was rendered in the state court was a judgment of a court of competent jurisdiction. The question of the lien of the receiver's certificates properly belonged to the subject-matter of the controversy. The judgment was delivered upon the merits of the cause, and it is final and conclusive in any subsequent action upon the same cause of action and between the same parties and those in privity with them, not only as to all matters actually litigated and determined in the former action, but also as to every ground of recovery or defense which might have been presented and determined therein. 24 Am. & Eng. Enc. of Law, 781; 23 Cyc. 1295; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; Nesbit v. Riverside Independent District, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562.

[2] The appellant contends that the question whether his bill presents ground for equitable relief must be determined from the facts alleged in the body of the bill, and that recourse may not be had to the proceedings in the state courts of Idaho to determine what was at issue and what was decided therein. But it seems too clear to require discussion that when the appellant comes into a federal court of equity seeking to set aside a judgment of a state court, and in his bill he describes the suit in the state court, the parties thereto, and the issues involved, and sets forth the date of the judgment and the volume and page of the Reports wherein it is reported, he authorizes the court to advert to the reported decision and to read the same in connection with the allegations of his bill, with the same effect as if a copy thereof had been appended as an exhibit to his bill. The court in doing so does not, as suggested by the appellant, take judicial notice of a proceeding of a state court, but takes notice of that which is brought to its attention by proper pleading.

[3] The appellant contends that the defense of estoppel and res adjudicata is not available to the appellee herein for the reason that that defense has not been pleaded. But where upon the allegations of the bill it clearly appears that that defense exists, it has always been held that it might be presented on a demurrer to the complaint. 23 Cyc. 1525; Davis v. Hall, 57 N. C. 403; Keen v. Brown, 46 Fla. 489, 35 South. 401; Williams v. Cheatham, 99 Ga. 301, 25 S. E. 698; Ferriman v. Gillespie, 250 Ill. 369, 95 N. E. 495; Van Etten v. Leavitt, 90 Neb. 461, 133 N. W. 649; Shook v. Shook (Tex. Civ. App.) 145 S. W. 699.

The appellant presents as ground for setting aside the judgment of the state court that the receiver's certificates issued by the first receiver were false and fraudulent, and padded, and issued for illegal claims, and as the result of an illegal conspiracy, and that the debts represented thereby were incurred by reckless and indifferent management on the part of the receiver. All these grounds for attacking the receiver's certificates were available to the appellant in his foreclosure suit, and should have been therein presented. There is no allegation that the appellant was not then fully aware of the alleged infirmities of the certificates. He then had his day in court, and the present attack on that ground comes too late.

[4] The appellant alleges as further ground of equitable relief that the purchaser on the foreclosure sale conspired with the receiver of the property to deprive appellant of his right to bid in the property for the amount of the receiver's certificates and the liens prior to his mortgage, that they stifled competition, and that the minimum bid was excessively low, and wholly disproportionate to the true value. We may pass the question whether those facts as pleaded constitute any ground for equitable relief. The appellant presented a portion of these objections to the state district court, and to the Supreme Court of Idaho, and they were considered and adjudicated by those courts. He had then the opportunity to present all of said objections. He does not allege that he had not discovered the conspiracy at the time of making his objections to the confirmation of sale. It was his duty to present all other grounds of objection of which he had knowledge, and he is deemed to have waived any which he knew and did not present. 24 Cyc. 36, and cases there cited.

We find no error. The decree is affirmed.

MOORE v. DOUGLAS.

In re BERLIN DYE WORKS & LAUNDRY CO.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1916.)

No. 2665.

1. BANKRUPTCY ⟸315(1)—CLAIMS PROVABLE—JUDGMENTS APPEALED FROM—"JUDGMENT"—"PENDING."

Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 (Comp. St. 1913, § 9647), authorizes the proof of debts which are a fixed liability as evidenced by a judgment absolutely owing at the filing of the petition, whether then payable or not, or which are founded upon open account or a contract, express or implied. Code Civ. Proc. Cal. § 577, provides that a judgment is the final determination of the rights of the parties in an action or proceeding. Section 1049 provides that an action is deemed "pending" until its final determination upon appeal, or until the time for appeal has passed unless the judgment is sooner satisfied. *Held*, that a judgment recovered for personal injuries prior to the filing of the petition, from which an appeal had been taken without executing a supersedeas bond, necessary to stay execution under Code Civ. Proc. Cal. § 942, was provable, as a "judgment" is a liability, and is absolutely owing when rendered and entered, and it is immaterial whether it is admissible in evidence under the state laws, as the Bankruptcy Act makes a judgment evidence to prove a fixed liability if the liability exists.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 491; Dec. Dig. ⟸315(1).

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

2. BANKRUPTCY ⟸314(1)—CLAIMS PROVABLE—UNLIQUIDATED CLAIMS.

Bankr. Act, § 63b, providing that unliquidated claims may be liquidated as the court shall direct and thereafter proved and allowed, does not enlarge the class of provable debts, but only permits the liquidation of unliquidated claims provable under section 63a.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469, 471, 477, 478; Dec. Dig. ⟸314(1).]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

In the matter of the Berlin Dye Works & Laundry Company, bankrupt. From an order (225 Fed. 683) allowing the claim of C. K. Douglas, Wm. H. Moore, Jr., trustee, appeals. Affirmed.

W. T. Craig, Carroll Allen, Benjamin E. Page, and Dave F. Smith, all of Los Angeles, Cal., for appellant.

E. B. Drake, of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. C. K. Douglas, appellee here, recovered a judgment against the Berlin Dye Works & Laundry Company, a corporation, now a bankrupt, on July 11, 1913, in the superior court of the state in Los Angeles county, in an action theretofore brought by Douglas against the above-named corporation for damages for personal injuries suffered by reason of alleged negligence of the corporation. After the entry of the judgment referred to, on September 10, 1913, the corporation appealed from the judgment to the Supreme Court of the state. In appealing the corporation executed a cost bond in the sum of $300, but failed to execute any supersedeas bond as provided in section 942 of the Code of Civil Procedure of California.

September 15, 1913, petition in involuntary bankruptcy was filed against the corporation, and on October 7, 1913, adjudication in bankruptcy was entered. On February 14, 1914, Douglas, appellee, filed a claim against the estate based upon a certified copy of the judgment. On April 21, 1914, the claim of Douglas was presented to the referee in bankruptcy for allowance. The trustee objected upon the ground that Douglas had no provable claim against the estate of the bankrupt, and that the judgment upon which the claim was based was not a final judgment. On December 17, 1914, the judgment in favor of Douglas was affirmed by the Supreme Court of the state. Thereafter, on February 1, 1915, the claim of Douglas was disallowed by the referee in bankruptcy. Review was had by the District Court, and the order of the referee was reversed, and an order directed allowing the claim. Appeal from the order of the District Court brings the matter before this court.

[1] Section 63a of the Bankruptcy Act, in providing for debts which may be proved, includes:

(1) "A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;" (4) "founded upon an open account, or upon a contract express or implied."

[2] When we read this section with 63b, we find that by the latter, provision is made for unliquidated claims against a bankrupt, which may be liquidated upon application to the court in such manner as it

shall direct and may thereafter be proved and allowed against his estate. It is thoroughly established that paragraph "b" does not enlarge the class of debts which may be proved under paragraph a; it does, however, permit an unliquidated claim to be liquidated as the court may direct provided, always, such claim is one within the provisions of 63a. Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084. So we must resolve the present case by deciding whether the claim was a debt provable and allowable against the bankrupt's estate at the time of the filing of the petition against him, or on September 15, 1913. A judgment being a liability, the judgment debtor becomes, generally speaking, subject to a charge or duty which may be judicially enforced. We know of no reason why a judgment rendered before petition in bankruptcy is filed in an action upon a liability arising out of a tort should be regarded as less a debt owing under section 63a than if it were one arising upon other obligations or liabilities.

It is said that such a judgment is not a "fixed liability," that it is not one "absolutely owing" at the date of filing of the petition, and hence is not provable and allowable. The argument is that, it being the duty of the federal courts to give to judgments of the state courts the same force and effect they have under the state laws, the judgment herein did not, under the statutes of California (section 577, Code of Civil Procedure) become a final determination of the rights of the parties because, appeal having been taken in due time and manner, the action, under section 1049, California Code of Civil Procedure, is to be "deemed pending" from the time of its commencement until its final determination upon appeal. Going on with this argument appellant would test the force and effect of the judgment by inquiring whether under the laws of the state it would be evidence and conclusive as to the amount due under it. But inasmuch as the judgment fixed a liability of the bankrupt and was in effect when the petition against the bankrupt was filed, by force of the bankruptcy statute (section 63a), it became the evidence of a debt against his estate. It is true the judgment was subject to review on appeal to a higher state court, but there was nevertheless a valid judgment existing and of record. The appeal may have suspended the operation of the judgment as an estoppel and rendered it inadmissible as evidence in a litigation between the parties. But, even so, there was no longer an unliquidated claim of liability for tort which concededly could not be made a provable claim. We need not dwell upon possible distinctions between the meaning of the word "debt" as used in the Bankruptcy Act and statutes which are not similar to 63a, because we think the qualifying language of 63a is in itself a sufficient guide for interpreting the statute under consideration. Its terms are reasonably clear and furnish their own characterization of what liability is included within the debts provided for. A debt to be provable and allowable against a bankrupt's estate must be a "fixed liability as evidenced by a judgment," and the judgment must be "absolutely owing" at the time of the filing of the petition against the bankrupt. Rulings of the courts of the state against the admissibility in evidence of a judgment as not a final adjudication as to the

rights of the parties, because the action in which the judgment is rendered is still pending, are not controlling for the reason that under the Bankruptcy Act, a judgment being made evidence to prove a fixed liability, if the liability exists, the question of provability is settled, and we need not consider the effect of the judgment from a general evidentiary standpoint.

Where a judgment has not been paid, or has not been superseded on appeal by a bond given pursuant to the Code of Civil Procedure of the state, surely the judgment debtor cannot avoid the effect of levy and execution. And here the effect of the appeal by giving the cost bond did not itself operate to stay execution or to stay proceedings or to make the judgment any the less an obligation absolutely owing by the bankrupt. As already said, the liability was fixed and evidenced by the judgment existing prior to and at the time of the filing of the petition in bankruptcy. The Bankruptcy Act expressly makes it unimportant whether or not the liability is payable at the time of the filing of the petition. If the debt was then a fixed liability in the form of a judgment the right to file the claim existed. Hibberd v. Bailey, 129 Fed. 575, 64 C. C. A. 143. A judgment is primarily absolutely owing when rendered and entered. If it has been paid before the petition in bankruptcy against the judgment debtor has been filed, or if some agreement of satisfaction has been had, or, perhaps, if the judgment is of a kind where it is very uncertain whether an actual duty to pay has arisen, in such cases the judgment would not be absolutely owing. But as the record here presents no questions of that nature we need not consider them.

To sustain appellant's contention would make it easy for one who has become insolvent to defeat a judgment founded upon a wholly meritorious cause of action. All he would have to do would be to take the simple steps providing for appeal, give a bond to cover costs, and by these steps prevent proof and allowance of a just claim to a judgment creditor. We are reluctant to believe that the bankruptcy statute calls for such a construction. These views are not inconsistent with action which may appropriately guard against possible reversal upon appeal in the state courts: It would generally be just that the referee in bankruptcy should upon proper showing postpone order for dividends to the judgment creditor until the appeal may have been disposed of. In re Buchan's Soap Corporation (D. C.) 169 Fed. 1017. This course was followed in the present instance, and thereafter the judgment of the superior court was affirmed. Douglas v. Berlin Dye Works, 169 Cal. 28, 145 Pac. 535.

The order appealed from is affirmed.

RHAME v. SOUTHERN COTTON OIL CO. et al.

(Circuit Court of Appeals, Fourth Circuit. November 24, 1915.)

No. 1385.

1. BANKRUPTCY ⊂=100—JUDGMENTS—AMENDMENT—TIME FOR AMENDMENT.
Bankruptcy Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (Comp. St. 1913, § 9609), authorizes appeals from judgments adjudging or refusing to adjudge the defendant a bankrupt, and requires such appeals to be taken within 10 days after the judgment is rendered. On February 12th defendant was adjudged a bankrupt, and on February 20th his counsel wrote a letter to the District Judge, asking for an order granting 10 days from the receipt of the transcript of the testimony within which to file the notice of appeal and exception. The District Judge received the letter on February 23d, and replied that he had no power to extend the time for appealing. A motion for rehearing was made and denied on March 17th, and on March 25th a petition was filed to amend the judgment, which was refused; the order, however, providing that the bankrupt might appeal from that order, and have the question whether the appeal from the adjudication was taken in time determined by the appellate court. *Held*, that the court, on March 25th, more than 10 days after the entry of the judgment, was without power to grant the relief sought, and its refusal of the motion to amend the judgment was strictly proper.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. ⊂=100.]

2. BANKRUPTCY ⊂=461—APPEAL—TIME FOR APPEAL.
The Circuit Court of Appeals could not entertain the appeal from the adjudication, as its jurisdiction can only be acquired when the appeal is properly taken within the time prescribed by statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–923; Dec. Dig. ⊂=461.]

3. BANKRUPTCY ⊂=461—APPEAL—LEAVE TO APPEAL.
The appeal from the order denying the motion to amend was improvidently granted under the circumstances.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–923; Dec. Dig. ⊂=461.]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston, in Bankruptcy; Henry A. Middleton Smith, Judge.

Proceeding by the Southern Cotton Oil Company and others to have Lyde R. Rhame adjudicated a bankrupt. From the judgment adjudging him a bankrupt, the alleged bankrupt appeals. Appeal dismissed.

S. G. Mayfield, of Denmark, S. C., and Thomas F. Brantley, of Orangeburg, S. C. (Mayfield & Free, of Bamberg, S. C., and Brantley & Zeigler, of Orangeburg, S. C., on the brief), for appellant.

George H. Moffett and Julian Mitchell, both of Charleston, S. C., for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. On the 19th day of December, 1914, the Southern Cotton Oil Company, Virginia-Carolina Chemical Company, and Planters' Fertilizer & Phosphate Company filed their petition praying that Lyde R. Rhame be adjudged a bankrupt. On the 31st

day of December, 1914, the said Lyde R. Rhame filed his sworn return, claiming he should not be adjudged a bankrupt, in that "his chief occupation is of one chiefly engaged in the tillage of the soil," and because he was solvent, and demanding a jury trial on the issue of insolvency. The issue of the commission of the acts of bankruptcy and of insolvency were tried before a jury at the January term of the District Court in the city of Charleston, and the verdict of the jury was rendered on the 26th day of January, 1915, finding that Lyde R. Rhame had committed the acts of bankruptcy and was insolvent.

We are met at the threshold of this case with the question as to whether or not the appellant is entitled to an appeal under section 25a of the Bankruptcy Act from the judgment of the lower court, entered on the 12th day of February, 1915. The section referred to is in the following language:

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the territories, in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

The record shows, among other things, that on the 20th day of February, 1915, counsel for the alleged bankrupt wrote a letter to the learned judge who heard this case in the court below which was received by him on February 23, 1915, requesting an order to the effect that:

"The attorneys for Lyde R. Rhame, alleged bankrupt, have ten days within which to file their notice of appeal and exception from the date of receipt of transcript of testimony in said case from the stenographer of said court."

In response to this letter the court below stated:

"If you had taken your appeal within the time allowed by statute I could then have extended the time within which you could have prepared your exceptions or assignments of error; but, as no appeal was taken, it appears to me that it is out of my power to extend the time for you."

Thereafter the respondent moved for rehearing on the ground of alleged errors of fact and errors of law committed by the court below, and on March 17, 1915, the court entered an order refusing the motion for rehearing, stating that the object of the motion for rehearing was to afford respondent an opportunity to appeal from the decree of the court made on the 12th day of February, 1915, adjudging respondent a bankrupt, and the court, among other things, said:

"There being in the opinion of the court no meritorious reason advanced for the granting of a rehearing on any grounds, it is therefore ordered that the motion for a rehearing be and the same is hereby refused."

Thereafter, on the 25th day of March, 1915, a petition was filed in the court below to have the judgment of that court amended. Among other things, the court below, in refusing the petition, said:

"* * * In the opinion of the court neither the letter nor the paper complied with the legal requirements of an appeal. They were only an application

for an extension of time, which might or might not be availed of by the party desiring the extension. The appeal might be consummated, or it might not be consummated. These papers cannot properly be considered as an appeal. The lower court should always favor the allowance of an appeal, but in view of the peremptory provisions of the Bankruptcy Act the presiding judge, notwithstanding this inclination, does not feel empowered to allow it in this case. However that may be, as it is a matter that should be finally disposed of by an appellate court, the bankrupt will be allowed an appeal from this order (if taken in time), and may urge before the appellate court that the appeal from the adjudication was taken in due time, and let that court decide the question."

[1, 2] If appellant had presented his formal application for an appeal then, it would have been the duty of the court below, upon the giving of a bond by appellant, to have allowed the appeal at any time within the 10 days; but this course was not pursued. On the 25th day of March, the day on which it was sought to amend the judgment, being more than 10 days after the entry of the judgment, the court was without power to grant the relief sought by appellant. Therefore the action of the lower court, under the circumstances, was eminently proper, and strictly in accordance with the decisions of the Supreme Court as well as the decisions of this court. Old Nick Williams Co. v. United States, 215 U. S. 541, 30 Sup. Ct. 221, 54 L. Ed. 318, and cases cited. Such being the case, we cannot entertain this appeal, inasmuch as the jurisdiction of this court can only be acquired in cases of this character when the appeal is properly taken within the time prescribed by the statute.

[3] Under the circumstances, we are of opinion that the appeal in this instance was improvidently granted. However, in this connection we deem it proper to say that a careful examination of the evidence relied upon by counsel for appellant impels us to the conclusion that the action of the lower court in refusing to grant the rehearing upon the merits of the case was proper, feeling as we do that the judgment of that court adjudicating appellant a bankrupt was amply sustained by the weight of the evidence.

For the reasons stated, the appeal will be dismissed.

In re BEAN et al.

In re QUIGLEY.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1916.)

No. 2700.

1. BANKRUPTCY ⟸100(1)—CONCLUSIVENESS OF JUDGMENTS—MATTERS CONCLUDED.

The claimants entered into a contract with Q., whereby they agreed to procure by their indorsement of his notes additional capital for his business, and received a transfer of 49 per cent. of the business. Subsequently they discovered that Q. had misrepresented the condition of the business, and with Q.'s consent the contract was canceled. Claimants paid the notes indorsed by them and took Q.'s notes for the amount so paid. Q. was thereafter adjudicated a bankrupt; the claimants being among the petitioning creditors. Other creditors thereafter filed a petition

against claimants on the theory that they were partners of Q.; but on the hearing they dismissed the petition, when it was pointed out that the petition did not and could not truthfully allege the insolvency of one of the claimants. The referee allowed the claims of the claimants, but postponed their payment to the claims of creditors who became such while claimants were partners of the bankrupt. *Held*, that the adjudication in bankruptcy on the petition of the claimants was not an adjudication that the claimants were not partners, as, even though they were partners at one time, they had ceased to be, and were in the ordinary status of retired partners, who were creditors of the continuing sole owner of the business for the agreed purchase price of their interests, and as such were entitled to petition for and obtain an adjudication in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 142, 143; Dec. Dig. ⊂⊃100(1).]

2. BANKRUPTCY ⊂⊃100(1)—CONCLUSIVENESS OF JUDGMENTS—MATTERS CONCLUDED.

The dismissal of the petition in bankruptcy against the claimants was not an adjudication in their favor on the question of partnership, as it was voluntary, and amounted only to a nonsuit which adjudicates nothing, and moreover, had the court's action been invoked, its action would have rested on the point that one of the claimants was not insolvent; and would not have involved or decided the question of partnership.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 142, 143; Dec. Dig. ⊂⊃100(1).]

3. PARTNERSHIP ⊂⊃20—CREATION OF PARTNERSHIP AS TO THIRD PERSONS.

Claimants entered into a contract with the bankrupt, whereby they agreed to indorse his notes in specified amounts, and he agreed to borrow such amounts from a bank and to gradually reduce the principal until the whole amount borrowed was paid in full. The agreement provided that the borrowed money was to be used in the bankrupt's business, that the bankrupt thereby transferred to the claimants 49 per cent. of the assets of such business to be divided between them equally, that the bankrupt should retain possession of 51 per cent. of the business and assets and should be manager at a specified salary and devote his entire time to the business and make statements from time to time to the claimants, which should be verified by investigation, if desired, that the business should be conducted under the bankrupt's name, that all of the assets of the business were to be used for merchandising purposes at the "location of the partnership" at the bankrupt's place of business, that the business should be conducted in an economical manner and be open at all times to the inspection of the claimants, and that all checks and payments should be signed and countersigned by the bankrupt and one of the claimants. *Held* that, while some provisions of the contract were not inconsistent with the view that the transfer of the interest in the business was only by way of security or indemnity against the indorsements, the contract as a whole made it reasonably clear that the parties intended to create those rights and interests from which the relation of partnership and its attendant liabilities must be inferred, though, as found by the referee, the parties did not hold themselves out as partners, nor think they were partners, and the bankrupt was the only person known to creditors when credits were extended.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 6, 7; Dec. Dig. ⊂⊃20.]

4. BANKRUPTCY ⊂⊃446—PETITION TO REVISE—REVIEW OF QUESTIONS OF FACT.

On a petition to revise an order in bankruptcy, the court cannot determine conflicting inferences of fact, though the substance of the evidence is embodied in an agreed statement.

[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 Division of the Southern District of Ohio; John E. Sater, Judge.

In the matter of Harry Quigley, bankrupt. On petition by R. H. Bean and another to revise an order postponing their claims to certain other claims. Order affirmed.

Quigley, the bankrupt, was engaged alone in the retail furniture business. On September 28, 1912, Bean & Lupfer (and others) entered into a written contract with Quigley whereby they agreed to procure, by their indorsements, additional capital for the business, and whereby they received a transfer of 49 per cent. of the business. The contract seemed to be carefully drawn and covered many details. It is copied in the margin.[1] On October 28th they discovered that Quigley had misrepresented the condition of the business. With Quigley's consent, the contract was canceled, and Quigley gave to Bean & Lupfer, severally, his notes for the amounts which had gone into the business on account of their indorsements, and they paid up the indorsed obligations to the same amount. On December 11th Quigley was adjudicated bankrupt; Bean & Lupfer, in right of the notes so given, being among the petitioning creditors.

It soon developed that the contract of September 28th was believed to create a partnership between Quigley and the others, and on December 17th certain alleged creditors of this partnership filed a petition in bankruptcy against them, alleging the existence of such partnership and the resulting lia-

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[1] Article of agreement by and between Harry Quigley, party of the first part, and George B. Lupfer, R. H. Bean, and O. P. Blue, parties of the second part.

Harry Quigley agrees to borrow from the National Bank of Commerce, or other agreed banks, amounts equaling to fifteen hundred dollars total, to pay the interest on the amounts and to gradually reduce the principal as the notes mature, until the whole amount borrowed is paid in full. The amounts up to fifteen hundred dollars are to be borrowed on three months' time.

Said Geo. B. Lupfer, R. H. Bean, and O. P. Blue agree to indorse for said Harry Quigley as follows: Geo. B. Lupfer will indorse for $500, and said R. H. Bean will indorse for $500, and said O. P. Blue will indorse for $500—making the total amount fifteen hundred dollars, the first amount above stated.

Both parties of the first part and of the second part agree that the total amount borrowed from the National Bank of Commerce or any other bank or banks shall be fifteen hundred dollars, which money is to be used wholly and solely in the conduct of the business located at No. 344 N. High street, to buy stock, settle accounts and pay the necessary expenses of the business.

In return for these indorsements said Harry Quigley *transfers to said parties of the second part,* Geo. B. Lupfer, R. H. Bean, and O. P. Blue, *forty-nine per cent. of the assets* of the business at No. 344 N. High St., stock, fixtures; also all other assets and accounts *to be divided between them equally.*

It is agreed by the parties of the second part that Harry Quigley shall *retain possession of fifty-one per cent.* of the business at No. 344 N. High St., stock, fixtures and accounts and all other assets.

It is further agreed by the parties of the first part and second part that the said Harry Quigley *shall be manager* of the business located at No. 344 N. High St., *at a salary* not to exceed $20 weekly for the ensuing year, *shall devote his time entire* to the conduct of the business and *shall make statements from time to time to parties of the second part* which shall be verified by investigation of parties of the second part if desired. It is also further agreed that the business shall be *conducted under the name of Harry Quigley.*

It is further agreed that all of the assets of the business, stock, accounts and fixtures are to be used for merchandising purposes *at the location of the partnership* at No. 344 N. High St., Columbus, Ohio. The present financial statement is as follows:

Stock and fixtures	$2,925.01
Accounts	1,743.28
Total	$4,668.29
Indebtedness	2,747.42
Net assets	$1,920.87

It is further agreed that the business shall be conducted in an economical manner, and shall be open at all times to the inspection of parties of the second part. It is further agreed that *all checks and payments* shall be signed and *countersigned* by Harry Quigley and *O. P. Blue.*

In witness both parties of the first part and second part hereunto set their signatures.

Party of the First Part, Harry Quigley.
Party of the Second Part, O. P. Blue.
Riley H. Bean.
Geo. P. Lupfer.

bility of the individuals. When, however, upon the hearing of the order to show cause, it was pointed out that the petition did not allege the insolvency of Lupfer, one of the alleged partners, and that it could not truthfully do so, the petitioning creditors dismissed this petition. Whereupon Bean & Lupfer presented their notes for allowance as claims against the bankrupt estate of Quigley; objection to the allowance was made upon the ground that Bean & Lupfer were partners; and the referee held that the contract did in fact create a partnership, but that the notes were, nevertheless, allowable as claims against Quigley. He cared for the respective rights of Bean & Lupfer on one side, and the creditors of this partnership on the other side, by providing that on the claims so allowed any dividends which might become payable should be paid, not to Bean & Lupfer, but to those creditors of Quigley who became such between September 28th and October 28th, thereby, in effect postponing Bean & Lupfer, as creditors of Quigley, to the creditors of Quigley, Bean & Lupfer. Upon Bean & Lupfer's petition for review, the District Judge affirmed the referee in all respects; and they bring this petition to revise.

Charles J. Pretzman and John W. Wilson, both of Columbus, Ohio, for petitioners.

A. H. Johnson, of Columbus, Ohio, for trustee.

Raymund & Hedges and Watson, Stouffer, Davis & Gearheart, all of Columbus, Ohio, for creditors.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1,2] 1. Bean & Lupfer urge that the question of partnership or not has been twice adjudicated in their favor: First, when their status as creditors of Quigley was fixed by the adjudication in bankruptcy based on their petition; and, second, when the petition, alleging that they were partners, was dismissed. Neither branch of this position is tenable. Even if Bean & Lupfer were partners until October 28th, they then ceased to be, and they were in the ordinary status of retired partners who were creditors of the continuing sole owner of the business for the agreed purchase price of their interests. No reason is suggested why such creditors may not petition for and obtain an adjudication in bankruptcy; and such adjudication has no bearing upon the question whether the petitioning creditors had, at some former time, been partners of the one against whom they file their petition. The dismissal of the second petition in bankruptcy was not only voluntary, amounting only to that nonsuit which adjudicates nothing, but the meritorious point upon which the action of the court would have rested if that action had been invoked, viz., that Lupfer was not insolvent, did not involve and so could not have decided the question of partnership.

[3, 4] 2. We are not inclined to discuss at length the effect of the contract. This was fully and satisfactorily done, both by the referee and by the District Judge. It is claimed that the transfer of the interest in the business was only by way of security or indemnity against the indorsements, and some provisions of the contract are not inconsistent with this view; but we think the contract, as a whole and on its face, makes it reasonably clear that the parties actually intended to create those respective rights and interests from which the relation

of partnership and its attendant liabilities must be inferred. We have put in italics those parts of the margin-quoted contract which are persuasive to this effect. The substance of the evidence is embodied in an agreed statement; but we cannot, on this petition to revise, determine any conflicting inferences of fact. There is nothing to dispute the inferences to be drawn from the contract itself which goes beyond the referee's finding:

"A partnership did not exist in fact; that is, the parties did not hold themselves out as partners, nor did they think they were partners, and Quigley was the only person known to any of the creditors when credits were extended."

This finding, self-explained as it is, is not sufficient to require the overturning of the finding that in law there was a partnership, nor to show that the parties did not in fact intend to do those things which by law made them partners.

The action of the District Judge, confirming that of the referee, is affirmed.

JACKSON v. WAUCHULA MFG. & TIMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1916.)

No. 2756.

BANKRUPTCY ⊂=78—INVOLUNTARY PROCEEDINGS—RIGHT OF PARTIES INTERESTED TO DEFEND.

Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (Comp. St. 1913, § 9601), provides that a discharge in bankruptcy shall release a bankrupt from all his provable debts, except those therein specified, including liabilities for willful and malicious injuries to the person or property of another. Section 18b (section 9602) provides that the bankrupt or any creditor may appear and plead to an involuntary petition within five days after the return day, or such further time as the court may allow. An alleged bankrupt denied the allegations of insolvency and the alleged acts of bankruptcy, but subsequently withdrew its denial and substituted an unwarranted admission of insolvency. *Held* that, even though a person recovering judgment for a personal injury not willful and malicious after the filing of the petition, but before the adjudication, was not a creditor, the court had power to permit him to appear and resist an adjudication, as he was interested in the estate of the bankrupt, since a discharge would operate to release the liability under the judgment, and the administration of the estate would lessen the chance of his demand being satisfied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 111, 112; Dec. Dig. ⊂=78.]

Petition to Superintend and Revise from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

In the matter of the Wauchula Manufacturing & Timber Company, alleged bankrupt. The petition of William D. Jackson to set aside an adjudication and permit him to resist an adjudication was denied, and the petitioner brings a petition to superintend and revise. Reversed.

Howard P. Macfarlane, of Tampa, Fla., for petitioner.

H. S. Phillips and J. W. Frazier, both of Tampa, Fla., for respondents.

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

WALKER, Circuit Judge. This is a petition to superintend and revise the action of the District Court in denying the motion of the petitioner, William D. Jackson, to set aside an adjudication of bankruptcy rendered on an involuntary petition against the Wauchula Manufacturing & Timber Company, a corporation, and to permit the maker of the motion to resist such an adjudication by putting in issue the involuntary petition's allegations of insolvency and of acts of bankruptcy. The averments of the motion showed that, in a suit based upon a liability for a personal injury not "willful and malicious" (Bankruptcy Act, § 17), Jackson, after the involuntary petition was filed, but before the adjudication thereon, recovered a judgment against the alleged bankrupt; that the alleged bankrupt at the proper time pleaded to the petition against it, denying its allegations of insolvency and of acts of bankruptcy, but subsequently, after the rendition of the judgment in favor of Jackson, though the fact was that it was entirely solvent, withdrew its valid and sufficient defense, and substituted therefor its unwarranted admission of insolvency, whereupon the adjudication of bankruptcy was made. The court's action on the motion was by it based upon the expressly stated ground:

"That movant was not a creditor within the meaning of the Bankruptcy Act at the time of the filing of the involuntary petition, and therefore has no standing to make this motion."

By the record it is made to appear that the denial of the motion was due, not to a conclusion that there was any lack of timeliness in the application, but to the conclusion that it was beyond the power of the court to permit an involuntary petition in bankruptcy to be resisted by one whose relation to the debtor was that borne by the maker of the motion. The sought-for permission to continue a defense which unwarrantably had been abandoned by the alleged bankrupt was refused, not because the application was unseasonably made, but because the applicant "was not a creditor within the meaning of the Bankruptcy Act at the time of the filing of the involuntary petition, and therefore has no standing to make this motion." Two propositions were involved in the ruling, viz.: (1) That the maker of the motion was not a creditor within the meaning of the Bankruptcy Act when the involuntary petition was filed; and (2) that only such a creditor may be permitted to resist such a petition.

The first proposition is supported by decisions which are entitled to much weight, among them the following, which were cited by the District Judge: Brown & Adams v. United Button Company, 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, 9 Ann. Cas. 445; In re New York Tunnel Company, 159 Fed. 688, 86 C. C. A. 556; In re New York Tunnel Company, 166 Fed. 284, 92 C. C. A. 202. So far as we are advised, the proposition has not been definitely settled by the court

whose decisions are controlling. The contention made by counsel in this case may be summarized as follows: The liability adjudged in favor of the petitioner for revision, being for a personal injury which was not "willful and malicious," is one which a discharge in bankruptcy of the defendant in the judgment would release; and any demand founded on a liability subject to be so released may, when liquidated and fixed by a judgment, be proved and allowed against the debtor's estate in bankruptcy, and the claim being of a kind that may be made provable and allowable, the claimant's right, given by provisions of the act, to participate in the bankruptcy proceeding, is not dependent upon his claim having been liquidated and fixed by a judgment, when the latter is necessary to make it provable and allowable, before the proceeding was instituted. Bankr. Act, §§ 17, 59f, 63b (Comp. St. 1913, §§ 9601, 9643, 9647); Grant Shoe Company v. Laird Company, 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591; Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754; Crawford v. Burke, 195 U. S. 193, 25 Sup. Ct. 9, 49 L. Ed. 147.

We do not find it to be necessary to a decision of this case to affirm or deny the correctness of the first-stated proposition. Whether the maker of the motion was or was not a creditor within the meaning of the Bankruptcy Act, that he had, when he presented the motion, an interest to be served by favorable action on it, is not open to question. Obviously, as the plaintiff in and the owner of the judgment he had recovered, he was vitally concerned in the question of the estate of the judgment defendant, which was the thing brought under the sole control of the bankruptcy court by the filing of the involuntary petition, being subjected to the diminishing process of a bankruptcy administration; outcomes to be expected being a lessening of the chance of his demand being satisfied out of the estate in existence, and a discharge of the judgment defendant, operating to release its liability under the judgment. From the fact that the Bankruptcy Act (section 18b) makes express provision for the exercise by the bankrupt or by any creditor of a right to appear and plead to a petition for involuntary bankruptcy it does not follow that it was a purpose of the act to withhold from the court of bankruptcy the power of permitting participation in the proceedings by other parties shown to be interested in the result of them.

Nothing in the act stands in the way of the conclusion that the court of bankruptcy has the power to permit an involuntary petition to be resisted by one other than the debtor or a creditor within the meaning of the act, who shows that he has an interest in the estate in the court's charge which would be prejudicially affected by an adjudication of bankruptcy on that petition and the consequences which might be expected to follow from such adjudication. Blackstone v. Everybody's Store, 207 Fed. 752, 125 C. C. A. 290; Altonwood Park Co. v. Gwynne, 160 Fed. 448, 87 C. C. A. 409; In re Cooper Brothers (D. C.) 159 Fed. 956; In re Simonson (D. C.) 92 Fed. 904. When such an interest is shown by an applicant for leave to take up a valid defense which the alleged bankrupt made in due time, but subsequently unwarrantably abandoned, the application may not properly be denied upon the ground of a lack of power in the court to permit the appli-

cant to participate in the proceeding. The record in this case does not enable us to affirm that the application was not made with due promptness after the occasion for making it arose, or that it should have been denied upon a ground other than the untenable one upon which the court based its action.

This being the situation, the conclusion is that the disposition which was made of the motion is not sustainable, and that the decree presented for revision should be reversed; and it is so ordered.

GROSS et al. v. VAN DYK GRAVURE CO.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 94.

COPYRIGHTS ⊂=77—INFRINGEMENT—LIABILITY FOR DAMAGES.

Under Act Sept. 18, 1913, c. 14, § 3, 38 Stat. 113 (Comp. St. 1913, § 9526), amending the Copyright Act (Act March 4, 1909, c. 320, 35 Stat. 1075), which provides that an infringer shall be liable "to pay to the proprietor such damages as the proprietor may have suffered due to the infringement, as well as all the profits which the infringer may have made from such infringement," all persons who unite in an infringement are liable for the proprietor's damages, although they may not be liable for profits in which they did not share.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 69; Dec. Dig. ⊂=77.]

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

Suit in equity by Edward Gross and Jacob Gross against the Van Dyk Gravure Company and others. Decree for complainants, and the named defendant appeals. Affirmed.

The opinion below of Learned Hand, District Judge, is as follows:

As this case now comes up, the issue of infringement is conclusively established by the decision of the Circuit Court of Appeals. There remains for the substance of dispute the following facts developed at the hearing: Rochlitz took two photographs of a nude model, each in the same pose and with the same background, except as mentioned later. She was sitting upon the floor, her knees raised to about half their complete flexure, her hands clasped below the knees, her back arched; the body appears in each plate in profile. In one photograph her head was also taken in profile, thrown forward, looking straight down between her knees; in the other, the head was raised and turned to the left, the plate taking the face in an exposure of three-quarters or more. A careful comparison of the photographs shows without any doubt that Rochlitz is right when he says that the two plates were taken in immediate succession, without any change, except in the head. He sold a copy of the plate showing the face in profile to Obendorfer, who has exposed it in his private photographic studio ever since; later he sold the plate showing a three-quarters face to Gross, the plaintiff, and gave him possession of the other plate as security; he warranted against any invalidity in his copyright title to the plate sold. The defendants now insist that the sale of what I may call the profile plate put the three-quarters plate into the public domain.

That Rochlitz supposed the two poses to be enough different to be readily distinguished follows from his making them; no other motive can be given. A painter, for example, often makes two pictures from the same model; but there may be great differences between the several positions, sometimes even

between several aspects of the same position. We have nothing to do with the beauty or originality of the artistic purpose; here it is only novelty that counts. Merely trivial variations will not distinguish, it is true; but the head and face are not trivial elements, as, for example, the feet might be, crossed or parallel. It seems to me, therefore, that Rochlitz was entirely successful in what he started out to do, and that he did make two clearly distinguishable and independent poses of the model, each one a separate piece of artistic copyright, each capable of statutory copyright. Hence I overrule the defense based upon the profile photograph called "At Ease."

The proof is insufficient to show that Rochlitz ever sold any copy of "Grace of Youth" before Gross bought it. Rochlitz is himself wholly discredited by his present effort to repudiate the warranty which he gave Gross. Furthermore, it appears that Gross had two large pictures of "Grace of Youth" until after the picture was copyrighted, and Rochlitz says he only made two. The proof of prior publication therefore fails, and the only thing left is the question of damages.

Smith swore that he printed 3,000 of the large and 12,000 of the small photographs. Florence Gross said that she saw six piles of nine inches high, and the plaintiff says that this would equal 6,000. Seligman did not contradict this, although he was called. Under section 25b (2), Comp. St. 1913, § 9546, these numbers would exceed the maximum, but I shall not take them as a basis of damages in any event, as I cannot think it has any relation to actual damages. I shall rather try to estimate Gross' actual damages, without observing the rules of evidence, as though the issue had to be proved like other such issues, and allowing myself considerable latitude in speculation. This is, as I understand the duty laid upon the court by section 25b: In place of the old penalties the court is to estimate damages, but to estimate them within the sums given, without the limitations of usual legal proof. I think the whole course of copyright law shows a recognition of the difficulty of making legal proof of damages, and that, in substituting for rigid penalties the discretionary power of the court, we must assume that a plaintiff should not fail for lack of proof. I must assess the damages, all things considered, by the best inference I can make, even when I cannot have much basis for certainty, even when the plaintiff would fail, were the issue tried before a jury.

Gross says that his first year's sales were between $800 and $900, his second year's between $300 and $400, and his third year's $200, in spite of his spending between $300 and $400 to push the picture. He also says that such a picture was not fugitive, but, when once popular, held its own for some time. I shall assume that he would have had five years' sale after the first $1,000 a year; I shall take his actual sales at $350 the second year and $200 every other, making $1,150 in all. Therefore I find that his damages are represented by $3,850 gross sales. His profits I must estimate; he says that they are hard to state. If I take them at 20 per cent., I shall do as well as the circumstances warrant. Of course, it is a mere speculation; but, if I am right, the statute requires me to make as fair a speculation as I can. Thus his damages would be $770, to which I shall add the extra expense he incurred in pushing his picture unsuccessfully. His damages, therefore, I fix at $1,100, and a decree will go against all the defendants in that sum.

Under section 40 of the act (Comp. St. 1913, § 9561), the court may in its discretion fix a counsel fee, which I do fix at $350, considering the fact that the case has already once been to the Circuit Court of Appeals and has been tried. However, as this is discretionary, I shall add this to the decree only against Rochlitz, Seligman, and the Seligman Company, because the Van Dyk Company, though concededly an infringer, was an innocent infringer, and it does not seem just to me to charge them with that element. I will make the same disposition as to costs.

Mirabeau L. Towns, of New York City (J. T. Walker, of New York City, of counsel), for appellant.

Everett B. Heymann, of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The validity of the copyright of complainant's photograph entitled the "Grace of Youth," and infringement thereof by the photograph entitled "Cherry Ripe," which was made, printed, and sold by the defendants, were established by our former decision in Gross v. Seligman, 212 Fed. 930, 129 C. C. A. 450.

This action is to recover damages for infringement against the appellant and the other defendant as joint and several tort-feasors. Copyright Act, § 25 (Comp. St. 1913, § 9546), provides that any person who shall infringe shall be liable—

"to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court may appear to be just."

What happened here was that defendant Rochlitz made the infringing photograph, defendant Gravure Company printed 16,000 copies, which it sold to defendants Seligman, who themselves sold the copies to the public for profit.

We are somewhat at a loss to understand exactly what appellant's contention is—apparently he advances the proposition that there can be no recovery for damages against an infringer who has not made profits from the sale of the infringing copies.

The District Judge made a careful calculation to determine how many sales of the copyrighted photograph were lost to plaintiff, because of sales of the infringing photograph to persons who would, otherwise, have bought the copyrighted one. He then calculated what net profit plaintiff would have realized on the sales which he would have made, had not the infringing photograph prevented his making such sales. These *lost profits* of the *plaintiff* he found to be the measure of plaintiff's damages. We find nothing wrong about the calculation; indeed, the judge's figures are not attacked.

Why all who unite in an infringement are not, under the statute, liable for the *damages* sustained by plaintiff, we are unable to see. If the court had reached his "estimated" damages (in lieu of actual damages) by finding so much for damages caused by interfering with complainant's sales, and then had found an additional sum representing profits which the infringers made, and then added the two sums together, there might be some force in the argument that this particular defendant, which did not know it was infringing, and merely did the mechanical work of lithographing, for which it was paid in all $125 (indicating presumably a profit of not over $25), should not be charged with any part of the profits the other infringers made. But, on the contrary, the District Judge figured only on the damages to plaintiff, without figuring on profits of any defendant. Therefore, as all united in infringing, all are responsible for the damages resulting from infringement.

The decree is affirmed.

THE TILLICUM.

THE ROSALIE.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916. Order Denying Rehearing, March 6, 1916.)

No. 2616.

COLLISION ⊂=83—STEAM VESSELS IN FOG—VIOLATION OF RULES.

A tug with a tow on her side, extending ahead, came into collision with a meeting steamer in Puget Sound in a dense fog. Both vessels were sounding fog signals. The steamer, on hearing a signal ahead, stopped for a minute and then proceeded, but almost at once reversed on hearing another signal. The only lookout on the tug was in the pilot house. *Held*, that both vessels were in fault; the steamer for not stopping until she ascertained the position of the vessel ahead, as required by the rules, and the tug for not maintaining a proper lookout forward.

[Ed. Note.—For other cases see Collision, Cent. Dig. §§ 156, 167, 175; Dec. Dig. ⊂=83.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in admiralty for collision by the Inland Navigation Company, as owner of the steamship Rosalie, against the towboat Tillicum; the Stimson Mill Company, claimant and cross-libelant. Decree against both vessels, dividing damages, and cross-libelant appeals. Affirmed.

For opinion below, see 217 Fed. 976.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for appellant.

Ira Bronson, J. S. Robinson, and H. B. Jones, all of Seattle, Wash., for appellee.

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

ROSS, Circuit Judge. There is practically no conflict in the testimony in regard to the cause of the collision which occurred between the freight and passenger steamer Rosalie, at the time making her regular night trip southward from Bellingham to Seattle, and the tug Tillicum, having in tow a barge made fast on her port side, and which was proceeding from the Standard Oil dock at the port of Seattle on her usual course towards Marysville, unless it be in respect to the speed of the Rosalie after she entered the heavy fog. The collision resulted in damage to both the libelant and cross-libelant, which was by the decree divided between them; the court having found both vessels in fault.

We think, from the evidence, that the trial court was substantially correct in thus stating the facts:

"The usual speed of the Rosalie was about 9½ knots per hour. She passed West Point Lighthouse about 5:05 a. m. At that time a very light fog prevailed, and the light at West Point was plainly visible. She was giving her regu-

lar fog signals, one prolonged blast of her whistle, at the usual intervals. About three minutes after passing West Point her lookout reported one whistle on the port bow, which was also heard by the mate, then on duty in the pilothouse. The engine was stopped, and the vessel drifted about a minute, and, hearing no further response to her whistle, she started ahead. Then another whistle was heard followed by a danger signal from the tugboat, which was answered by a like signal from the Rosalie. At this time the lights were seen a short distance ahead. The Rosalie, after giving the signal to go ahead, almost instantly gave the order to reverse. The tug Tillicum proceeded on her course in a thick fog which was prevailing. She gave her fog signals at the regular intervals, and as she proceeded along under Magnolia Bluff in the vicinity of Four Mile Rock she slowed down to about three miles an hour and endeavored to locate her position by the echoes from the bluff. After proceeding at this speed for about five minutes, having heard no whistle from other vessels, she got an echo of a long whistle from some object ahead of her. She immediately stopped her engine and drifted until her next whistle was given, when the echo from ahead was repeated, and also a danger signal immediately followed, and her engine was thereupon reversed. While the vessels were in this position the collision occurred. At the time of the collision, A. W. Anderson was master and pilot of the tugboat. Captain Charlesworth was acting as lookout from the pilot house. The scow's bow was from 12 to 30 feet forward of the bow of the tug. The bow of the tug was at least 12 feet forward of the pilot house."

Article 16 of the act of Congress entitled "An act to adopt regulations for preventing collisions at sea" provides, among other things, that:

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." Act Aug. 19, 1890, c. 802, 26 Stat. 326 (Comp. St. 1913, § 7854).

In the present case, when the Rosalie first heard a whistle ahead, her engine was stopped for about a minute, during which time she drifted, and, hearing no response to the whistle she gave, was started forward; but her engine was almost immediately reversed—she having heard another whistle, followed by a danger signal from the Tillicum. In the dense fog then prevailing, the Rosalie, in our opinion, cannot be regarded as having been navigated with caution in being started ahead so quickly without ascertaining anything in regard to the location of the vessel whose whistle she had heard, and therefore violated the express provision of the statute above quoted, and was clearly in fault, whether or not she had theretofore proceeded with proper speed. Had the tug had a proper lookout, properly placed, no one can say whether, even with the bad navigation of the Rosalie, the latter might not have been seen or her whistles heard by the Tillicum, and the collision avoided. It appears that the master and pilot of the tug was navigating her at the time, and that her lookout, Capt. Charlesworth, was in the pilot house with him, where not only the opportunity of seeing and hearing was lessened, but where the attention of both lookout and pilot was liable to be, and may have been, distracted by conversation.

In the case of The Ottawa, 3 Wall. 269, 18 L. Ed. 165, many times referred to with approval, the Supreme Court said:

"Steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. They must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty. * * * Proper lookouts are competent persons other than the master and helmsman, properly stationed for that purpose on the forward part of the vessel; and the pilot house in the nighttime, especially if it is very dark and the view is obstructed, is not the proper place. * * * Lookouts stationed in positions where the view forward, or on the side to which they are assigned, is obstructed, either by the lights, sails, rigging, or spars of the vessel, do not constitute a compliance with the requirement of the law; and in general, elevated positions, such as the hurricane deck, are not so favorable situations as those more usually selected on the forward part of the vessel, nearer the stem. Persons stationed on the forward deck are nearer the water line and consequently are less likely to overlook small vessels, deeply laden, and more readily ascertain their exact course and movement."

And article 29 of the Regulations for Preventing Collisions upon Harbors, Rivers, and Inland Waters (Act June 7, 1897, c. 4, 30 Stat. 102 [Comp. St. 1913, § 7903]), declares:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

We agree with the court below that the vessels in question were equally in fault, and that the damages were properly divided.

It is contended by the appellant that the damages paid for repairs on the Rosalie were excessive, but upon the record we do not think we would be justified in interfering with the amount.

The judgment is affirmed.

Order Denying Rehearing.

PER CURIAM. Upon consideration thereof, it is ordered that the petition, filed March 2, 1916, on behalf of the appellant herein for a rehearing of the above-entitled cause be and hereby is denied. It is further ordered that the decree filed and entered in the above-entitled cause on the 7th day of February, 1916, be and hereby is amended so as to read as follows:

"The judgment of the court below having, according to the oral admission of the respective proctors, included by mistake one-half of the damages to the appellant's tug and tow, will be so modified as to omit therefrom said damages, and, as so modified, the judgment will stand affirmed."

WADE McHENRY LUMBER CO. v. FRANK SPANGLER CO.

(Circuit Court of Appeals, Fifth Circuit. March 6, 1916.)

No. 2830.

1. SALES ⟸421—ACTIONS FOR BREACH BY SELLER—INSTRUCTIONS.
In an action for breach of a contract for the sale of lumber, where there was evidence tending to prove that, after plaintiff was informed that defendant would not comply with the contract, plaintiff could have secured from other parties the lumber required to fill the contract within the time stated in the contract for less than the lumber would have cost if the contract had been performed, the court erred in refusing to charge that, if such was the fact, then plaintiff suffered no legal damage, and could recover only nominal damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1203; Dec. Dig. ⟸421.]

2. SALES ⟸418(7)—BREACH BY SELLER—MEASURE OF DAMAGES.
A seller's refusal to carry out a contract for the sale of lumber entitled the buyer to obtain from other sources such lumber as the seller should have furnished, and to charge the seller with such damages only as with reasonable endeavors and expense it could not prevent in obtaining the lumber.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1188; Dec. Dig. ⟸418(7).]

3. SALES ⟸418(7)—BREACH BY SELLER—MEASURE OF DAMAGES.
Where a contract for the sale of lumber did not call for lumber of special grades, such as the buyer accepted orders for, the cost to the buyer of making purchases to fill such orders did not properly enter into the estimation of the damages to be awarded for the seller's breach, if by the exercise of reasonable diligence the buyer could have obtained such lumber as was called for by the contract.

[Ed. Note.—For other cases see Sales, Cent. Dig. § 1188; Dec. Dig. § ⟸418(7).]

4. SALES ⟸418(7)—BREACH OF CONTRACT—DAMAGES—DUTY TO MITIGATE.
A buyer was under a duty to avoid or mitigate the loss to which the seller's breach of the contract of sale exposed it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1188; Dec. Dig. ⟸418(7).]

5. SALES ⟸418(7)—BREACH BY SELLER—MEASURE OF DAMAGES.
If a buyer had an opportunity to obtain in a nearby market lumber required to fill a breached contract of sale, the measure of damages was the difference between the contract price and the cost of obtaining the lumber from another source, including any additional expense incident to making another purchase, as additional cost of transportation, or interest on the purchase price, if required to be paid sooner than under the breached contract; and if this expense was less than the buyer would have been subjected to if the contract had been performed, it was benefited, instead of harmed, by the breach and could recover only nominal damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1188; Dec. Dig. ⟸418(7).]

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action by the Frank Spangler Company against the Wade McHenry Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

John W. Cutrer, of Clarksdale, Miss., for plaintiff in error.
St. John Waddell, of Memphis, Tenn., for defendant in error.

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

WALKER, Circuit Judge. This was an action to recover damages for the alleged breach of a contract, dated November 5, 1910, for the sale of 2,000,000 feet of "one-inch and thicker liquid amber, commercially known as gum," lumber, "No. 2 common and better, log run," to be cut from first-class logs only, none smaller than 18 inches in diameter, to be of standard lengths and manufactured as the purchaser shall direct, and sawed in such manner as to produce the most red and sap box boards 13" to 18" wide; "1,500,000 feet to be put on stick by June 1, 1911, and the balance by November 5, 1911." The averments of the declaration were put in issue, but it was conceded in the argument of the case in this court that the alleged breach of the contract by the defendants, the plaintiffs in error here, was established by the evidence.

[1] To show that the defendants' failure to comply with the contract caused damage to the plaintiff, the latter introduced evidence tending to prove that, relying on its estimates of the amounts of different grades of gum lumber it would get under the contract, it accepted orders from customers for specified quantities (in the aggregate considerably less than 2,000,000 feet), of some of those grades of gum lumber, and, to fill some of those orders, had to pay more for the lumber the orders called for than that lumber would have cost it if the defendants had complied with their contract, and that, in consequence of its inability to buy from others the particular lumber called for by one or more of those orders, it had to pay damages to the parties to whom it was so obligated. There was evidence tending to prove that after the plaintiff was informed that the defendants would not comply with the contract the plaintiff could have secured from another or others the lumber required to fill the contract, and within the time stated in the contract, for less than the lumber would have cost it if the contract had been complied with. This state of the evidence called for some instruction by the court to the jury as to the rule to be applied by them in ascertaining the amount of damages to be awarded to the plaintiff. The charge which the court gave did not inform the jury how the damages should be measured or ascertained. The evidence as above summarized was such that, in the absence of instruction from the court as to a rule to be followed in determining the amount of damages, it was open to the jury to allow, as the whole or a part of the damages awarded, the amount found to have been paid by the plaintiff to its customers in consequence of their accepted orders for special grades of lumber not being filled, and what it cost the plaintiff to fill other such orders in excess of what that cost would have been if defendants had complied with the contract.

[2-5] An exception was duly reserved to the refusal of the court to give the following special instruction requested by the defendants:

"The court charges the jury that, if they believe from the evidence that the plaintiff could have obtained the lumber to fill the contract at any near or available market, at a less price or at a price equal to that named in the contract within the time mentioned therein, then the plaintiff has suffered no legal damage, and the jury in that event will not return a verdict for anything but nominal damages—which means $1, or some such small sum."

It is to be observed that the contract which the defendants breached called, not for gum lumber of special grades, such as the plaintiff accepted its customers' orders for, but for 2,000,000 feet of gum lumber, of whatever grade within the description "No. 2 common and better, log run," might be produced in sawing, in the way which the contract specified, the kind of timber described in the contract. Each of the purchases the plaintiff made, and also the one it unsuccessfully tried to make, to enable it to fill orders it had accepted for particular grades of lumber, was in material respects different from its purchase from the defendants of 2,000,000 feet of gum lumber, "No. 2 common and better, log run." The refusal of the defendants to carry out their contract entitled the plaintiff to obtain from another source such lumber as the defendants ought to have furnished, and to charge them with such damages only as, with reasonable endeavors and expense, it could not prevent in so obtaining that lumber. What it may have cost the plaintiff to make purchases entirely different from the one evidenced by the breached contract does not properly enter into the estimation of the damages to be awarded, if by the exercise of reasonable diligence the plaintiff could have obtained the lumber as called for by the contract. The plaintiff was under a duty to avoid or mitigate the loss to which the defendants' breach of the contract exposed it. If, as there was evidence tending to prove, the plaintiff was afforded the opportunity of obtaining in a nearby market the lumber as required to fill the breached contract, the proper measure of recoverable damages is the difference between the contract price and the cost to the plaintiff of so obtaining the lumber from another source, including in such cost any additional expenses incident to making another purchase, as, for instance, added cost of transportation, or interest on the amount of the purchase price if required to be paid sooner than the breached contract called for. Grand Tower Company v. Phillips, 23 Wall. 471, 23 L. Ed. 71; Lawrence v. Porter, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167; Borden & Co. v. Vinegar Bend Lumber Co., 7 Ala. App. 333, 62 South. 245. And if the expense of so obtaining from another source the lumber as called for by the contract was less than the plaintiff would have been subjected to if the contract had been complied with, it was benefited, instead of being harmed, by the breach complained of. In that event, while the breach of the contract entitled the plaintiff to a verdict in its favor, only nominal damages were allowable.

The conclusion is that, as applicable to the evidence in the case, the requested charge above set out was a proper one, and that the court erred in refusing to give it.

The judgment is reversed.

HIGGINS OIL & FUEL CO. v. VICTORY CO. et al.*

(Circuit Court of Appeals, Fifth Circuit. March 6, 1916.)

No. 2784.

EASEMENTS ⊂=23—PROPERTY CONVEYED—EXCEPTIONS IN DEED.

A deed described the land conveyed as a lot or parcel containing 19 acres, more or less, and being the north half of the southwest quarter of a described quarter section, excepting from the terms thereof a strip about 30 feet in width along the west line of such premises, "conveyed by me to the parish of C. for a public road," and recited that "the said 19 acres of land" was part of a larger tract therein described. The grantor had made no conveyance to the parish, but the parish by expropriation proceedings had acquired an easement for a public road on the strip mentioned. *Held*, that such strip was not conveyed, especially as the deed indicated an intention not to convey the full 20 acres contained in the described subdivision.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 63; Dec. Dig. ⊂=23.]

Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Suit by the Higgins Oil & Fuel Company against the Victory Company and others. Decree for defendants, and plaintiff appeals. Affirmed.

Will E. Orgain and D. Edward Greer, both of Beaumont, Tex. (S. L. Herold, of Shreveport, La., and F. C. Proctor and Hightower, Orgain & Butler, all of Beaumont, Tex., on the brief), for appellant.

Leland H. Moss, Charles A. McCoy, A. P. Pujo, and W. B. Williamson, all of Lake Charles, La., for appellees.

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

PER CURIAM. This suit, brought by the appellant, Higgins Oil & Fuel Company, asserted a right to a strip of land 30 feet in width and adjacent to the section line and extending across the west end of the N. ½ of the S. W. ¼ of the N. W. ¼ of section 28, township 9 S., range 11 W., in the parish of Calcasieu, La. The asserted right does not exist, unless that strip of land was embraced in a deed of conveyance of Mrs. Lucy H. Yellott to the appellant, a copy of which was made an exhibit to the bill. That deed described the land it conveyed as follows:

"All that certain lot or parcel of land situate in the parish of Calcasieu, state of Louisiana, containing 19 acres of land, more or less, and more particularly described as follows, to wit: The N. ½ of the S. W. ¼ of the N. W. ¼ of section 28, township 9 S., range 11 W., Louisiana meridian, excepting from the terms of this conveyance a strip of land about 30 feet in width along the west line of said described premises, conveyed by me to the parish of Calcasieu for a public road; the said 19 acres of land being a part of that certain 160-acre tract of land patented to me by the United States by virtue of homestead certificate No. 3058, application No. 8485, dated October 15, 1895, recorded on page 330 in Book No. 25 of Conveyances, Records of Calcasieu Parish, Louisiana."

*Rehearing denied April 19, 1916.

Mrs. Yellott, the grantor in that deed, had not in fact made a conveyance to said parish, but some years prior to the date of that deed the parish had, by condemnation or expropriation proceedings, acquired an easement for a public road on the strip of land first above mentioned, which at and prior to the time of such proceedings belonged to Mrs. Yellott.

We are of opinion that the language of Mrs. Yellott's deed to the appellant forbids the conclusion that the strip in question was conveyed by that instrument. The words, "excepting from the terms of this conveyance a strip of land about 30 feet in width along the west line of said described premises, conveyed by me to the parish of Calcasieu for a public road," when considered in connection with other parts of the instrument, we think, put it beyond doubt that the strip mentioned, which was identified by the expropriation proceedings, was excluded from the grant. The land conveyed is so described —in one part of the description being referred to as "containing 19 acres, more or less," and immediately following the excepting clause being mentioned as "the said 19 acres of land"—as to make it unequivocally plain that the whole of the subdivision mentioned, one-half of the S. W. ¼ of the N. W. ¼ of section 28, which subdivision contains 20 acres, was not intended to be conveyed. Furthermore, the language of the deed shows that the grantor was under the impression that the excepted strip had been conveyed by her to the parish of Calcasieu, and that she did not intend the deed to embrace land the title to which she supposed had passed out of her by a previous conveyance. It seems to us that the intent and design of the parties to exclude the strip in question from the grant made is so clearly manifested by the language used as to make palpably untenable the contention that that strip was included in Mrs. Yellott's conveyance to the appellant. See Greenleaf v. Birth, 6 Pet. 292, 9 L. Ed. 132; Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 14 Sup. Ct. 458, 38 L. Ed. 279; Spillman v. Brown (C. C.) 45 Fed. 291; Hall v. Wabash R. Co., 133 Iowa, 714, 110 N. W. 1039.

The decree appealed from is affirmed.

CURRY et al. v. UNION ELECTRIC WELDING CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1916.)

No. 2688.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—TOOL FOR TWISTING WIRE TIES.

The Curry patent, No. 908,649, for a tool for twisting wire ties, claims 2 and 3 are not limited beyond the fair import of their language, and are entitled to a fair range of equivalents. As so construed, *held* infringed.

2. PATENTS ⊂=167(2)—CONSTRUCTION OF CLAIMS—USE OF REFERENCE LETTERS.

The presence of reference letters in a claim is not of controlling effect, as arbitrarily limiting the claim, or as depriving it of the benefit of

equivalents; but where they form the only distinction between two claims, they indicate a narrower scope.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. ⟸167(2).]

3. PATENTS ⟸22—INFRINGEMENT—"EQUIVALENCY."

The word "equivalency," as used in the patent law, is a relative rather than an absolute term. The device of a patent may be the equivalent of that of a prior patent, in such sense as to infringe, while the latter may not be the equivalent of the former, when the second patent is construed as narrowly as it must be.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. ⟸22.

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

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

Suit in equity by John P. Curry and Clifford L. Miller against the Union Electric Welding Company and Jacob J. Urschel. Decree for defendants, and complainants appeal. Reversed.

Samuel Owen Edmonds, of New York City, for appellants.

Almon Hall, of Toledo, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. [1] This is an infringement suit based on patent No. 908,649, issued January 5, 1909, to John P. Curry, for a "tool for twisting wire ties." The District Court thought there was no infringement, and dismissed the bill; complainants appeal. The case is one of those where it is clear enough that the defendants' device departs from the form shown in the patent drawing, and yet where, in a broad sense, there is equivalency. Hence, it is necessary to ascertain whether the patentee's actual improvement in the art was generic enough to cover the defendant's form, and if so, then to determine whether the patentee has, by his claims, imposed or accepted such limitations as negative infringement. The patent in suit was built upon the common idea, most familiar in screwdrivers and drills, that by connecting an outer sleeve and an interior shaft by a screw thread engagement of sufficiently high pitch, a longitudinal motion of the sleeve upon the shaft will cause the latter to revolve, and, of course, its operating end would carry with it, in the revolution, anything with which it engaged and which was free to revolve.

The only earlier application of this idea which needs mentioning—the only one because it is the closest—is in the patents to Cassidy, Nos. 666,514 and 656,513, dated August 21, 1900. These were for use in connection with wire ties for fastening corks into bottles. The tie is a double wire, looped at its center, which thus becomes one end, and then twisted upon itself, and then having, for the remainder of its length, the wires parallel and with free ends. The loop was laid on top of the cork, projecting forward and down over the edge. The twisted wire was passed down behind the cork to a point below a

shoulder on the neck; the free ends of the wire were then brought forward passing on each side of the neck under the shoulder and then were brought together and put up through the loop. At this time, the looped end and the free double end were gripped by Cassidy's tool, which, except as to the head on the inner end of the revolving shaft, was essentially like Curry's. This head consisted of a short arm extending one way at approximately a right angle to the shaft. This bent arm was passed through the loop in the wire, and then the two free ends were caught in a wedge-shaped slot in the end of the arm. In some forms of Cassidy, both the loop and the double end of the wire were held by the head almost or quite together and nearly in the axial line of the shaft; in other forms, they were held both at one side of such line, one a little further away than the other, but close together. The result was that when the shaft was revolved by sliding the sleeve along it, the loop end and the double end of the wire would twist together, and the loop would have a double twist around the free ends. If both were substantially in the axial line of the shaft, they would be left so close together and with such a compound twist as to be difficult to get hold of to untwist; if they were both held on one side of this line, but as near together as illustrated, the untwisting would be difficult and the twisting would be complicated and for some purposes made more or less impracticable by the fact that both wires, instead of merely twisting together, would swing around a circle, and one upon a larger circle than the other. It occurred to Curry that this general plan could be applied to wire ties for the necks of bags holding Portland cement. He proposed to use a single wire tie having a closed eye at each end, and he adapted his twisting tool to this tie by providing at the inner end of the shaft a right-angled arm extending both ways and carrying two hooks, each equally offset from the axial line, and so shaped as to engage the eyes at the end of the wire. It followed that when the tie was put around the neck of a bag and the eyes engaged by the hooks and the shaft revolved, the wire was perfectly twisted, without any of the swinging motion or compound twisting of Cassidy's forms, and the free ends of the wire, each end consisting of an eye, were necessarily left separated from each other the distance which the hooks were apart, and in the most convenient form for untwisting.

The device of the Curry patent rapidly went into general use in cement mills, and to such extent that in the year 1913 it was in use by 80 per cent. of the cement mills in the country, and applied 160,000,000 ties. No other device for this purpose appears to have been commercially known in this particular field until defendant put out its tool. This is the same as Curry's, except that the tie, instead of having an eye at each end, has a head; and the twisting tool, instead of having hooks entering the tie eyes, has in the same location wedge-shaped slots in which the heads enter and by which they are held in engagement while being twisted. For better understanding, we may say that the right-angled arm or cross-bar of defendants' tool carries, at each of its ends, a double claw like the familiar claw hammer, and that these are engaged with the heads of the wire tie just as a claw

hammer surrounds and grips the head of a nail when the nail is passed down to the narrow part of the claw-opening. Plaintiff's and defendants' forms are here illustrated:

Plaintiff's: Fig. 3 of the Curry Patent.

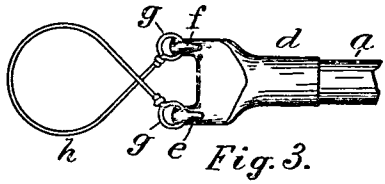
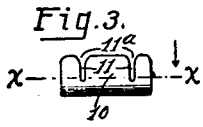
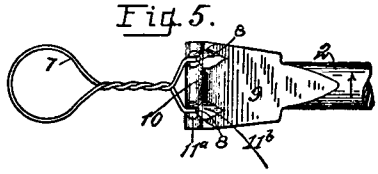


Fig. 3.

Defendant's: Figs. 3 and 5 of the Beam Patent.





The thing which Curry did, as compared with Cassidy, was to provide a tool of this class carrying upon its revolving shaft a crosshead provided, at points opposite each other and equidistant from the shaft's axial line, with means for engaging the two free ends of a wire tie provided with corresponding engaging means. Cassidy fell short of this; and while it now seems a rather obvious thing to space the two engagement points opposite each other and equidistant from the axis for engaging the two free ends of a tie, it never had been done with any closely analogous tool, it simplified Cassidy's tool, it produced a stronger, surer and more accurate twisting, and it left the tie better adapted for untwisting and removing. This was invention, and entitled him to a patent of the scope just stated; but his claims are said to be limited to less than the real invention for the reasons to be mentioned; and the case must turn upon the application of the doctrine of equivalents.

The three claims of the Curry patent, each of which is said to be infringed, are quoted in the margin.[1] In the court below the limita-

[1] "Claim 1. The portable hand tool for twisting wire ties having eyes upon their opposite ends, consisting of the spindle *a* having the spiral body *b* with a handle *c* adapted to rotate the spiral body by a longitudinal movement, the end of the spindle having two recurved hooks *e* and *f* equidistant from the axis of the spindle and at a suitable distance apart to twist the ends of the wire tie and leave the eyes in position for untwisting.

"Claim 2. The tool for twisting wire ties, consisting of the spindle having the cylindrical body *a* and the spiral body *b* with a handle *c* fitted to both bodies, and the head *d* upon one end of the spindle with two hooks *e* and *f* extended in the same direction laterally upon the head, equidistant from the axis of the spindle and at a suitable distance apart to hold the ends of a wire tie in position for untwisting.

"Claim 3. The tool for twisting wire ties, consisting of the spindle having the cylindrical body *a* and the spiral body *b* with a handle *c* fitted to both

tions of the first claim—particularly as imposed during the application—formed the subject chiefly considered; and it was thought the second and third carried the same limitations. From the history of the case, we conclude that the first claim is, as to the form of the "recurved hooks," more limited than either of the others; and as we think the broader claims (in this respect), the second and third, are infringed, it will not be necessary to determine the precise scope of the first. The Patent Office record is peculiar. The first claim, as first presented, was as follows:

"Claim 1—The tool for twisting wire ties, consisting of the spindle having a spiral body with handle adapted to rotate the same by a longitudinal movement, the end of the spindle having two recurved hooks equidistant from the axis of the spindle and at a suitable distance apart to hold the ends of a wire tie in position for untwisting."

The second and third claims were originally in their final form. The only (now material) difference between the original first claim and the second claim is that the first omits the reference letters used in the second and that the first specifies that the hooks shall be "recurved." The examiner, in his first action, required the correction of several errors in the specification, and rejected claim 1 on reference to Cassidy, saying further that "claims 2 and 3 are deemed allowable, subject to the foregoing." It is suggested that this action is also a rejection of claims 2 and 3 upon the same ground; but this is incorrect. It is the fixed practice of the Patent Office not formally to allow any claim until all objections to description or drawings are removed and until all the claims are ready for allowance. Prior to that time, it is customary to indicate that certain claims are allowed or allowable subject to the doing of whatever is necessary to make the entire case ready for allowance; and, in this case, the examiner's language means that claims 2 and 3 are found to be allowable, but cannot be formally granted until the specification has been corrected and until claim 1 is either canceled or put in acceptable form.

[2] Obviously, this action indicates that the examiner considered claim 1 as broader than claim 2, for he would not intend to allow the broader claim and reject the narrower. This inference that the first was broader must have resulted, mainly, on the absence therefrom of reference letters. We have recently had occasion to refer to the effect of such letters, in Houser v. Starr, 203 Fed. 264, 269, 121 C. C. A. 462, and we have given the subject further consideration in this case. We cannot regard their presence or absence as being of any controlling effect. Sometimes, they may have some importance in construction, and sometimes not; just as with reference to the formula "substantially as described." National Co. v. Mark, 216 Fed. 507, 515, 133 C. C. A. 13. The name of a part, as an element of a claim, of necessity carries us to the specification to see what that part is, and

bodies, the head *d* upon the end of the cylindrical body *a* with two hooks *e* and *f* extended in the same direction laterally upon the head equidistant from the axis of the spindle at a suitable distance apart to hold the ends of a wire tie in position for untwisting, and the knob *i* swiveled upon the end of the spiral body *b* for drawing the spindle lengthwise in the handle."

the reference letter in connection with the part does not naturally do more. In either case, the claim refers to the named part, in the form shown in the specification and drawings or in any other form which is the equivalent of the form shown; and in determining equivalency, we cannot, usually, get aid from any supposed limitation arbitrarily to be implied from the use of a reference letter. We are aware that sentences may be found among some of the opinions of the Supreme Court, and, indeed, of this court, which, taken by themselves, imply the existence of such an arbitrary limitation, but in no case do we find this to have been the essential ground of decision or to have been more than a makeweight. In Knapp v. Morss, 150 U. S. 221, 228, 14 Sup. Ct. 81, 37 L. Ed. 1059, it is said that the patent must be restricted to the specific form indicated by the letters of reference, because "otherwise, the effect would be to make the claim coextensive with what was rejected in the Patent Office"; and so it appears there that, as usually, the limitation was in truth imposed by the state of the art and not by the reference letters. So, also, in Ross Co. v. Randall, 104 Fed. 355, at page 359, 43 C. C. A. 578, this court, in an opinion by Judge Day, reviewed some of the cases which touched on the subject, and said:

"An analysis of the cases will show that the conclusion reached depends upon the character of the improvement under consideration."

The case held, in substance, that when the invention has already been decided to be of a very limited character, the use of reference letters may re-enforce that conclusion. In two opinions of this court, written by Judge Taft (McCormick Co. v. Aultman, 69 Fed. 371, 393, 16 C. C. A. 259, and Bonnette Co. v. Koehler, 82 Fed. 428, 431, 27 C. C. A. 200), it is held and reaffirmed that the patentee describing his elements by reference to letters on the drawing does not thereby deprive himself of the benefit of the doctrine of equivalents otherwise applicable to his patent. See, also, National Co. v. Interchangeable Co. (C. C. A. 8), 106 Fed. 693, 715, 45 C. C. A. 544; Kelsey Co. v. Spear Co. (C. C. Pa.), 155 Fed. 976, 980, 981; Walker on Patents (4th Ed.) § 117a.

Rarely, if ever, can a claim using reference letters be saved from anticipation by limiting it to specific form, when the same result would not follow from the mere naming of the part with the implied reference to specification and drawing for identification. To hold that a limitation, beyond what would otherwise exist, is necessarily to be implied from the presence of reference letters, would be so contrary to the underlying principle of interpreting claims by reference to the specification that it cannot be accepted as a general rule. We may add that, just as with "substantially as described," it was, 40 years ago, very common—almost universal—to find reference letters in a claim, while now it is unusual; and it cannot be supposed that patents have grown broader as their number, complexity and refinements have increased. National Tube Co. v. Mark, supra, at page 521 of 216 Fed., 133 C. C. A. 13.

This application, as originally filed, showed an exception, or a possible exception, to the general view just stated. The natural ground

for assuming, as the examiner did, that the first claim was broader than the second, was that the second used reference letters and the first did not. If two claims differ from each other only in this respect, it must be assumed that the letters are intended to imply a smaller range of equivalents than is intended by the claim without the letters; and we may concede that the examiner was justified (as to most of the elements) in taking this view of the first claim. In response to the office action, plaintiff amended his first claim by inserting reference letters, thus making it exactly like the second (save for the addition of "recurved," and the omission of "extending laterally in the same direction"), and then he added the functional reference to use "for twisting wire ties having eyes upon their opposite ends" which is said to limit this claim to the particular form of tool specially adapted to engage with that particular form of tie. At any rate, it is clear that the first claim took such form that it might be narrower than the second, as to the element "hooks." The claim, as so amended, was at once allowed. We see nothing extraordinary, nor, indeed, unusual in this result. The examiner, from the beginning, saw that a claim which covered this tool and not Cassidy's was allowable. He feared, rightly or wrongly, that the language of the original first claim was so vague that it might cover Cassidy's, and so he required some limitation; the plaintiff could not have two claims alike, and so, rather than abandon the first claim altogether and rest the case upon his second, he limited his first claim so as to be not as broad in this respect as the second.

In all this, there is nothing which should limit the second claim beyond the fair import of its words. The second claim is for:

"The head, *d*, upon the end of the spindle with two hooks, *e*, *f*, extended in the same direction laterally upon the head, equidistant from the axis of the spindle and at a suitable distance apart to hold the ends of a wire tie in position for untwisting."

The entire structure thus described in this part of the claim was novel over Cassidy; it is the essential basis for a very successful tool; the "hooks *e*, *f*," are not limited to a recurved form as in the first claim, and as this recurved form was specially intended for engagement with an eye, the hooks, when spoken of without that limitation must be thought of as capable of other engagement also; and for every purpose and every function here important, both in twisting and in untwisting, the engagement of a double claw hook with a head on the wire is the equivalent of the engagement of a single claw hook with an eye on the wire. This is emphasized by the fact that the two forms of tie—with eye and with head—were well-known alternatives before Curry selected one of the forms, and by the further fact that although the tie with the head, the defendants' form, could not be used in the Curry tool constructed as shown in his drawing, because the head would slip off from the hook; yet the Curry tie, the form with the eye, can be used in defendants' tool, since, if the tie just below the eye is passed into the double claw, the base of the eye serves as a head. This method of use is not convenient nor very practical, but that it is possible strongly indicates the essential similarity between the two tools. We are satisfied that claims 2 and 3 are fairly entitled

to such a range of equivalency that defendants' tool, Complainant's Exhibit 5, infringes.

Among the exhibits, we find a tool marked "Defendants' Exhibit 2." We can find no reference to this exhibit in the record, save when it was mentioned by expert witnesses, and we infer that it was a tool constructed only to illustrate a theory. If there were evidence of the making or selling of this form, it would be necessary to decide whether it escaped claims 2 and 3, on the theory that its two hooks did not extend in the same lateral direction from the head, and, if so, then whether it was within claim 1; but, as to these questions, there is neither evidence nor argument, and, as was said in Grever v. Hoffman Co., 202 Fed. 923, 927, 121 C. C. A. 281, it will be time enough to determine such questions, when the device is put into actual use and becomes important enough to justify an infringement suit.

[3] The decision below was in part rested upon the inference to be drawn from the fact that defendants' tool was made pursuant to a later patent granted to one Beam, and it was said that the issuing of the later patent to Beam was either a mistake or a Patent Office decision that the Beam tool did not infringe the Curry patent. In view of what was said on this general subject by this court in Herman v. Youngstown Co., 191 Fed. 579, 584, 112 C. C. A. 185, we infer that the court below thought this case came within the exception suggested in the Herman-Youngstown Case, rather than within the general rule there stated. We are not able to accept that view. If it were to be assumed that the Curry patent was so limited that it could reach nothing except the precise form shown in the drawing or other forms equivalent in every detail and aspect, then it would be true that the later patent could be valid only on the theory that its device was not that kind of an equivalent of the device of the earlier patent; but, obviously, if it is assumed, as we here conclude, that the earlier patent is entitled to a range of equivalency broad enough to reach the later form, the question whether the later form also embodies patentable modification or improvement is quite immaterial. Such confusion as there is on this subject, must come from failing to observe that the word "specific" has only a relative meaning. An invention may be most properly characterized as specific with reference to what has gone before; but if there ever was a specific improvement or construction which was worthy the name of invention and so entitled to a patent, and yet which might not turn out to be relatively generic—and so entitled to the benefit of equivalents—as against some possible future construction, such a case does not readily suggest itself in concrete form; and, at any rate, this is not one. It is a natural thought that if device *b* is the mechanical equivalent of patented device *a* and so infringes, then, because it is the equivalent of what is old in the art, it cannot be patentable, and the finding that it is patentable implies that it is not an equivalent; but this also fails to observe the relative rather than the absolute meaning of equivalency. Its existence depends on its range or scope, and device *b* may be the equivalent of *a*, when the latter is broadly considered, and yet *a* not be the equivalent of *b*, when the latter is defined as narrowly as it must be.

The decree below is reversed and the usual injunction and accounting decree will be entered as to claims 2 and 3. It may be silent, as to claim 1; but since the matter of infringing claim 1 is not decided either way, but is thought to be immaterial, we do not see that the normal disposition of costs should be affected.

Urschel's personal liability has not been considered in the court below or here, and it will be determined by the District Court.

HAMILTON BEACH MFG. CO. v. P. A. GEIER CO.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916.)

No. 2209.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—VIBRATOR.
The Kirby patent, No. 891,776, for a vibrator for movement cure purposes, *held* not anticipated, valid, and infringed.

2. PATENTS ⟸66—ANTICIPATION—PATENTS IN PRIOR ART.
A patent speaks as an anticipation from the date of its issue, and not from the date of filing of the application.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ⟸66.]

3. PATENTS ⟸165—VALIDITY—DUPLICATION OF CLAIMS.
A claim of a patent in suit will not be held invalidated by other claims not in suit, except in clear cases of duplication.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⟸165.]

4. PATENTS ⟸20, 244—INFRINGEMENT—REVERSAL OF PARTS—"INVENTION."
There is no invention in the mere reversal of parts, when the result produced is the same, nor does such reversal avoid infringement.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 20–22, 385; Dec. Dig. ⟸20, 244.
For other definitions, see Words and Phrases, First and Second Series, Invention.]

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Suit in equity by the P. A. Geier Company against the Hamilton Beach Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

This suit involves claims 9 and 13 of patent No. 891,776, granted to J. B. Kirby June 23, 1908, for a "vibrator for movement cure purposes," and now owned through mesne assignments by appellee. Those claims read as follows, viz.:

"9. In vibrators, an electric motor and an applicator having vibratory connection with said motor, in combination with a speed regulator for said motor comprising a brush holder having frictional supporting parts and rotatably supported in respect to the field of the motor to vary the speed of the motor."

"13. In vibrators, a hollow body and an electric motor supported therein, and a shifting brush holder for said motor comprising a rotatable spring support frictionally engaged with said body, in combination with an applicator and a vibratory support for said applicator operatively connected with said motor."

"The general purpose of my invention," says the specification, "is to produce a rotary vibratory movement by simple and durable means comprising in part a yielding fulcrum support for the applicator adapted to minimize friction and wear. A further object of the invention is incorporated in the shifting brush holder adapted to vary the speed of the motor and the vibratory movement of the applicator."

Figs. 1 to 5 of the drawings are herewith reproduced:

Fig. 1.

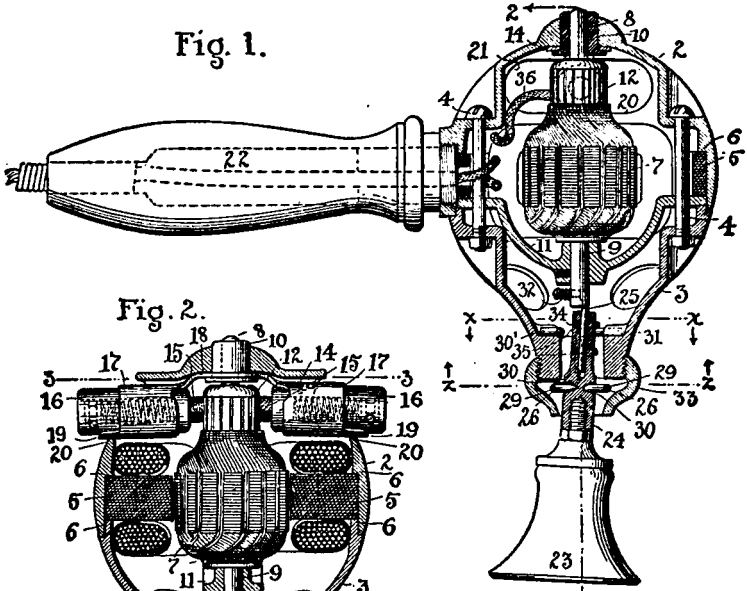


Fig. 2.

Fig. 3

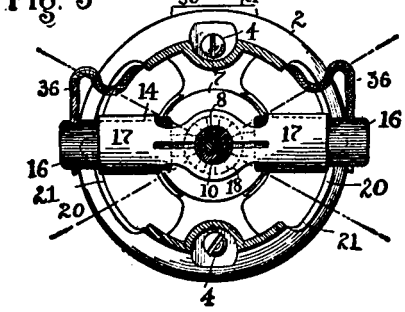


Fig. 4.

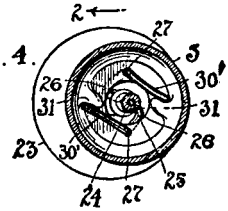
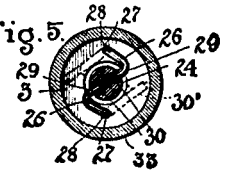


Fig. 5



The specification reads:

"A two-part hollow body is shown which consists of a main section 2 of semi-spherical shape, and an extended section 3 secured thereto by a pair of bolts or screws 4. Main section 2 provides a housing support for an electrical

motor, the field cores *5* of which are clamped between shoulders *6* of the respective body sections when joined together.

"Armature 7 of the motor is supported centrally between the field cores by shaft ends *8* and *9* which have their respective bearings in bushing *10* in main section *2*, and in a cross-piece *11* secured in place between the sections at their joint line and by bolts or screws *4*. The commutator *12* of armature 7 is arranged adjacent to bushing *10*, and said bushing rotatably supports brush holder *14* centrally between its ends and said brush holder has a pair of spring-pressed carbon brushes *15* engaged with the commutator and confined within insulating tubes *16* mounted in the cylindrical brush holder ends *17*. Brush holder *14* is made of spring metal and has a split-sleeved bearing engagement with bushing *10* and also a flat bearing engagement at *18* with body section *2*, and the holder is bent or bowed to maintain frictional engagement at lips *19* of ends *17* against edges *20* of elongated openings *21* within the sides of body section *2*, and through which the brush holder ends extend to be grasped by the fingers of the operator for rotating said brush holder on its axis and in respect to the commutator and the fields, and whereby the speed of the motor is governed and a corresponding change in vibration is obtained. The frictional engagement between the brush holder ends and stationary body section *2* firmly holds the brush holder in any position as set, and the ends are so disposed in respect to handle *22* of the device and in such close relation thereto that the operator may conveniently operate the brush holder with the thumb of the hand grasping the handle. Obviously, this arrangement of a speed-regulating brush holder constructed as a part of the device is of material advantage in giving treatments where the other hand of the operator may be otherwise employed.

"The rotary movement of the motor armature is utilized to impart a gyratory and vibratory movement to applicator *23* and its supporting member *24* by a crank stem *25* secured off center at the end of armature shaft end *9* and inclined axially in respect thereto, but sleeved centrally and axially within tubular supporting member *24*. This result, of course, would not be obtainable without a fulcrum support for said member, and which, in this instance comprises novel means adapted to yieldingly resist end pressure upon the applicator and also lateral pressures upon the same and its support, and whereby friction and wear is reduced to a minimum, thus assuring long life and durability to the device at a point where the strain and wear is greatest. To this end, a pair of fulcrum members *26* are provided which are made of spring wire having a straight middle portion *27* adapted to be rotatably mounted within bores *28* in the tubular end of body section *3* and which members are further provided with angularly bent fulcrum ends *29* adapted to seat at their pointed or rounded extremities in sockets *30* in opposite sides of supporting member *24*. It will be noted also that the angular relation of fulcrum end *29* to the middle portion *27* is such that a lateral pressure upon applicator *23* and its support *24* against the extremities of the fulcrum ends *29* will tend to rotate fulcrum members *26* at their middle portion *27* within bores *28*. This tendency is spring-counteracted by inner right-angled ends *30'* of members *26* which engage at their free ends with lugs or stops *31* integral with the inner wall of section *3*. A yielding play in various directions is thereby given to the fulcrum support *24* which relieves the strain on crank stem *25*, although said stem is also preferably backed up by a spring *32* mounted upon the right-angled end of said stem and bearing against the shaft to yieldingly hold said stem to its seat, and which provides for a limited amount of irregular movement of said stem and prevents rattling and noise. The spring wire for these parts is preferably piano wire of suitable gage, and in practice the construction as described has been found to stand up for indefinite periods without breaking and without appreciable wear and making an ideal fulcrum support for the uses and purposes set forth.

"A screw cap *33* attached to the end of section *3* incloses the fulcrum members and provides a neat finish for the device at this point. Any suitable oiling medium may be employed between the operating parts, but as here shown self-oiling felt washers *34* are used, which are sleeved over tubular member *24* and pressed into a side slot *35* and into engagement with stem *25*. The

electrical connections between the fields and the brushes consist of flexible tinsel cords *36*, and the line connections are made through the hollow handle *22*."

Appellee's expert Geier explains the construction of the motor in suit, the operation and how the movable brush mechanism is made to cause the armature of the motor to rotate at different speeds, as follows, viz.:

"This motor consists of two field cores which are magnetized by coils of wire through which electric current passes, and the armature consists of a metal core or body with numerous slots containing coils of wire, and by the current passing through these coils successively, as the armature is revolved, various sections of this armature are successively magnetized and the shifting of the brushes magnetizes relatively different sections of this armature in relation to the field cores or magnets; or increases or decreases the 'lead' of the commutator with relation to the various sections of the armature. It might perhaps be clearer to state that a given section of the armature can receive its magnetism through the electric current passing through the corresponding coil on the armature, at an earlier or later point in its revolution with respect to the field magnets thereby increasing or decreasing the speed of the armature. The electric current passes through one of the wires, through the coils, around the field magnets, thence through a brush into a section of the armature winding, and out through the other brush. The passage of the current through the coils of the field magnets, magnetizes them, and the passage of the current through a section of the armature magnetizes the armature, whereby the field magnets attract the magnetized armature and pull it around. The different sections of the armature windings end in commutator segments so that as the armature revolves different windings are successively brought into contact with the brushes, thereby shifting backwards the magnetized parts of the armature as the armature rotates forward, so that the field magnets cause a continuous rotation of the armature. Shifting the brushes backwards, against the rotation of the armature, causes a given section of the armature to become magnetized sooner than it would otherwise have done so, and thereby increases the speed of the motor."

The use of brushes in electric motors for varying the speed is concededly old. The means specified in the claims constitute what is claimed as new. Kirby, it is claimed, provided a spring-actuated friction device capable of producing a substantially constant pressure for retaining the rotatable brush holder in adjustable position against the disturbing influence of excessive vibration at the same time affording it almost unlimited adjustments at the will of the operator. This vibratory action is extremely wearing on the machinery and requires simple and strong constructions.

Appellant's vibrator consists of "an electric motor and applicator having vibratory connections with said motor, in combination with a speed regulator for said motor, comprising a brush holder having frictional supporting parts and rotatably supported in respect to the field of the motor to vary the speed of the motor. It also consists of a hollow body or casing which supports the said motor and a shifting brush holder for said motor comprising a rotatable support frictionally engaged with the said body by means of springs in combination with an applicator and a vibratory support for said applicator operatively connected with said motor. The exhibit in question has two brush holders consisting of brass tubes clamped to a fiber washer which revolves about the armature shaft and is frictionally engaged against the top of the casing by two flat springs which are notched or serrated to supplement the friction of the above described washer against the cap. The purpose of the above described rotatable brush holder is to vary the speed of the motor and it does this."

It is charged to infringe claim 9 because it is a vibrator which has embodied in its construction an electric motor, an applicator having vibratory connection with the electric motor and a speed regulator for the electric motor comprising a brush holder rotatably supported in respect to the field of the motor to vary the speed of the motor, the brush holder having a spring member to hold the brush holder in different positions of adjustment, and being frictionally engaged with the body portion to support the brushes in their proper

relation to the commutator of the armature and to prevent these brushes from being rotated while so supported, and at the same time remain in whatever position they may be set without the need of other fastening and to hold the brushes from rotating because of the rotation of the armature or from ordinary handling. "I find [in appellant's device] a black washer," says appellee's expert Geier, "of nonconducting material, probably fiber, supporting two brush holders, said washer being rotatably supported in the hollow body of the vibrator and supported in this position by two flat springs, essentially for the purpose as the construction described in claim 13."

The reason for varying the speed of a motor in connection with an applicator is to vary the number of vibrations. In appellant's vibrator the springs of the brush holder support are stationary as against Kirby's rotatable spring brush holder. The two methods, says appellant's expert Driver, are mechanical equivalents. This admission the expert later sought to modify. Appellant's flat springs are ribbed or serrated as stated above, which fact, he claims, serves to increase the friction of the washer against the cap.

A number of patents were introduced by appellant from the prior art on what may be termed the rehearing. Of these, it will suffice to consider the Slater patent, No. 404,661, dated June 4, 1889, for an electric motor; Pengnet's patent, No. 595,731, granted December 21, 1897, for an electric motor; Wantz patent, No. 742,534, granted October 27, 1903, for a massaging implement; Kimble patent, No. 1,004,437, granted September 26, 1911, for an alternating current motor; and Clark patent No. 854,983, granted May 28, 1907, for a massage machine. Besides these the record contains certain alleged prior uses and devices. Of these, the vibrasage machines, the Victor motor, the Truax-Pfanschmidt vibrators, and the Slater and Farmer patents, so appellee claims, operate with a flexible shaft and are not self-contained in the sense in which Kirby operates, thus avoiding the high vibration. This shaft arrangement presupposes a stationary type of motor and a rotatable instead of vibratory connection between the motor and implement operated, and also freedom from any resultant motion communicated from the implement to the motor.

The record in the case consists largely of affidavits and stipulations entered into by the parties, with a view to settling all the questions between the parties and avoiding future litigation. Thus the court was in possession of all facts deemed necessary for a final disposition. The District Court, on the record as it first stood and as it came to this court in the first instance, found the issues for the appellee. Afterwards, when appellant represented to this court that a large amount of pertinent evidence had been inadvertently overlooked, the District Court at our suggestion reconsidered the case in connection with the later case of Geier Co. v. Julius Andrea & Sons Co. et al., pending in the District Court (no opinion filed), and held that cause in statu quo. All of the pertinent defenses, however, advanced in the later suit, are here presented for determination through stipulations of the parties. That record is before us, invested with the same force and effect as though regularly taken on the first hearing herein.

The errors assigned assail the decree of the District Court on the ground of the alleged invalidity of the patent because of anticipation in the prior art, and want of patentable novelty as being a mere aggregation, and the absence of proof to sustain infringement. Other facts appear in the opinion.

Flanders, Bottum, Fawsett & Bottum, of Milwaukee, Wis. (Charles W. Hills, of Chicago, Ill., and E. H. Bottum and F. E. Dennett, both of Milwaukee, Wis., of counsel), for appellant.

Francis J. Wing and Albert Lynn Lawrence, both of Cleveland, Ohio, for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] An understanding of just what appellee claims as the invention in

suit may serve to simplify the task of unraveling the many apparent snarls in the theories of the parties hereto. It must be borne in mind that the claims in suit cover a combination patent embracing a number of elements, all of which, or their equivalents, are essential.

Considering first claim 13, there is the hollow body, an electric motor supported therein, including the field structure and armature, a shifting brush holder composed of a rotatable spring support frictionally engaged with the body of the device, an applicator, a vibratory support therefor connected up with the motor. Appellee's counsel say in their supplemental brief:

"Kirby found it necessary, for his particular purpose, to augment the normal frictional engagement by laterally acting spring pressure, and such augmented friction without doubt is the intent of his patent."

And again:

"Kirby * * * was the first to equip and manufacture manually operable electric vibrators with the compact frictional or spring retained mounting for the adjustable brushes, whereby the speed of the propelling motor might instantly be varied by the user as conditions required."

Thus it appears that what the patentee claims is a self-contained hand vibrator, in which the brushes are so adjusted with reference to the commutator and other parts as to cause the brushes to bear continuously, under constant pressure, in their adjusted positions until a change therefrom is desirable, against excessive vibrations and other disturbing influences. In this way the operator secures even advancement or backward movement of the brushes. This seems to result from the resilient material and arrangement of the brush holders and the frictional engagement at lips *19* of ends *17* against edges *20* of the elongated openings *21* through which the brush holder ends extend to be grasped by the operator for rotating the brush holder on its axis and in respect to the commutator and the field, whereby the speed of the motor is governed and a change in the vibration is obtained. The specification says, "The frictional engagement between the brush holder ends and stationary body section *2* firmly holds the brush holder in any position as set, and the ends are so disposed in respect to handle *22* of the device" that the operator may move the brush holder with his thumb and employ but one hand in manipulating the vibrator.

The result attained and claimed as new was the even and easy manipulation of the brush holders back and forth across the commutator sections for speed regulation, as against methods in the prior art in which devices are shown for locking, sub modo, the movement of the brushes or retaining them in fixed positions, either arranged beforehand or operated by lever or otherwise into and out of what may be termed locked positions, requiring a step by step advancement or reversal. Thus, in the Slater patent, the adjustment of the brushes is regulated by rotating the brush holder arm, having a series of small cavities on its inner face, against a fixed spring pawl or detent in the frame, which detent is adapted to spring into and out of the cavities as required. Manifestly, the movement of the brushes would, in that case, be a kind of step by step, or articulated or jerky movement, if firm enough to hold against great vibratory action only when the detent

is in the cavities prepared for it. In any case it must lack the even, steady frictional movement of the patent in suit. Then, too, it is capable of acting in only a few—that is, some six—positions, while the Kirby frictional action is continuous throughout the whole range of brush movements. We are unable to say that there is any spring or frictional element in the actuation or movement of the Slater device. Evidently the Slater device has no vibratory connection with an applicator, nor does it appear that it ever went into any appreciable public use. The word "spring" as used in this device does not seem to imply resiliency, since the so-called spring pawl or detent is freed from the cavities through the interior wedging action of the manually operated brush holder arm.

Appellant finds what it considers indications of speed adjustment in the ebonite ring of the Pengnet patent, which rotatably mounts the brushes of the motor in that device. This ring is provided with teeth which mesh with a cogwheel "so that the brushes may be adjusted by turning the cogwheel to rotate the ebonite ring *H*," thereby setting and holding the brushes in their effective positions. It is in no sense a speed regulator. The speed is regulated by a rheostat or a reducing gear. This ebonite ring, together with its connections, constituting the brush adjusting device is contained within the casing and evidently not intended to form a speed regulator. No applicator is shown.

[2] The Kimble patent was granted September 26, 1911, upon an application filed May 15, 1905. While the patent was granted subsequently to that in suit, the application was prior. As we have often held, a patent speaks as an anticipation from the date of its issue and not from the date of filing the application. Both the Kimble patent and the alleged Kimble prior motor show no means for stationing the brushes against rotation other than manual action. The means for altering the speed of the armature consists of a sleeve, rotatable upon a hollow shaft and carrying the brushes which bear upon the commutator.

The Adams-Randall vibrator is not self-contained. Its speed regulating provision is exterior of the case. It consists of varying sets of batteries or resistances which may be cut into and out of circuit. Manifestly it does not anticipate the device of the patent in suit, nor does the Wantz device so anticipate. Louis E. Samms, who is an agent for this latter device, says Wantz never has employed brush shifting apparatus for small motors, and that the brushes were equipped at the factory and made normally inaccessible by the surrounding casing.

[3] We have examined the other patents, prior uses and devices cited, and find none of them to anticipate the device of claim 13 when construed as above stated. Nor do we deem said claim, as construed by us, rendered invalid by reason of the character of the remaining and here unasserted claims of the patent. It covers features not included in any of the other claims. Moreover, we are not disposed to insist on a strict application of the principle invoked, except in cases where there is unquestionable evidence of duplication of claims. Such is not the case here. The same is true of claim 9. It omits the hollow body and the location therein of the motor, and differs from claim 13 in a number of respects, and is, in our judgment, sufficiently distinct from the

remaining claims to escape the condemnation imposed by appellant. It states the concept of claim 13 in a different and modified way. It calls for vibratory connection with the motor and the speed regulating arrangement comprising the brush holder having frictional supporting parts, and rotatably supported in respect to the field of the motor to vary the speed of the motor.

Construed as above, we hold the claims in suit to be valid. The claims contemplate rather elements to effect a definite result than of a specific mechanical form, and should in our judgment be so construed. Appellant's vibrator has appropriated the concept of Kirby as a unitary machine. "The constructions of defendant's [appellant's] vibrators and the vibrator of the Kirby patent in suit are mechanical equivalents for holding the brushes in selected positions of adjustment for the purposes desired," said appellant's expert in an unguarded moment. Notwithstanding the witness' modification of this admission thereafter, the proposition seems to be true. Appellant's two corrugated springs constitute the equivalent of opposing walls of the elongated openings *21* of appellee's device, while the rotatable supporting disc is forced thereby against the recessed casing to frictionally engage the casing throughout all positions of adjustment of the brushes. This affords the frictional engagement intended by claim 9. The corrugations of appellant's device serve little or no other purpose than to increase the friction so as to hold the brushes in any position. The inner frictional bearings of both devices against the interior of the frames, adjacent to the motor shaft, are identical, and the stationary mounting of the springs of both attain the same result. Appellant plainly has the spring-pressed frictional engagement of the brush holder with the casing. These springs with the casing comprise frictional supporting parts as covered by claim 9, and when associated with the insulating disc comprise a rotatable spring support frictionally engaged with the body as covered by claim 13.

Both of the claims may be read upon appellant's vibrator. We regard the rotation of the springs as the equivalent of the stationary mounting thereof in the devices under consideration. Appellant's corrugated springs must be sufficiently resilient to hold the brush holder and its friction disc within its recess in the frame. By bearing upon the brushes, the frictional force of these springs, augmented by whatever of detaining action is produced by the corrugations, affords such frictional engagement on the disc side of the brush holder as will hold the brushes in any position of adjustment.

[4] There is no invention in the mere reversal of parts when the result produced is the same. Adam v. Folger, 120 Fed. 260, 56 C. C. A. 540. Appellee's brushes are mounted upon a rotatable bowed spring which bears against the body or frame laterally for frictionally retaining the brushes in position. Appellant uses two nonrotatable springs which serve to conduct current to the brushes, while at the same time they supply frictional engagement between the annular, rotatable brush holder and the casing of the alleged infringing vibrator. The concept of the latter succeeded and was evidently suggested by the patent in suit. The Kirby vibrator provides a hand supported device with self-contained brush adjustment—self-contained speed controlling means, which, as

above stated, were new with Kirby. This, appellant has appropriated. Its utility the appropriation of the device by appellant serves to concede.

The decree of the District Court is affirmed.

SWINDELL et al. v. YOUNGSTOWN SHEET & TUBE CO.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1916.)

No. 2676.

1. COURTS ⟸290—UNITED STATES COURTS—JURISDICTION—NATURE OF ACTION AND AMOUNT INVOLVED.

Judicial Code (Act March 3, 1911, c. 231) § 24, par. 1, 36 Stat. 1091 (Comp. St. 1913, § 991), provides, relative to the jurisdiction of District Courts, that the provision therein as to the sum or value of the matter in controversy shall not apply to the cases mentioned in succeeding paragraphs. Section 256, par. 5 (Comp. St. 1913, § 1233), provides that the jurisdiction of United States courts of all cases arising under the patent or copyright laws shall be exclusive of the courts of the several states. A bill and answer were in the ordinary forms employed in patent suits, except that the ultimate issue was whether plaintiffs were entitled to damages in the form of fixed royalties, instead of an indefinite sum in the form of profits, and an injunction was prayed restraining defendant from further using infringing furnaces until it should pay plaintiffs such fixed sum. *Held*, that the District Court had jurisdiction, though the sum involved was less than $3,000, as the bill showed that plaintiffs invoked the aid of the patent laws, and the suit might be said to have arisen under those laws.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 832; Dec. Dig. ⟸290.]

2. ACCORD AND SATISFACTION ⟸11(2)—COMPROMISE AND SETTLEMENT ⟸5(2)—PART PAYMENT CONDITIONED ON ACCEPTANCE IN FULL—"LIQUIDATED."

Patentees of an improvement in annealing furnaces constructed and installed furnaces for defendant, for which defendant paid a license fee of $250 each. Thereafter defendant built four additional furnaces, and the patentees presented a bill for royalties thereon at $250 each. Defendant declined to pay until convinced by decree that it was infringing the patentees' rights. In a suit against a third party the patent was subsequently held valid and infringed, and defendant thereafter mailed the patentees a check for the amount of the bill previously presented, with interest, and a receipt for such amount "in full payment," with a request that it be receipted and returned. The patentees retained and cashed the check, but, instead of signing the receipt, sent defendant a new account for royalty at $500 for each furnace, crediting thereon the amount of the check. They claimed that they had seasonably notified defendant's counsel that they had established this fixed royalty fee, but defendant denied that its counsel received this information as its representative, and denied knowledge that the first bill had been canceled or withdrawn until receipt of the new account. *Held*, that there was an accord and satisfaction, as an amount is not "liquidated," within the rule as to accord and satisfaction, unless the amount claimed has been ascertained and agreed on or fixed by operation of law.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 76, 77; Dec. Dig. ⟸11(2); Compromise and Settlement, Cent. Dig. §§ 12, 13; Dec. Dig. ⟸5(2).

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

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3. PATENTS ⟸1—RIGHTS OF PATENTEE—SOURCE.

The patent law is not the source of a patentee's right to fix the price of his patented article, nor of the right to make, use, and vend such article, these being natural or inherent rights of the patentee; but the patent law is the source of his right to exclude others from making, using, and vending such article.

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

4. PATENTS ⟸1—RIGHTS OF PATENTEE—NATURE.

A patentee's exclusive right to make, use, and vend the patented article is a franchise, possessing the qualities and characteristics of property during the life of the patent, and may be dealt with like any other property.

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

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; Wm. L. Day, Judge.

Suit by Edward H. Swindell and others against the Youngstown Sheet & Tube Company. From a decree dismissing the bill, complainants appeal. Affirmed.

Stearns, Chamberlain & Royon, of Cleveland, Ohio, for appellants.

Hine, Kennedy & Manchester, of Youngstown, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This is an appeal from a decree dismissing the bill of complaint. It was agreed by the parties to the suit that the question presented by the appeal could be determined without examination of the pleadings and evidence, and, with the approval of the District Court and in pursuance of new equity rule 77, the parties signed a statement of the case with a view of showing how the question arose and was decided below, setting forth such of the agreed facts as were deemed essential to a decision of the question here, and so the pleadings were not included. Prior to the submission in the court below it was stipulated that the case should be presented there "for final hearing upon an application for injunction upon no other issue except one of accord and satisfaction."

Appellants were seeking to recover $797.18 as a balance of royalties claimed to be due in consequence of alleged construction and use by defendant of four annealing furnaces in accordance with certain letters patent belonging to appellants. From the facts so presented, however, it is uncertain whether the suit was grounded upon the letters patent and alleged infringement, or simply upon the claim for the sum of money stated. Upon the hearing here this uncertainty gave rise to a question of jurisdiction, which resulted in bringing up the pleadings.

[1] The bill and answer are of the ordinary forms employed in patent suits, except that the ultimate issue was whether plaintiffs were entitled or not under the patent to recover damages in the form of fixed royalties, instead of an indefinite sum in the form of profits; and an injunction was prayed restraining defendant from further us-

ing the furnaces in question "until the said defendant shall pay to your orators the said sum of seven hundred ninety-seven dollars eighteen cents ($797.18), additional to the costs herein."

The plaintiffs were entitled to the selection of the laws upon which they would rely to maintain their suit, and we think the bill shows they invoked the aid and protection of the patent laws; indeed, the suit may be said to have arisen under those laws, notwithstanding the fact that definite royalties, instead of profits were made the ultimate object of the recovery. Healy v. Sea Gull Specialty Co., 237 U. S. 479, 480, 35 Sup. Ct. 658, 59 L. Ed. 1056; Geneva Furniture Co. v. Karpen, 238 U. S. 254, 258, 35 Sup. Ct. 788, 59 L. Ed. 1295; The Fair v. Kohler Dye Co., 228 U. S. 22, 25, 33 Sup. Ct. 410, 57 L. Ed. 716; White v. Rankin, 144 U. S. 628, 635, 12 Sup. Ct. 768, 36 L. Ed. 569; Picture Talking Machine Co. v. The Fair, 123 Fed. 424, 425, 61 C. C. A. 58 (C. C. A. 7th Cir.); Dunham v. Bent (C. C.) 72 Fed. 60, 61; Seibert Cylinder Oil Cup Co. v. Manning (C. C.) 32 Fed. 625, 626. It is scarcely necessary to say that such a suit may be maintained for a sum less than $3,000, in view alike of the proviso to the first paragraph of section 24 of the Judicial Code (see also 36 Stat. 1086, 1091, and Judicial Code, § 256, par. 5), and of the rule of decision settled prior to the enactment of the proviso. Miller-Magee Co. v. Carpenter (C. C.) 34 Fed. 433, 434, opinion by Circuit Judge, later Mr. Justice, Jackson, approved in Re Hohorst, 150 U. S. 653, 662, 14 Sup. Ct. 221, 37 L. Ed. 1211; Ames v. Hager (C. C.) 36 Fed. 129, 130; Westinghouse Air Brake Co. v. Great Northern Ry. Co., 88 Fed. 258, 260, 31 C. C. A. 525 (C. C. A. 2d Cir.); Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co. (C. C.) 181 Fed. 974, 977. It follows that the court below had jurisdiction.

[2] Upon the issue of accord and satisfaction the District Court, under the facts there presented, found in favor of the appellee. The patent in suit, No. 624,401, was issued to William Swindell, now deceased, and John C. Swindell, May 2, 1899, for an improvement in annealing furnaces. According to the agreed statement of facts the appellee, prior to 1909, constructed and installed "some of these furnaces," for which appellee paid to appellants a license fee to use the furnaces. This is made clear by certain admitted allegations of the bill and by part of the correspondence. It there appears that the patentees prior to 1910 constructed and installed at the works of appellee three furnaces for which appellee paid "certain fees"; and the correspondence shows that another furnace was constructed later for the appellee, but whether by the patentees is uncertain, though it appears that the royalty paid on that furnace (in February, 1906), and also on the earlier furnaces, was $250 each. In 1909 appellee built four additional furnaces, and the royalties claimed in respect of these are the subject of the present controversy. On February 28, 1910, the patentees presented to the appellee an account against it as follows:

"To royalty on four (4) Swindell patent annealing furnaces @ $250 each, $1,000.00."

This account was presented several times in 1910, once in duplicate, and twice later in the form of "bill rendered." A dispute at once

arose concerning both the validity of the patent and the claim of infringement; the appellee caused tests to be made of the furnaces and the results reported to the patentees; both sides were advised by counsel, the counsel for the patentees concluding that there was, and counsel for the appellee that there was not, infringement; and this was apart from the question of validity. The dispute was continued through correspondence until December 23, 1910, when the appellee declined to pay the license fees, at least until it should be "convinced, either by the decree of the court or otherwise, that we are infringing on any part of their (patentees') rights, as a matter of principle." After that date the patentees instituted an action in the United States District Court for the Western District of Pennsylvania against George Hagen for infringement of the letters patent, where, on August 27, 1912, the patent was held to be valid and infringed (198 Fed. 490), and on April 4, 1913, the decree was affirmed (204 Fed. 442, 122 C. C. A. 628 [C. C. A. 3d Cir.]). On the 15th of July following, the appellee sent a letter to appellants, stating that it understood the patent had been upheld and that it was mailing to them a check "covering your invoice of February 28, 1910, plus interest at 6 per cent. per annum." Inclosed with the letter were the check and a "voucher," the check containing these words and figures:

"For payment of your invoice of February 28, 1910.....$1,000 00
3 years, 4 months, 17 days interest at 6%..... 202 82

$1,202 82"

The accompanying voucher was as follows:

"Received of the Youngstown Sheet & Tube Company twelve hundred two and eighty-two one-hundredths dollars, in full payment of above account. * * * Receipt and return this voucher in envelope provided."

The letter, with the check and voucher, was received by appellants, who cashed the check and retained the money, but did not sign or return the voucher. Correspondence followed, and on the 6th of August the patentees sent another account for royalty on the same furnaces, but at $500 for each, in all $2,000, crediting thereon the amount of appellee's check, $1,202.82, and so leaving the balance, $797.18, now in issue. This was the first presentation of such an account, and it resulted in further dispute between the parties. The reason assigned by the appellants for so increasing the royalty was because of the "extensive litigation" which they had "gone through to establish this patent." They claimed in effect that they had seasonably notified counsel for appellee that they "had established a fixed royalty fee of $500 per furnace." Appellee's version of this is that, if the counsel named was so advised, he "simply accepted this information as information and not in any way as our representative," insisting that the bill it had paid, with interest, was never "canceled or withdrawn" to its knowledge; and so it is not open to fair inference that appellee was even notified of the increase in royalty until it received the new account. It is to be observed that this was after it had mailed its check and voucher to appellants. But, whatever the facts may be as to

notice, it is certain that the parties never agreed upon the new royalty.

It is nevertheless claimed for appellants that the new "license fee" "was liquidated as soon as the complainants made the charge," and consequently that there was "no consideration for the waiver of the balance due." The new license fee, however, could not be liquidated by the act alone of appellants. The word "liquidated," in the sense of the rule relied on by counsel, signifies that the amount claimed has been ascertained and agreed on or fixed by operation of law. Chicago, Milwaukee, etc., Ry. v. Clark, 178 U. S. 353, 372, 20 Sup. Ct. 924, 44 L. Ed. 1099; Redmond v. Atlanta & Birmingham Railway, 129 Ga. 133, 138, 58 S. E. 874; Treat v. Price, 47 Neb. 875, 883, 66 N. W. 834. It is not suggested that the amount was agreed on; and it is not shown how the increased license fee can be said to have been "fixed by operation of law," unless it is meant to ascribe such an attribute as this to the act alone of a patentee in fixing or changing a license fee; but this might as well be said of his act in fixing or changing the price of his patented device—the patented furnace in the present instance.

[3, 4] The patent law is not the source of a patentee's right to fix the price of his patented article, nor of the right himself to make, use and vend the article; these are natural or inherent rights of the patentee. As Judge Denison said, when speaking for this court in Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 584, 112 C. C. A. 185:

"A patent is not the grant of a right to make or use or sell. It does not, directly or indirectly, imply any such right. It grants only the right to exclude others."

And see Bloomer v. McQuewan, 55 U. S. (14 How.) 539, 548, 14 L. Ed. 532; Paper Bag Patent Case, 210 U. S. 405, 425, 28 Sup. Ct. 748, 52 L. Ed. 1122; Fuller v. Berger, 120 Fed. 274, 278, 56 C. C. A. 588, 65 L. R. A. 381; Macomber on Fixed Law of Patents (2d Ed.) 687.

The patent law is, however, the source of the patentee's right to exclude others, and so the entire or partial disposal of this right is involved in any transaction requiring payment of a license fee. This exclusive right is, of course, a franchise, possessing the qualities and characteristics of property during the life of the patent, and may be held and dealt with like any other kind of property belonging to the patentee. Wilson v. Rousseau, 45 U. S. (4 How.) 645, 673, 11 L. Ed. 1141; Hollister v. Benedict Mfg. Co., 113 U. S. 59, 67, 5 Sup. Ct. 717, 28 L. Ed. 901; Bement v. National Harrow Co., 186 U. S. 88 to 90, 22 Sup. Ct. 747, 46 L. Ed. 1058; Dowagiac Mfg. Co. v. Minnesota Plow Co., 235 U. S. 641, 648, 35 Sup. Ct. 221, 59 L. Ed. 398; United States v. American Bell Tel. Co. (C. C.) 29 Fed. 17, 43 (opinion by Circuit Judge, later Mr. Justice, Jackson).

The right, then, of a patentee to select the amount he will charge as a license fee is an incident to his absolute ownership and power to dispose of his exclusive franchise, his property; and, so far as amount of the license fee is concerned, this right cannot be differentiated from

the inherent right of the patentee to fix the selling price of his patented article. Both rights derive their ultimate sanction through acceptance, and consequently in contract or agreement. Macomber correctly states the rule when he says (page 825): "Royalties arise out of contract and agreement." It results that the assertion of a liquidated claim cannot be sustained, and that the rule applicable to the settlement of liquidated claims need not be considered.

What, then, was the effect of the transaction which involved the acceptance of appellee's check, the collection and retention of the money it represented, and the failure to sign and return the voucher? We think Judge Day was right in holding that the transaction amounted to an accord and satisfaction. It is said that when appellee sent its check in July, 1913, there never had been any dispute between the parties as to the amount of the license fee; but according to this record the understood license fee was $250 for each of the furnaces. This was shown, not only by the February account, but also by the previous course of dealing between the parties, already alluded to, in respect of four other furnaces; and if it be assumed that appellee had notice of the purpose to demand an increased license fee, it is a mistake to say that the amount was not in dispute. It is also said that at the time the check was sent there was no "dispute between the parties as to the validity of the patent or the infringement of it"; and yet, in addition to what has already been pointed out, the first assignment of error is based on the claim that the evidence shows that appellee refused to pay the account rendered in February, 1910, "because complainants' patent was not valid, and because the furnaces used * * * did not infringe" the patent. There is nothing to show that these differences between the parties were composed until the check was sent and the money it represented was received and retained as stated.

It is not necessary to consider the effect of appellee's refusal in December, 1910, to pay the invoice of the previous February, since the refusal at last was "until" appellee became "convinced, either by the decree of the court or otherwise," that it was "infringing on any of their rights"; for, conceding that this amounted to a rejection of appellant's offer of February, 1910, the appellee's letter of July 15, 1913, inclosing its check and voucher, was in effect a distinct offer of settlement alike of the claim and the dispute. It was open to appellants to reject this offer, but they could not both accept and reject. The language of the check and that of the voucher plainly disclosed a conditional proposal to make a full and final settlement; and this could not be frustrated simply by presenting a new and enlarged account, with a credit thereon of the amount of the check. The retention of the money was an acceptance of the condition upon which it was tendered. The transaction thus comprised the essential and familiar elements of an accord and satisfaction. United States Bobbin & Shuttle Co. v. Thissell, 137 Fed. 1 and 3, 69 C. C. A. 651, and citations (C. C. A. 1st Cir.), writ of certiorari denied 199 U. S. 608, 26 Sup. Ct. 749, 50 L. Ed. 331; Thissell v. United States Bobbin & Shuttle Co., 157 Fed. 1005, 85 C. C. A. 680 (C. C. A. 1st Cir.); In re D. H. McBride & Co. (D. C.) 132 Fed. 285, 287, 289; Grain & Hay

Co. v. Conger, 83 Ohio St. 169, syllabus, 171, 174, 93 N. E. 892, 32 L. R. A. (N. S.) 380; Richardson v. Taylor, 100 Me. 175, 177, 60 Atl. 796; Nassoiy v. Tomlinson, 148 N. Y. 326, 329, 331, 42 N. E. 715, 51 Am. St. Rep. 695; Canton Coal Co. v. Parlin, etc., Co., 215 Ill. 244, 247, 74 N. E. 143, 106 Am. St. Rep. 162; Jenkins v. Nat. Mut. B. & L. Ass'n, 111 Ga. 732, 734, 36 S. E. 945; Cunningham Co. v. Rauch-Darragh Grain Co., 98 Ark. 269, 273, 135 S. W. 831; Williams v. Bienenzucht, 54 Misc. Rep. 209, 104 N. Y. Supp. 438; Knapp & Co. v. Syrup Co., 137 Mo. App. 472, 478, 119 S. W. 38; Bass Dry Goods Co. v. Roberts Coal Co., 4 Ga. App. 520, 521, 61 S. E. 1134.

Decree affirmed, with costs.

EAID et al. v. TWOHY BROS. CO. et al. *

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

No. 2589.

PATENTS ⊜328—VALIDITY AND INFRINGEMENT—CHOCK ATTACHMENT FOR CARS.

The McConnell patent, No. 901,815, for a chock attachment for log cars, is for improvements only, and in view of the prior art is limited to the precise devices shown and described. As so limited, *held* not infringed by the devices of the Chandler patent, No. 1,066,795.

Appeal from the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

Suit in equity by Clayton T. Eaid and Joseph A. McConnell against the Twohy Bros. Company, the Northwestern Equipment Company, and Elbert G. Chandler. Decree for defendants, and complainants appeal. Affirmed.

Stapleton & Sleight and Joseph L. Atkins, all of Portland, Or., for appellants.

William R. Litzenberg, of Portland, Or., for appellees.

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

ROSS, Circuit Judge. The appellants were complainants in the court below in a suit for the alleged infringement of a patent issued in 1908 to the appellant McConnell—the alleged infringers operating under and in pursuance of a patent issued about five years thereafter to the appellee Chandler. McConnell declared in his patent, among other things, that his invention "relates to logging cars and the like, and more particularly to chock attachments designed to be secured upon a car for the purpose of holding logs or timbers against displacement upon the car. Another object is to provide an adjustable chock, which, when in operative position, is securely held in place and cannot be forced accidentally out of proper position. Another object is to provide novel means whereby chocks can be moved into lowered positions, said means being so disposed that there is no danger of the

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

*Rehearing denied May 8, 1916.

released logs falling upon the operator. Another object is to provide simple means for detachably securing the attachment to a car. With these and other objects in view, the invention consists of certain novel features of construction and combinations of parts," afterwards described in the specifications; the patent concluding with 10 claims.

We see no merit whatever in the contention on the part of the appellants that the patent issued to McConnell was in any respect of a pioneer character, for the record discloses that years before patents had been issued to other persons having the same objects in view, as well as some similar features, and, indeed, that McConnell was compelled by the Patent Office to amend his claims in several respects in order to avoid anticipation and to secure a patent at all. The earliest patent found in the record was issued August 7, 1888, to one Wilbur, who declared therein:

"My invention relates to certain new and useful improvements in devices for holding logs or lumber upon a frame when it is desired in transporting, the same consisting in the construction and combination of the parts, as will be hereinafter fully set forth, and specifically pointed out in the claims. In the accompanying drawings, Figure 1 is a front view of a supporting frame, showing my improvement applied thereto, said frame being supported by a suitable truck. Fig. 2 is a plan view. Fig. 3 is a detail perspective view. Fig. 4 is a detail view of one of the links detached. The frame or support to which my improvement is adapted to be applied may be used in connection either with a car truck for transporting logs or upon a truck for carrying logs to a sawing mechanism in a sawmill.

"*A* refers to a beam, two of which are employed, each being provided on its upper edge with an angle iron, *a*, upon which the logs will rest to hold them from longitudinal movement. The beams are secured to suitable truck frames. *B* and *B'* refer to guide strips, which are secured to the upper and lower edges of the beam *A*, so as to project outwardly therefrom to form slots in which the serrated bars *C* may move vertically. The serrated bar has its ends reduced to lie between these guides and the edge of the beam. The upper edge of this bar *C* is T-headed, the outer flange of which is serrated, as shown at *c*. To the T-head of the bar *C* is secured a sliding block, *D*, one edge thereof being beveled or inclined, as clearly shown in Fig. 1. The sliding block has pivoted to its lower edge, opposite the serrations, a pawl, *e*, which has an inward projection which engages with the serrations *c*, said pawl being held normally against the serrations by a spring, *e'*. The sliding block *D* can be slid or moved upon the serrated bar in one direction by simply pushing the same; but to move it in an opposite direction it is necessary to elevate the pawl.

"Suitably pivoted to the sides of the beam *A* are links *E E*, which are bifurcated at one end, as shown at *f*, and the sides thereof are recessed, as shown at *f'*, so that when they are turned upon their pivots to lie horizontal, as shown in dotted lines, Fig. 1, the connecting bar will lie within said recesses to permit the serrated bar to be depressed sufficiently to allow the sliding blocks *D* to lie on a line or beneath the upper edge of the beam *A*. The connecting bar *F* is pivoted to each of the links and also to a trip rod, *G*. This trip rod is connected to a pivoted bar, *H*, the front end of which is recessed for the reception of the reduced end of the trip rod and within which the said trip rod is pivoted. This bar *H* is provided on its upper edge with a pin, which serves to hold in place a wrench or lever, *I*, for operating the same. The bar *H* is held on a line with the trip rod when the links are elevated, by a spring catch, *h*.

"The attachment hereinbefore described is applied on each side of the beam *A*. When it is desired to hold logs on the beam *A*, the lever or wrench *I* is slipped over the bar *H* to depress the spring *h*, and then by pressing the lever downwardly the parts are caused to assume the position shown in

dotted lines Fig. 1, the sliding blocks *D* being below the upper edge of the beam. Logs are then loaded upon the beams, and the serrated bars are elevated by moving the trip rods and parts connected therewith to the position shown in Fig. 1 in full lines, when the sliding blocks will be moved above the upper edge of the beam and can be slid upon the serrated bar to abut against the logs and prevent them rolling off the beams.

"Having thus described my invention, I claim—

"1. In combination with the beam *A* and serrated bar *C*, provided with adjustable sliding blocks, links pivoted to the beam and connected to each other to be operated simultaneously for elevating the serrated bar, and adjustable block carried thereby, substantially as shown, and for the purpose set forth.

"2. In combination with the beam *A*, guide strips *B B*, *B' B'*, vertical moving bars held by said guide strips and provided with suitable sliding blocks *D D*, links *E*, pivotally secured to the beam *A* and to connecting bars *F*, and the trip rods *G*, pivotally secured to the ends of the bars *H*, the parts being organized substantially as shown, and for the purpose set forth.

"3. In combination with a beam, *A*, a vertically movable serrated bar carrying sliding blocks *D*, links *E*, having the upper portions thereof bifurcated and one of the slides recessed, a connecting bar pivotally secured to said links, and a trip rod for operating the same, substantially as shown, and for the purpose set forth.

"4. In combination with a compound trip rod, *G*, for the purpose set forth, a wrench or lever for moving one of the sections thereof, having a bifurcated head, one member extending beyond the other and curved at its end to operate or depress a spring catch employed for holding the trip rod, substantially as shown, and for the purpose set forth."

In 1889 there was issued to one Thompson a patent for "dog attachment for log cars," in which patent the patentee declared:

"My invention relates to an improved dog attachment for log cars, wagons, sleds of all descriptions, and log decks in saw mills, and has for its object to provide a simple device whereby the logs may be effectually retained in position upon the body of the car or wagon or other log carrier or holder and expeditiously released therefrom at the proper time. The invention has for its further object to provide a series of dogs so arranged that the said dogs may be raised or lowered simultaneously, and wherein the dogs upon either side of the body may be manipulated independently"

—and among the specifications of which patent, referring to the accompanying drawings, there was the following:

"Figure 1 is an end view of a log car having my improvement applied thereto, and illustrating the dog in position to retain the logs upon the car; also illustrating a pivoted dog at one end of the bolster and a rigid dog at the opposite end. Fig. 2 is a side elevation of the bolster illustrated in Fig. 1, showing a dog in position to admit of the dumping of the logs. Fig. 3 is a plan view of the device a slightly modified form of bracket being shown. Fig. 4 is a side elevation of a bolster, illustrating a pivoted dog applied to both ends thereof; and Fig. 5 is a detail view of the manipulating lever and the link connection between the said lever and dog."

The next patent found in the record was issued to one Matheny January 23, 1894, who therein declared his invention to consist "of a new and improved form of bunk for logging trucks. The object is to provide a bunk which may be convenient to load, will hold the logs securely both against rolling off and sliding thereon, and may be easily and safely unloaded. This is secured by the means described in the specification hereinafter" set out, together with accompanying

drawings, in the course of which specifications he stated, among other things that:

"To hold the logs from rolling off sidewise I use chock blocks *C*, or cheese blocks as they are sometimes called. These are adjustable to different positions on the bunks, and may be dropped down level with the top of the bunk, so that the logs may roll off unhindered."

In the subsequent patent issued to one Parsons in 1905, he described his invention as follows:

"This invention relates to means for securing logs, lumber, and like material upon the bolsters of trucks or running gear of cars or wagons used in the hauling of same. The invention aims to provide for ready adjustment of the chock or load retainer upon the bolster, the firm securance of the same in the adjusted position, and its quick release when it is required to unload"

—adding a specific description of the various elements in the form preferred, together with accompanying drawings.

In view of the state of the art as disclosed by the foregoing patents, the contention that the McConnell patent is a pioneer one, and therefore entitled to the broad construction to which the latter are rightly entitled, does not, in our opinion, merit discussion. Being a mere improvement on the prior art, McConnell is only entitled to the precise devices described and claimed in his patent, and if the devices embodied in the Chandler patent can be differentiated, it is clear that the charge of infringement cannot be maintained. Such is the well-established law. Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689; Boyd v. Janesville Hay Toll Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053; McCormick v. Talcott, 20 How. 402, 15 L. Ed. 930.

It is in substance urged on behalf of the appellants that while some of the devices of the Chandler patent may differ in name, form, or shape, they do the same work, in substantially the same way, as similar devices of the McConnell patent, and as they confessedly accomplish the same results, that they are the mechanical equivalents of the latter, and that therefore infringement is established. But we agree with the court below that in at least two respects there is a substantial difference in the operation of the devices of the two patents in question. A careful examination of them and of the drawings respectively annexed satisfies us that the court below correctly described them as follows:

"The McConnell patent consists of two parallel beams, which are disposed crosswise of a car, and are detachably affixed thereto. Between and on the outer side of these beams are arranged rods so disposed as to operate a chock upon the opposite side of the car, so that when the car is loaded with logs the chock may be lowered and thus release the logs, by which they are dumped from the car. Between the beams, and secured to the opposing faces thereof, are combined guiding and stop devices, each of which consists of a face plate having an integral longitudinally extending ratchet bar, and also a longitudinally channeled guide formed integral with the face plate, located above, but beyond, the ratchet bar. Interposed between the stop devices of each pair is a chock consisting of a bowed or curved arm, having trunnions, designed to travel with the guides. Those portions of the trunnions outside of the guides and above the ratchet bars are provided with cam faces, termi-

nating in shoulders, so designed that when the chock is swung upward they turn downward into engagement with the adjoining teeth of the ratchet bar. An arm extends downward from each of the chocks, and pivotally connecting with it is a rod called a link, having a series of apertures any one of which is designed to receive a wrist or pin on the extended chock. From the other side of the car is another rod, which is connected with the shaft by another crank arm, and through the co-operation of these two rods the chock is operated in releasing it for dumping the logs. The crank arms are so arranged or disposed that when the chock is set between the ratchet teeth, in a position for holding the logs, the chock cannot be lowered, when the pressure of the logs is against it, except by pulling the co-operating rods outwardly. The chocks are slidable in the channeled guides, and when lowered may be adjusted to suit the size of the logs being loaded, but not when elevated or locked. The operation for unloading is by a handle on the outer and opposite end of the rods."

The claims of the McConnell patent are 10 in number, the broadest of which are the first and tenth, and therefore they only need be set out. They are as follows:

"1. An attachment for cars comprising parallel beams, means for securing the beams to a car platform, oppositely disposed chocks pivotally and movably mounted between the beams, fixed means for engaging the chocks when elevated only to hold them against sliding movement in one direction, and means carried by the beams for actuating the chocks."

"10. An attachment for cars comprising a chock, stop devices for engagement with the chock when in one position, and means for lowering the chock to disengage it from said devices and for sliding the chock while in lowered position."

In respect to the Chandler patent the court said:

"The Chandler patent has side beams as in the McConnell, secured to the inside of the beams at each end of the bunk, and opposite each other are bracket members, having corrugated or notched upper edges. Beneath the bracket member on one side is hinged a swinging plate, and on the other side a flange-like portion. A chock is provided, having trunnions, movably and changeably mounted in the notches of the bracket members; the upper end of the chock being adapted to project above the top of the beams or supporting surface of the bunk, and the lower end being provided with a lip or flange portion, there being a chock at each end of the bunk. The opposite side of the lower extension of the chock has a cleat which co-operates with the flange portion of the opposite bracket above described. The operation of the chock to hold it in position for receiving the load is effected by means of a rod extending from one end of the bunk to the other underneath the swinging plate; the rod having offset portions, so adjusted with reference to the swinging plate as that, when the rod is turned in one direction, it raises the swinging plate so that the lip on the lower extension of the chock comes into engagement with it, and the chock is held in place against pressure from the load. The rod is provided with a handle for its adjustment, and, when revolved in the opposite direction the swinging member is allowed to drop down, and the chock, being released, falls back, and the load is liberated. The chock can be moved outwardly or inwardly, whether the rod and swinging member are in position for holding the chock in place for receiving the load or not."

To this should be added the further fact, shown by the record, that the chock of the Chandler patent is moved by hand from the bracket seats in which it rests and dropped into others as occasion requires, which is, of course, not a sliding movement.

The chock is one of the important elements of each of the patents, more or less bowed or curved, the function of which is to hold and

release the logs. In the McConnell patent the chocks are operated by means of rods, the ratchet bar and guiding and stop devices, the chocks being interposed between the opposing stop devices and having trunnions, and are designed to travel with the guides, sliding therein. In that patent the chocks are engaged only when elevated; when lowered they may be adjusted to suit the size of the logs being loaded, but not when elevated or locked—the logs being unloaded by means of a handle on the outer and opposite end of the rods.

In the Chandler patent the chocks are mounted in the notches of the bracket members, beneath which, on one side, is hinged a swinging plate, and on the other side a flanged portion; the upper end of the chock being adapted to project above the beams of the bunk and the lower end being provided with a lip or flange. The opposite side of the lower extension of the chock has a cleat which co-operates with the flanged portion of the opposite bracket; the operation of the chock to hold it in position for receiving the logs being effected by means of a rod extending from one end of the bunk to the other, so adjusted with reference to the swinging plate as that, when the rod is turned in one direction, it raises the swinging plate so that the lip on the lower extension of the chock comes into engagement with it, and the chock is held in place against pressure from the load. The rod is provided with a handle, and when revolved in the opposite direction the swinging member is allowed to drop down, and the chock being released falls back and the load is liberated. In the Chandler patent the chock can be adjusted by moving it forward or back, whether in an elevated position or not, and whether the means of engaging the chock are set or not—it being, as already said, movable by hand from one place to another.

It is apparent, we think, that the respective mechanisms for the adjustment of the chocks, and the means for engaging and disengaging them, are substantially unlike.

The judgment is affirmed.

VICTOR TALKING MACH. CO. v. STRAUSS et al.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 140.

PATENTS ⊂=209(1)—RESTRICTIONS ON USE OF PATENTED ARTICLE—VALIDITY OF LICENSE CONTRACTS.

The Victor Talking Machine Company disposes of its machines, parts of which are covered by various patents, under a plan by which, in consideration of a "royalty," the right to use only is granted until the expiration of the patent having the longest time to run, when a licensee who has complied with the conditions becomes the owner of the machine. The terms of such use are defined by contracts and in notices attached to each machine, and are not all the same, as "distributors" and "dealers" are given the right to use only for demonstrating, with the right to convey the right of use to members of the public who pay the stipulated "royalty" for a machine, subject to the condition that it shall remain unaltered and

be used only with parts, records, needles, etc., supplied by the company, which retains the ownership and the right to retake for a violation of conditions until the expiration of the patent period. *Held* that, under the settled rule that the owner of a patent, who manufactures thereunder, may give the right to use the machines to whom he pleases, upon what conditions he may choose, such license contracts are valid and enforceable.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 300; Dec. Dig. ⊂=209(1).]

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 Jesse I. Strauss and others. Decree for defendants, and complainant appeals. Reversed.

See, also, 222 Fed. 524; 225 Fed. 535, 140 C. C. A. 519.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing the bill. Plaintiff is the manufacturer of certain talking machines and sound records, which are covered by patents which it owns. The suit is brought to restrain defendants, who conduct a department store, from selling or offering for sale, or attempting to part with the title and right of possession, of any of plaintiffs' patented talking machines and sound records. The theory of the bill is that defendant has some of these in his possession, having obtained such possession without the assent, direct or indirect, of complainant, and that defendant has no right to dispose of such machines and records without the consent of complainant and upon the terms which it prescribes.

Upon the filing of the original bill motion was made to dismiss it under the new equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), which is the equivalent of a demurrer under the old practice. Judge Augustus N. Hand granted such motion and filed an opinion. (D. C.) 222 Fed. 524. Appeal was taken to this court; we held that even on complainant's own theory, his bill failed to make certain allegations which were essential. The dismissal was therefore affirmed, but with leave to amend. 225 Fed. 535, 140 C. C. A. 519. The bill was then amended by inserting these allegations. Motion was made to dismiss the amended bill and was granted by Judge Hough, who filed no opinion, although he delivered one, orally. From the order of dismissal this appeal is taken.

Frederick A. Blount and Hector T. Fenton, both of New York City, for appellant.

Wise & Seligsberg, of New York City (E. E. Wise, of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). This case presents the familiar one of the manufacturer of a patented article undertaking to extend its use and at the same time regulate the terms and conditions under which it shall be used. It seeks to accomplish this in part by a written contract entered into between itself and

every so-called licensed dealer to whom it delivers the possession of instruments or records. This need not be recited, as in substance it is the same as a so-called "license notice" which is attached to a conspicuous part of every machine. This notice varies only in its statement of the amount of royalty, which of course is different for different types of machine. The notice affixed to every instrument of the type known as Victrola XVI reads as follows:

"This machine is manufactured by us under our patents hereinafter noted, and is licensed for use only for the term of the patent having the longest term to run, and only with sound records, sound boxes and needles manufactured by us; and our records and sound boxes are licensed only for use with our machines. Only the right to use the said machine is granted to Victor distributors and dealers, for demonstrating purposes, with the right to the distributor to assign a like right to regularly licensed Victor dealers at the dealers' regular discount royalty, with the right to the dealers to convey the license to the public to use the said machine only when a royalty of not less than $200.00 shall have been paid, and upon consideration that all the conditions of license shall be strictly observed. A similar right is also granted to the distributor to convey to the public the right to use this machine under the same conditions. No license to use this machine is granted to the public until the full royalty shall have been paid. This machine is not licensed for use for public entertainments for profit; for a license for such public use an extra license fee of ten per cent. (10%) of the full royalty shall be payable. Title shall remain in the Victor Talking Machine Company; also the right to repossess the said patented goods upon the breach of any of the conditions upon the repayment by the Victor Company to the user of the royalty paid by him; less 5% per annum of the full royalty for each year, or fraction of a year that the user shall have had the use thereof. The Victor Company also reserves the right for itself and its representatives to inspect, adjust and repair this machine at all reasonable times while in the possession of the user, and to instruct the user in its use, but assumes no obligation so to do. All patent rights are reserved by the licensor except those hereby granted to the licensees upon the performance of the conditions noted. Any excess use, or violation of the conditions, will be an infringement of the said patents. The patents under which this machine is manufactured and licensed for use are, among others, as follows: [Here follows a long enumeration of the numbers and dates of issues of various patents]; and other U. S. patents under which this machine or parts thereof are manufactured.

"No license is granted to use this machine in any altered or changed condition or with any parts not manufactured by this company. This machine is licensed for use only in the condition, construction and arrangement in which it is put out by us, and any use of this machine, or parts thereof, in any other or altered construction or arrangement, will be construed as a violation of this license. This machine is licensed for use only with needles supplied by the Victor Company; needles will be supplied by the Victor Company, direct to any licensee of any of its patented machines at wholesale price, upon written request.

This license is good only so long as this label remains on this machine; any erasure, alteration or removal of this label, or of any of this company's labels, or marks attached to this machine, will be construed as a violation of this license. This machine, at the expiration of the patent having the longest term to run, under which it is licensed, shall become the property of the licensee (the machine being then free of the patents, the subject-matter of the license): Provided that the licensee shall have faithfully observed the conditions of license, and the Victor Company shall not have previously taken possession of the machine as herein provided.

"An acceptance of this machine is an acceptance of these conditions.

"All rights revert to the undersigned in the event of violation.

"Victor Talking Machine Company,

"August 1, 1913. Camden, N. J."

A somewhat similar license notice is affixed to every sound record or its envelope. A study of these various documents leads to the conclusion that complainant has undertaken to avoid making such a sale of its machine, as would permanently pass it beyond any further control by itself. We think it has succeeded in so doing; this is not a sale outright, or a conditional or restricted sale or any sale at all.

Under the authorities the owner of a patent who manufactures machines under such patent can give the right to use to whom he pleases upon what conditions he may choose to impose. Some of those conditions may involve pecuniary return, such as royalties, rentals for fixed periods, specified lump sum compensation for the whole period. We do not see why he may not give to one person a more restricted right to use than he does to another. The Dick Case, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, establishes the proposition that a restriction to use only with other products of the patentee is legitimate. Of course the giving to any person of a "right to use" things of this sort is an idle thing, unless the person is also supplied with the physical thing to be used, to hold the same while he is enjoying the use and complying with its terms.

Turning now to the license notice. What is granted by the patentee is "only the right to use" the particular machine, unaltered, without parts not manufactured by the Victor Company, maker and owner of the patents, and only with records and needles made by the Victor Company, and to use it only so long as the notice unerased and unaltered remains on the machine. The term for which this right to use is granted is a fixed period "for the term of the patent having the longest term to run"—this term is ascertainable with precision by reference to the notice affixed to the machine which enumerates all the patents.

The character of the use is not the same in all cases.

1. To "Victor distributors" there is given a right to use only for "demonstrating." As the sole result of demonstration is to induce the public to get the machines it may be assumed that these distributors are paid by the Victor Company.

2. To regularly licensed "Victor dealers" there is also given a right to use for "demonstrating" purposes. Sometimes conveyance of such right to use is made directly by the Victor Company, to the licensed Victor dealer. Sometimes the conveyance is made to the "dealer" by the "demonstrator," who by the terms of the notice is expressly authorized to convey such right to the dealer. These dealers, of course, do not use these machines for their personal enjoyment; their demonstrations are given to induce the public to apply for machines and they are paid by a commission on the amount paid by every person who may be induced by them to take one.

3. To the public; i. e., to individuals who wish to use the machines generally. Apparently such conveyances are not made directly by the manufacturer; they are made by "Victor distributors" or by "licensed Victor dealers," who are expressly empowered to make such conveyances. For each one of such machines the person to whom a right

to use the same is granted and a machine delivered, to be by him used, shall pay a lump sum, which varies with the type of machine.

This is called a royalty; in effect it is a payment in advance covering use for the entire term—down to the expiration of the last patent. During such terms the restrictions as to parts, integrity of notice, needles, records, etc., are in force and the manufacturer reserves title in itself. Of course when the patents expire no such restrictions could be maintained and, therefore, when that time comes any licensee (or user) in whose hands a machine may be and who has faithfully observed the conditions, shall receive full title to the same.

The documents are long and complicated, but it seems to us that this is what they provide for. We do not know why, under the law and the authorities a patentee may not thus dispose temporarily of the use and ultimately of the title of a machine made by him and protected by his patent.

The order is reversed.

CINCINNATI BUTCHERS' SUPPLY CO. v. WALKER BIN CO.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1916.)

No. 2666.

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—TILTING BIN.
   The Walker patent, No. 614,279, for a tilting bin, *held* valid and infringed.
2. PATENTS ⊜327—SUITS FOR INFRINGEMENT—AUTHORITY OF PRIOR DECISIONS.
   Numerous and concurring decisions of courts of the same rank in respect to a patent should be followed, unless the evidence to the contrary is of that degree of certainty which amounts to a demonstration.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. ⊜327.]

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

Suit in equity by the Walker Bin Company against the Cincinnati Butchers' Supply Company. Decree for complainant, and defendant appeals. Affirmed.

Heidman & Street, of Chicago, Ill., and Ralph E. Clark, of Cincinnati, Ohio, for appellant.

Ernest Howard Hunter, of Philadelphia, Pa., Guy W. Mallon, of Cincinnati, Ohio, and A. E. Paige, of Philadelphia, Pa., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. [1] Suit on Walker patent, No. 614,279. We are strongly impressed that the claim of the patent is not ambiguous enough to permit it to be read so as not to cover the earlier Carr structure, unless we import into the claim a limitation contrary to the rule

on that subject. We also appreciate the (at least) considerable force in the argument that defendant's axis of oscillation is far enough back from the front edge of the casing so that defendant must have some of that waste clearance space, the avoidance of which was the patentee's declared object in locating his axis as specified in his claim, and likewise in the further argument that defendant's effective counterbalance is largely had by pulling out the bin before tilting. The reported opinions of other courts in former cases do not treat these points as completely as we presume would have been done if those courts had heard the arguments now here made; but the patentee is entitled almost to invoke the rule of stare decisis rather than merely the rule of comity.

[2] The validity of the patent has been many times held or assumed;* and two Circuit Courts of Appeals have found infringement in structures which cannot be substantially distinguished from that of defendant in this case. In the Gloekler Case, in the Third Circuit, the bin was practically identical with the one now involved; and the bin of the Liebe Case, in the Fifth Circuit, is not far removed. We could not acquit this defendant of infringement without finding both of these courts to be in error; but while we doubtless have that power, under Mast v. Stover, 177 U. S. 488, 20 Sup. Ct. 708, 44 L. Ed. 856, yet its exercise could be justified only by that degree of certainty which amounts to a demonstration. We think it is our duty here to adopt the principle declared by Judge Lurton, speaking for this court in Penfield v. Potts, 126 Fed. 475, 478, 61 C. C. A. 371, when he said that "a decent respect for the stability of judicial decisions and the proper regard for the security of property in patents" requires that prior decisions be followed, "unless convinced of a very palpable error in law or fact." Though he was speaking of a former decision of the same court, there comes a time when it must apply to concurring decisions of other courts of the same rank.

The decree must be affirmed; but, the patent having expired, obviously no injunction can issue, and the further proceedings below must be confined to the accounting.

*Walker Co. v. Brown (C. C. Pa.) 110 Fed. 649; Walker Co. v. Miller (C. C. Pa.) 132 Fed. 823; Miller v. Walker Co. (C. C. A. 3) 139 Fed. 134, 71 C. C. A. 398; Walker Co. v. Gloekler (D. C. Pa.), affirmed in 225 Fed. 46; Gloekler v. Walker Co. (C. C. A. 3) 225 Fed. 46, 140 C. C. A. 372; Walker Co. v. Liebe (D. C. La.) 224 Fed. 516, affirmed in 225 Fed. 45, 140 C. C. A. 371; Liebe v. Walker Co. (C. C. A. 5) 225 Fed. 45, 140 C. C. A. 371.

COSS v. DETROIT FORGING CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1916.)

No. 2662.

PATENTS ⊂⊃328—INVENTION—BOW SOCKETS FOR CARRIAGE TOPS.

The Coss patent, No. 1,002,649, for bow sockets for carriage tops, covers specifically the attachment of the spreader members to the tubular sockets by means which were common to devices of that type, and is void for lack of invention.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by James C. Coss against the Detroit Forging Company and H. Scherer & Co. Decree for defendants, and complainant appeals. Affirmed.

Obed C. Billman, of Cleveland, Ohio, for appellant.

R. A. Parker, of Detroit, Mich., for appellees.

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

DENISON, Circuit Judge. Suit for infringement of patent No. 1,002,649, September 5, 1911, to James C. Coss, the complainant below. Infringement was clear; but the District Court held the patent invalid, and Coss appeals.

The bows which support the folding top of a buggy or automobile have downwardly bent tips inserted in the ends of metal tubes which are known as bow sockets. When the top is folded back, these bow sockets approach each other closely, and it is necessary that they be held firmly in the desired relative position. For this purpose, the maker adds what are known as "spreaders" or "separators," which consist of a lug or head attached to the lower side of one bow socket, and a corresponding small socket or pocket oppositely attached to the upper side of the next bow socket, so that when the lug and pocket mutually engage as far as possible, the two bow sockets are barred against further motion towards each other, and are, in large degree, held against relative side motion. At the time of Coss' supposed invention, bow socket separators were well known, in variant forms, and they were attached in different ways to their respective bow sockets. The most common method of attachment was to construct the head half and the socket half of the separator each with a base plate or flange concaved to fit the bow socket, and then to attach this flange to the bow socket with two or four screws through holes punched or drilled through the flange and through the metal tube of the bow socket and passing into its wooden core. What Coss did was to omit this flange and base, make a hole through the center of each half separator and a corresponding hole through the bow socket tube, insert a headed rivet through the holes from inside of the tube, and then upset this rivet on the outside of the half separator, making it flush

either with the top of the head or with the bottom of the socket. After this, he inserted the wooden core. Based on this construction, his patent claimed:

"In a carriage top, a plurality of tubular bow sockets, head and socket members fitted thereon, and rivet members secured to said bow sockets by having their heads disposed within the walls of said bow sockets, and passing axially through and riveted to said head and socket members."

Of course, there was nothing patentable merely in attaching together two parts by rivets instead of by screws, and it would seem that any claim of patentable invention must rest on the axial character of this riveted attachment. It is not impossible that there would once have been invention, depending on the additional cheapness and efficiency to be derived from riveting these separator members at only one spot, and that in their center; but this was not new. Decker, by patent No. 875,052, intended for precisely the same use, used separator members of the same form and fastened them to the bow socket by axial riveting. The only difference was that his axial rivets extend entirely through the bow socket and its core, and the opposite heads of the same rivet attach a head member on one side of the bow socket and a socket member on the other side. Even after Decker, the change from his form to an effective riveting to one wall of a hollow tube so small and so fragile as these bow sockets suggests difficulties which might call for invention in overcoming them, and the first man to do so might receive an appropriate patent; but the record shows that such riveting to such tubes was the commonest expedient. Any part intended for receiving and holding something, as these separator sockets are, and attached to the outside of anything like a bow socket, is properly called a "clip" attached thereto. Clips of other forms are shown riveted to a whip socket, in the Johnson patent, No. 479,811, and to a bow socket, in Lane, No. 550,512; and it is conclusively proved, without attempt to dispute, that clips for holding movable cross-braces had been so riveted to bow sockets for many years before Coss' first construction.

Coss did not make a new combination of elements so as to produce what the law can consider a new result; he took an existing form of spreader, attached and used in its existing location; he did nothing new except to fasten it to its base by a method already common for devices of that type. Perhaps there is no more concretely pertinent authority than Howard v. Stove Works, 150 U. S. 164, 168, 169, 14 Sup. Ct. 68, 37 L. Ed. 1039. See, also, our opinions in Adrian Co. v. United Co., 223 Fed. 342, 345, 138 C. C. A. 604, and Star Hame Mfg. Co. v. United States Hame Co., 227 Fed. 876, — C. C. A. —.

The decree dismissing the bill is affirmed.

HENRY v. CITY OF LOS ANGELES.

(District Court, S. D. California. January 10, 1916.)

No. A-87.

1. PATENTS ⟸178—CONSTRUCTION—"MEANS."

When the word "means" is used in a patent simply to describe connecting parts that bring into working relation the real elements of the machine, it should have the broadest significance in the application of the doctrine of equivalents; but, where the word is used to describe the real working elements of the patent, it must be limited to the disclosures in the patent and to such equivalents thereof as are justified by the relation which the invention bears to the state of the art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. ⟸178.

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

2. PATENTS ⟸178—VALIDITY AND CONSTRUCTION—EFFECT OF USE OR NONUSE OF INVENTION.

The fact that a patented device does not go into instant and general use is at least some evidence that it is not a new and useful invention, and where the device has never been manufactured or used during 10 or more years after patenting, the patent is not entitled to that liberal application of the rule of equivalents to which a patent is entitled where the invention was the first to produce a new and useful result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. ⟸178.]

3. PATENTS ⟸328—INFRINGEMENT—WATER WHEEL GOVERNOR.

The Lyndon patent, No. 695,220, for an electro-mechanical water wheel governor, construed, and *held* not infringed.

In Equity. Suit by George J. Henry, Jr., against the City of Los Angeles. On final hearing. Decree for defendant.

Raymond Ives Blakeslee, of Los Angeles, Cal., for complainant.

Joseph F. Westall and Albert Lee Stephens, both of Los Angeles, Cal., for defendant.

TRIPPET, District Judge. This is a suit in which the complainant claims that the defendant is infringing a patent owned by the complainant and granted to one Lamar Lyndon. The patent was granted for an electro-mechanical water wheel governor. It will not be necessary for the court to describe fully this patent, or the claims made in it. The purposes which were sought to be accomplished by the invention are described in a general way in the first paragraph of the specification, as follows:

"The governors at present employed to regulate the water supply to the water wheel in general simply operate to open or close the water wheel gate, thereby allowing of the admission of a greater or less supply of water. Now, the first effect of such opening or closing of the gate, owing to the inertia of the water, is always the opposite to that which it is desired to bring about; i. e., the opening of the gate operating to momentarily cause less velocity of water at the wheel, owing to the greater orifice the water has to flow through, and, vice versa, the closing of the gate operating to momentarily cause an increase of velocity, owing to the contraction of the orifice. More-

over, these contrary effects will last until the changed conditions can be imparted to the source of supply of water."

Complainant contends that the evidence shows that the defendant is infringing the complainant's patent, and that it is not necessary to resort to the doctrine of equivalents in order to determine this infringement. The complainant contends that the Lyndon patent in controversy is a primary and pioneer patent; that it is so broad in scope and entitled to such broad interpretation that the claims therein may be read upon the structures of the defendant, so as to show infringement regardless of the doctrine of equivalents. The broadest claim in the Lyndon patent is as follows:

"6. In a water wheel governor, the combination with means for operating the water gate in either direction, a by-pass for the water wheel, and a valve controlling said by-pass, of means connected to the water gate operating means, and operating the by-pass valve inversely to the operation of the water gate."

The complainant urges that this claim covers any mechanical means connected with the water gate operating means, and operating the by-pass valve inversely to the operation of the water gate. He contends that the word "means" is so broad in its scope that it embraces any mechanism that will accomplish the result claimed for his patent. In support of this contention complainant cites the Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; Ries et al. v. Barth Manufacturing Co., 136 Fed. 850, 69 C. C. A. 528; Arnold v. Tyden, 193 Fed. 410, 113 C. C. A. 344; Davis Sewing Machine Co. v. New Departure Manufacturing Company, 217 Fed. 775, 133 C. C. A. 505.

In order to understand the Paper Bag Case as it is claimed to apply to the question before the court, we will quote a few sentences from it:

"It may be well before considering these contentions to refer again to the view which the Circuit Court and the Circuit Court of Appeals had of Liddell's patent. The Circuit Court said that the 'pith' of the invention 'is the combination of the rotary cylinder with means for operating the forming plate in connection therewith, limited, however, to means which cause the plate to oscillate about its rear edge on the surface thereof,' and distinguished the invention from the prior art, as follows: 'Aside from the cylinder and the forming plate oscillating about its rear edge everything in these claims [the claims of the patent] is necessarily old in the arts.' It was this peculiar feature of novelty, it was said, which clearly distinguished it from all that went before it. This conclusion was in effect affirmed by the Circuit Court of Appeals. * * * The court, as we have seen, concluded, from the character of the Liddell patent, that 'the second method'—that is, the method of the Continental Company's machine—was *'within the doctrine of equivalents.'* Counsel, however, contends that the Circuit Court, in its decision, virtually gave Liddell a patent for a function by holding that he was entitled to every means to *cause the forming plate to oscillate about its rear edge.* The distinction between a practically operative mechanism and its function is said to be difficult to define. Robinson on Patents, § 144 et seq. It becomes more difficult when a definition is attempted of a function or an element of a combination which are the means by which other elements are connected and by which they coact and make complete and efficient the invention. But abstractions need not engage us. *The claim is not for a function, but for mechanical means to bring into working relation the folding plate and the cylinder. This relation is the very essence of the invention, and marks the advance upon the prior art. It is the thing that never had been done* before, and both the low-

er courts found that the machines of the Continental Company were infringements of it. It is not possible to say that the findings of those courts on that fact or on the fact of invention were clearly wrong, notwithstanding the great ability of the argument submitted against them."

It it plain to be seen, from the quotation made and a careful reading of the Paper Bag Case, that that case is decided upon the doctrine of equivalents. The court gave to the invention a broad interpretation in that regard. All the subsequent cases relied upon are based upon that case, and none of the cases hold what is contended for by complainant. The true interpretation of the word "means," used in the patent, is found in the case of Arnold v. Tyden, supra, wherein the court says:

"Since the decision referred to the Supreme Court, in the Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, has considered the question of functional claims, and held that claims for means are valid *where the specifications clearly disclose the particular means or mechanism having the function indicated in the claims.*"

[1] From these decisions it is plain that, in construing the word "means" in the patent, there are two effects to be given to it. When the word is used simply to describe connecting parts that bring into working relation the real elements of the machine, the word should have the broadest significance in the application of the doctrine of equivalents; but, where the word is used to describe the real working elements of the patent, it must be limited to the disclosures in the patent and to such equivalents thereof as are justified by the relation which the invention bears to the state of the art. If the word "means" in the patent is designed to have a greater significance than the disclosures in the patent—that is to say, the specific device disclosed and the equivalents thereof—then the patent would be for a function. The only way to uphold the use of the word "means" in a patent is to construe it as above stated. Any other construction would make the patent void.

In determining what an equivalent is, we must look at the machines, or their several devices or elements, in the light of what they do, or what office or function they perform and how they perform it. It is not safe to give much heed to the fact that the corresponding devices in two machines organized to accomplish the same result are different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the devices work, and at the result as well as the means by which the result is attained. We should pay special attention to such portions of the device as really do the work, so as not to give undue importance to other parts of the same, which are only used as a convenient mode of constructing the entire device. In this regard it is appropriate to take a general view of the situation and determine the positions occupied by the invention and the alleged infringing device in the state of the art.

The statute requires that every patent shall contain a short title or description of the invention or discovery correctly indicating its nature and design. Lyndon, in complying with this statute, named his

patent "electro-mechanical water wheel governor." The application for this patent was filed September 30, 1900, and it was granted March 11, 1902. In a brief for complainant it is said:

"Lyndon approached many companies manufacturing governors in the attempt to get them to manufacture under his patent, or recognize it, covering a period from nearly four years prior to the grant of the patent up to shortly before the time negotiations commenced with complainant to buy the patent."

[2] These negotiations were shortly before the commencement of this suit. The evidence supports this claim of complainant. Probably the best evidence that a device is for a new and useful invention is that it goes into instant and general use. The fact, unexplained, that a device does not go into instant and general use is at least some evidence that it is not a new and useful invention. There never has been a machine manufactured like that described in this patent. No machine has ever been manufactured under and in pursuance of it. No license was ever issued for any machine to operate under it prior to the commencement of this suit. Since the commencement of this suit licenses have been issued under the patent, but these licenses were issued under such circumstances that they do not carry much weight as to the utility of the invention. The defendant has attacked the patent by expert testimony, and the witnesses testified that the alleged invention of Lyndon is not a practical machine and will not work. The evidence shows, unquestionably, that the Lyndon invention will not work if the mercury cups are used as disclosed in the patent without change.

The defendant's device was installed early in the year of 1909. It is wholly unlike the conception in the Lyndon patent as to the principle of operation and mechanical construction; and this is true, whether considered as a whole, or when separated into elements. It is very much like the machine called in the record the "Bakersfield device." This Bakersfield device was described in a printed publication, namely, the Journal of Electricity, in September, 1897. The defendant's device has been highly successful from the time of its installation, and since then has been actually producing the useful result claimed for the Lyndon patent.

In a brief filed on behalf of complainant it is argued as follows:

"* * * We wish to show to the court a little more particularly that the other prior patents set up, namely, English, Wetmore, Escher-Wyss, and Schaad, were not shown ever to have been put, as to their subject-matter, into practical operation or effect, and are therefore what is known in patent law as mere 'paper patents.'"

The brief in argument states that:

"Such patents reflect nothing more than academic attempts to do something which, as far as the record shows, never was done. * * * It was held in a leading case in this very circuit, by the Circuit Court of Appeals, in an opinion filed October 3, 1910, namely, in Kings County Raisin & Fruit Co. et al. v. United States Consolidated Seeded Raisin Co., 182 Fed. 59, 104 C. C. A. 499, that a patent for the first successful machine to accomplish a new and useful result is not anticipated or limited by a mere paper patent granted years before, although it discloses a theoretically successful machine; such a patent having no place in the prior art."

The brief then quotes from the decision the following:

"The Crosby invention undoubtedly anticipates and describes the whole theory of the Pettit patent, but it does not appear ever to have been put to use, and there is no evidence that any machine was ever constructed under it. It is one thing to invent the theory of a machine; it is quite another thing to invent a successfully operating machine. * * * It is probably unnecessary in this appeal to determine just what effect should be given to the Crosby patent as limiting the scope of the patented invention. It would seem that it was one of those unsuccessful or abandoned inventions which are held to have no place in the art to which they relate. In an analogous case Mr. Justice Brown said: 'His efforts in that direction must be relegated to the class of unsuccessful and abandoned experiments, which, as we have repeatedly held, do not affect the validity of a subsequent patent.' Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118–124, 39 L. Ed. 153. In any view, the Pettit being the first successful machine to accomplish a new result, the claims of the patent are clearly entitled to a broad and liberal construction and to the benefit of the doctrine of equivalence."

The argument thus made by complainant concerning the patents in the prior art applies to the foregoing facts concerning the patent in suit and defendant's device, notwithstanding that defendant's machine has never been patented. The defendant has a successful machine; complainant has a patent on an idea or theory. Under such circumstances complainant is not entitled to that liberal application of the rule of equivalents that a patent is entitled to where the invention was the first to produce a new and useful result.

[3] Shortly after the issuance of the Lyndon patent, a patent was issued upon what, in the argument, was called the automatic control in use by the defendant. This patent upon this automatic control was issued on the 18th day of March, 1902. The issuance of this patent, of course, would not prevent the claim of infringement; but it amounts to a declaration of the patent office that the defendant's automatic control is not an equivalent of the automatic control in the Lyndon patent, and some weight should be given to this interpretation of the patent office. No suit has ever been prosecuted by Lyndon or his successor, except this one, to have it adjudicated that this patent was an interfering patent, or an infringement of the complainant's patent, nor has there been any notification given of his claim. The defendant in this case had a right to assume, by reason of the laches of Lyndon in this regard, that this automatic device was not an equivalent. Aside, however, from these reasons against this automatic device being recognized as an infringement of complainant's patent, I am clearly of the opinion that the two devices are not equivalents.

The complainant argues that the Lyndon patent covers a frictionless type of valve in the by-pass, and asserts that the defendant is infringing that feature of the patent. The Lyndon patent, in the drawing, shows what is known as a "butterfly valve," and in one place in the description of the patent the name "butterfly valve" is used; but nowhere in the claims is there any reference to "butterfly valve," or to a frictionless type of valve. In claims 8 and 9 of the patent a claim is made for "a valve for such by-pass normally held in partly opened position." This is the only claim in the patent concerning the valve. Any valve may be held in partly opened position, and such position

may be the normal position of the valve in the mechanism. In regard to the valve, there is nothing in the description or claims to the effect that any particular kind of valve ought to be used, or that it would be better to use any particular kind of valve. The defendant does not use a butterfly valve, but uses a needle valve in the by-pass, and this needle valve works upon a different principle from the operation of the butterfly valve in the Lyndon patent in this: The butterfly valve is held in partly opened position, so that the water will continually flow past it out of the by-pass, while the defendant's by-pass is normally closed, the needle valve sitting firmly on its seat and only removed to let the water out when necessary to relieve the pressure of the water from the main nozzle upon the water wheel. The butterfly valve in the Lyndon patent, it is said in the description, would be normally half open, so that the amount of water flowing through the by-pass and around the wheel without doing work would be one-half the amount which the by-pass is capable of carrying.

The principle upon which the defendant's device is worked is that no water goes out of the by-pass except to relieve the pressure upon the wheel. The Lyndon patent proposes to control the velocity of the wheel in both directions—that is to say, make it speed up and make it slow down—while the defendant's device primarily is intended only to take the pressure off the wheel, and thereby make it tend to slow down. The defendant's device saves water, while the Lyndon patent continually wastes water. It is argued that the defendant's device, in this regard, is only an improvement upon the Lyndon patent, and this might be well urged if the Lyndon patent claimed a frictionless type of valve. If the defendant's device was manifestly a copy of the complainant's machine, with the exception that the defendant had substituted a dash pot for a solenoid, or a dash pot for a reversible clutch gear, or a needle valve in the by-pass for a butterfly valve, in order to avoid infringement, the court might well look with more favor on the claim that such elements should be regarded as equivalents. But where it is manifest that the whole conception of the alleged infringing device, and all its elements, are different, and where the machines are intended to operate on a different principle, the court could not decide such things to be equivalents without doing violence to the rule of law on the subject.

The complainant has not sustained the claim of infringement. There are other questions of interest in the case, but it is unnecessary for the court to notice them.

The defendant will prepare a decree dismissing the bill, and submit the same to the complainant.

MILLS v. INDUSTRY NOVELTY CO. et al.

(District Court, N. D. Illinois, E. D. January 24, 1916.)

No. 551.

PATENTS ⊂=283(1)—SUIT FOR INFRINGEMENT—DEFENSES.

Granting a valid patent, an infringer is not concerned with the use which the patentee makes of the device, and cannot avoid liability on the ground that he only uses it in connection with an unlawful gambling device, nor on the ground that defendant makes the same use of it, and that therefore complainant is not entitled to recover profits or damages.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452; Dec. Dig. ⊂=283(1).]

In Equity. Suit by Herbert S. Mills against the Industry Novelty Company and others. On motion by complainant to strike paragraph from answer, and motion by defendant for leave to amend answer. Complainant's motion sustained, and defendants' denied.

Plaintiff in this case asks for an injunction to restrain the defendants from infringing letters patent No. 1,027,749. The object of the invention, as stated in the letters patent, "is to provide a construction of annunciator to co-operate with a delivery device for checks, or the like, under the control of the operator, and cause operation of the delivery device to display the amount to be paid, or value, denoted on or by the check." The bill contains the usual allegations.

Paragraph 10 of the answer is as follows: "Defendants deny that the alleged invention set forth in said letters patent is a useful invention; but, on the contrary, defendants aver that the only use to which said alleged invention has ever been applied is an integral part of certain machines of chance which, with the knowledge and connivance of plaintiff, were sold or used or let for hire or on shares to be used solely for gambling purposes, and that the use of all such machines in which said alleged invention has been embodied is against public policy and good morals, and is in violation of the laws of the United States and of the several states thereof; that plaintiff is the president of the Mills Novelty Company (a corporation) of Chicago, Ill., and for and in behalf of said company holds the said letters patent as trustee, the equitable title of said letters patent being in the Mills Novelty Company, and that the only way in which the plaintiff has practiced the alleged invention is by licensing said Mills Novelty Company to embody the same as an integral part of such machines of chance designed and used solely for gambling purposes; that plaintiff in this proceeding merely stands for and represents said Mills Novelty Company; that the purpose of this litigation is to maintain in said Mills Novelty Company the exclusive right to manufacture and control gambling machines embodying the said alleged invention, and that the conduct of said plaintiff in and with respect to said alleged invention is and at all times has been solely that of licensing and encouraging the use of said alleged invention in machines of chance, designed for and used and susceptible of use solely for gambling purposes, and is such that the plaintiff has no right or standing in a court of equity, and no right to demand the relief prayed for in his bill of complaint."

Plaintiff moves to strike from the record this paragraph of the answer. As a counter motion the defendant seeks to amend the answer by inserting a paragraph numbered 10a, as follows: "Defendants further aver that the only way in which defendants have ever practiced their alleged infringement of the pretended invention of said patent No. 1,027,749 is as an integral part of certain machines of chance made, sold, and used, with plaintiff's knowledge, solely for gambling purposes and incapable of any other use; that the profits,

if any, derived by defendants from the alleged infringement complained of are profits made in violation of public policy and good morals, and are of such a character that plaintiff can have no right to recover the same; that as defendants' alleged infringement has consisted solely in the practice of the alleged invention in connection with such gambling machines, a court of equity should not recognize any right (exclusive or otherwise) in plaintiff to manufacture, sell, or use such gambling machines, and defendants therefore aver that their alleged infringement has not inflicted, nor will their continuance of the alleged infringement inflict, upon plaintiff any damages which in a court of equity plaintiff is entitled to recover."

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., for plaintiff.
Peirce, Fisher & Clapp, of Chicago, Ill., for defendants.

CARPENTER, District Judge (after stating the facts as above). I have considered carefully the briefs of the defendants, not having been favored with briefs on the part of the plaintiff. The motion to strike paragraph 10 of the answer must prevail, and leave to amend the answer will be denied.

A patentee's rights are defined in Paper Bag Patent Case, 210 U. S. 407, 28 Sup. Ct. 748, 52 L. Ed. 1122. Granting a valid patent, the right to an injunction against infringement is clear. Granting there is a valid patent in this case, the defendants are not concerned with the particular use which the plaintiff makes of his monopoly. As was said in Fuller v. Berger, 120 Fed. 274, 56 C. C. A. 588, 65 L. R. A. 381:

"Equity is not concerned with the general morals of a complainant; the taint that is regarded must affect the particular rights asserted in his suit. * * * If the defendant can do no more than show that the complainant has committed some legal or moral offense, which affects the defendant only as it does the public at large, the court must grant the equitable remedy, and leave the punishment of the offender to other forums."

It is true in that case Judge Grosscup made a most vigorous dissent, but apparently he became reconciled to the view of the majority of the court, because in the later case of Board of Trade v. L. A. Kinsey, 130 Fed. 507, 64 C. C. A. 669, 69 L. R. A. 59, he concurred in the opinion of Judge Baker, which quoted with approval the above excerpt from the opinion in the Berger Case.

The unlawful conduct of the plaintiff is a collateral issue, and as such does not affect the defendants, and furnishes no grounds for defense. Dr. Miles Medical Company v. Platt (C. C.) 142 Fed. 606 and cases cited. Clearly an unlawful use of a device made by its patentee can given no license to the general public to infringe the patent by the construction of a device which is used in legitimate trade. The motion to strike paragraph 10 will be allowed.

As to the proposed amendment to the answer: The defendants admit that their infringement of the plaintiff's device is in violation of the public policy of the United States and the various states of the Union, and is unlawful, and claim, therefore, that the plaintiff should not share in any profits arising from an unlawful act. This is not a suit between persons in pari delicto; this is not a suit where the plaintiff and defendant have been jointly interested in a violation of the

law. If the defendants have in fact infringed the plaintiff's patent, they must account for their profits, whether or not their use of the patent was legitimate or illegitimate.

If full effect is given to the defense set out in the proposed amendment to the answer, it would amount to giving the public generally a license to manufacture these gambling instruments, instead of restricting the unlawful use to the plaintiff. So far as the general public is concerned, it will be much better off if the manufacture is limited to the plaintiff. If the plaintiff is violating the law, he can be punished in the proper forum. If the state of Illinois and the government of the United States have seen fit to permit the manufacture of gambling devices under this patent, it is not for the defendants to say that they can infringe upon the plaintiff's monopoly without making lawful compensation.

The defendants, admitting their own wrong, seek to avail themselves of the plaintiff's rights, because they say the plaintiff has never used his patent, except to manufacture a gambling instrument. The defendants' position is more unmoral than the plaintiff's. The plaintiff had a lawful right to manufacture under his patent. He exercised that right to make a device to be used in violation of the law. The defendants admit (arguendo) that they have not only violated the same law by manufacturing the gambling instruments, but also that they have unlawfully infringed upon the exclusive rights of the plaintiff. Such a defense should not be permitted, and leave, therefore, will not be granted to the defendants to amend the answer, as indicated.

Nothing herein is intended to prevent the defendants from making a general denial of the utility of the plaintiff's invention.

In re LESLIE & GRIFFITH CO.

(District Court, D. Massachusetts. January 6, 1916.)

No. 21766.

1. BANKRUPTCY ⟸318(4)—CLAIMS ALLOWABLE—DEBTS ACCRUING SUBSEQUENT TO FILING OF PETITION.

Assuming that a common-law assignment by a bankrupt, including the bankrupt's rights in a lease, constituted a breach of a covenant in the lease not to assign, and afforded ground for the lessor to re-enter and terminate the lease, the lessor's claim for damages claimed to have been caused by this breach was not provable, where, at the time of the filing of the petition, it had not re-entered and terminated the lease, and it was not certain whether it would waive the breach occasioned by the assignment and continue the lease, or elect to regard the lease as broken and retake possession, as the claim was not an existing debt at the time the petition was filed, but arose, if at all, out of the subsequent act of the lessor in terminating the lease.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 482; Dec. Dig. ⟸318(4).]

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2. BANKRUPTCY ⟸318(1)—CLAIMS ALLOWABLE—AGREEMENTS TO TAKE EFFECT UPON BANKRUPTCY.

It is doubtful how far a person may make contracts contingent on his own bankruptcy and intended to affect in such event the distribution of his estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸318(1).]

In Bankruptcy. In the matter of the Leslie & Griffith Company, bankrupt. On review of orders of the referee. Orders affirmed.

David Stoneman, of Boston, Mass., for creditor.
Isaac Harris, of Boston, Mass., for trustee.

MORTON, District Judge. These three certificates from Mr. Referee Darling present the following case:

The Ratshesky Estate Trust offered for proof against the bankrupt a claim for $225,500. It was objected to by the trustee, and after full hearing was disallowed by the referee. The first certificate brings up for review that decision.

Following the disallowance of the claim, the referee ordered a 10 per cent. dividend. If this dividend be paid, not enough will be left in the estate to pay a similar dividend upon the Ratshesky claim, if it should finally be allowed. The referee declared the dividend without giving to creditors 10 days' notice of his intention to do so. The claimant contends that under Bankr. Act July 1, 1898, c. 541, § 58 a (5), 30 Stat. 561 (Comp. St. 1913, § 9642), such notice was required, and that because of the lack of it the dividend in question was not properly declared. Upon petition of the claimant these questions have been certified by the referee, and form the subject-matter of his second certificate.

The claimant also requested that the trustee be directed to take review of the dividend order for the purpose of raising the same questions, and that, in the event of his refusal to do so, the claimant be authorized to take such action in the name of the trustee. The referee refused so to direct the trustee. The claimant petitioned for review of such refusal; and this constitutes the subject-matter of the third certificate.

It is evident that the basic question is whether the petitioner's claim ought to have been allowed. If the referee was right in disallowing it, the petitioner has no standing to object to the proceedings in reference to the dividend, or to the refusal to order the trustee to take review of those proceedings. No objection to the dividend is made by the claimant in respect to so much of its claim as was allowed.

[1, 2] The facts in reference to the disallowed claim are not seriously in dispute; they are fully stated in the certificate of the referee, whose findings are hereby confirmed. If it be assumed, as the claimant contends, that the common-law assignment, which included the bankrupt's rights in the lease, constituted a breach of the covenants of the lease, and afforded ground for the lessor to re-enter and terminate it, the lessor, as the referee finds, did not do so before the petition in bankruptcy was filed, and apparently not afterwards. (Report,

pages 4 and 6.) At the time of such filing it was uncertain whether the lessor would waive the breach occasioned by the assignment and continue the lease, or whether it would elect to regard the lease as broken and would retake possession of the demised premises. The claim in question was not, therefore, an existing debt at the time when the petition was filed, but has arisen, if at all, out of a subsequent act of the lessor in terminating the lease. There is, I think, a tendency to restrict the right of persons to make contracts, contingent upon their own bankruptcy, and intended in the event of it to create claims against the estate. Upon the decisions in this circuit the learned referee was clearly right in holding that the claim was not allowable. Slocum v. Soliday, 183 Fed. 410, 106 C. C. A. 56; Wm. Filene's Sons Co. v. Weed et al., Receivers, 230 Fed. 31, — C. C. A. — (C. C. A. 1st Cir. December 9, 1915); Cotting v. Hooper, Lewis & Co., 220 Mass. 273, 107 N. E. 931.

I doubt whether the damages which formed the basis of the claim can properly be said to have been caused by the breach of the covenant not to assign; but as what has been said is sufficient to dispose of the matter, it is not necessary to decide that question.

As the claim was properly disallowed, it follows that the petitioner has no standing to object to the dividend order, nor to the refusal of the referee to order the trustee to take review of the dividend order, or to permit such review to be taken by the claimant in the trustee's name.

The several orders of the referee from which review was taken are affirmed.

TOMLJANOVICH v. VICTOR-AMERICAN FUEL CO.

(District Court, D. Maine. February 14, 1916.)

No. 350.

NEW TRIAL ⊂=102—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

On a motion for a new trial, in an employé's action for injuries, on the ground of newly discovered evidence, defendant filed affidavits stating that P., a witness for plaintiff, told the affiants that he had made a statement to defendant regarding the accident, but that he was going to go with the other side, because he could get more money out of the other side. Though these affidavits were taken immediately after the trial, no satisfactory reason for not interviewing the affiants before the trial was given, and, though defendant claimed to have been surprised by P.'s testimony, it did not make any suggestion of surprise and ask for further delay at the trial. *Held*, that defendant had not met the burden of showing due diligence in the production of the alleged newly discovered evidence, especially as the evidence was of an impeaching character.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210–214; Dec. Dig. ⊂=102.]

At Law. Action by Paul Tomljanovich against the Victor-American Fuel Company. On motion by defendant for a new trial on the ground of newly discovered evidence. Motion denied.

For opinion on motion to set aside verdict, see 227 Fed. 951.

George C. Wheeler, of Portland, Me., and A. T. Hannett, of Gallup, N. M., for plaintiff.

Caldwell Yeaman, of Denver, Colo., and Frederick W. Hinckley, of Portland, Me., for defendant.

HALE, District Judge. This case is now before the court upon the motion of the defendant for a new trial, on the ground of newly discovered evidence.

On December 4, 1915, this court passed upon a motion of the defendant to set aside the verdict, for the reason that it was against the weight of evidence, and that the damages were excessive. The court held that the verdict should not be allowed to stand for more than $15,000, and that, unless the plaintiff would remit all over that sum, a new trial would be granted. The plaintiff did remit all over $15,000.

The motion now before the court is based in part on matters which have already been considered; but it may be treated as a motion for a new trial on the ground of newly discovered evidence.

Among the affidavits now filed by the defendant is that of Robert Pritchard. Pritchard says that he was working in the Navajo mine a short time before Tomljanovich was injured; that on that day he was assisting a man by the name of Liberati to put a sheave wheel on the track in the second dip off the third east entry; that a day or two prior to the day of the injury he was in the mine in company with the general superintendent and the local superintendent; that before he left the company he discussed in a general way with Patero the accident to Tomljanovich; that Patero told him that he had formerly made a statement to the company regarding the accident, but that he was going to "buck the company and go with the other side, because he could get more money out of the other side."

Other testimony of a similar character is offered by means of affidavits, tending to impeach an important witness at the trial of the cause. This witness, Patero, was a rope rider on the car by means of which the plaintiff received his injuries. Due diligence would ordinarily require the defendant to produce him at the trial, unless a sufficient reason were shown for his nonproduction. The defendant urges that Patero gave a statement to the company vitally different from his testimony to the jury, and that such statement caused the officers of defendant company to believe that Patero would not be a witness against the company. This matter was a subject of inquiry at the time of the trial.

In the affidavit now before me Patero denies that he made such statements as Pritchard says he made; he denies the truth of all the impeaching testimony now produced. Immediately after the trial to the jury the affidavits of Pritchard and of others were taken.

Upon the whole evidence the defendant, I think, has not met the burden of showing that it has used due diligence in producing the testimony at the trial which it now produces on this motion.

If it was surprised at Patero's testimony before the jury, it could at least have made a suggestion of surprise and asked for further delay.

In Carr v. Gale, Fed. Cas. No. 2,433, 1 Curt. 384, Mr. Justice Curtis says:

"A party cannot be allowed to wait and take his chance of a verdict in his favor and, when it is against him, allege surprise. It is then too late. * * * It cannot be considered as the use of due diligence to suffer the trial to proceed, and after a verdict against him, proceed to make the inquiries which he might and ought to have made before."

The testimony now brought before me by affidavits is impeaching testimony; its truth is denied by Patero. The federal courts have not generally set aside verdicts on testimony, subsequently submitted, impeaching the credibility of a witness. United States v. Potter, Fed. Cas. No. 16,077, 8 McLean, 182.

The witnesses who have given their affidavits touching this impeaching testimony have said that they had "recently been seen" by agents of the defendant. They were seen immediately after the trial. No reason satisfactory to the court is given for not interviewing them before the trial. There is not sufficient in the testimony to affirmatively prove due diligence on the part of the defendant.

I am constrained to find, then, that the defendant has not met the burden of showing due diligence in the production of testimony at the trial which is now offered by affidavits.

Upon this motion other affidavits are offered presenting cumulative evidence, and evidence which manifestly could, by due diligence, have been produced at the trial. I think I need not consider these other affidavits in detail.

The motion to set aside the verdict on account of newly discovered evidence is denied.

O-SO-EZY MOP CO. v. CHANNELL CHEMICAL CO.

(District Court, S. D. New York. July 7, 1915.)

1. PLEADING ⊂=313—BILL OF PARTICULARS—INFORMATION WHICH MAY BE REQUIRED.

While a party will not be compelled to furnish the names of its witnesses or its evidence in a bill of particulars, it will be required to furnish information as to matters forming a substantial part of the material facts, including facts not directly in issue, but the existence or nonexistence of which is relevant to the existence or nonexistence of the facts directly in issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 949; Dec. Dig. ⊂=313.]

2. PLEADING ⊂=320—BILL OF PARTICULARS—INFORMATION WHICH MAY BE REQUIRED.

While, on an application for a bill of particulars, facts should not be required which are within the knowledge of the moving party, if the facts relied upon are really thus known, this is not true when it is not known what are the facts which the party of whom the information is sought proposes to show, as where defendant in its counterclaim alleged the making of derogatory statements concerning it by plaintiff, in which case plaintiff did not necessarily know what statements defendant might claim were made, who made them, or whether the person charged with making them was an authorized representative of plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 972; Dec. Dig. ⊂=320.]

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3. PLEADING ⟸326—BILL OF PARTICULARS—ADDITIONAL BILLS.
An objection to the furnishing of a bill of particulars concerning defendant's counterclaim, on the ground that it might thereby be precluded from proving facts subsequently discovered, could be obviated by applying for leave to file an amended bill of particulars, so as to include any such new facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 990–992; Dec. Dig. ⟸326.]

At Law. Action by the O-So-Ezy Mop Company against the Channell Chemical Company. On motion for a bill of particulars respecting defendant's counterclaim. Motion granted in part.

Kenyon & Kenyon, of New York City, for plaintiff.

Howson & Howson, of New York City (Charles W. Hills, of Chicago, Ill., of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. [1] It is well settled that a party will not be compelled to furnish the names of its witnesses or its evidence in a bill of particulars. But the very function of a bill of particulars is to apprise the moving party of the ultimate facts upon which the other party proposes to rely without furnishing the mode of proof. The English case of Marriot v. Chamberlain, L. R. 17 Q. B. D. 156, cited by the plaintiff, very clearly sets forth what is proper to require in such cases. Lord Esher there held interrogatories must be answered which inquire as to—

"matters forming a substantial part of the facts material to the issue and not merely the names of witnesses or mere evidence of such facts. * * * The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names not forming any substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves. But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or nonexistence of which is relevant to the existence or nonexistence of the facts directly in issue."

[2, 3] The argument is frequently made that facts should not be required which are within the knowledge of the person asking for the information. That is true when it can be said that the facts *relied* upon are really thus known, but not when it is not known what are the facts which the party of whom the information is sought proposes to show. While in this case the plaintiff may be assumed to know what, if any, derogatory statements concerning the defendant it really made, it does not necessarily know what statements of this nature the defendant may claim were made, who made them, or, consequently, whether the person charged with having made them was an authorized representative of the plaintiff. I therefore think the first count of the motion for further particulars should be granted. The defendant objects to the foregoing bill of particulars on the ground that it may be thereby precluded from proving facts hereafter discovered which may support the allegations of its counterclaim, but

may not now be known to it. I think this objection can be obviated, should such facts be discovered, if the defendant shall in that event make application to file an amended bill of particulars, so as to include any such new facts. Doubtless the court would grant such an application if seasonably made upon a proper showing.

In regard to the second count, relating to damages caused by cancellation of orders for goods, I think it was in substance covered by Judge Mayer's order, who only allowed particulars as to the general character of such damages. I shall therefore deny the motion in respect to these matters, without prejudice to an application to Judge Mayer to amend his order, or to make any further order he may deem best as to further particulars of alleged damages.

In re HAWLEY DOWN DRAFT FURNACE CO.

(District Court, E. D. Pennsylvania. March 7, 1916.)

No. 4521.

BANKRUPTCY ⊂=184(1)—TRANSFERS OF CHOSES IN ACTION—VALIDITY AS AGAINST TRUSTEE.

Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (Comp. St. 1913, § 9651), providing that conveyances, assignments, etc., made by a bankrupt within four months prior to the filing of the petition, with intent to hinder or defraud creditors, shall be null and void as against creditors, except as to purchasers in good faith and for a present consideration, and that conveyances or transfers made by a debtor within four months prior to the filing of the petition and while insolvent, which are null and void as against creditors by the laws of the state, shall be deemed null and void against creditors if the debtor be adjudged a bankrupt, and that the property shall be reclaimed and recovered for the benefit of creditors, and under the decisions in Pennsylvania, an assignee of the choses in action of an insolvent assignor, who did not take possession of the property assigned by giving notice of his title to the debtors, but who permitted them to be paid by the debtors and received by the assignor's trustee in bankruptcy, had no equitable claim to moneys in the hands of the trustee, though some of the assignments were made more than four months prior to bankruptcy, as its sole right was the right to sue the debtors of the bankrupt, and, having lost that right, equity would not provide a substitute at the expense of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 275; Dec. Dig. ⊂=184(1).]

In Bankruptcy. In the matter of the Hawley Down Draft Furnace Company. On petition for review of an order of the referee allowing the claim of the National Trust & Credit Company. Order vacated and reversed, and claim dismissed.

See, also, 214 Fed. 500.

John W. Creekmur, of Chicago, Ill., and Kirkpatrick & Maxwell, of Easton, Pa., for petitioner.

E. J. & J. W. Fox, of Easton, Pa., for trustee.

DICKINSON, District Judge. The controversy between the parties concerned is the second time before the court. A broad outline

statement of the facts will suffice to bring out the questions involved. The claimant is engaged in the business of aiding manufacturing and other concerns to finance themselves by buying their accounts current. This is effected by entering into an agreement setting forth the particulars of what is proposed to be done and on what terms. The agreement involved an assignment in writing of purchased accounts, and provided that such assignments should be given. It involved also the guaranty of the assignor of the genuineness of the accounts and of the correctness of the amounts set forth as due. It provided for the collection by the assignor and the transmission of the amounts paid, in the form in which paid. It provided further for the payment of the consideration, which was fixed, at the amount of the account less certain discounts, graded according to the length of time the accounts had to run, of which consideration 20 per cent. was deferred in payment until the account was actually collected. Following the agreement thus made, a large number of accounts, aggregating in amount a considerable sum of money, were from time to time purchased and paid for in pursuance of the agreement.

As might be expected, the assignor did not live up, in all respects, to its agreement. It did not (at least always) remit the collections as made, but treated the transactions as loans or advancements, and made payments accordingly. The phraseology employed in the statements rendered was to "retire" the named accounts thus closed. No notice was given of the assignments to the parties who owed the accounts. They were left in entire ignorance of any change of ownership in the accounts they owed, and settled them with the assignor as still the owner. The transaction amounted to nothing more than giving to the claimant the naked equitable title on paper to the accounts. It was therefore to all intents and purposes an arrangement between the assignor and assignee that as between themselves the claimant owned the accounts, but as to all the rest of the world the assignor remained the owner. This was, of course, coupled with the power thus given the assignee to complete and make effective its title by giving notice to the debtor. This, however, was never done. Were the accounts of the transactions between the assignor and assignee made the subject of a settlement statement between them based upon the terms of the agreement, there would be found owing the latter a balance exceeding the moneys involved in this dispute. These latter represent the proceeds of the collection of certain accounts. We understand it to be agreed that the aggregate sum is $4,138.79, and that the agreed proportion of this sum, which is made up of accounts assigned before May 5, 1912, is $1,775. We therefore have not attempted to verify the correctness of this apportionment. The significance of this date lies in the fact that the petition in bankruptcy was filed September 5, 1912. The moneys in controversy are included in the sum of collections of accounts made by the bankrupt on July 31 and during August, 1912. The assignor company went into the hands of a receiver appointed by the state court. Just when the appointment was made, or the nature of the proceedings in which it was made, we are not informed, except that the referee incidentally finds it was before Au-

gust 14, 1912. The assignor turned over to the receiver the funds in its hands (including some part of the collected accounts) and the receiver in turn paid the moneys over to the trustee in bankruptcy less certain disbursements made by him. The balance was the sum of $4,138.79 above mentioned. The referee found against the title of the claimant basing his order on the ground that there had been no valid assignment of the accounts and the authority of American Bank v. Federal Bank, 226 Pa. 483, 75 Atl. 683, 27 L. R. A. (N. S.) 666, 134 Am. St. Rep. 1071, 18 Ann. Cas. 444. No facts were returned, other than the making of the agreement.

At the argument upon the review, it was stated, without contradiction, that the ruling was that, although the assignments had been offered and treated as in evidence and were not in dispute, they must be regarded as nonexistent because there had been no formal proof of execution. Complaint was further made that the record was without any findings of the facts upon which the claim was based. The cause was referred back to the referee for such findings. He has now returned very full and satisfactory findings upon all phases of the case. These include the fact that assignments of particular book accounts were made in good faith, without notice, or any reasonable cause to believe that the assignor was insolvent, or that the transaction would be to the detriment of creditors, and that the agreement between the parties contemplated a bona fide purchase and sale of the accounts free from any taint of its being in reality an usurious loan transaction in attempted disguise. The inquiry which the referee has thus made has led him to the conclusion that the claimant had a valid title to the accounts, and has accordingly awarded to it the fund of $4,138.79. This order is made upon the authority of Phillips' Estate (4) 205 Pa. 525, 55 Atl. 216, 97 Am. St. Rep. 750, and the line of cases which rule that an assignment of choses in action is good against attaching creditors without notice thereof to debtors.

The findings of the referee have left little in the case beyond the question (purely one of law) which is next discussed. However plausible and forceful the argument in favor of the inference that the relation between the claimant and the bankrupt, established by the dealings of the parties, was one of creditor and debtor, and not of vendee and vendor, the referee has found the latter relation to have existed. We accept this finding. We accept also his further finding that at the time the assignments were made, the claimant did not know, nor had it reasonable cause to believe, that the assignor was then insolvent, or in contemplation of insolvency, or that the transactions had would be detrimental in any way to its creditors, or work out any situation in the nature of an unlawful preference. This is the extent to which we understand his findings to go. To find that this bankrupt was in fact at the time solvent, or even the negative finding that it was not insolvent, is flatly inconsistent with the admitted situation and the admissions made at the argument. The fact is, and is so found, that it was then insolvent. We require only the additional fact that the assignments made were secret, and that not only was no notice given at the time, but no notice was ever given, and no claim of ownership

was made until after the debtors had made payment of the accounts and the moneys had passed into the keeping of the receiver. We are therefore brought to face the plain proposition which will be later stated. It is preceded by this question: Is a secret, but otherwise unimpeached, written assignment of choses in action, made when the assignor is insolvent, good as against a trustee in bankruptcy, where there has been no delivery of the property assigned other than that of the written assignment itself? We have, of course, the subsidiary question of whether a trustee may avoid a transfer (otherwise voidable) unless made within the four months' period.

The main question is one of prime importance to the commercial world. It is surprising, as well as regrettable, that the law of the subject should be as open to difference of opinion as the adjudged cases permit. It would be well if it were authoritatively settled one way or the other. The real basis of the discussions, which the question has provoked, is the conflict between the rugged principles of the common law and the doctrine of secret liens and titles which finds favor in the subtle genius of the civil law. We have stated the question broadly, because we do not see that any real gain is effected by the device of constituting the assignor the undisclosed agent of the assignee for the collection of the accounts. The real transaction is an effectual or attempted means by which the vendor may transfer his property, and yet remain in possession of and in full dominion over it; in other words, both transfer and not transfer it by one and the same act. This is clearly inconsistent with the very spirit of the common law and destructive of its well-established policy. Its requirements are that sale transactions shall be straightforward and aboveboard. The right of alienation is freely given, but a sale must be a real sale, and not a sham or pretense. A real sale of chattels is accompanied with delivery, resulting in a change of possession. When we pass from tangible to other forms of property, a like change in the form of delivery is forced. It is necessarily limited to that of which the subject-matter is in its nature capable.

The first inroad upon the common-law doctrine was inspired by obvious equities when the question arose between the vendor and his vendee. The next was taken from the standpoint of an attaching creditor, whose position is frequently described as of one standing in the shoes of his debtor. Here, it may be stated in passing, an obvious distinction is frequently overlooked. The plaintiff in attachment in execution proceedings is none the less, not only a creditor, but an execution creditor, of the defendant. As against the garnishee, he, of course, has no rights which the defendant does not have, because he succeeds through the attachment only to such claims against the garnishee as the defendant himself had. In other words, the issuing of the attachment does not in any degree increase the liability of the garnishee to his creditor. The plaintiff in the attachment, however, does not lose his status as a creditor, and as such he surely does not stand in the shoes of his debtor. Another supposed departure from the doctrine is presented by the case of successive assignees of the same chose in action, neither of whom has completed the transfer to

him by notice to the debtor of the assignor. Here the doctrine of first in time, strongest in right, is applied. The reasons for so holding are likewise obvious. It is clear that none of these steps (except the attachment cases) involve any recession from the position of one standing on the original principle.

What, then, is its application to the instant transaction? What the claimant had was an equitable title on paper to these accounts. There was no delivery of what is assumed to have been sold, either in substance or form. No notice was ever given to the debtors, who paid in ignorance of any change of ownership. The accounts had been converted into cash before the present claim was asserted. This and other suggested features of the claim will be later considered. What concerns us now is the naked question of the legal necessity of delivery, as evidenced by notice to the debtor that the debt had been assigned. The law of Pennsylvania is now settled in accord with the English doctrine that, as between successive assignees, he who first gives this notice takes under his assignment. Phillips' Estate (3) 205 Pa. 515, 55 Atl. 213, 66 L. R. A. 760, 97 Am. St. Rep. 746. The same doctrine is accepted by the courts of the United States. Bayley v. Greenleaf, 20 U. S. (7 Wheat.) 46, 5 L. Ed. 393.

On principle, therefore, we would seem to be led to the conclusions that the assignment of a chose in action is subject to the same rules which pertain to other transfers of personal chattels, and that all sales, to be effective against the world, must be accompanied with delivery or its equivalent. A sale otherwise made is good as against the vendor, but is not good as against bona fide purchasers or execution creditors. The results, when the clash is (as it is here) between such assignees and those who are subsequent assignees by operation of law, we will consider later, deferring its consideration in order to introduce another feature of the present case. This feature is that presented by the further situation already suggested. The title of the claimant is an equitable title. Had it completed its assignment by notice to the parties owing the accounts, this would still have been its status. If it had enforced its demand for payment by suit against the debtors, the suit must have been in the name of its assignor to its use. The title of the trustee is the legal title. This has crystallized into the actual possession of the proceeds of the collection of the accounts. The right of demand of the claimant was against those who owed the accounts. This right it has lost, because clearly a payment to the holder of the legal title to the account protects the debtor against any claim of title of which no notice was given.

The appeal of the claimant must, in consequence, be made to the court as a chancellor to charge the moneys in the hands of the trustee with an equitable lien in its favor to the sum of the claims which it asserts it might itself have collected. This presents the extent of claim of equity which is put forward on its behalf. It pushes its claim of right to a point beyond any line which has yet been drawn in favor of any such assignees. The rights of trustees in bankruptcy are defined in section 67e of the act. This bankrupt was undoubtedly insolvent when these transfers were made. Had the property trans-

ferred been corporeal, and left with the assignor, the sale would unquestionably have been void against creditors. This consequence would have followed, not because the transfer was fraudulent in fact, but because it was void in law. There was a like retention of possession by the bankrupt here, and a like result would be expected to follow.

We would entertain no doubt of the result, except for those cases which, under the rulings of the courts of Pennsylvania, have upheld assignments as against attachments in execution and foreign attachments. So far as they have been called to our attention, in none of them was the right of the creditor as an execution creditor directly presented to the consideration of the court. As against a second assignee, even though a mere creditor assignee, the first assignee takes nothing. Whether an assignee who is such by operation of law is within the protection of the same principle is seemingly still an open question. It is not necessary to plant the ruling in the instant case upon this ground and because of this we do not further discuss it. As far as we need go is that an assignee of the choses in action of an insolvent assignor, who does not take possession of the property assigned by giving notice of his title, but permits the accounts to be paid by the debtors and received by a trustee in bankruptcy of his assignor, is without any equitable claim to any moneys which may be in the hands of the trustee, based upon the mere fact that he held a written assignment of the accounts thus collected.

This conclusion finds support in the expressed opinion of Judge Gibson in Fisher v. Knox, 13 Pa. 622, 53 Am. Dec. 503, and in the ruling in Bank v. Penn Motor Co., 235 Pa. 194, 83 Atl. 622. Indeed, this latter case may be said to rule in part the present, notwithstanding that it has not been accepted as ruling the flat proposition for which the language of the opinion might seem to stand. The referee has gone into the question with painstaking care, and, it must be admitted, has followed the commonly accepted doctrine of the attachment cases to its logical results. That doctrine, however, is really not as broad as commonly accepted to be. It is merely that even mere paper assignments are good as against the assignor and all who are asserting only his rights. It leaves untouched the other doctrine that transfers unaccompanied with delivery, or its equivalent, are void as against subsequent bona fide purchasers and creditors. The rights of creditors may be asserted through a levy under an execution. If the transfer is of corporeal chattels by a paper writing without change of possession, the vendee admittedly cannot successfully assert his title against the execution. It is true that choses in action can only be reached through attachment process, and it is not a little difficult to understand why attaching creditors are not creditors and execution creditors as well.

We are nevertheless confronted with these rulings, and we appreciate the view of the referee that he felt compelled to give them their logical application. This distinction has been suggested: What we have termed the common-law policy has in fact no basis in the common law, but springs wholly from the statute of Elizabeth, and the

statute applies only to lands and corporeal chattels and the other kinds of property enumerated. On the other hand, the law of assignments of choses in action we have borrowed from the civil law, and in consequence must there apply its principles. We get, however, small help from this thought, because the principle referred to, no matter what its source, is part of the common law of Pennsylvania, and has been recognized as requiring delivery or its equivalent to accompany a transfer of choses in action.

The present ruling, as before suggested, may be rested on the narrower grounds that a trustee in bankruptcy may avoid any transfer which, under the law, is voidable by an execution creditor and a paper transfer of title with possession left in the vendor is void against an execution creditor. This, of course, would not apply to the $1,775 part of the claim. All, however, which the claimant acquired by his paper, was the right to demand and receive payment of these accounts from the debtors. When he permitted them to pay without notice of his title, his right to collect was gone. He cannot, without the aid of a chancellor, transfer his claim to the money, and the chancellor must refuse his aid to one whose title is not favored by the policy of the law. In other words, the sole right of the claimant was to sue the debtors of the bankrupt. If it has lost that right through its own act, equity will not provide a substitute which it can only supply at the expense of creditors. The reason is the legal title to these moneys is in the trustee. The claimant can confront this at the most with an equitable title to accounts, which was good only against the bankrupt, and even this it has lost. It would require a stronger equity than the claimant has shown to create for it another title.

The elaborate argument submitted on behalf of the claimant calls for an allusion to two points raised. Whether this was a Pennsylvania or an Illinois contract is of no consequence, in the light of the absence of any shown difference in the law of the two jurisdictions. So far as we have any light on the subject, the law of Illinois is against the claimant. Green v. Van Buskirk, 72 U. S. (5 Wall.) 317, 18 L. Ed. 599.

The numerous cases holding the title of the trustee in bankruptcy to be only that of the bankrupt apply (since the amendment to the Bankruptcy Act) only to those accounts which were assigned before May 5, 1912. Had the claimant perfected its title by notice at any time before the accounts were paid, and had the chose in action passed to the trustee, the title of the claimant to these accounts could have been successfully asserted through reclamation proceedings. It now has no title to assert, except through the interposition of a chancellor, and it has no such equity as will move a chancellor to intervene.

The order of the referee is vacated and reversed, and the claim of the National Trust & Credit Company is dismissed.

CLARK v. ERIE R. CO.

(District Court, N. D. New York. February 12, 1916.)

1. MASTER AND SERVANT ⟸129(6) — LIABILITY FOR INJURIES — PROXIMATE CAUSE.

The absence of an automatic coupler from a railroad car used in interstate commerce, or the use of a defective automatic coupler, gives rise to no cause of action in favor of an injured employé, unless it occasions or contributes to the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 262; Dec. Dig. ⟸129(6).]

2. APPEAL AND ERROR ⟸1033(5)—ERROR FAVORABLE—INSTRUCTIONS.

Employers' Liability Act April 22, 1908, c. 149, § 3, 35 Stat. 66 (Comp. St. 1913, § 8659), provides that contributory negligence shall not bar a recovery, but that the damages shall be diminished in proportion to the amount of negligence attributable to such employé, provided that no such employé shall be held to have been guilty of contributory negligence where the violation by the carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé. Plaintiff was a member of crew engaged in switching and moving cars in interstate commerce. When an engine was brought in contact with some standing cars in an effort to couple thereto they failed to couple, and after the engine had moved away some distance plaintiff went between the engine and the cars to make the coupling work, and was injured when the cars, either from their own weight or from another cause, ran down on the engine. There was a slight grade at that point, of which plaintiff may have known, and it appeared that he did not block the cars before making his effort to make the coupling work. He alleged, and the jury found on sufficient evidence, that the coupler was defective, or so out of repair that it did not work at all times, and did not work or operate at the time in question. The court submitted the question of contributory negligence, and charged that plaintiff was not chargeable with contributory negligence in merely going between the engine and the cars to make the coupler operate, but was chargeable with such negligence if, after going between them, he failed to exercise ordinary care for his own safety, and that if the coupler was out of repair and defective, and the proximate cause of the injury, and if plaintiff was guilty of negligence contributing to the injury, then such negligence, though not an absolute defense, would go in diminution of damages. *Held* that, in view of the proviso in the statute, the instructions were more favorable to defendant than it was entitled to, and the submission of the question of contributory negligence, if error, did no harm to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. ⟸1033(5); Trial, Cent. Dig. § 587.]

3. MASTER AND SERVANT ⟸226(1)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

While, under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 [Comp. St. 1913, §§ 8657-8665]), assumption of risk, except in certain cases, has its former effect as a bar to an action by an injured employé, and when the employé knows of a defect in the appliances used by him, and appreciates the danger resulting, and continues in the employment without objection, or without obtaining from the employer an assurance of reparation, he assumes the risk, though it may arise from the employer's breach of duty, this rule had no application where the employer failed in its absolute duty to equip its engine and cars with a workable and suitable automatic coupler.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660; Dec. Dig. ⟸226(1).]

At law. Action by William Clark against the Erie Railroad Company. On motion to set aside the verdict of the jury and for a new trial. Motion denied.

Vincent N. Elwood, of Hancock, N. Y. (F. W. Welsh, of Binghamton, N. Y., of counsel), for plaintiff.

Lyon & Painter, of Binghamton, N. Y., for defendant.

RAY, District Judge. This action was brought by the plaintiff against the defendant to recover the damages alleged to have been sustained by him while in the employ of the defendant, and while acting as one of the crew of an engine engaged in switching and moving cars in interstate commerce at Deposit, N. Y., by reason of a defective automatic coupler attached to such engine. The action was brought under the provision of the federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531, amended by Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 [Comp. St. 1913, §§ 8605–8615]), and also the provisions of federal Employers' Liability Act (35 Stat. 65, c. 149, as amended in 1910).

The plaintiff claimed that a defective automatic coupler was the cause of and contributed to his injury, which consisted in the loss of one hand and a portion of the arm. The evidence was conclusive that the defendant's road is an interstate railroad, and that the cars being moved in the Deposit yards by the engine in question were loaded with interstate freight and had come from some point in western New York into Pennsylvania, and thence into New York, and were bound for some point in New Jersey. While this was befogged all that was possible, the conductor, who at first claimed that he did not know whether or not he had any cars in his train while moving from a point in the state of Pennsylvania to Deposit, N. Y., finally admitted that, after leaving the station in Pennsylvania, no stop was made before reaching Deposit, and that these cars in question were there in the train, with a number of others. It was while these cars were being moved in the Deposit yards by a yard engine that the accident happened. The plaintiff was one of the crew of engine No. 2068, and in the night was attempting to couple the head of such engine to one of such cars, No. 50637. There was an automatic coupler on the engine, and a corresponding one on the car. When the engine and car came in contact, in the effort to couple on, the coupling did not make, as was shown by the fact that, when the engine moved away, the cars did not follow. The engine moved away some distance, and Clark went between the head of the engine and the car and attempted to remedy the defect—make the coupling work—and while so engaged the cars, or one of them, either of its own weight or moved by another engine, ran down on the engine, and the plaintiff's hand was caught in the coupling and crushed, and amputation followed.

It was shown that there was a slight grade in the yard at this point and that the plaintiff *may have known* this fact, and it was also shown that he did not block the cars to which the crew was attempting to couple the engine before making his effort to make the defective coupling work. Every act and move of the plaintiff and of the crew

working with him and of the cars and engine were proved, and the judge allowed the evidence. The whole situation was fully proved, as were the movements of this engine and of these and other cars prior to the accident, as well as what was done with and to the engine and coupler at the time of and immediately following the accident.

There was some evidence in the case tending to show that these automatic couplers will not work and that the engine will not couple to the car readily when on a curve, or unless the engine and car are brought together with sufficient force to cause the coupling to operate. For an automatic coupler to work or operate when in perfect condition it is necessary that, when standing or moving on a straight track, the car and engine be brought together properly. Inasmuch as it was contended that this coupler on the engine was defective or out of repair, so that it would not work at all times when the engine and cars were properly brought together or into contact, and as the coupler itself was not brought into court, but another one was, which, it was contended, was not like the one on the engine at the time of the accident, much evidence was given as to the construction and operation of automatic couplers, and it became an important consideration whether the failure of the engine to couple to the car was due to improper or inadequate movement or action on the part of the ones operating the engine or to defects in the coupler.

The court received all evidence bearing on the question of the alleged contributory negligence of the plaintiff. The plaintiff, as an act of negligence or failure to perform its duty to the plaintiff on the part of defendant, stood on the proposition that the automatic coupler was out of repair and for that reason did not work, and would not operate at all times when coupler, engine, and car were properly moved and handled, and did not on this occasion, and that this was the cause of the accident and consequent injury; that is, the plaintiff contended, finally, that the car and engine were properly brought together, that the coupling failed to work because of its defective condition, that the plaintiff in the performance of his duty went to the coupler on the engine to make it work, the cars being some 15 or 20 feet away, and that while the plaintiff was engaged in the performance of this duty to the defendant railroad company the cars came down on him in the darkness and his hand was crushed. The plaintiff contended that the question of the plaintiff's contributory negligence, if any, was of no importance, not in the case; but the court ruled against him on this question and, after receiving all the evidence as to conditions, etc., held and charged the jury that for the plaintiff to recover the evidence must have established and the jury must find that the coupler was out of repair or defective, and that such condition was the proximate cause of the accident and injury—that is, made it necessary for the plaintiff to go to the coupler, and between the head of the engine and the cars, some 15 or 20 feet away, for the purpose of making the coupler operate, and that while engaged in the performance of this duty the car came upon him and crushed his hand; also, that the plaintiff could not recover if the coupler was not out of repair and defective, or if his own negligence was the cause of the accident and injury; also, that

the plaintiff was not chargeable with contributory negligence, under such circumstances and conditions, if they existed, in merely going between the head of the engine and the cars to make the coupler operate, but was chargeable with contributory negligence if, after going between them, he failed to exercise ordinary care for his own safety; also, that if the coupler was out of repair and defective, and the proximate cause of the accident and injury, and the plaintiff was guilty of negligence contributing to the accident and injury, then such negligence, while not an absolute defense, would go in diminution of damages.

[1] As I understand the law, a defective automatic coupler must be the proximate cause of the injury complained of. The absence of an automatic coupler, or a defective automatic coupler, does not give rise to a cause of action for injury, unless it occasions the injury or contributes to the injury.

[2] The plaintiff in this case relied finally upon a defective automatic coupler as the act of negligence or omission of duty causing his injury, or a contributing cause, and sought to recover on no other ground. The jury was instructed that plaintiff could not recover on any other ground. The jury found that the automatic coupler was defective or out of repair, and that such defect was the proximate cause of the injury. There was evidence to support the finding, and no evidence bearing on this question was excluded. Every fact and circumstance connected with this accident and injury as stated was gone into and proved, and was competent for the purpose of showing whether the accident and injury was due to a defective coupler, or to some negligent act of the plaintiff, or some act of some third person. It is erroneous to assert in this case that the defendant was not permitted to show contributory negligence or give evidence on that subject. The contrary is the truth. But, however that may be, the rulings and charge of the court were much more favorable to the defendant company than it was entitled to.

As stated, the plaintiff relied for his right to recover upon the alleged defective coupler, and the jury on sufficient and competent evidence found it was defective, or so out of repair that it would not work at all times, and did not work or operate at the time in question, and that consequently the plaintiff in the line of his duty went to the head of the engine to make it work, and while so employed was injured by the cars coming down upon him. The injury to this plaintiff was occasioned, as the jury found, by the failure of the defendant railroad company to have this engine equipped with an operative, workable, automatic coupler as required by the Safety Appliance Act. The jury also found that plaintiff was in the employ of the defendant, engaged at the time in moving this engine and these cars in interstate commerce. Consequently the case was and is within both the federal Employers' Liability Act and the federal Safety Appliance Act.

This case is quite similar in its facts and rulings to Grand Trunk Railway Co. v. Lindsay, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168 (below 201 Fed. 844, 120 C. C. A. 166), where an engine coupled to four loaded freight cars moving in interstate

commerce was attempting to couple to other loaded cars that the train might be completed and depart. When by impact it was attempted to make the coupling, the cars failed to couple automatically, and the switchman (plaintiff below in that case) walked beside the car as it approached the point of coupling, signaled the engineer to stand fast, and entered between the cars for the purpose of ascertaining and remedying, if possible, the cause of the trouble. While between the cars and engaged in handling the coupler the cars were pushed up, and he was caught and his arm crushed. There was some proof tending to show that the switchman (plaintiff) stepped in before the moving cars had entirely stopped, and some that he gave a signal to come ahead as he stepped in; but there was evidence to the contrary. It was proved that the coupler would not operate because of a bent pin. The court was requested to instruct the jury that if the switchman, as he entered between the cars, gave the signal to come ahead, this was the proximate cause of the injury (an act of negligence), and he could not recover. The court refused, but did charge:

"If after he started to go between the cars he has done something which was carelessly done, or which you can say from a preponderance of the evidence contributed approximately to the accident, then he cannot recover. * * * If there be contributory negligence at all, it depends, not upon his assuming the risk under the circumstances in evidence in this case, but upon the care with which he acted while in the performance of the work which he assumed. You are further instructed that if you believe, from the preponderance of the evidence, that the plaintiff gave a 'come ahead' signal to the switchman or engineer—one or both—and after that went between the cars and was injured, then you have a right to consider whether the giving of the 'come ahead' signal by the plaintiff was the proximate cause of the injury, as distinguished from the condition of the coupler, and if you find that under the circumstances the 'come ahead' signal was the proximate cause of the injury then your verdict must be for the defendant. You are also instructed that where there is a safe and a dangerous way of doing an act, and the servant uses a dangerous way and is injured thereby, he is charged with negligence on his part and may not recover."

It is noted that there, as here, the court made contributory negligence after going between the cars a defense, and contributory negligence a proper consideration in fixing damages. But the Supreme Court (233 U. S. 49, 34 Sup. Ct. 583, 58 L. Ed. 838, Ann. Cas. 1914C, 168) held:

"But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence; that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the Safety Appliance Act and by the contributing negligence of the switchman in going between the cars. Under this condition of things it is manifest that the charge of the court was greatly more favorable to the defendant company than was authorized by the statute for the following reasons: Although by the third section of the Employers' Liability Act a recovery is not prevented in a case of contributory negligence, since the statute substitutes for it a system of comparative negligence whereby the damages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier, in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the

amount of negligence attributable to the employé (Norfolk & Western Railway Co. v. Earnest, 229 U. S. 114, 122, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172), nevertheless under the terms of a proviso to the section contributory negligence on the part of the employé does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress enacted to promote the safety of employés. In that contingency the statute abolishes the defense of contributory negligence, not only as a bar to recovery, but for all purposes. The proviso reads (Act April 22, 1908, c. 149, § 3, 35 Stat. 65, 66): 'Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.'"

This it seems to me is decisive of this case, and here, as there, the charge of the court "was greatly more favorable to the defendant company than was authorized by the statute."

[3] The Employers' Liability Act has expressly eliminated the defense of assumption of risk in certain specified cases, but in all other cases such assumption of risk has its former effect as a bar to an action by the injured employé, and when the employé knows of a defect in the appliances used by him, and appreciates the danger resulting, and continues in the employment without objection, or without obtaining from the employer an assurance of reparation, he assumes the risk, even though it may arise from the employer's breach of duty. Seaboard Air Line Railway v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. However, this rule as to assumption of risk has no application here, inasmuch as the Safety Appliance Act made it the absolute duty of the defendant company to equip the cars and engine with a workable and suitable automatic coupler. Grand Trunk Railway Co. v. Lindsay, supra. When the employé knows of the defect and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arises out of the master's breach of duty. Seaboard Air Line R. v. Horton, supra. But this rule has no application in this case, inasmuch as it was the absolute duty of the defendant to equip the engine and car with the workable automatic coupler, and for the further reason that there was no evidence that the employé knew of the defect and appreciated the risk attributable to it. In Schlemmer v. Buffalo R. & P. Railway Co., 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596, it was expressly held that the Safety Appliance Acts of March 2, 1893, April 1, 1896, and March 2, 1903 (chapter 976, 32 Stat. 943), took away from the carrier the defense of assumption of risk by the employé, but did not affect the defense of contributory negligence. In Chicago, R. I. & P. Railway Co. v. Brown, 229 U. S. 317, 33 Sup. Ct. 840, 57 L. Ed. 1204, it was held that:

"Under the Safety Appliance Acts the failure of a coupler to work at any time sustains a charge of negligence on the part of the carrier."

This follows the holding in C., B. & Q. R. R. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

We have seen (Grand Trunk Railway Co. v. Lindsay, supra) that by the proviso referred to contributory negligence on the part of the employé does not operate even to diminish the recovery, where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress enacted to promote the safety of employés, and that in that contingency the statute abolishes the defense of contributory negligence, not only as a bar to recovery, but for all purposes. Act April 22, 1908, c. 149, § 3, 35 Stat. 65, 66, in the proviso:

"Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé."

If the court erred in submitting to the jury the question of the contributory negligence of the plaintiff after he had entered between the engine and cars, and in holding as it did, no possible harm was done to the defendant. The ruling was more favorable to the defendant than it was entitled to, and no harm resulted. In Kanawha & Michigan Railway Co. v. T. K. Kerse, Administrator of the Estate of Thomas P. Barry, 239 U. S. 576, 36 Sup. Ct. 174, 60 L. Ed. ——, decided January 10, 1916, the Supreme Court of the United States held:

"A judgment is not to be reversed for an error by which the plaintiff in error cannot have been prejudiced. And the refusal of an instruction as to the legal result that would follow only upon the hypothesis that the deceased knew of the presence of the timber, and knew it would not clear a man standing upon the top of a box car, became legally insignificant when the jury had in its findings distinctly negatived the facts that made up the hypothesis. Thus the progress of the trial rendered the error wholly immaterial to the merits. Greenleaf's Lessee v. Birth, 5 Pet. 132, 135 [8 L. Ed. 72]; Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 351 [22 Sup. Ct. 833, 46 L. Ed. 1193]."

It was not disputed that the plaintiff lost his hand on the night in question, and a portion of his arm, by having it crushed in the coupler attached to the engine while attempting to make the coupler work. There was evidence that the coupling was defective and had failed to work before. The question whether or not it was defective or in proper repair, so it would work, was submitted to the jury, and the jury found for the plaintiff. The damages were moderate, and less than they would have been, probably, had not the court submitted to the jury the question of contributory negligence, and allowed the jury to reduce damages in case it found the defendant was at all negligent under the circumstances and at the time specified in the charge. Under the decisions it is clear that recovery by the plaintiff was not defeated, even if he knew that the cars stood upon an incline or downgrade and failed to block them before going to the head of the engine to make the necessary examination and cause the coupler to work or operate.

I find no substantial error detrimental to the defendant. The motion to set aside the verdict and for a new trial is denied.

THE SURF.

(District Court, D. Massachusetts. August 5, 1915.)

No. 1092.

1. COLLISION ⇐91—STEAM AND SAILING VESSELS MEETING—FAULT.

The steam trawler Surf, passing out from Boston Harbor on a clear and calm night in about the middle of the main channel, came into collision with and sunk the fishing schooner Perry, which was coming in under sail on a substantially opposite course. The lights of both vessels were burning, and those of the steamer were seen by the Perry when a considerable distance away; but the Perry's lights were not seen on board the steamer until shortly before collision. All members of the watch on the Surf, including the lookout, were in the pilot house, in front of which was a large mast, although there was a lookout station forward. *Held*, that the Surf was in fault for not having a properly stationed lookout, for failing to keep a proper lookout, and for negligently failing to observe the Perry seasonably; that the Perry was not in fault, it appearing that she kept her course until immediately before collision, when the captain attempted to throw her head around to avoid it.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187–192; Dec. Dig. ⇐91.]

2. COLLISION ⇐125—CONTRIBUTORY FAULT—MEASURE OF PROOF.

A claim by one of two vessels in collision, whose own fault is established, of contributory fault on the part of the other vessel, must be proved by a preponderance of the evidence.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 266–279; Dec. Dig. ⇐125.]

In Admiralty. Suit for collision by Joseph Cabral and others against the steamer Surf. Decree for libelants.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

Warner, Warner & Stackpole, of Boston, Mass., for claimant.

MORTON, District Judge. This is a libel to recover damages for injuries to the fishing schooner Annie E. Perry, caused by a collision with the steam trawler Surf, which occurred near the entrance to Boston Harbor, between 12 and 1 o'clock a. m. on October 20, 1914. It was a clear, starlight night, with no moon. The Perry sank within a few minutes after the collision, but was subsequently raised and repaired.

The Perry was a two-masted fishing vessel of the usual type, about 97 feet long, not equipped with power. She was coming into the port of Boston on the night in question loaded with fish. The wind died down, as she approached the entrance to the harbor, to a light air from the north or north-northeast. The sea was smooth, with some swell. The Perry was carrying all four lower sails, namely, mainsail, foresail, staysail, and jib. Her lights were properly set and burning. She had on deck three men on watch forward, a man at the helm, and the captain, who was in charge of the navigation of the vessel.

The Surf is a steam trawler about 120 feet long. She had a whaleback forward deck, on which is a small railed-in place affording a posi-

tion, although not a secure one in heavy weather, for a lookout to stand. It was safe enough for a lookout on the night in question. She carried an unusually large foremast, which was used in the work of trawling. Her pilot house was in the rear of the foremast and was somewhat higher than the bow. Her speed was about 9 knots per hour. She was equipped with proper lights, which were brightly burning. She left Boston on the night in question a little after 11 o'clock and proceeded down the harbor. Her entire watch, consisting of her captain, Doyle, her mate, Campbell, a lookout, Drone, and a helmsman, Sorenson, was in the pilot house. There was no lookout on the forward deck. The navigation was in charge of the captain, who stood at the starboard window of the pilot house. The lookout was standing behind him, looking over his shoulder. The mate was standing at the middle window of the pilot house; and the helmsman, who was watching the binnacle and the course, was behind the port window of the pilot house. The view of all these men was, to some extent, obstructed by the foremast directly in front of them. Drone, who was charged with the duties of lookout, had to look past the captain, through the window at which the captain was standing. The captain was using field glasses from time to time, in an effort to make out Boston Lightship. The man who seems in fact to have been performing the duties of lookout was the mate, Campbell.

[1] The account of the collision given by witnesses on the schooner is substantially as follows: They were proceeding nearly due west about in the middle of the channel into Boston Harbor. They noticed some distance off an approaching steamer, which subsequently turned out to be the Surf. It was apparently headed straight toward them; they saw both its side lights. As it drew near, it became apparent that the steamer's course was bringing her very close to the Perry. All hands on deck on the Perry were aware of the steamer's presence, and most of them were observing her as closely as their positions enabled them to. They testified, in substance, that when the steamer was close at hand she changed her course towards them, and struck the Perry near her fore-rigging on the port side. After the steamer had changed her course so as to head into them, the captain of the Perry rushed to the wheel and turned it, so as to throw the schooner's head to port, in the hope of avoiding the collision which was imminent. Aside from this, the testimony of the schooner's crew is that no change in her course had been made for some time before the collision. Their evidence is that the steamer came directly out through the main channel from the Narrows Light, about in the middle of that channel, and that the collision occurred about half way between Boston Light and Point Allerton buoy. The Perry went down a short distance north of that buoy and to the south of the middle of the channel.

The steamer's account of the collision is as follows: She proceeded down the channel and turned eastward near the gas buoy on the south side of the entrance to it. From this point, some of the evidence given on her behalf differs radically from that of the schooner's crew. The steamer's captain and helmsman testify that she did not come straight out through the main channel, but, on the contrary, went to the north

of Nash's Rock, and passed between it and Boston Light. After passing Nash's Rock, they say that her course was changed for Boston Lightship; that she was running on that course, having passed Boston Light, when they saw a green light slightly on their starboard bow; that the steamer's course was thereupon changed one-half a point to the north, in order to give the greater clearance to the other vessel, which was judged to be, when first seen, about a quarter of a mile away; that very shortly after this change in the steamer's course the green light disappeared, and a red light appeared in the same place; and that the vessels were then very near together. The captain of the steamer says that he judged that the other vessel, which he supposed to be a sailing vessel, had changed course directly across his bow; and he ordered the helm of the Surf hard-aport and reversed the engines in an effort to go astern (i. e., to the southward) of the other vessel. The maneuver was unsuccessful, and the collision followed.

This testimony places the collision a considerable distance to the north of where the schooner's witnesses say it took place, and of where the Perry sank. No good reason is suggested why the steamer should take such a devious course from the Narrows Light to the Boston Lightship. Her natural way would be straight out through what is unquestionably the main channel. All the men on the schooner say that they saw the steamer take that course, and they are corroborated in this by the testimony of the mate of the steamer, Campbell, and by such inferences as to the place of collision as are afforded by the location of the wreck. Campbell testifies that the Surf passed perhaps one-half or three-quarters of a mile from Boston Light, pretty nearly in mid-channel, between Boston Light and Point Allerton. If so, the place of collision must have been substantially as testified by the crew of the schooner; and the testimony of Doyle and Sorenson on this point is quite inaccurate. Drone, the steamer's lookout, did not testify as to her course out of the harbor. How far the Perry moved from the place of collision before sinking does not clearly appear. The Surf did not keep her nose into the cut after the collision, and, although she endeavored to keep near the schooner, it is not claimed that she was in continuous contact with her, or pushed her any great distance. It is more likely that the schooner sank near where the collision occurred than that she was pushed or drifted 600 or 700 yards in a direction slightly west or south before going down.

It seems to me that in all probability the steamer did come straight out, as the witnesses on the schooner testify, and that the collision occurred substantially where they state; and I so find.

It devolved upon the steamer to keep clear of the schooner. The reasons advanced to excuse her not having done so are that the Perry's red light was obscured by her head sails, and that she suddenly changed course across the Surf's bow. The two vessels were proceeding nearly in the middle of the channel, one about west, the other about east, headed almost directly at each other. Both the schooner's lights should have been visible from the steamer for a distance much greater than the quarter of a mile which separated the two vessels when Captain

Doyle says he first noticed the Perry's green light. Sorenson says that he saw the green light at the same time; but neither Campbell, who stood at the front window, nor Drone, who was on lookout, observed it at any time. All four testify to having seen a red light just before the collision. Drone says he saw it almost dead ahead, a little on the Surf's port bow, which is consistent with the testimony of the schooner's men. There is no direct evidence that the Perry's head sails were of such size and so trimmed as to obscure her red light on the night in question; and there is direct evidence to the contrary. The contention that that light was obscured rests only on the fact that it was not seen on board the Surf. There is testimony that no change had been made in the placing of it, or in the size and rigging of the head sails on the schooner, for a number of years, nor (except for necessary repairs) since the collision, and that her lights, sails, and rigging were proper. The head sails certainly did not obscure both the Perry's lights at the same time. Her green light was, I think, visible from the Surf for a considerable distance; but there is no claim that it was noticed on the Surf until close at hand.

To a man standing in the middle window of the Surf's pilot house, her foremast cut off the view for a substantial angle on each side of the bow. If the schooner were proceeding straight up the middle of the channel, as her crew says that she was, and the steamer were proceeding straight down the middle, as her mate implies, and as the schooner's crew testify, the two vessels being headed almost directly towards each other, it is by no means impossible that the schooner's lights within the arc were cut off from Campbell's and Drone's vision by the foremast. This was Campbell's own suggestion in his testimony before the inspectors, and is by no means inconsistent with Drone's evidence, although other things would adequately explain Drone's not seeing the lights of the Perry. He was improperly placed for a lookout; he should have been on the forward deck. Eastern Dredging Co. v. Winnisimmet Co. et al., 162 Fed. 860, 861, 89 C. C. A. 550. If Captain Doyle was using field glasses in an effort to locate Boston Lightship, there is in his case an additional reason why he might have failed to see the schooner's lights until the vessels were so close together that there was already danger of collision.

The first order given by Captain Doyle after becoming aware of the proximity of the Perry was either "starboard" or "hard-astarboard." The three other men in the pilot house all "jumped" to the wheel to execute it; probably before the wheel had been thrown hard over, order "steady" and "hard-aport" were given. This last one had not been fully executed at the time of the collision. This testimony from the steamer's crew strongly suggests that an emergency had already arisen at the time when the schooner was first discovered. Upon all the evidence, it does not seem to me that the mere fact that the Perry's red light was not seen from the Surf on the night in question is sufficient to establish that it was obscured by her sails. It seems to me probable, and I find, that the failure to notice the schooner was due, either to neglect on the part of the men on lookout on the steamer, or to the fact that they were behind the steamer's

mast and it happened to come directly between them and the lights of the schooner. The New York, 175 U. S. 187, 204, 20 Sup. Ct. 67, 44 L. Ed. 126.

[2] The remaining question is whether the Perry changed course at the last moment across the steamer's bow, and thereby brought about the collision. The charge that she did so rests upon the testimony of Doyle and Sorenson. Such an assertion, made on behalf of a vessel whose own fault is established—it is, I think, clear that the Surf was at fault in respect to her lookout—is regarded with suspicion and must be proved by a preponderance of the evidence. Haney v. Baltimore Steam Packet Co., 23 How. 287, 291, 16 L. Ed. 562. No sufficient reason has been suggested why the schooner, which was coming into port with a fair wind, should suddenly change course in a direction away from her destination. Doyle does not claim that the schooner was becalmed; if she was, it was plainly the duty of the steamer to give her sufficient clearance to allow for involuntary movements caused by the swell. The accuracy, at least, of Doyle's and Sorenson's testimony, is seriously impaired by their misstatements concerning the course of the steamer and the place where the collision occurred. I am not prepared to accept their testimony, contradicted as it is by all the witnesses on the schooner, and unsupported by the evidence of Campbell and Drone, who were in the pilot house, that there was a change of course on the part of the schooner. If, as testified by some witnesses who were on the steamer, the vessels came together almost head on, the schooner's bowsprit ranging along the port side of the steamer, and the steamer striking the schooner on the "bluff of the [port] bow," the details of the collision tend to support the schooner's account of it. If, as testified by various witnesses on the schooner and some on the steamer, the angle between the two vessels were considerably wider, it would be explained more easily on the supposition of a change of course by the schooner. The exact details of the way in which the vessels came together seem to me not sufficiently certain to justify following inferences based upon them in disregard of the evidence referred to.

I find and rule that the Surf was at fault in not having a man on lookout stationed for that duty, in failing to keep a proper lookout, and in negligently failing to observe the schooner seasonably. The management and discipline of the steamer appear to me to have been lax, and her handling after the emergency arose to have been unskillful, although, considering the wide latitude of action allowed in an emergency, it would perhaps be unduly severe to hold her at fault in this particular.

I find the schooner Annie E. Perry to have been free from fault, and that the collision occurred solely by reason of the faults of the steamer Surf.

Decree for libelants.

In re SPILLER et al.

(District Court, D. Massachusetts. March 9, 1916.)

No. 22516.

1. BANKRUPTCY ⟸374—COMPOSITION—OFFER AFTER DISCHARGE.
The facts that a bankrupt has received his discharge in due course and that a first dividend has been paid by the trustee do not prevent the bankrupt from offering composition.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 575; Dec. Dig. ⟸374.]

2. BANKRUPTCY ⟸381—COMPOSITION—HEARING AND DETERMINATION OF APPLICATION—ASSENT OF CREDITORS.
The assent of 90 per cent. of a bankrupt's creditors to an offer of composition was evidence prima facie that the composition was for the best interests of creditors, and the burden was on the objecting creditors.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. ⟸381.]

3. BANKRUPTCY ⟸381—COMPOSITION—HEARING AND DETERMINATION OF APPLICATION—ADEQUACY OF OFFER.
That it was conceded that a bankrupt estate, if fully administered, would pay more than 75 per cent. of the claims of creditors, and that it was probable that it would pay a still larger percentage, was not ground for denying confirmation of a composition offer of 70 per cent., to which 90 per cent. of the creditors had assented.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. ⟸381.]

4. BANKRUPTCY ⟸382—COMPOSITION—HEARING AND DETERMINATION OF APPLICATION—OMITTED CLAIMS.
On a hearing on an offer of composition, the bankrupt's counsel admitted that a claim had been omitted from the schedules, and the objecting creditors thereupon contended that the referee had no jurisdiction to proceed because the schedules were incomplete and the deposit did not cover all existing claims. The referee, however, proceeded, and made a report, accompanied by the evidence and exhibits before him. *Held* that, if the objection could be insisted upon by any creditor except those omitted, still the statute (Bankr. Act July 1, 1898, c. 541, §§ 7a, 12a, 39a [2], 30 Stat. 548, 549, 555 [Comp. St. 1913, §§ 9591, 9596, 9623]) and General Order 9 (89 Fed. vi, 32 C. C. A. xiii) did not so limit the general discretionary power of the court in matters of reference to and reports from referees as to prevent it from hearing and deciding the case on the referee's report.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 592; Dec. Dig. ⟸382.]

In Bankruptcy. In the matter of Joseph B. Spiller and others, bankrupts. On report of referee respecting an offer of composition. Report and offer confirmed.

Swift, Friedman & Atherton, of Boston, Mass., for bankrupts.
Phipps, Durgin & Cook, of Boston, Mass., for objecting creditors.

MORTON, District Judge. The bankrupts were adjudicated. A trustee was appointed. The liquidation of the estate was begun, and a dividend of 25 per cent. was paid to creditors. The bankrupts applied for and received their discharges. Thereafter they filed an offer in composition to pay 45 per cent. in addition to the 25 per cent. al-

ready paid by the trustee, making 70 per cent. in all. This offer was referred to the referee, who has reported in favor of confirming it. With the application for the confirmation of the composition, the bankrupts filed a petition for the revocation of their discharges.

Three questions are presented: First. Was it open to the bankrupts to offer composition after having received their discharges? Second. Is the composition offer for the best interests of the creditors? Third. Did the referee have power to hear and report on the matter? No objections on other grounds are now urged.

[1] As to 1: Was it open to the bankrupts to offer composition after having received their discharges? The present act explicitly allows composition after adjudication. Section 12a. At that time, a bankrupt has no longer any legal interest in his estate; it has, by the adjudication, become the property of his creditors. Composition proceedings under such circumstances are, in effect, an offer by the bankrupt to repurchase his property from the trustee. That is what they amount to in the present case; and they are not on that account unpermissible.

If the bankrupt, at the time of making the offer, has not received his discharge, the confirmation operates as one, and secures to him both his former property, and his discharge. In the present case the bankrupts received one of these before making the offer. It is difficult to see why that fact should restrict their right to redeem their property. The creditors could have objected to the discharges, but did not, and the grant of them completed one of the two principal branches of the case. The creditors could still object to a disposal of the estate in accordance with the offer in composition upon any ground specified in the statute. The fact that the discharges were obtained in the usual course seems to me no sufficient reason for denying the right to settle the estate through proceedings in composition. I therefore agree with Mr. Referee Gibbs that this objection is not sound and cannot be sustained. If I thought otherwise, I should allow the petition to revoke the discharges; but I see no necessity for such action.

[2] As to 2: The objecting creditors contend that the offer in composition is not for the best interest of the creditors, and that the referee's finding to the contrary is plainly erroneous, and if confirmed is an unconstitutional taking of property. About 90 per cent. of the creditors have assented to the offer. "Such approval is evidence, prima facie, that the composition is for the best interests of the creditors; and the burden is upon those who attack the composition." Hale, J., Re Hoxie (D. C. Me.) 25 Am. Bankr. Rep. 32, 34, 180 Fed. 508. See, too, Adler v. Jones, 6 Am. Bankr. Rep. 245, 109 Fed. 967, 48 C. C. A. 761.

[3] The referee has found that "the assets of the bankrupts were of a value in excess of the amount required to pay the creditors 70 cents on the dollar"; and it was conceded by counsel for the bankrupts at the hearing before me that upon full administration the creditors would receive as much as 75 per cent.—i. e., 5 per cent. more than the offer. The referee has not reported how much more than

70 per cent. the creditors would receive upon full administration; and I am not able to form a satisfactory conclusion upon that point from the evidence before me. The estate would in all probability pay more than 75 per cent.—just how much more is somewhat problematical, depending upon the collectability of the accounts receivable and the amount which can be realized for certain equities in real estate, and also upon whether a verdict for a substantial sum which has recently been rendered against one of the bankrupts in the state courts is affirmed on appeal. On the other hand, payments made in due course will, as the referee reports, be considerably delayed.

The mere fact that the estate will on full administration pay more to the creditors than the offer in composition is not sufficient reason for refusing confirmation. Other considerations than the mere amount of the dividends may properly be considered by creditors in determining whether to accept or reject the offer. They have, within fair limits, a right to decide in favor of an immediate payment, as against a postponed and uncertain one, probably of larger amount. A decision to that effect, honestly made by an overwhelming majority of the creditors, in the exercise of their business judgment, ought not to be overridden, unless justice to the objecting minority plainly requires such action.

The test by which the adequacy of the offer is to be determined has been thus stated:

"If the court is satisfied upon the hearing that the composition offered would pay creditors *very considerably less* [italics mine] than they might reasonably be expected to realize in the administration of the assets in due course, then the composition is not for the best interests of creditors." Day, J., Adler v. Jones, 6 Am. Bankr. Rep. 245, 248, 109 Fed. 969, 48 C. C. A. 763 (C. C. A. 6th Circuit).

Some of the assenting creditors doubtless were influenced by the hope of doing further business with the bankrupts if the composition shall go through; but I cannot say, upon the case before me, that this motive, which to some extent at least is a legitimate one, is so extensive and dominant as to justify me in disregarding the views of the majority, nor that the offer is "very considerably less" than would probably be realized on full administration. Upon this question, also, I agree with the conclusion of the referee, and am satisfied that the offer is for the best interests of creditors.

[4] At the hearing before me counsel entered into an oral stipulation, a copy of which from my notes is hereto annexed. In substance this stipulation is that at the first hearing before the referee counsel for the bankrupts admitted that there had been omitted from the schedules a claim of about $4,500 against two of the bankrupts, and that thereupon the objecting creditors contended that the referee had no jurisdiction to proceed because the schedules were incomplete and the deposit did not cover all the existing claims. The referee made no explicit ruling on the objection, but he did proceed to hear and report on the case.

It is now urged by the objecting creditors that, upon it appearing that there were claims not scheduled, the referee lost jurisdiction un-

til the schedules had been amended and a deposit made, or a waiver filed, to cover the added indebtedness. Sections 12a, 7a, 39a (2), and General Order 9 (89 Fed. vi, 32 C. C. A. xiii) are referred to in support of this contention. No decision on the point has been called to my attention.

If such an objection can of right be insisted on by any creditor except those so omitted—which I doubt—I am of opinion that the sections and order mentioned do not so limit the general discretionary power of the court in matters of reference to and reports from referees as to prevent me from hearing and deciding the case on the present report of the referee, accompanied as it is by the evidence and exhibits before him.

Report of the referee confirmed. Offer in composition confirmed.

In addition to what appears in the record, it is stipulated and agreed between the parties as follows:

On January 14, 1916, the day of the first hearing before the referee, Mr. Friedman, counsel for the bankrupts, stated to the referee that there was a claim of about $4,500 against Spiller and McCandlish which had been omitted from the schedules, it being in favor of Welch or Cotting, trustees. (See Exhibit 6.) Thereupon Mr. Cook, counsel for the objecting creditors, objected to the referee's going on with the case, on the ground that he had no jurisdiction to do so, because the schedule was admittedly incomplete and the deposit did not cover the entire indebtedness. The referee did not rule on the objection explicitly, but proceeded with the case. On the same day, and at the same hearing, Mr. Friedman also stated that he would admit that the estate, if fully administered in the ordinary course of bankruptcy, would pay 75 per cent. to general unsecured partnership creditors. The referee took notice of that statement, and said that it was a matter of calculation to see that the estate would pay more than 70 per cent.

The foregoing stipulation is to be considered part of the record in the case.

THE LUIGI.

(District Court, E. D. Pennsylvania. February 22, 1916.)

No. 5.

INTERNATIONAL LAW ⊂⊃10—INTERNATIONAL COMITY—ATTACHMENT OF FOREIGN VESSEL REQUISITIONED FOR GOVERNMENT SERVICE.

While, under the rule of international comity, a court will not exercise jurisdiction, at suit of an individual, over a vessel which is employed in the public business of a foreign nation, where after the attachment in such a suit of a privately owned foreign vessel, which had been requisitioned for service by its home government, the owners appear and have given bond for its release, the further action of the court can no longer affect the rights of the foreign government, but private rights only, and comity does not require it to discharge the attachment.

[Ed. Note.—For other cases, see International Law, Cent. Dig. §§ 10, 11; Dec. Dig. ⊂⊃10.]

In Admiralty. Suit by the Barnes-Ames Company against the steamship Luigi and John Dufour and James Dufour, doing business as Figli di Luigi Dufour. On suggestion that writ of attachment be quashed. Denied.

H. Alan Dawson, of Philadelphia, Pa., and Haight, Sandford & Smith, of New York City, for libelant.

Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for United States.

Francis Rawle and Joseph W. Henderson, both of Philadelphia, Pa., for Italian Embassy.

THOMPSON, District Judge. On October 26, 1915, Messrs. Figli di Luigi Dufour, of Genoa, Italy, as owners of the Italian steamship Luigi, entered into a charter party with the Barnes-Ames Company of Duluth Minn., for charter of the Luigi to carry wheat from New York, Philadelphia, Baltimore, and Newport News to Italy or Sicily. On January 29, 1916, the charterers filed a libel for breach of charter party against the Luigi and against John Dufour and James Dufour, doing business as Figli di Luigi Dufour, of Genoa, Italy, praying process in rem and in personam. On the same day process was allowed and bond fixed at $125,000, available in either the action in rem or in personam or both.

An attachment having issued and the Luigi having been attached by the marshal, the amount of the bond, on petition of the libelants, was reduced to $60,000. While the Luigi was in the custody of the marshal, Francis Rawle, Esq., appeared in open court as amicus curiæ and orally suggested to the court that, at the time the attachment was issued, the Luigi was under requisition by the Italian government and had proceeded to and was in the port of Philadelphia for the purpose of receiving and carrying a cargo of grain for the Italian government. Mr. Rawle called the attention of the court to an order of requisition from the royal consul general of Italy at Marseilles, dated December 24, 1915, to the captain of the Luigi, informing him that the steamship was requisitioned and at the disposition of the state, dating from the 23d of December, 1915, ordering the steamer to proceed to New York for a cargo of grain for the account of the Royal Ministry of Agriculture, Industry, and Commerce. Mr. Rawle, as amicus curiæ, suggested the release of the Luigi as a public vessel in the service of the government of Italy.

The court was of the opinion that, inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States government. Thereafter, on February 15th, the master of the Luigi filed a claim intervening for the interest of Figli di Luigi Dufour, as owners, averring that he was in possession of the Luigi at the time of the attachment, that the persons above named are the true and bona fide owners of the steamship, and praying as master and bailee for the owners to be admitted to defend. Upon the same day bond was entered by the master, with surety, in the sum of $60,000, with the usual condition that the claimant and the owners fulfill and perform the judgment or decree which may be rendered in

the premises, and pay the costs and charges, and providing that the bond should be available in the action in rem or in personam or both. On the same day the marshal made return that he had restored the steamship Luigi, and the master indorsed upon the return a receipt for the vessel.

It now appears by the suggestion of the United States attorney, at the instance of the Attorney General, and by the affidavits of the royal Italian consul and the master of the Luigi, that, when the Luigi arrived at the port of Philadelphia she was and now is under requisition by the Italian government, and is now engaged in the business of that government for the carriage of a cargo of grain from Philadelphia to Italy for public use; that she is under the orders, direction, and control of the Italian government, through its consul and through her master under the order of requisition, and that she is now loaded with grain of the Italian government and is ready to sail. The above facts are brought to the attention of the court at the suggestion of the district attorney in accordance with the established practice. The Exchange, 7 Cranch, 116, 3 L. Ed. 287; The Parlement Belge, L. R., 5 P. D. 197; The Constitution, L. R., 4 P. D. 39. The ship has been by the usual means declared by the Italian government to be in its possession and to be a public vessel of the state for its use in carrying grain.

As was stated in the case of The Parlement Belge:

"It seems very difficult to say that any court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that, if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in The Exchange. Whether the ship is a public ship, used for national purposes, seems to come within the same rule."

In the case of The Parlement Belge, the court laid down the following as the correct exposition of the law of nations, viz.: That as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

It is stated in Hall's Treatise on International Law (5th Ed.) p. 161, that:

"Public vessels of the state consist in ships of war, in government ships not armed as vessels of war, such as royal or admiralty yachts, transports, or storeships, and in vessels temporarily employed, whether as transports or otherwise, provided that they are used for public purposes only, that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his state, and that they satisfy other conditions which may be required by that law."

And at page 200:

"Besides public vessels, property of the state properly so called, vessels employed in the public service * * * are exempted from the operation of the local sovereign to the extent, but to the extent only, that is required for the service of the state owning such vessel or property."

Following a discussion of the manner of proof of the public character of the vessel, Mr. Hall, citing The Parlement Belge, says:

"A fortiori, attestation made by the government itself is a bar to all further inquiry."

It is far more important for the courts of the United States to recognize the international rule of comity that an independent sovereign cannot be personally sued, because such a suit would be inconsistent with the independence and equality among the nations of the state which he represents, than it is to take cognizance of private rights, if, by so doing, that rule is violated. If, therefore, by means of the attachment against the Luigi now under requisition as a public vessel of the Italian government, the authority of the court is indirectly exercised or attempted to be exercised upon the Italian government, so as to be inconsistent with the independence and equality of that government, the writ of attachment must be quashed.

The question to be determined, then, is whether, under the present circumstances, the authority of the court is so exercised as to be construed an attempt indirectly to bring within its authority the Italian government. The libel is against the res and the owners of the Luigi. Prior to the hearing upon the suggestion, the owners, through the master of the Luigi, had intervened, entered bond, the vessel had been released, and, at the time of the hearing, the loading had been practically completed and the vessel ready to sail. It appears, therefore, that prior to the formal suggestion the owners had stepped in, asserted their ownership, and had accomplished for the vessel, and incidentally for the Italian government, all that could have been accomplished through the court refusing to allow the attachment to stand. It was conceded at bar that, prior to the entry of bond and the release by the marshal, no berth could have been obtained for the Luigi, and that she had received her cargo as expeditiously as though she had never been attached. The custody of the court, through the marshal, over the vessel, ceased at the moment of her release, and all that remains is the bond which has been substituted for the vessel.

As the case now stands, therefore, the court possesses authority only over the obligors' bond, and none over the vessel. Nothing remains, therefore, through which, directly or indirectly, the court can exercise or attempt to exercise any authority to implead the Italian government in this suit. After the release of the Luigi, she was as to this suit as completely freed of any authority of this court as though she were upon her voyage across the Atlantic, or lying at her dock in an Italian port.

It was urged by Mr. Rawle at the hearing that the court should take cognizance of the matter in the same manner as though these facts had come to its knowledge at the time the order for process was issued.

The reasons which existed at that time for the application of the rule of comity, which would have moved the court to refuse the order for an attachment because of the universal consent to immunity of a sovereign state to being impleaded in a cause, no longer exists; and the suit from now on is between private individuals. I am unable to reach the conclusion that the rule of comity, notwithstanding its vast importance and unanimous recognition by the courts, should have retroactive effect and be applied where the necessity for its application no longer exists.

The attachment and bond will therefore be allowed to stand.

MALLEN et al. v. RUTH OIL CO. et al.

(District Court, E. D. Oklahoma. April 19, 1915.)

No. 2089.

1. GUARDIAN AND WARD ⟸113—MANAGEMENT OF ESTATE—LEASES—DURATION.

Const. Okl. art. 7, §§ 11, 13, provides for the establishment of county courts and gives them jurisdiction to appoint guardians of minors, etc., settle their accounts and transact all business pertaining to the estates of minors, etc., including the sale and distribution of their estates. Rev. Laws 1910, Okl. § 3330, provides that the court appointing a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward. Section 6569 provides that the county court, on application of the guardian or any person interested, may authorize the investment of the proceeds of sales and any other of the ward's money in the manner most to the interest of all concerned, and that it may make such further orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require. Section 6547 empowers guardians to lease and grant mineral oil and mineral gas, in consideration of a royalty or a part or portion of the production thereof, under the same procedure in the county court, as now provided by law, where the consideration is money, and has been construed as referring to section 6569 in its mention of procedure and to require the county court's approval of oil and gas leases. *Held* that, where it is for the best interest of the minor's estate, the county court has authority to authorize a guardian to make an oil and gas lease without specifically limiting the lease to the minority of the ward, as county courts are given the powers which formerly belonged to courts of equity, and such courts, acting in loco parentis, and as general guardian for a minor, would do for him and his property what he himself in all probability would do, but for his disability.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 405, 406; Dec. Dig. ⟸113.]

2. GUARDIAN AND WARD ⟸113—LEASE—JUDGMENT—COLLATERAL ATTACK.

When an Oklahoma county court, by approving a guardian's oil and gas lease, extending beyond his ward's minority, has manifested its finding that such lease is for the best interests of the estate of the minor, such finding is impervious to collateral attack.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 405, 406; Dec. Dig. ⟸113.]

At Law. Action by William D. Mallen, Jr., and others, against the Ruth Oil Company and others. On demurrer. Demurrer sustained.

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

O'Hare & Davidson, of Muskogee, Okl., and Bert Van Leuven, of Nowata, Okl., for plaintiffs.

Biddison & Campbell, of Tulsa, Okl., and Lambert & Sloop and Stanford & Stanford, all of Independence, Kan., for defendants.

Geo. S. Ramsey and Edgar A. De Meules, both of Muskogee, Okl., and John M. Chick, of Tulsa, Okl., amici curiæ.

CAMPBELL, District Judge. As to whether the demurrer in this case is well taken or not depends upon whether the county courts of this state may order guardians of minors to execute oil and gas leases of the ward's land for terms extending beyond minority: If such leases are valid after the minor reaches majority, the demurrer should be sustained. If not, it should be overruled.

[1] Section 11 of article 7 of the Oklahoma Constitution provides for the establishment of the county court in each county, which shall be a court of record. Section 13 of article 7 of the state Constitution provides:

"The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the sale, settlement, partition, and distribution of the estates thereof."

The effect of the foregoing constitutional provision, so far as it relates to the question now being considered, is to clothe the county court with full, complete, and exclusive jurisdiction and authority to transact all business appertaining to the estates of minors, including the sale, settlement, partition, and distribution of the same. The jurisdiction is full and complete, so far as relates to matters appertaining to business of the estates of minors, because it applies to *all* business of that character. It must be exclusive, because it is not to be presumed, in the absence of clear provisions to the contrary, that the framers of the Constitution intended there should be any division of authority between the county courts and any other courts of the state relating to this important matter, in view of the embarrassment and confusion which such divided authority would lead to. The jurisdiction is neither in plain terms nor by implication lodged in any other court.

By section 3330 of the Revised Laws of Oklahoma it is provided that:

"In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward."

By section 6569 of the Revised Laws of Oklahoma it is provided:

"The county court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein;

and the county court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require."

By section 6547 of the Revised Laws of Oklahoma it is provided:

"Guardians of infants and insane persons are hereby empowered to lease and grant mineral oil and mineral gas, in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the county court, as now provided by law, where such consideration is money."

The "procedure" mentioned under which such lease shall be made the Supreme Court of this state has held refers to the portion of section 6569, supra, which provides:

"The county court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require."

It is therefore held that oil and gas leases made by the guardian under authority of section 6547, supra, in order to be valid must be first approved by the county court. Duff et al. v. Keaton et al., 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472. It is clear therefore that the guardian may, with the approval of the county court, make a valid oil and gas lease of his ward's land for a period covering at least the term of minority. The statute authorizing such leases does not undertake in terms to fix the period for which such leases shall be made to run. If the county court is without authority to authorize the guardian to make an oil and gas lease beyond the term of minority "when circumstances require," then it must follow that cases will from time to time arise when the court will be seriously hampered in the transaction of business appertaining to the ward's estate and will be precluded from making such orders for the management and disposition of the estate as the circumstances require. It is a matter of common knowledge that in the development of the oil business new territory is constantly being proven. When a paying well is brought in in new territory, the rush for leases is very like the rush for claims in a new mining camp. Frequently the largest bonuses and the best terms are procured during the first flush of the excitement. But suppose that in such a case the ward's land is in the midst of the most desirable territory, but he is say 19 or 20 years old, so that, if the court and the guardian may not make and approve a lease beyond his minority, its term can only be one or two years as the case may be. His neighbors adjoining may lease for 10, 15, or 20 years, and so much longer as oil and gas may be found in paying quantities. It is obvious that the purchasers of such leases would give vastly more for the long-term leases than the one running only for one or two years. It might reasonably happen that this handicap against the leasing of the ward's land would make it impossible to effect any lease at all, and that immediate development on adjoining tracts would result in serious drainage of the land, which, during a year or two, might practically ruin it as an oil and gas property, and thus divest it of the greatest element of value it contains, and leave to the ward when he reaches majority the mere shell. Now, in a case of this kind, a most important feature of business appertaining to the estate of the ward is the dis-

position of his land for oil and gas purposes to the very best advantage. The ward, by reason of his disability of minority, cannot act. It is for this reason that the county court is authorized to act for him.

In the exercise of its exclusive jurisdiction to transact all business appertaining to the estates of minors, the county court must, I think, be held to have all the powers relating to the conduct of minors' estates which formerly belonged to courts of equity. In Gassenheimer v. Gassenheimer, 108 Ala. 651, 18 South. 520, it is said:

"It has long been the settled doctrine in this state that it is within the original jurisdiction of courts of equity to decree the sales of lands of infants, not only for their maintenance and education, or to remove incumbrances, or to satisfy charges resting thereon, but for the investment of the proceeds of sale for the general interest and advantage of the infant. Ex parte Jewett, 16 Ala. 409; Rivers v. Durr, 46 Ala. 418; Goodman v. Winter, 64 Ala. 410 [38 Am. Rep. 13]; Thorington v. Thorington, 82 Ala. 489, 1 South. 716. The exercise of the jurisdiction is not dependent on the nature and quality of the estate of the infant—whether it is an absolute estate or present possession and enjoyment, or a future estate, a reversion, or remainder—though, as was said in Goodman v. Winter, supra, because of the uncertainty of the value of a future or contingent estate, lest there should be a sacrifice of the interests of the infant, the court would be the more reluctant to decree a sale. The reason underlying the doctrine is that, as the infant labors under disability—is incapable of managing and disposing of property—the court owes to him the duty of protection, and of controlling and administering his property so as to promote his convenience and interests; a similar reason to that which prevails when the court decrees a sale for his maintenance and education."

In Gibson's Suits in Chancery, § 970, it is said:

"Whenever it is necessary for the welfare of an infant, idiot, or lunatic to convert his realty into personalty, or his personalty into realty, or to invest his money, or to ratify or avoid his contracts, the chancery court has authority to order it to be done, and to superintend the execution of its order. In short, the chancery court, acting in loco parentis, and as general guardian for minors, idiots, lunatics, and persons of unsound mind, will do for them and their property what they themselves would in all probability have done if possessed of good reason and good conscience."

In Huston et al. v. Cobleigh, 29 Okl. 793, 119 Pac. 416, a case involving the validity of an oil and gas lease executed by a guardian in Indian Territory prior to statehood for a term beyond the minority of the ward, approved by the United States Court for the Northern District of Indian Territory, sitting as a court of probate, the land being at the time in the hands of a receiver of that court, Justice Williams says:

"The lease was approved by the Secretary of the Interior, and also by the United States Court, exercising chancery jurisdiction, and also by the same court, exercising probate jurisdiction. It seems to be settled that such court, exercising the powers of chancery, had authority to approve a lease extending beyond the minority of the ward. Ricardi et al. v. Gaboury et al., 115 Tenn. 484, 89 S. W. 98; Marsh v. Reed, 184 Ill. 263, 56 N. E. 306; Branton v. Branton, 23 Ark. 569; Haag v. Sparks, 27 Ark. 594; Hankins v. Layne, 48 Ark. 545 [3 S. W. 821]; Turner v. Rogers, 49 Ark. 51 [4 S. W. 193]."

The framers of the Constitution, recognizing the disability of the minor to handle his own affairs, intrusted his business matters to the

county court. As said in the Gassenheimer Case, supra, the court owes to him the duty of protection and of controlling and administering his property so as to promote his convenience and interests. And as said in the quotation from Gibson's Suits in Chancery, supra, the court acting in loco parentis, and as general guardian for the minor, will do for him and his property what he himself in all probability would do but for his disability.

Now the statute specifically authorizes the guardian to execute an oil and gas lease for the minor's land, subject to the county court's approval, if it shall find it advantageous to the minor under the circumstances. The statute fixes no limit upon the term of the lease. Does it contemplate a term beyond the ward's minority? A case in point is Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659. The guardian, under order of the probate court, had made a lease of certain business property extending beyond the ward's minority. The question was as to whether the ward upon reaching majority might disaffirm the lease. The court said:

"Our statute empowers the probate court, upon being satisfied that it would be for the best interest of the estate of a minor, to make an order authorizing the guardian to rent the lands of such minor publicly or privately, as in his judgment shall be best for the interest of his ward, subject to the approval of the probate court, or the judge thereof in vacation. Sections 3789, 3790, Kirby's Dig. It also gives the probate court power to sell or lease for purposes of reinvestment or putting proceeds on interest. Section 3801, Kirby's Dig. At the common law the guardian in socage could make a lease in his own name of the lands belonging to his infant ward, to continue only till the infant was 14 years of age, unless the latter chose to continue it longer. But 'the common law,' says Drake, Justice, 'in its ever-watchful care of the interest of minors, has suffered their guardians to make advantageous leases for them continuing at the option of the minor beyond the age of 21.' Snook v. Sutton, 10 N. J. Law, 133, and authorities cited. Under the common law, or statutes simply declaratory thereof, leases made by the guardian to extend beyond the term of the guardianship are voidable. Rogers on Domestic Relations, 861, note 5; 15 A. & E. Ency. Law (2d Ed.) 68 and 69, note 1; Emerson v. Spicer, 46 N. Y. 594; Ross v. Gill, 1 Wash. (Va.) 87; Ross v. Gill, 4 Call (Va.) 250; Talbot v. Provine, 7 Baxt. (Tenn.) 502, at page 510; 1 Bac. Abr. Leases; 2 Kent, Com. 228; 1 Wash. Real Prop. 307; Schouler, Dom. Rel. § 350, note 1; Putnam v. Ritchie, 6 Paige (N. Y.) 390; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; People ex rel. Hannagan v. Ingersoll, 20 Hun (N. Y.) 316. In England from the time of Lord Hardwicke, the High Court of Chancery had no power to lease or sell an infant's real estate without the aid of act of Parliament. The course was to give reference to a master to inquire whether it would be for the benefit of the minors that application be made for an act of Parliament. Russell v. Russell, 1 and 2 Malloy, 258. But the supreme lawmaking power in our state has by the above statutes invested the probate court with power to sell and lease the lands of infants. The matter is left in the judgment of the probate court, and there are no limitations prescribed for the term of lease, and we are of the opinion, from the above and cognate provisions of chapter 76, Kirby's Dig., that none were intended. The best interest of the estate of the minor is the prime and only consideration, and that seems to be the only limit to his discretion within the statutory provisions. Complying with these, the intention of the lawmakers was to give the probate courts plenary power in the premises. Hence the lease made by order of the court was valid, although it was to continue beyond the minority of the infants."

[2]. So I conclude that, when the Legislature authorized the guardian to lease the ward's property for oil and gas purposes with the

approval of the county court, without specifically limiting the time for which such lease might be made to the period of minority, it intended to leave the matter to the judgment of the court in the light of what might appear to be for the best interest of the minor's estate, and that where such interest, in the judgment of the court, would be best subserved by a lease for a term extending beyond minority, a lease for such a term made by the guardian and approved by the court is valid. And of course, when the county court, by approving such a lease, has manifested his finding that such lease is for the best interests of the estate of the minor, that finding is impervious to collateral attack.

The demurrer in this case will be sustained.

In re WELLMADE GAS MANTLE CO.

(District Court, D. Massachusetts. February 23, 1916.)

No. 21825.

1. BANKRUPTCY ⟸101—JURISDICTION OF BANKRUPTCY COURT OVER BANKRUPT'S PROPERTY—CONFLICT OF JURISDICTION.

A bankrupt estate is within the exclusive jurisdiction of the bankruptcy court from the time of the filing of the petition, and its jurisdiction does not depend upon actual possession of the property affected.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 163; Dec. Dig. ⟸101.]

2. BANKRUPTCY ⟸101—CUSTODY OF PROPERTY—SEIZURE PENDING PROCEEDINGS—STATE COURT'S JURISDICTION.

After the filing of the petition, property admittedly belonging to an alleged bankrupt may not be seized or attached without the consent of the bankruptcy court, though actual possession of the property has not been taken by its officers.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 163; Dec. Dig. ⟸101.]

3. BANKRUPTCY ⟸116—CUSTODY OF PROPERTY—SEIZURE PENDING PROCEEDINGS—"BANKRUPT'S ESTATE."

Under Bankr. Act July 1, 1898, c. 541, § 2, cl. 7, 30 Stat. 545 (Comp. St. 1913, § 9586), authorizing bankruptcy courts to determine controversies in relation to the bankrupt's estate and section 70a, cl. 5 (section 9654), providing that the trustee shall upon adjudication be vested as of the date of the adjudication with the bankrupt's title to all property which prior to the filing of the petition the bankrupt could have transferred, or which might have been levied upon or sold under judicial process against him, property in the possession of a bankrupt and bona fide claimed by him at the time of the filing of the petition, but also claimed by another person upon the ground that it was wrongfully obtained from him by the bankrupt, is a part of the "bankrupt's estate," and may not be replevied by such other claimant after the filing of the petition, though prior to the adjudication and before actual possession is taken by the officers of the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸116.

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

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4. BANKRUPTCY ⊂=152—TRUSTEE—TITLE TO PROPERTY.
Such title as a bankrupt possessed to property in his possession and claimed by him at the time of the filing of the petition, but also claimed by another party, passed to the trustee as of the filing of the petition.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194; Dec. Dig. ⊂=152.]

In Bankruptcy. In the matter of the Wellmade Gas Mantle Company, bankrupt. On review of orders of the referee. Affirmed.

Joseph B. Jacobs, of Boston, Mass., for trustee.
Robert A. B. Cook, of Boston, Mass., for creditor.

MORTON, District Judge. After the filing of the involuntary petition in bankruptcy, and before the appointment of a receiver or adjudication, the respondents in these proceedings replevied certain property from the possession of the bankrupt upon a writ issued by the Municipal Court for the city of Boston. Subsequently there was an adjudication, and the present petitioner was appointed trustee. He prays that the respondents be directed to return the property so replevied, that they be enjoined from proceeding further with the suit in the municipal court, and that they be adjudged in contempt of this court.

The fundamental question is whether, after the filing of an involuntary petition in bankruptcy, persons have the right, by proceedings in a state court, to replevy property in the possession of the bankrupt, which they claim was obtained from them by fraud. The matter was fully heard by Mr. Referee Olmstead, who, in an elaborate opinion contained in his certificate, reached the conclusion that the prayers of the petition ought to be granted, and entered orders enjoining the suit in the municipal court and directing the return of the goods. From these orders the present review proceedings were taken by the claimants.

[1] A conflict of jurisdiction is to be regretted, and should be avoided if it be fairly possible to do so. In the present case the parties are standing upon their rights, the issue raised seems to involve unavoidably the question of jurisdiction, and I proceed to consider it. It is settled that a bankrupt estate is within the exclusive jurisdiction of the bankruptcy court from the time of the filing of the petition, and that this jurisdiction does not depend upon actual possession of the property affected.

"The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts, wherever situated, into custodia legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, 27 Am. Bankr. R. 262." Day, J., Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305.

"When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when

the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed, and that his estate passes actually or potentially into the control of the bankruptcy court. We have said: 'The filing of the petition is assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and disposition of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition' "—citing cases. Van Devanter, J., Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. —— (1 Jan. 1916).

See, too, Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174.

[2] It follows that there is no right to seize or attach property admittedly belonging to an alleged bankrupt after the filing of the petition against him, without the consent of the bankruptcy court, regardless of whether actual possession of the property has been taken by its officers.

[3] The only point left open under the decisions referred to is whether property in the possession of a bankrupt and bona fide claimed by him at the time of such filing, but which another person also claims, upon the ground that it was wrongfully obtained by the bankrupt, constitutes part of the "estate." To hold that it does not, and that claimants are free to assert their alleged rights to it in any court where they can obtain jurisdiction, would obviously lead to great confusion and difficulty in the bankruptcy administration. The trustee, when appointed, might find replevin suits pending in an indefinite number of courts, and that a large part of the property which had been in the bankrupt's possession at the time when the petition was filed had been seized by claimants.

[4] The act explicitly vests bankruptcy courts with power to "determine controversies in relation to" the estate (section 2, clause 7), and also provides that the trustee shall, upon adjudication, be vested as of the date of adjudication with the title of the bankrupt to all property "which prior to the filing of the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him" (section 70a, cl. 5). While, if the respondent's claim to the property in question be well founded, the bankrupt could not rightfully have transferred it, and the trustee takes no better title than the bankrupt had (Clark v. Snelling, 205 Fed. 240, 123 C. C. A. 430; Bailey v. Baker Co., supra), it is clear that such title as the bankrupt possessed in the disputed property passed to the trustee as of the filing of the petition. The mere assertion of an adverse title did not deprive the bankrupt of the property; the adverse claim must be heard and decided; it may turn out to be unfounded.

No case in the federal courts explicitly deciding the important question here raised has come to my attention. In Everybody's Store, Inc., 207 Fed. 752, 125 C. C. A. 290, the issue was whether the respondent in the involuntary petition was insolvent. It was in possession of certain property, which it claimed to own. The petitioning creditors offered to show that the respondent's claim of ownership was not well founded, and that the property rightfully belonged to another per-

son. I ruled at the hearing that, in determining the question of solvency, the alleged bankrupt was to be credited with all property which it had possession of, and in good faith, and upon not unreasonable grounds, claimed to own, and I excluded the offered evidence. These rulings were affirmed by the Circuit Court of Appeals for this circuit. It follows that, as between the petitioning creditors and the alleged bankrupt, the property here in question constituted, at the filing of the petition, part of the "estate." It seems to me unwise and unsound to establish a different rule as to adverse claimants. The time of filing is the time at which the bankruptcy court's exclusive jurisdiction attaches, and is the date as of which the issue of solvency, if raised on the petition, is to be determined. I do not think that other courts, upon the mere assertion of an adverse title, ought to be permitted, pending the bankruptcy proceedings, to take from the alleged bankrupt property which he then had possession of and claimed, in good faith and upon not unreasonable grounds, to own.

The respondents rely on Ayers v. Farwell, 196 Mass. 349, 82 N. E. 35, in which it was held that property could be replevied under a state court writ from an adjudicated bankrupt, if actual possession of the property had not been taken by the bankruptcy court before it was seized on the replevin writ. The decision fully supports the respondents' position. See, also, In re Rathman (C. C. A.) 183 Fed. 913, 924, 925, 106 C. C. A. 253. In construing a federal statute, however, the construction put upon it by the United States Supreme Court and the Court of Appeals for this circuit is binding on this court. While the authority attaching to a decision of the Supreme Court of Massachusetts is very great, and a judge may well hesitate to differ from it, I am bound to say that Ayers v. Farwell seems to me, in its reasoning and in its conclusion on this point, to be inconsistent with the later cases in the United States Supreme Court to which I have referred. It should perhaps be added that Ayers v. Farwell was decided after York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, in which the broad expressions in Mueller v. Nugent had been doubted, and before the later case above referred to, in which those expressions were explicitly reaffirmed.

The order of the referee was right, and is affirmed.

THE COASTWISE.

(District Court, D. Massachusetts. November 3, 1915.)

No. 1039.

1. TOWAGE ⇐11(5)—STRANDING OF TOW—LIABILITY OF TUG—DEVIATION FROM PROPER COURSE.

A barge being towed up the New Jersey coast at night was stranded on Brigantine Shoal. There was a fresh easterly wind, but it was not foggy, and there were no unusual weather conditions. The proper course was outside the buoy marking the shoals, while the stranding was two or thre miles inside. Soundings taken before showed a depth of 10 fathoms

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

only, which is not considered safe in that locality with an east wind. *Held*, that the stranding was due to the negligence of the tug.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 17; Dec. Dig. ⊂⊃11(5).]

2. SHIPPING ⊂⊃136—LOSS OF CARGO OF TOW—HARTER ACT.

The owner of a barge let her by charter to carry a cargo between two ports, and also provided a tug owned by him to tow her. Both barge and tug were seaworthy and properly manned, equipped, and supplied. The barge and her cargo were totally lost by stranding through negligence in operating the tug. *Held*, that Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (Comp. St. 1913, § 8031), did not relieve the tug from liability for loss of the cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⊂⊃136.]

In Admiralty. Suit by Melville L. Cobb against the tugboat Coastwise. Decree for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

James J. Macklin, of New York City, for claimant.

MORTON, District Judge. The tow, consisting of the tug Coastwise and the barge Soule, rounded Northeast End Light and started up the New Jersey coast in a moderate northeasterly wind that was drawing farther to the east and freshening. A heavy underswell was running and some top sea. Going north from that point the proper course lies well outside the buoy off Brigantine Shoal. The officer on the tug intended to follow that course. The stranding occurred on Brigantine Shoal, two or three miles at least inside the buoy, and about four miles off the course. The first question is whether the accident was due to negligent navigation by the tug.

[1] The danger of being swept on this coast and on this very shoal in an easterly wind is well recognized. The United States Coast Pilot says:

"In strong easterly winds when abreast the coast between Tucker Beach and Absecon Lighthouses, special care is necessary not to be set on the shoals off Brigantine Beach." Page 59.

And again:

"Deep draft vessels should give the shore between Little Egg Inlet and Absecon Inlet a berth of over five miles." Id. p. 56.

It contains numerous other references to the danger of going too close to this coast with vessels of heavy draft, like the Soule. It was plainly the part of good seamanship, under the conditions existing when the tow passed Northeast End Light, to keep well offshore; and that is what the officers of the tug meant to do, but failed. Was their failure negligent?

The shoal on which the barge stranded has been well known to navigators for many years. A buoy is placed outside it to indicate its location. There is no evidence to support the suggestion of counsel for the claimant that there was a sudden change in its location or con-

formation. The master of the tug does not attempt to explain the accident on any such theory. His testimony is, in effect, that in coming a distance of about 24 miles to the north he got about 4 miles farther to the west than he intended to go.

There was nothing extraordinary in the weather, nothing sufficient to excuse such a mistake in navigation. I doubt if it was as thick as the men on the tug say it was. Her log says "Hazy" at 8 p. m. and also at 8:40 p. m., and "Quite Hazy" at 10:05 p. m. There is no mention in it of fog on this trip. The men on the barge say it was not foggy. Witnesses on the tug and on the barge testify that for a substantial time before the stranding lights on shore were visible. If so, it was possible to determine the distance from the shore. Witnesses on the barge testify that they noticed that they were farther inshore than usual. The fact was equally apparent from the tug.

For nearly an hour and a half before the stranding, the tug, according to her own log, had been getting soundings of less than 10 fathoms. The United States Coast Pilot advises that vessels on this coast keep outside the 20-fathom line, and that sailing vessels should go about and head offshore as soon as they strike 10 fathoms. Tows customarily go inside the 20-fathom line, but they mean to keep outside the 10-fathom line. Going inside the latter line under such weather conditions as prevailed on the night in question was perilous, and it was unnecessary. The soundings made on the tug indicated that she was nearer the shore than she ought to be. Her master testifies that he did not at any time suppose that the tow was far enough inshore to create a situation which could be called an emergency, and that he at no time put straight out to sea in a southeasterly direction, which, according to the Coast Pilot, is the proper course to get out of danger in that vicinity.

It is suggested for the tug that there must have been a temporary current of unusual and hitherto unknown character which set the tow towards the land. There is, however, no evidence of the existence of any such current, either at that time, or before, or since. An onshore current there in northeasterly winds is well known; navigators are warned against it in the Coast Pilot. The heavy ground swell and this onshore current, in connection with the unusual draft of the barge, probably set the tow towards the land faster than the master or mate of the tug appreciated; and in setting the course they did not make sufficient allowance for the leeway due to those causes. There was, however, nothing about the conditions which an experienced and careful navigator ought not to have appreciated and guarded against; and there seems to me to have been warning of the danger, both in the appearance of the lights on shore and in the soundings. It was the duty of the tug to exercise a high degree of care for her tow; and the fact that, in weather of no extraordinary severity or difficulty, she stranded the barge on a well-known and charted shoal, strongly suggests negligence on her part.

If the Harter Act does not apply, I feel obliged, upon all the evidence, to hold the tug solely at fault for the accident.

[2] The claimant contends that under the Harter Act the tug and

barge are to be treated as a single vessel, that both were seaworthy and were properly manned, equipped, and supplied, and that they and their owner are therefore exempted from liability for faults or errors in navigation, or in the management of the tug. 27 Stat. 445.

The tug and barge both belong to the same person. The claimant contends that both were chartered together, as one vessel. Mr. Van Der Bergh, who acted for the claimant, testifies that this was the arrangement which he made over the telephone with Mr. Ward. Mr. Ward, however, does not so recollect the talk. He testifies that the agreement covered only the barge Soule. Both say that their conversation was previous to the letter by which the charter was finally completed. In the claimant's letter to the libelant, dated May 4, 1914, it was said:

"The Coastwise, with barge New Jersey, arrived in New Bedford yesterday morning and is now en route south with one outside barge, also barge Soule for Sewall's Point. We hope that you will be in a position to load the Soule ere she arrives south."

On May 5th the claimant again wrote:

"The barge Soule, under tug Coastwise, is now en route to Hampton Roads, as yet unchartered."

This last letter apparently crossed in the mail one from the libelant dated May 5th, in which he says:

"Have Enos Soule report at News for West Va. Coal Co. loading."

In this letter closing the charter nothing is said about the Coastwise. It is not frequent to tie a tug to a barge by a charter, although it is sometimes done. Upon all the evidence, I do not think that the agreement under which the Soule was chartered included the Coastwise. I think, and I find, that the claimant was free to tow the Soule up the coast by any tug at its disposal.

The libelant contends that the tug was not powerful enough to handle such a deep and heavy barge as the Soule, that she was not therefore properly equipped for the work in hand, and that on this account the case is not within the provisions of the Harter Act. There is testimony that the Coastwise had sufficient power to tow the Soule under any ordinary conditions. The only substantial evidence to the contrary is the fact that she did not pull the barge clear. She apparently never tried to go right out to sea, and failed to make headway because of her lack of power; and she made fair progress before the stranding. Her captain at some point, and I think very shortly before the stranding, did, as he says, change his course to an easterly one; and still they did not get clear. I do not think that fact alone sufficient to indicate a lack of power in the tug. It is possible, perhaps probable, that the barge stranded on the way out. I do not attach much importance to the testimony as to the tug's power, given by the captain of the barge, who, so far as appears, never navigated on the tug at all. I do not think it is made out that the tug was lacking in sufficient power for the purpose in hand. In all respects the tug and barge were seaworthy, and were properly manned, equipped, and supplied.

The case thus presents this question: The owner of a barge charters her to carry a cargo between two ports. He provides a tug, also belonging to him, to tow her. Both barge and tug are seaworthy, and are properly manned, equipped, and supplied. The barge and her cargo are totally lost by negligence in operating the tug. Does the Harter Act relieve the tug from liability? As an original question, I should regard this as a doubtful, as it certainly is an important, one; but I think it has been closed, so far as this court is concerned, by the decision in Baltimore & Boston Barge Co. v. Eastern Coal Co. (C. C. A. 1st Circuit) 195 Fed. 483, 115 C. C. A. 393. In that case a barge, which had been chartered to the owner of the tug, was lost by the negligence of the tug. The owner of the cargo on the barge made a claim against the tug. The Harter Act was set up in defense. It was held both by the District Judge and by the Circuit Court of Appeals that the Harter Act did not apply. The question decided is thus stated in the language of the learned District Judge in his opinion on that case:

"The question then presented is: May an owner of a tug have the benefit of the act, as against damage through negligence on the part of his tug, in towing a barge under charter to him, loaded with cargo which he, thus controlling the barge, has agreed to carry in her?' Dodge, J., The Murrell (D. C.) 200 Fed. 826, page 829.

It was explicitly pointed out by the Circuit Court of Appeals that there was no distinction, upon the point under discussion, between full ownership of the barge by the owner of the tug and ownership pro hac vice by charter.

I see no sound distinction between that case and this one. I therefore rule that, upon the facts found, the Harter Act does not exempt the tug from liability. There must be a decree for the libelant, and the case must be referred for assessment of damages.

UNITED STATES v. KNOELL et al.

(District Court, E. D. Pennsylvania. March 3, 1916.)

No. 64.

1. CRIMINAL LAW ⟸742—TRIAL—QUESTIONS FOR JURY—CREDIBILITY OF TESTIMONY.

The credibility of uncorroborated witnesses, who have been convicted of crime, is for the jury, and must be submitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719–1721; Dec. Dig. ⟸742.]

2. CRIMINAL LAW ⟸935—NEW TRIAL—GROUNDS—SUFFICIENCY OF EVIDENCE.

A conviction, based on the uncorroborated testimony of witnesses who have been convicted of crime, will not be set aside on motion for new trial, unless in the judgment of the court the conviction was unjust.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2193, 2194, 2297, 2298, 3068; Dec. Dig. ⟸935.]

3. WITNESSES ⊂=106—COMPETENCY—WIFE OF CONSPIRATOR.
The wife of a co-conspirator with defendants on trial is competent to testify as to facts which do not involve her husband in any way.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 415–424; Dec. Dig. ⊂=106.]

4. CRIMINAL LAW ⊂=406—EVIDENCE—DECLARATIONS—FORMER TESTIMONY.
In a prosecution for conspiracy, the admission in the present prosecution of evidence of the testimony of a defendant, given to support a fraudulent claim involved in the conspiracy, before a referee in bankruptcy, is not error.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894–917, 920–927; Dec. Dig. ⊂=406.]

5. CONSPIRACY ⊂=47—OFFENSES AGAINST BANKRUPT LAW—EVIDENCE.
In a prosecution for conspiracy, evidence *held* to sustain an allegation of the indictment of the receiving of property of a bankrupt after petition filed.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105–107; Dec. Dig. ⊂=47.]

6. CRIMINAL LAW ⊂=921—NEW TRIAL—GROUNDS—ADMISSION OF INCOMPETENT EVIDENCE.
Where no objection was made to the admission of incompetent testimony of one of the defendants incriminating his wife, though the attention of able counsel for defendants was called to the matter by the court, the admission of such evidence is not ground for new trial.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2206–2209; Dec. Dig. ⊂=921.]

John Knoell and another were convicted of conspiracy, and move for a new trial. Motion overruled, with leave to United States to move for sentence.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

William A. Gray, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. This motion is based upon a number of reasons. Some of them may be grouped in classes, and others do not call for discussion. We will take them up as raising the questions which counsel for defendants has discussed, but in a different order.

[1] Several of the reasons go to what may be called the abstract justice of the case. Is the verdict just? The basis of this question is the source of the incriminating evidence. It is admittedly tainted. The chief witnesses, and indeed all the witnesses, whose testimony was not confined to facts which required only formal proof, were smirched with self-confessed crimes of the most detestable character. The testimony of none of these witnesses had other support than that of the testimony of other witnesses as unreliable as themselves. It is, of course, conceivable that the testimony of the vilest witness may be true in a particular case or as to particular facts. The course of the trial may be such as to force a conviction of guilt, notwithstanding every abhorrence of the source of the evidence. Such was the present case. The jury gave the evidence a most careful, intelligent, and conscientious consideration. The reasons which to the minds of the jury

compelled the finding made can be readily understood. It cannot be said that a mistake was made.

This brings us face to face with the question whether a wise general policy of the law will be denied its logical results in a particular case. The answer must be in the negative, because the idea of impartial universality in its application is of the very essence of the idea of a law. This further brings us to the question of what is the law of the United States on the subject of convictions founded only upon tainted evidence. We waive the subsidiary question of the duty of the trial judge to warn the jury of the danger of the acceptance of such testimony because we are bound to find this duty to have been fully met. Does the law lay its injunction upon the jury to disregard such testimony, or may they convict upon it alone? The law of the United States is that the credibility of such testimony is for the jury and must be submitted. Richardson v. United States, 181 Fed. 1, 104 C. C. A. 69.

[2] The proper reluctance of the courts, in the enforcement of a wise policy, to permit a conviction so based to stand, is overborne by a verdict which gives credence to such testimony, unless this is in turn overborne by the judgment of the court that the conviction was unjust. This finding, as already stated, we cannot make.

We are next led to consider the complaints of specific errors by the court.

[3] The second question discussed is whether Rose Turetz, the wife of one of the conspirators, was a competent witness. The distinction between the general competency of a witness and the admissibility of the testimony or competency to testify to particular facts is one which in his rulings the trial judge made an effort to observe. The husband in this case was not on trial. He had been eliminated by his plea of guilty. The wife was not, therefore, testifying against her husband on the face of the record, and was in consequence not incompetent generally. Her testimony, moreover, was confined to facts affecting only the defendants on trial. This distinction was made with the thought in mind of confining the objection to its real grounds.

We are in accord with the expressed views of counsel for defendants that the incompetency is not limited to cases in which the husband is on trial. Such a restriction would leave the principle shorn of its real and true value. It is founded upon a wise policy of the law, and its application should be broad enough to subserve the purpose intended. This is that the wife will not be heard to give testimony which directly incriminates the husband, or to appear against him in a case to which he is a party, or in a case such that a verdict in accord with her testimony will carry the necessary implication of his guilt. If the charge is such as in Cornelius v. Hambay, 150 Pa. 359, 24 Atl. 515, that the guilt of the party to the record necessarily involves the spouse of the witness, he or she cannot testify.

There is no such relation here between the husband of the witness and the defendants. We, of course, know as a fact that the husband was equally guilty with them; but (and this is the important distinction) we do not learn this from the testimony of the wife, nor does their guilt of itself in any way imply his. The husband is in no way concerned until we learn from others the facts which bring him into

the conspiracy. The distinction is clearly brought out by the difference between the position of the wife and the husband here. The wife might have testified (indeed, under the restrictions imposed, she was required and did so testify) to the guilt of the defendants on trial without in any way implicating her husband. The guilt of each is just as distinctly a different thing as if she had testified to the guilt of defendants on trial charged with burglary, and it had been learned through the testimony of others that her husband was guilty of like crimes.

The test is: Does her testimony incriminate him, either directly or by necessary implication? She did not directly implicate him, because all such testimony was carefully excluded and her testimony was confined to the defendants. It is clear that their guilt did not necessarily implicate or involve him. His testimony, however, did directly and by necessary implication involve her. In the first place, the charge directly involved her. In the second place, the charge was of such a nature that the guilt of any one necessarily involved her. The husband was clearly incompetent. No objection, however, was made to his testimony. Objection was interposed to the testimony of the wife. We are unconvinced that there was any error in admitting her to testify within the limits to which her testimony was confined. The admission of the testimony of the husband will be considered later. We pass it for the present, to take up some of the other points made.

[4] One is that which counsel present as the first. It is based upon the use of statements which the defendants had made before the referee. It is true the statements were made in the course of testimony delivered under oath. They were none the less statements, and voluntary ones, and we are able to see nothing more in the use made of them than the use which is always made of incriminating declarations of a defendant. There is a well-justified expectation that courts will frown upon all attempts to fritter away constitutional rights, and that they will preserve to all persons the real values which those rights confer. Such rights are, however, clearly not involved in some situations. A person is indicted for conspiracy. The conspiracy involved a fraudulent claim before a referee in bankruptcy and testimony in support of it. The defendants had so testified. On the conspiracy trial the testimony thus given becomes of evidential value. How can the constitutional right be said to be involved?

There is a ground of exclusion of incriminating statements somewhat akin to the constitutional ground. A familiar instance is a confession secured by promises of immunity or through threats of punishment. Neither ground appeared in this case. We quote from the brief of defendants the statement that at the time the testimony was given there was no thought of the prosecution of the defendants. They were not, therefore, in any sense called to testify against themselves. It was their right to refuse to testify to any incriminating facts. It is true that the use of this testimony in a prosecution against them results in their bearing testimony against themselves in the same sense in which any declaration made by them would be self-condemning. The excluding ground must therefore be the same in the one case as in the other. It might be well if the law made testimony given in ju-

dicial proceedings inadmissible, except when it became the basis of a charge of perjury. We are, however, not persuaded that the trial judge would have been justified in ruling such to be the law.

[5] The questions which counsel have classified as the fifth and sixth are interdependent. So far as they go to the sufficiency of the indictment, they were disposed of when the court, through Judge Thompson, overruled the demurrer interposed to the fourth and fifth counts. That part of the law of this case was then settled. The point, of course, remains that there was no evidence to support the fourth count, and as the offense involved in the fourth count is included in the fifth, this retains also the point that the fifth count is alike unsustained. The point is pivoted upon the feature that the offense which figures in the fourth count is that of receiving property of the bankrupt *after* petition filed, and the assertion that all the evidence was directed to transactions before the filing of the petition. It was filed November 23, 1914. There was evidence that on November 21st property of the bankrupt was placed in the keeping of a man by the name of Rash. Had this been all the proofs showed, it clearly would not have justified a finding that property had been received after November 23d. This was, however, not all which was proven. The property was received by the defendants after the date of filing. The November 21st transaction really went only to the proof that the property which the defendants afterwards received was property of the bankrupt. The charge, be it remembered, is one of conspiracy. The offense was to be accomplished in the way set forth in the indictment. The proofs closely followed the facts averred. We do not, therefore, feel at liberty to find there was no evidence to support the charge.

[6] The only remaining reason urged is the incompetency of the husband of the bankrupt to testify. We entertain no doubt of his incompetency. It may be explained in passing that not only was no objection interposed to his testimony, but he was the first or an early witness called. The full facts of the case had not then been disclosed. He was heard by the court under the impression that he was himself the bankrupt. Later it developed, or at least came to the attention of the trial judge, that the wife was the bankrupt. At once the thought of his incompetency arose and was presented to counsel. The notes of testimony do not show just what took place, but it was made clear that the absence of objection was not an inadvertence, and no motion to strike out was made. As the defendants were represented by counsel of experience and ability fully equal to the discharge of the duty of safeguarding the interests of their clients, the trial judge did not see his way clear to further interfere. The point now made is very strongly, and yet very fairly, expressed by counsel thus:

"Though it appears that his [the husband's] competency was not raised at the trial, still it is respectfully submitted, if he was incompetent, the court should in its discretion * * * not sustain a conviction based upon testimony incompetent under the law."

We feel the power of this appeal, and admit that it has caused us to waver in our judgment of the proper conclusion to be reached. It is beyond dispute that the court should, at whatever cost, preserve to

defendants all their rights. That is not, however, the whole duty of the court. A like regard is the due of the public, whose laws have been found to have been violated, and to the orderly administration of justice. We hold that measure of the ability of counsel as to credit them with the exercise of good judgment in the course they took, although the reasons for that course do not on the surface appear. The evidence was in the case without error of law. It was submitted to the jury without complaint of unfairness or inadequacy in the charge. It was passed upon by the jury, we are convinced, in the spirit of men conscientiously striving to do their full duty, and, in the absence of errors of law, we cannot see our way to impeach the verdict.

The answer to the present complaint of the defendants is summed up in this observation: Had the jury, out of deference to the general policy of the law that tainted testimony should be regarded with suspicion and scrutinized with the utmost care, been able to entertain a reasonable doubt of defendants' guilt and in consequence had acquitted them, the verdict would have had support in the facts which impeached the credibility of the witnesses who testified to guilt. The charge impressed this duty upon them. We cannot refuse the inference that the jury found themselves, notwithstanding, unable to entertain a doubt of defendants' guilt, and the court is in its turn unable to find that such a conclusion is without support in the evidence.

The motion for a new trial is overruled, and the United States has leave to move for sentence to be imposed upon all who stand convicted of the offense charged.

GOODNO et al. v. HOTCHKISS et al.

(District Court, D. Connecticut. February 26, 1916.)

No. 1437.

1. EQUITY ⊂=209—PLEADING—REPLICATION—"COUNTERCLAIM."

Equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) provides that the answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against plaintiff which might be the subject of an independent suit in equity against him, and that such set-off or counterclaim shall have the same effect as a cross-suit. Rule 31 provides that, unless the answer asserts a set-off or counterclaim, no reply shall be required without special order of the court or judge, and that, if the answer include a set-off or counterclaim, the party against whom it is asserted shall reply within 10 days. In a suit to enforce a family agreement for the division of an estate in the proportions indicated in an unsigned will, and to require an accounting by the executrix and administratrix of parties to the agreement as to property received by them upon a division which it was alleged was not in accordance with the agreement, one of the defendants filed a pleading, denominated an "answer," but which, after denying in part and admitting in part the allegations of the complaint, and pleading limitations and a former adjudication, asked for certain orders, judgments, and decrees. *Held* that, unless the answer was amended, so as to omit the prayers for affirmative relief, a replication to the answer must stand, as the word "counterclaim," in the rules, must be taken to be a general and comprehensive term, in-

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

cluding all counter demands which might be the subject of an independent suit in equity, so as to enable the court to pronounce final judgment in the same suit, both on the bill of complaint and the answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 481; Dec. Dig. ⟸209.

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

2. EQUITY ⟸208—PLEADING—"CROSS-BILL."

Matter pleaded in an answer was not a "cross-bill," so as to require a reply, unless it was brought against plaintiff, or against other defendants, or against both, touching the matters in question in the original bill, either to obtain a discovery of facts in aid of defense to the original bill, or to obtain full and complete relief as to the matters charged in the original bill, when otherwise a complete decree could not be made.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 479, 480; Dec. Dig. ⟸208.

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

3. EQUITY ⟸208—PLEADING—COUNTERCLAIM.

Matter pleaded in an answer to a bill in equity was not a "counterclaim," so as to require a reply, unless it stated matters arising out of the same transaction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 479, 480; Dec. Dig. ⟸208.]

In Equity. Suit by Louise T. Goodno, individually and as executrix of Nathaniel S. Hotchkiss, deceased, and another, against Marie O. Hotchkiss, individually, as executrix of Mary A. F. Hotchkiss, deceased, and as administratrix of William H. Hotchkiss, deceased, and another. On motions to strike out special replications to the answers. Motion of the defendant Yale University granted, and motion of the defendant Hotchkiss granted conditionally.

Prentice W. Chase, A. McC. Mathewson, and Ernest L. Averill, all of New Haven, Conn., for plaintiffs.

George D. Watrous, of New Haven, Conn., for defendant Hotchkiss.

Leonard M. Daggett, of New Haven, Conn., for defendant Yale University.

THOMAS, District Judge. These are motions to strike from the files the special replications to the separate answers of these defendants. Louise T. Goodno, one of the plaintiffs, is the executrix of the last will and testament of Nathaniel S. Hotchkiss, deceased, a son of Henry O. Hotchkiss, deceased, who died, domiciled in New Haven, some time about 1884. The other plaintiff is William C. Goodno, the husband of the said Louise T. Goodno.

The bill is filed in the name of Louise T. Goodno, as executrix of the last will and testament of said Nathaniel S. Hotchkiss, deceased, and individually in her own right. The defendants are Marie O. Hotchkiss, individually and as executrix of the last will and testament of Mary A. F. Hotchkiss, widow of the said Henry O. Hotchkiss, and as administratrix of the estate of William H. Hotchkiss, deceased, a son of said Henry O. Hotchkiss, deceased, and Yale University.

The bill of complaint charges in substance that said Henry O. Hotchkiss, deceased, left an unsigned will, and that, following his death, the widow, Mary A. F. Hotchkiss, and his three children surviving him, to wit, Marie O. Hotchkiss, William H. Hotchkiss, and Nathaniel S. Hotchkiss (father of the plaintiff, Louise T. Goodno), mutually agreed in writing to divide the estate of said Henry O. Hotchkiss, when ready for distribution, among themselves in the proportions indicated by him in his unsigned will, and thereafter a division was effected. It is further alleged in the bill that this division did not carry out and effect the actual intention manifested in the unsigned will; that after this division was made, said Mary A. F. Hotchkiss settled her account as administratrix; that thereafter said Mary A. F. Hotchkiss drafted a will in her own handwriting, which was duly executed, and which, with subsequent codicils, was, after her death in 1912, admitted to probate; that the estate of said Mary A. F. Hotchkiss consisted in part of property which she had obtained from her husband under this division, and in violation of the provisions of the unsigned will, and also in part of property which she had obtained from the estate of her son, William H. Hotchkiss, who had predeceased her, and which was given to him in violation of the provisions of the unsigned will and the agreements thereunder, and that all of said property so obtained by said Mary A. F. Hotchkiss was subject to a trust arising from the actual agreement and the terms of the unsigned will; that the defendant Marie O. Hotchkiss was the executrix of said will and codicils of her mother, Mary A. F. Hotchkiss, and was also the administratrix of her brother's estate, and that Yale University is a legatee named in said will of Mary A. F. Hotchkiss; and that certain parts of said will are vague and indefinite.

The bill of complaint then prays that the agreement be given its true effect by this court, and also demands its enforcement pursuant to the provisions of the unsigned will as construed by the plaintiff, and the real intent of the parties as claimed by the plaintiff; that the amount of the share belonging to the estate of Nathaniel S. Hotchkiss, deceased, or due his heir at law, Louise T. Goodno, be ascertained, and that judgment be rendered for said amount against the defendants, who now hold or claim said property; that the mutual distribution of January 9, 1884, be set aside on the ground that it was made by mistake, and is unjust and inequitable and without consideration, and that it be corrected to conform to the true intent and meaning of the parties; a construction of the will of Mary A. F. Hotchkiss; an accounting from Marie O. Hotchkiss, as executrix, of all the property coming to her formerly belonging to the estate of Henry O. Hotchkiss, deceased, its earnings and increase from the date of the division; and accounting from said Marie O. Hotchkiss individually for all moneys she has received from the principal of the estate of the said Henry O. Hotchkiss from the date of the mutual agreement; and a judgment that she be directed to pay said moneys into court for the purpose of apportioning the same under the agreement; an accounting from said Marie O. Hotchkiss, as administratrix of the estate of her brother, William H. Hotchkiss, deceased, for all moneys and proper-

ties received by William H. Hotchkiss during his life, or by her as administratrix since his decease, and to pay into this court such sums as may be found to have been received by said William H. Hotchkiss over and above his lawful share in the estate of his father, Henry O. Hotchkiss.

Separate answers have been filed to this bill of complaint by the defendants Marie O. Hotchkiss, individually and as executrix and administratrix, and by Yale University. These answers deny in part and admit in part the allegations of the complaint, and further allege the defenses of the statute of limitations and a former adjudication of the matters involved in the bill by the state courts of Connecticut in litigation to which all of the parties were either parties or privies. The answer of Marie O. Hotchkiss is denominated an "answer," and is drawn in the form of an answer, save that at the end she asks for certain orders, judgments, and decrees which the plaintiffs now strenuously contend are in the nature of affirmative relief, so that the answer is in effect a cross-bill or counterclaim. To these separate answers special replications have been filed, denying all matters affirmatively alleged, and setting forth other matters in confession and avoidance of the special defenses alleged in the answers.

[1] If it were not for the plaintiffs' contention that the answer of Marie O. Hotchkiss is in effect and substance a cross-bill or counterclaim, and not an answer, the disposition of these motions would present no serious question.

Prior to 1842 special replications in equity had fallen into disuse, and they were not permitted, save by leave of the court in extraordinary cases. It was always required that new matter, or matter in response to allegations in the answer, should be set up by amendments to the bill, and could not be supplied by averments in the replication. Taylor et al. v. Benham, 5 How. 233, 12 L. Ed. 130; Wilson v. Stolly, 4 McLean, 272, Fed. Cas. No. 17,839; Coleman v. Martin, 6 Blatch. 291, Fed. Cas. No. 2,986; Vattier v. Hinde, 7 Pet. 252, 274, 8 L. Ed. 675; Story's Equity Pleadings, §§ 676, 679, 878; Mitford & Tyler, Pleadings and Practice in Equity, 413; Swift's Digest (Ed. 1822) vol. 2, p. 245.

In 1842 the Supreme Court promulgated equity rule 45 (see Dewhurst's Rules of Practice in United States Courts [2d Ed.] p. 394), providing that "no special replication to any answer shall be filed," and that if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill he may have leave to amend the same, with or without the payment of costs, as the court or a judge thereof may in his discretion direct. This rule was construed by the Supreme Court as meaning that:

"A general replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill." Mr. Justice Harlan in Southern Pacific Railroad v. United States, 168 U. S. 1, 57, 18 Sup. Ct. 18, 30, 42 L. Ed. 355.

And in Mason, Adm'r, etc., v. Hartford, Providence & Fishkill R. Co. (C. C.) 10 Fed. 334, a special replication to a plea and demurrer

was stricken from the files by Judge Colt in accordance with the rule.

Rule 31 of the New Equity Rules promulgated by the Supreme Court in 1912 (198 Fed. xxvii, 115 C. C. A. xxvii), which is new and largely based on the English practice, has done away with *all* replications to answers by providing that:

"Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff."

The only difference between this rule and the English rule upon which it is based is that the latter is peremptory in all cases, while the former merely does not require a reply.

It is clear from an examination of the pleadings that the plaintiffs' reply to the answer of Yale University is contrary to both the letter and the spirit of present rule 31, and contrary also to the long-established practice in equity as shown by the authorities cited, and the motion to strike it from the files is granted.

[2, 3] The answer of Marie O. Hotchkiss, however, presents another question. The matter pleaded by her is clearly not a set-off, nor is it a cross-bill, unless it is brought against the plaintiff, or against other defendants, or against both, touching the matters in question in the original bill, either to obtain a discovery of facts in aid of defense to the original bill, or to obtain full and complete relief as to the matters charged in the original bill, when otherwise a complete decree could not be made. Story's Equity Pleadings, § 389; Mitford & Tyler, Pl. & Pr. in Equity, 178; Daniell's Chancery Pl. & Pr. vol. 2, 1548; Ayres v. Carver, 17 How. 595, 15 L. Ed. 179. Nor is it a counterclaim unless it states matters which have arisen out of the same transaction. The word "counterclaim," as used in rule 31 and the preceding rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), must be taken to be a general and comprehensive term including all counter demands (Boothe v. Armstrong, 76 Conn. 530, 57 Atl. 173), which might be the subject of an independent suit in equity, so as to enable the court to pronounce final judgment in the same suit both on the bill of complaint and the answer. It would seem as if the affirmative relief demanded by the defendant Marie O. Hotchkiss is unnecessary, and that her answer would be complete without it; but it is her privilege to insist upon it, if she so desires. Equity rule 30.

The conclusion therefore is that, in view of the form in which the defendant Marie O. Hotchkiss has filed her answer, the replication must stand. If, however, her attorney desires to amend his answer by striking out at its conclusion the prayers for affirmative relief within 10 days, the motion of Marie O. Hotchkiss to strike the replication from the files will be granted; otherwise, it will be denied.

Ordered accordingly.

THE ROCHESTER.

(District Court, W. D. New York. January 19, 1916.)

1. SHIPPING ⟸209(2)—LIMITATION OF LIABILITY—WAIVER OF RIGHT.
The owner of a vessel in a proper case is entitled to a limitation of liability against a claim asserted by a libel either in personam or in rem, and in the latter case does not lose the right by giving an undertaking for the release of the vessel.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 647; Dec. Dig. ⟸209(2).]

2. SHIPPING ⟸207—LIMITATION OF LIABILITY—SCOPE OF STATUTE.
Rev. St. § 4283 (Comp. St. 1913, § 8021), providing for limitation of liability, is not limited to loss of merchandise in course of transportation, but is broad enough to permit a shipowner to claim such limitation for injury to a person aboard the ship.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 555, 643, 644; Dec. Dig. ⟸207.]

3. SHIPPING ⟸209(3)—PROCEEDING FOR LIMITATION OF LIABILITY—ISSUES.
In a proceeding for limitation of liability, the questions presented are whether there is any liability in fact, and, if so, whether a proper case for limitation of liability is presented.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 652; Dec. Dig. ⟸209(3).]

4. SHIPPING ⟸207—PROCEEDING FOR LIMITATION OF LIABILITY—NONMARITIME TORTS—"ANY AND ALL DEBTS AND LIABILITIES."
Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (Comp. St. 1913, § 8028), limiting the liability of shipowners for "any and all debts and liabilities," extends to liabilities for torts, maritime or nonmaritime, claimed to have been caused by the negligence of the master and crew, and the fact that a tort is nonmaritime, and not within the admiralty jurisdiction, does not debar the shipowner of the right to maintain a proceeding in admiralty for limitation of his liability.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 555, 643, 644; Dec. Dig. ⟸207.]

5. SHIPPING ⟸209(2)—LIMITATION OF LIABILITY—RIGHT TO MAINTAIN PROCEEDINGS.
Where libels assert the liability of a vessel, the owner may maintain a proceeding for limitation of liability for the claims, although no property has been attached thereunder.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 647; Dec. Dig. ⟸209(2).]

In Admiralty. Proceeding by the Richelieu & Ontario Navigation Company, as owner of the steamship Rochester, for limitation of liability. On exceptions to petition. Overruled.

Brown, Ely & Richards, of Buffalo, N. Y. (Burlingham, Montgomery & Beecher and Roscoe H. Hupper, all of New York City, of counsel), for petitioner.

Hamilton Ward, of Buffalo, N. Y., and Lewis A. McGowan, of Providence, R. I. (Irving W. Cole, of Buffalo, N. Y., of counsel), for claimants.

HAZEL, District Judge. [1] The libelant contends that, by giving the undertaking of the steamer Rochester to pay the claims and allow-

ing her to proceed on her voyage, the owner elected to waive its right to surrender or to limitation of liability. But this view is not supported by the cases cited in the brief submitted by the libelants. Under the Revised Statutes the owner, notwithstanding the release of the vessel by the undertaking, was entitled to a limitation of liability to the value of its interest in the vessel and freight at the termination of the voyage on which the loss or damage occurred. Such a proceeding is applicable either where the libel was in rem against the vessel or in personam against the owner; the limitation extending to the owner's property as well as to his person. The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.

The adjudications construing sections 4283 and 4285 of the Revised Statutes (Comp. St. 1913, §§ 8021, 8023) and Supreme Court admiralty rules 54 and 56 (29 Sup. Ct. xlv, xlvi) relating to the limitation of liability of the owners of vessels uniformly hold that the statutes in comprehensive terms extend to every case in which the shipowner may desire to claim limitation of liability, and indeed seem to include the complete settlement of every issue raised between the owner and claimants seeking to hold the vessel liable for loss or damage. Admiralty rule 56 indicates that in a proceeding for limitation of liability the owner is at liberty to contest his liability or the liability of the vessel for any loss, damage, or injury sustained; the only requirement being that the petition shall set forth the facts and circumstances under which the exemption from liability is claimed, saving to persons injured the right to contest the asserted right either to exemption from liability or to limitation of liability.

In Providence & New York S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038, it was held that proceedings to limit the liability of shipowners for loss or damage to goods superseded all other actions to recover for such loss in the state or federal courts "upon the matter being properly pleaded therein."

[2] Section 4283 is not limited to loss of merchandise in course of transportation, but states that the owner's liability shall in no sense exceed the amount or value of his interest in the ship for any injury or loss sustained or for "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner." While no specific reference is made to injury to a person, the wording of the statute broadly includes any loss or damage sustainable aboard the ship, and permits a limitation of liability therefor save where it was occasioned with the privity or knowledge of the owner.

[3] The questions arising in the present proceeding are whether there was any liability in fact, and whether a proper case for limitation of liability is presented. Providence & New York S. S. Co. v. Hill Mfg. Co., supra; The John H. Starin, 191 Fed. 800, 112 C. C. A. 286; Brougham v. Oceanic Steam Nav. Co., 205 Fed. 857, 126 C. C. A. 321. In the latter case it is suggested that where the proceeding is unsuccessful—that is, where the petitioner is not entitled to a limitation of liability—other proceedings or prior proceedings are not nullified; the idea being that, owing to the obvious intention of Congress to free

shipowners from the harsh provisions of the common law, the shipowner should have opportunity to bring all claimants before the court, with a view to adjusting the various claims arising out of a disaster. Butler v. Boston & Savannah S. S. Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017.

[4] Proctor for claimants urges that this proceeding is not maintainable as to claims arising from deaths occurring on land caused by negligence aboard the vessel. The petition does not state where the deceased died, or that they died within the jurisdiction of admiralty; but the absence of such allegations does not in my opinion invalidate the proceeding. In may be true, as has heretofore been decided by this court, that where death occurs on land as a result of the negligence of the master or crew of a vessel, for which the vessel would be responsible had death ensued on board, admiralty is without jurisdiction, and, the remedy being statutory, the action must be at common law; but this does not deprive a shipowner of the right to prove in a limitation of liability proceeding that death did not result from negligence attributable to the vessel, but from other causes. Indeed, the right to litigate the question of liability for death on land in such a proceeding, assuming that admiralty is without jurisdiction, is nevertheless reserved to the shipowner, for the amendment to the act of 1884 extends to all torts, maritime and nonmaritime. In Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110, the Supreme Court, in construing section 18 of the act, says:

"We therefore conclude that the section in question was intended to add to the enumerated claims of the old law 'any and all debts and liabilities' not theretofore included. * * * Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort nonmaritime."

From this it would seem that it makes no difference whether the liability arises from a maritime tort of which a court of admiralty has jurisdiction, or from a tort not strictly maritime in nature, inasmuch as death occurred on land. I think, therefore, that the owner of the steamship Rochester may limit its liability for death claims, and that such claims are embraced by the words "any and all debts and liabilities," not theretofore included, of section 18 of the act of June 26, 1884.

The question of whether the loss, injuries, or damage were sustained with the privity or knowledge of the owner, and the liability, therefore, one that cannot be limited, can be determined only from the evidence adduced in this proceeding. The first and second exceptions are overruled.

[5] The third exception relates to the contention that a limitation of liability proceeding cannot be maintained as to certain libelants, on whose libels no property has been attached; but, as the libels filed assert claims against the steamer, there exists no ground for refusing the petitioner the benefit of the statute as to such claims. In re Morrison, 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

The fourth, fifth, sixth, and seventh exceptions also concern matters in relation to which evidence may be given at the hearing, as dis-

tinguished from matters which tend to prevent limitation of liability by the owner, and they are therefore overruled.

The eighth exception relates to laches in surrendering the steamship, and the ninth to a decrease in its value; but I do not think there was any negligent delay in filing the petition or in surrendering the steamship, and as to any decrease in value it is sufficient to say that limitation of liability will be predicated upon the value of the vessel and her freight at the termination of the disastrous voyage. Any decrease in value since the causes of action arose can be ascertained, and an undertaking given to provide therefor. The Passaic (D. C.) 190 Fed. 644.

At the hearing on the exceptions to the petition motions were heard to modify the order restraining the prosecution of claims in actions pending in the Supreme Court of New York and in this court, and to appoint another commissioner in this proceeding to receive claims, but such motions are denied.

Orders may be entered in accordance with the views herein expressed.

UNITED STATES v. EASTMAN KODAK CO. OF NEW YORK et al.

(District Court, W. D. New York. January 17, 1916.)

1. MONOPOLIES ⊂=24—SUIT TO DISSOLVE—MANNER OF DISSOLUTION.
   A proposed plan for the abrogation of an illegal monopoly in photographic cameras, films, papers, and plates, which did not provide for the separation of the business of manufacturing the various units of manufacture, did not afford the relief to which the government was entitled, where the various units were combined with the intention of monopolizing and restraining trade in such products, and their manufacture constituted the monopoly, even though some of such units were fairly noncompeting.
   [Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⊂=24.]

2. MONOPOLIES ⊂=24—SUITS TO PREVENT—LACHES.
   The doctrine of laches was inapplicable to a suit to abrogate an illegal monopoly, where some of the acts in furtherance of the monopoly were committed just before the filing of the bill, and in addition to this defendants were apprised before the beginning of the suit that their methods of doing business were deemed by the government violations of the statute.
   [Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⊂=24.]

3. MONOPOLIES ⊂=24—SUITS TO PREVENT—FORM OF JUDGMENT.
   In a suit to abrogate an illegal monopoly in photographic supplies, in which it had been determined that the government was entitled to a decree in its favor, proposed final decree *held* proper.
   [Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⊂=24.]

In Equity. Proceeding by the United States against the Eastman Kodak Company of New York and others. On petition for approval of plan for abrogation of illegal monopoly, or for reference to the Federal Trade Commission. Reference denied, and decree signed.

For former opinion, on the hearing of the merits, see 226 Fed. 62.

The defendants on November 23, 1915, submitted a plan, under the opinion of August 24, 1915, and on January 7, 1916, filed a petition that, if the court did not approve this plan, the suit be referred to the Federal Trade Commission to ascertain and report an appropriate form of decree.

Mark Hyman, of New York City, and John Lord O'Brian, of Buffalo, N. Y., Sp. Asst. Attys. Gen., for the United States.

William S. Gregg and J. J. Kennedy, both of New York City, for defendants.

HAZEL, District Judge. [1] 1. I have given consideration to the proposed plan for the abrogation of the illegal monopoly which the court has heretofore found unduly and unreasonably restrained interstate trade and commerce in photographic supplies, and think such proposed plan would not afford the relief to which the government is entitled. A dissolution of the monopoly created by the illegal methods specified in the opinion filed herein is not included in the proposed plan; it fails to provide for a separation of the business—the manufacture of cameras, films, papers, and plates.

The argument of counsel for the defendants that these articles are noncompeting, and that a division of the business into separate entities could not create competitive conditions, has again been considered by me; but as their manufacture constitutes the monopoly, which it has been held was not achieved by purely legitimate means I must adhere to my original views on this question. I think that, as various units of manufacture and production (even assuming some of them to be fairly noncompeting) were combined with the intention of monopolizing and restraining trade in such products, and as objectionable practices were resorted to, something must be done to separate or divide the business into independent companies in order to restore competitive conditions. This, I think, is not impossible, and may be done without greatly prejudicing the property interests involved. In any event the mere removal of incidental evils and practices would tend to legalize the monopoly.

A re-examination of United States v. St. Louis Terminal Co., 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810, United States v. Great Lakes Towing Co. (D. C.) 208 Fed. 733, and the Keystone Watch Case (D. C.) 218 Fed. 502, satisfies me that they do not point out the nature of the decree that should be entered in this case. At first I was inclined to think they did, but I am now convinced to the contrary. The larger portion of the business of the Towing Company related to towing vessels into local harbors. The towing tugs were not engaged in interstate commerce, and it can scarcely be held that there was competition between such tugs and tugs in other ports. It was not unlike the St. Louis Terminal Case, wherein the Supreme Court permitted the elimination of illegal practices which were in the nature of administrative conditions; the illegal combinations, consisting of terminal facilities, not being otherwise engaged in restraining interstate trade.

[2] 2. The doctrine of laches is inapplicable herein, as some of the acts in furtherance of the illegal monopoly were committed just be-

fore the filing of the bill, and in addition to this the defendants were apprised before the beginning of the suit that their methods of doing business were deemed by the government violations of the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1913, §§ 8820–8830]).

[3] 3. The final decree submitted by the government is thought satisfactory, but I shall withhold my signature for a few days to give the defendants an opportunity to make known any objections they may have to the form thereof. This proposed decree will enable the defendants to take an appeal to the Supreme Court and have the important questions herein involved determined once and for all. In the meantime an interlocutory decree may be entered, the terms of which may be settled on application for a supersedeas.

4. There is no necessity at this time for referring the matter to the Federal Trade Commission, as such procedure may be resorted to after a decision has been rendered on the appeal by the Supreme Court.

The decree signed by the court and duly entered is as follows:

"This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:

"(1) The defendants George Eastman, Henry A. Strong, Walter S. Hubbell, and Frank S. Noble (hereinafter called the individual defendants), and Eastman Kodak Company of New York and Eastman Kodak Company of New Jersey (hereinafter called the corporate defendants), have combined, conspired, and participated in various transactions directly affecting the trade and commerce among the several states in photographic supplies, consisting of cameras, films, plates, and photographic paper, with the purpose and intent of unduly and unreasonably suppressing competition and restraining and monopolizing such trade in violation of the act of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.' Thereby the corporate defendants have engrossed and monopolized, and will engross and monopolize, between 75 and 80 per cent. of such trade, and accordingly attained, and now hold, an illegal monopoly thereof, which in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered separately or collectively, violates sections 1 and 2 of said act of July 2, 1890. Said monopoly was induced by wrongful contracts with regard to raw paper stock, by preventing the trade from obtaining such stock, by acquiring competing plants, businesses, and stock houses, dismantling acquired plants, and restraining the vendors from re-entering the business, by imposing on photographic dealers arbitrary and oppressive terms of sale, and other regulations inconsistent with fair and free dealing, and arbitrarily enforcing the same through the establishment of a system of espionage and the keeping of records of violations, with a view of penalizing dealers, by limiting the number of dealers, and in general by suppressing competition by the foregoing and other means.

"(2) The individual defendants, and the corporate defendants, their subsidiaries, and their successors, together with their respective officers, directors, agents, servants, and employés, are hereby severally enjoined from continuing or carrying into further effect the monopoly herein adjudged illegal, or any of the contracts, conspiracies, restraints on trade, terms of sale, regulations, or practices, or any similar acts, which induced said monopoly, or which might in the future restrain commerce in photographic supplies among the states, or induce or prolong an unlawful monopoly of such commerce.

"(3) The monopoly herein adjudged illegal shall be abrogated, and to that end the business and assets of the defendants Eastman Kodak Company, a corporation of New Jersey, and Eastman Kodak Company, a corporation of New York, be divided in such manner and into such number of parts of separate and distinct ownership as may be necessary to establish competitive

conditions and bring about a new condition in harmony with law; and the defendants shall file with the clerk within 90 days from the entry of this decree a plan for such separation and division for the consideration of this court. In the event this case is appealed and the decree superseded within 60 days from the entry thereof, the time within which the defendants shall file said plan is hereby extended to 60 days from the filing of the mandate of the Supreme Court with the clerk of this court. Jurisdiction is retained by the court to make such additional orders or decrees as may be necessary to carry this decree into effect.

"(4) Inasmuch as trade in cinematograph film and foreign trade in photographic supplies are not covered by the petition herein of the United States of America, no decree in regard to such subjects is made herein, but without renouncing the power and duty of this court to deal with all the property and business of every character of the corporate defendants in effecting the abrogation of the monopoly herein adjudged illegal.

"(5) Nothing in this decree contained shall prevent the defendants, or any of them, from the institution, prosecution, or defense of any suit, action, or proceeding involving any of their property or rights.

"(6) The petitioner shall recover from the defendants the costs of this suit to be duly taxed herein.

"(7) The injunction granted by the second subdivision of this decree shall take effect 60 days after the entry of this decree, in case no appeal is taken from it. If an appeal be taken, and the decree be superseded, its operations shall be suspended until such time as shall be fixed in the final decree of this court entered on the mandate of the Supreme Court."

In re J. G. REICHARD & BRO., Inc.

(District Court, E. D. Pennsylvania. February 12, 1916.)

No. 5143.

BANKRUPTCY ⊂=323—CLAIMS—RIGHTS OF SECURED CREDITORS.

Bankr. Act July 1, 1898, c. 541, § 57a, 30 Stat. 560 (Comp. St. 1913, § 9641), provides that proof of claim shall consist of a verified statement of the claim, and whether any securities are held therefor. Section 57e provides that claims of secured creditors may be allowed to enable the creditors to participate in creditors' meetings, but for such sums only as are owing above the value of their securities. Section 57h provides that the value of securities held by secured creditors shall be determined as therein stated, that the amount shall be credited upon such claims, and that a dividend shall be paid only on the unpaid balance. A bank held a bankrupt's note, secured by the pledge of corporate bonds, which were secured by a mortgage on real estate, the legal title to which was in M., which was only another name for the bankrupt. The bank sold the bonds to itself for a nominal price, agreeing in advance to still hold them in pledge, and to hold the real estate in mortgage for the debt. By agreement with M. it took legal title to the real estate and surrendered the bonds for cancellation. *Held*, that it still remained a pledgee or mortgagee, and was only entitled to prove its claim against the estate for the deficiency, after applying the proceeds of a sale of the real estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 503, 505, 513; Dec. Dig. ⊂=323.]

In Bankruptcy. In the matter of J. G. Reichard & Bro., Incorporated, bankrupt. On petition for review of order of referee. Order confirmed, and petition for review refused.

R. A. & James Balph, of Pittsburgh, Pa., for petitioner.
Claude T. Reno and James L. Schaadt, both of Allentown, Pa., for trustee.

DICKINSON, District Judge. The court allowed the parties until February 11, 1916, to file paper books. The propriety of the order made by the referee is so clearly shown by the opinion accompanying the order that no further discussion would be of any value. The order as made exactly fits the occasion for its issuance.

By sections 56a and 57e of the Bankruptcy Act secured creditors are permitted to participate in the bankruptcy proceedings as creditors, but only as creditors for the sum which the court finds to be due them over and above the value of the securities which they hold. In the proof of claim section 57a requires such creditors to set forth, along with a statement of the debt, a statement of what securities are held. Section 57h limits the claim of such creditors to the amount of the debt less the sale or agreed value of the securities. In addition, the creditor preserves his right to rely upon his security and withhold any claim to share in the assets of the bankrupt estate.

The claim to which the above provisions of the Bankruptcy Law apply is that of the Monongahela National Bank of Pittsburgh. The bank had what, for the purposes of a ruling of the questions involved in this case, we will call a claim for $40,000. The claim was based upon a note of the bankrupt, which was accompanied with the pledge of bonds of the Standard Leather Company as collateral. There were 75 of these bonds, of the par and nominal value of $1,000 each. The payment of the bonds was secured by a mortgage of its real estate, etc., in the form usual in corporate loan transactions. The bank had the legal title to the bonds, and a man by the name of Meilly held the legal title to the real estate. Meilly is found by the referee to be only another name for the bankrupt. The bank took the legal title to the real estate and surrendered the bonds for cancellation. The mortgage given to secure the bonds was then satisfied. By the expression "legal title" we mean that on the face of the papers the holder of the title was the absolute owner, but only on the face of the papers. The bank was really a mortgagee. Before the conveyance above mentioned it was a pledgee of the bonds. After the conveyance it was a mortgagee of the real estate. Upon payment of the debts due to it, all its interest in the bonds, or in the real estate substituted for it, is gone.

This change or substitution was made by means of a private sale to itself of the $75,000 of bonds for the nominal price of $75; it agreeing in advance to still hold the bonds in pledge and the real estate in mortgage for its original debt. We have designated the sale as "private." This, in fact, it was, although in form, but not actually, it was public. A public sale was advertised. The sale was privately adjourned to a later date, and then the forms of a sale were gone through. No one was at the sale, except the parties to the agreement. Perhaps "secret" would be a more appropriate word. The bank then presented its claim against the bankrupt estate for its full claim, exceeding $40,000, less some $47.50, representing the $75 nominal purchase price

after deducting expense charges. The position of the bank was then precisely what it had been. It had before held the (in form) absolute title to property. Its real position was that of pledgee. It now holds the (in form) absolute title to property. Its real position is still that of pledgee, or, what is the same thing, mortgagee. The only difference is in the form of the property. First it was bonds secured by a mortgage of real estate. Now it is the real estate described in the mortgage. It was before its right to prove any debt due it in excess of the security held. The referee has conceded it a like right now.

Exception has been taken to the use of some expressions in the opinion of the referee. The language of the opinion itself is temperate and restrained. The expressions referred to occur only in the citations from other adjudged cases. The expressions "bona fide," "mala fide," "fraud," and equivalent terms, are employed in their legal, and not their ethical, sense. As applied to the facts of this case, they merely mean that the sale through and by which the title of the bank to the bonds was changed to a like title to the real estate was a sale had merely as a mode of conveyance, and not as a test of value, or for the purpose of transmuting the property into money and substituting the purchase-price moneys in place of the property. The only right which the bank has (and this it frankly avows) is to receive the amount of its just claim. When it receives this it has no further interest in the property and is entirely willing to surrender it. If the property is worth this sum, the bank is paid in full. If the property is worth less, the utmost right the bank has is a claim against the bankrupt estate for the shortage. This right the referee has preserved to it.

The argument of counsel for the bank is built upon a misapprehension of the views of the referee. There was no finding of "actual fraud." This feature has already been touched upon. The referee is clearly right in viewing the real security which the bank holds and has held to be the land. When either situation is analyzed this results. When the value of the security has been determined by a sale or otherwise in the manner directed by the act, claim may be made for the balance due. That was not this case. If a pledged security belongs to a third party, the claim may be proven in relief of the pledge. That again is not this case. It could scarcely be pretended that the bank and Meilly could agree the property of the bankrupt estate out of existence. That is what the bank assumed its right to do, through transferring whatever equity there was in the bonds from the estate to Meilly. What the bank did can only be excused on the theory that it did not appreciate what it was doing or what the limit of its rights were. It had only, as has been already several times stated, the right to hold the bonds in pledge. The property, subject to this pledge, was in the hands of the court for administration. In this statement all the legal consequences are summed up. By no process, not having the sanction of the court, could the court be deprived of control of the property over which it had jurisdiction.

We have been asked to modify the order, so as to permit proof of the $2,500 note claim. As we understand the position of this claim, the order made protects it as well as the other. The bank claimed to

hold the bonds as security for this also. The property was sold subject to the mortgage and realized a sum. This implies payment of the bonds. This may not, however, bring the bank its money. The Bankruptcy Law provides the means, indicated by the referee, for protecting the bank in all its rights. It has only to follow the path pointed out to secure all which rightfully belongs to it.

The findings of the referee are approved, the order made by him is confirmed, and the petition for review refused.

In re BLAESSER.

(District Court, E. D. New York. March 4, 1916.)

1. BANKRUPTCY ⟸413(1)—APPLICATION FOR DISCHARGE—DEATH OF PARTIES.
Where a creditor filing objections to a bankrupt's discharge died during the hearings, and no letters testamentary or of administration had been taken out and a reasonable time had elapsed to allow creditors of the deceased, if any, to act on the default of the next of kin or representatives of the deceased, the bankrupt should be allowed to proceed, and the reference might continue, there being no general presumption that a man is unable to pay his debts and that his creditors are more interested than his next of kin.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 712; Dec. Dig. ⟸413(1).]

2. BANKRUPTCY ⟸415(2)—APPLICATION FOR DISCHARGE—DEATH OF PARTIES.
Though General Order 22 (89 Fed. x, 32 C. C. A. xxv), relative to the taking of testimony before referees, requires the testimony when completed to be read over to the witnesses and signed, where a creditor objecting to the bankrupt's discharge died during the hearings after his testimony had been taken under oath, but had not been signed or verified upon the paper containing the testimony it might be used, when written out and proved by the reporter, or by some other person, without obtaining the witness' signature or verification upon the paper itself.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 702, 706, 708, 719; Dec. Dig. ⟸415(2).]

3. BANKRUPTCY ⟸412—APPLICATION FOR DISCHARGE—DEATH OF PARTIES.
Where a creditor, objecting to a bankrupt's discharge, died during the hearings, notice of further hearing should be given his attorney, the creditor's widow or her attorney, and children, or next of kin, the existence of whom were shown by the record.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 696, 697; Dec. Dig. ⟸412.]

4. BANKRUPTCY ⟸412—APPLICATION FOR DISCHARGE—NOTICE.
Application for a discharge must be made by a bankrupt upon notice to creditors at the addresses given in the schedules, unless something in the record gives information that the address has been changed, or that some one else has succeeded to the creditor's rights.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 696, 697; Dec. Dig. ⟸412.]

5. BANKRUPTCY ⟸413(1)—APPLICATION FOR DISCHARGE—DEATH OF PARTIES.
Where a creditor, objecting to a bankrupt's discharge, died during the hearings, and no letters testamentary or of administration had been granted, the bankrupt was not required to proceed in the proper jurisdiction for administration of the deceased creditor's estate, in order to cut

off the right to oppose his discharge by actual notice of further hearing to all parties who might prove themselves entitled to name the representative of the estate, or who might contest successfully the claims of others to name such representative.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 712; Dec. Dig. ⊂⇒413(1).]

In Bankruptcy. In the matter of Henry G. Blaesser, bankrupt. On hearing on order to show cause. Ordered in accordance with the opinion.

Walter M. Goldsmith, of New York City, for creditor.
John T. Loew, of New York City, for bankrupt.

CHATFIELD, District Judge. A creditor, filing specifications of objection, died during the hearings upon those specifications, upon the 18th day of May, 1915. His testimony had been taken under oath, but had not been signed, nor had he been sworn thereto, at the time of his decease. Various proceedings have been had, which do not affect this application, but which resulted in a memorandum decision filed January 7, 1916. In accordance therewith, the attorney for the bankrupt has obtained an order to show cause, addressed to the widow of the former objecting creditor, and served upon her by mail, and also upon the attorney who appeared for the deceased creditor in this proceeding.

Upon the return day this attorney appeared and filed an affidavit stating that he has been authorized to appear in the proceeding on behalf of the widow. It also appears from the record that no will has been offered for probate, or letters of administration taken out; that the deceased creditor had children, but it does not appear whether he left any estate, or was insolvent at the time of his decease.

[1] In the usual case, some party representing those entitled to share in the estate would have obtained authority to act in accordance with the laws of New Jersey, or in the county of Kings in this state, and the fact that no such application has been made would seem to indicate that the deceased had disposed of whatever property was in his control prior to his decease.

The record in the case would indicate that he had been possessed of some property which would have passed by will or by statute in the ordinary course. There can be no general presumption that a man is *unable* to pay his debts, and that therefore he has creditors who are more interested than his next of kin, and in the present case it would seem that a reasonable time has elapsed to allow such creditors, if they existed, to act on the default of the next of kin, or representatives of the deceased.

There would seem to be no reason, therefore, why the bankrupt should not be allowed to proceed with his application for discharge, and under the circumstances the reference may continue. In view of the absence of the commissioner before whom the hearing upon the specifications was being had, the matter will be transferred to Virtus L. Haines, as commissioner, for further hearing.

[2] By General Order 22 (89 Fed. x, 32 C. C. A. xxv), testimony,

when completed, *must* be read over to the witnesses and signed. It would seem that this General Order could not exclude or render useless testimony given under oath and proven by another person, or by the stenographer who reported the testimony. In the case of the death of a witness before the testimony is signed, the sworn evidence given in open court could certainly be made a part of the record, when written out and proven by the reporter. So, in the present case, the testimony of the objecting creditor, taken by consent and given under oath, may be used, upon proof of the administration of the oath to testify, even if the actual signature or verification upon the paper itself cannot be obtained.

[3] Notice of the further hearing upon the specifications should also be given to the attorney, who does not cease to represent the claim devolving through the objecting creditor, except in so far as some other party entitled may intervene. Under the circumstances, notice should also be given to the widow or her attorney, or to the children or next of kin of the objecting creditor, inasmuch as the record now shows the existence of these parties, and they are entitled to the privilege of a reasonable opportunity to be heard before the default of those who may be entitled, is taken for failure to proceed within a reasonable time.

[4] Application for discharge must be made by the bankrupt upon notice to the creditors at the addresses given in the schedules, unless something in the record gives information that that address has been changed, or that some one else has succeeded to the creditor's rights.

[5] The right to oppose the bankrupt's discharge may be a property right, in the sense that, if discharge is denied, any lien would remain and would pass under the state law in case of the death of a creditor. But this right to oppose is not such that the bankrupt should be compelled to proceed in the proper jurisdiction for administration of the deceased creditor's estate, in order to cut off those rights by actual notice of further hearings to all parties who might prove themselves entitled to name the representative of the estate, or who might contest successfully the claims of others to name such representative.

A trustee would not be bound, in declaring a dividend, to seek out those who had a right to make claim to that dividend; but the burden would be upon the proper representatives of the estate of the deceased creditor to claim their property. So, in the matter of discharge, the burden is upon the bankrupt to give reasonable notice to all those appearing by the record to be entitled to an opportunity of being heard or of putting themselves in a position where their interests may be heard. If the bankrupt does this, he is entitled to have the proceedings go forward, after waiting a reasonable time for other claimants to assert their claims.

UNITED STATES v. ADAMS EXPRESS CO.

(District Court, D. Massachusetts. October 1, 1915.)

No. 878.

1. INDICTMENT AND INFORMATION ⟸52(1)—REQUISITES—NECESSITY OF VERIFICATION.

Under Act Aug. 20, 1912, c. 308, 37 Stat. 315 (Comp. St. 1913, §§ 8752–8764), authorizing the Secretary of Agriculture to establish quarantine boundaries against plant diseases, and forbidding carriers receiving for transportation goods covered by the Secretary's regulations unless inspected and certified, an information charging an express company with a violation, upon which no warrant of arrest was asked, need not be sworn to, and, affidavits annexed thereto in support of the information being unnecessary, any insufficiency or informalities in them was not ground for quashing the information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 163; Dec. Dig. ⟸52(1).]

2. AGRICULTURE ⟸9½, New, vol. 4 Key-No. Series—PLANT DISEASES—QUARANTINE REGULATIONS—VIOLATIONS.

Under Act Aug. 20, 1912, authorizing the Secretary of Agriculture to promulgate regulations specifying classes of nursery stock subject to quarantine, and making it illegal for a carrier to receive for transportation any class of nursery stock specified in the notice of quarantine and not inspected and certified in the prescribed manner, it is not an offense for a carrier to receive for transportation uninspected deciduous nursery stock, where the quarantine regulations do not specify deciduous nursery stock, and the notice of quarantine does not cover such stock.

Information by the United States against the Adams Express Company. On demurrer and motion to quash. Demurrer sustained.

George W. Anderson, U. S. Atty., and James A. Hatton, Asst. U. S. Atty., both of Boston, Mass.

Choate, Hall & Stewart, of Boston, Mass., for defendant.

MORTON, District Judge. This is an information for violation of chapter 308 of the United States Statutes of 1912 (37 Statutes at Large 315 [Comp. St. 1913, §§ 8752–8764]), which authorizes the Secretary of Agriculture to establish, by regulations to be made by him from time to time, quarantine boundaries against dangerous plant diseases and insect pests, and forbids common carriers to receive for transportation goods covered by such regulations unless such goods have been inspected and the package containing them is certified by the proper officers. The information alleges that the defendant did receive for such transportation nursery stock which had not been inspected and which bore no certificate as required by the act, and that the defendant knew that the box which it received for transportation, and which bore no certificate, contained nursery stock.

[1] The information is made by the United States attorney and is not sworn to. The defendant is a corporation. Upon the filing of the information, a summons was issued directing the defendant to appear and answer to it. No warrant of arrest was asked for. The

defendant has moved to quash the information upon the grounds, in substance, that the affidavits annexed to the information do not justify the inference that the defendant had violated the law, and that it nowhere appears that the person before whom the affidavits were made was a notary public.

In Weeks v. U. S., 216 Fed. 292, 132 C. C. A. 436, L. R. A. 1915B, 651 (C. C. A. 2d Circuit), it was held, upon a full examination of the authorities, that an information under the Pure Food and Drugs Act, upon which no warrant for arrest was asked for, did not have to be sworn to. As to the points here involved, no substantial distinction has been pointed out between proceedings under that act and proceedings under the act here in question. It seems to me that the reasoning and conclusion of the Weeks Case are right, and are applicable to this case, that no affidavits were necessary in support of the information here in question, and that it ought not to be quashed on account of insufficiency or informalities in them.

[2] The fourth ground of the motion to quash is that the information does not state that the consignment of nursery stock alleged to have been received by the defendant for transportation was such as required inspection and certification. This question was also raised by a separate demurrer. The statute itself does not forbid shipments of "deciduous nursery stock," which is the expression used in the information. It provides, in substance, that the Secretary of Agriculture shall promulgate regulations specifying, inter alia, what classes of nursery stock are subject to quarantine, and that it shall be illegal for a common carrier to receive for transportation "any class of nursery stock * * * specified in the notice of quarantine" (section 8), except such as has been inspected and certified in the prescribed manner. The quarantine regulations in question in this case were issued by the Secretary of Agriculture on June 24, 1913. "Deciduous nursery stock" is not specified therein, nor is the notice sufficiently broad to cover everything which could properly be so described.

The information, therefore, seems to me substantially defective, and the demurrer must be sustained.

Demurrer sustained.

UNITED STATES v. POLLAK et al.

(District Court, N. D. California, First Division. January 10, 1916.)

No. 5584.

CRIMINAL LAW ⇐1083—APPEAL AND ERROR—JURISDICTION OF LOWER COURT.

The allowance of a writ of error in a criminal case did not divest the District Court of jurisdiction and transfer the case to the Circuit Court of Appeals; and where the writ itself was not issued and filed within the six months allowed by statute, the District Court had jurisdiction to vacate an order staying proceedings and an order releasing defendants on bail.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2732; Dec. Dig. ⇐1083.]

Criminal prosecution by the United States against Benjamin Pollak and others. On motion to vacate orders staying proceedings and admitting defendants to bail. Orders vacated, and defendants committed to custody.

John W. Preston, U. S. Atty., and A. A. Adams, Asst. U. S. Atty., both of San Francisco, Cal.

James W. Cochrane, of San Francisco, Cal., for defendants.

DOOLING, District Judge. On March 24, 1915, the defendants were duly convicted of the offense of using the mails in furtherance of a scheme to defraud, and on the 3d day of April, 1915, judgment of imprisonment was pronounced and entered upon such conviction. On June 21, 1915, the defendants presented a petition—

"for an order allowing them and each of them to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and that all further proceedings in this court be suspended, stayed and superseded until the determination of said writ of error by said Circuit Court of Appeals."

Upon the presentation of such petition the judge of this court on said June 21st made the following order:

"It is hereby ordered that a writ of error be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore rendered herein, and other matters and things in said petition and assignment of errors set forth, and that meanwhile all further proceedings in this court be suspended, stayed, and superseded until the determination of said writ of error by said Circuit Court of Appeals."

On the same day the defendants filed their assignment of errors and lodged with the clerk their proposed bill of exceptions. Nothing further has been done by them, and no writ of error has ever been sued out, or brought or filed, or even applied for by them. The time within which such writ could have been sued out, brought, and filed expired on October 3, 1915. The district attorney now moves that the order staying proceedings, and an order made by the court on April 6, 1915, that defendants be released upon bail, be vacated and set aside, and that defendants be committed to the custody of the marshal, and that the judgment entered on April 3, 1915, be enforced.

The defendants contend that the court is without jurisdiction to make the order applied for, for the reason, as claimed, that the order allowing the writ of error divested this court of all jurisdiction, and transferred the cause to the Circuit Court of Appeals. But this does not seem to be true. It is not the order allowing the writ, but the issuance and filing of the writ itself, that transfers the record and the cause from this court to the Circuit Court of Appeals.

"The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation * * * must be calculated accordingly." Brooks v. Norris, 11 How. 207, 13 L. Ed. 665.

The writ not having been issued and filed here within the six months provided for by the statute, this court has not lost jurisdiction, and the Circuit Court of Appeals has not acquired it. As it is too late now to issue or file the writ, it can never be heard or determined by the Circuit Court of Appeals.

The order staying proceedings herein, and the order releasing the defendants on bail pending the action of the Court of Appeals, are therefore vacated and set aside, and the defendants committed to the custody of the marshal for the enforcement of the judgment entered on April 3, 1915.

Ex parte WONG FOO.

(District Court, N. D. California, First Division. January 10, 1916.)

No. 15929.

1. ALIENS ⟸23(1)—CITIZENS ⟸9—WHO ARE CITIZENS—CHILDREN OF CITIZENS.
   The son of an American citizen, though of Chinese descent, is a citizen of the United States, and entitled to enter the country as such.
   [Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸23(1); Citizens, Cent. Dig. §§ 8–12; Dec. Dig. ⟸9.
   For other definitions, see Words and Phrases, First and Second Series, Citizen.]

2. ALIENS ⟸32(5)—EXCLUSION OF IMMIGRANTS—BURDEN OF PROOF.
   A person of Chinese descent, seeking to enter the country as the son of a native-born citizen, had the burden of proving such relationship.
   [Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸32(5).]

3. ALIENS ⟸32(5)—EXCLUSION OF IMMIGRANTS—HEARING BEFORE IMMIGRATION AUTHORITIES.
   Assuming that the immigration authorities, in passing upon the right of a person of Chinese descent to enter the country as a son of native-born citizen, may consider the applicant's father's sense of allegiance to this country as bearing upon the right of admission, such sense of allegiance must be proved as any other fact, and where it was assumed without any proof whatever that his sense of allegiance was the country of his ancestors, and not to this country, the hearing was unfair.
   [Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸32(5).]

Petition by Wong Foo for a writ of habeas corpus. On demurrer to the petition. Demurrer overruled, and writ issued.

George A. McGowan, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. In this case the applicant, who claims to be the son of a native-born Chinese citizen of this country, was denied admission for the reason that the relationship was not established to the satisfaction of the commissioner. Upon appeal the excluding decision was affirmed. In the decision affirming the excluding order the Assistant Secretary bases his action upon a doubt as to the relationship, because of the age of applicant's father at a certain time, as shown by the manifest of the ship upon which he arrived here in 1888. The language of the Assistant Secretary is as follows:

"The question, therefore, is whether proof of the relationship under the former practice is established. On that point it appears that, if the manifest of the arrival of the father in 1888 is correct, this applicant cannot be that person's son. While I do not regard the manifest as conclusive, in view of the other evidence, I do regard it as casting a doubt upon applicant's case; and that doubt I shall resolve by the test of allegiance. If the father's sense of allegiance were to this country, I should hesitate to exclude his son on the basis of a doubt raised by no stronger evidence, and in that case should be disposed (under the practice prior to rule 9f) to give applicant the benefit of the doubt. But inasmuch as the father's sense of allegiance is clearly to the country of his ancestors, and not to this country, which is true also of the applicant, who has lived all his life (28 years) in that country, the doubt should be resolved against naturalizing the applicant under the statute, by which alone he may claim admission into the United States. Appeal dismissed."

[1-3] If the applicant is in reality the son of an American citizen, even though it be a citizen of Chinese descent, he also is such citizen, and entitled to enter this country as such. The inquiry of the immigration department should be directed, of course, in good faith to the ascertainment of that fact. The burden of proving such relationship is undoubtedly upon the applicant. But that burden should not be increased by throwing extraneous matters into the scales against him. If, indeed, the proof offered by him is to be weighed in the light of his "father's sense of allegiance to this country," then certainly that sense of allegiance must be determined in the same manner as any other material fact; that is to say, from the record. I should be loth to hold that the rights of a citizen of this country, even though such citizen were born in China, may be dependent upon the notion of some officer that the father of such citizen had not manifested a proper sense of allegiance; but in this case it is not necessary to pass upon that question, for the reason that it does not appear from the record here that the father's sense of allegiance was ever inquired into at all. It is just assumed, without any proof whatever, that "the father's sense of allegiance is clearly to the country of his ancestors and not to this country." If the father's sense of allegiance is a proper matter to be weighed against the applicant, which is questioned here, but not decided, such sense of allegiance must be proved as any other fact. It was evidently the controlling factor in the adverse decision of the Assistant Secretary, and the hearing accorded to the applicant was to that extent unfair.

The demurrer to the petition will therefore be overruled, and the writ prayed for will issue, returnable January 15, 1916, at 10 o'clock a. m.

MANDERS v. WILSON et al.

(District Court, N. D. California, First Division. September 13, 1915.)

No. 15852.

1. BANKRUPTCY ⟸184(1)—FRAUDULENT CONVEYANCES—RIGHT OF TRUSTEE TO AVOID.

Bankr. Act Cong. July 1, 1898, c. 541, § 70e, 30 Stat. 565 (Comp. St. 1913, § 9654), providing that a trustee may avoid any transfer of property by a bankrupt which any creditor might have avoided, only authorizes the avoidance of transfers which creditors might have avoided under the laws of the state where the transaction occurred.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 275; Dec. Dig. ⟸184(1).]

2. FRAUDULENT CONVEYANCES ⟸154(1)—SETTING ASIDE—FAILURE TO RECORD DEED.

Civ. Code Cal. § 1214, providing that every conveyance of real property other than a lease for not exceeding one year is void against any subsequent purchaser or mortgagee in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title unless recorded prior to the recording of the notice of action, does not defeat an unrecorded deed in favor of a creditor extending credit on the faith of a debtor's ownership of land.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 485, 486, 490, 491; Dec. Dig. ⟸154(1).]

In Equity. Suit by John E. Manders, trustee in bankruptcy against George H. Wilson and others. On demurrer to the complaint. Demurrer sustained.

Reuben G. Hunt, of San Francisco, Cal., for plaintiff.

Harold L. Levin and H. I. Stafford, both of San Francisco, Cal., for defendants.

DOOLING, District Judge. [1, 2] This is an action by a trustee in bankruptcy to set aside a deed executed and delivered by the bankrupt to the defendants on September 27, 1911, but not recorded until October 23, 1914. There is no fraud alleged in connection with the original execution and delivery of the deed, but it is sought to set it aside upon an allegation that it was withheld from record by the defendants in order not to affect the credit of the grantor, and in order to enable him to extend his credit upon the reputed ownership of the property involved. The complaint also avers that a certain corporation did extend credit to the grantor upon his reputed ownership of the land in question.

Section 70e of the Bankruptcy Act provides that "a trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided," etc. But of course this means "which any creditor might have avoided" under the laws of the state where the transaction occurred. Whatever may be the rule in other states, or at common law, no law, nor any decision, has been called to my attention which would permit the corporation extending credit to the grantor to avoid a deed not otherwise fraudulent in this state,

because of failure to record it. Indeed, it was early held here that failure to record a transfer of real property renders such transfer void only as against subsequent purchasers or incumbrancers in good faith and for value. Section 1214, Civil Code; In re Prow, 4 Cal. 173; Pixley v. Huggins, 15 Cal. 127. Nor does there appear in the complaint the necessary elements of an estoppel, such as would prevent the defendants from asserting title.

The demurrer to the complaint is therefore sustained.

UNITED STATES v. SCHWARZ et al.

(District Court, N. D. California, First Division. May 21, 1915.)

No. 5679.

POST OFFICE ⊂=48(4)—FRAUDULENT USE OF MAILS—SUFFICIENCY OF INDICTMENT.

An indictment for using the mails in furtherance of a scheme to defraud alleged that the scheme consisted of inducing persons to buy lots by false representations concerning the locality in which the lots were situated, and by falsely representing that the lots were worth from $150 to $200, and that a number of lots were to be given away to leading members of various communities; the only expense to them being the sum of $19.50 to cover the cost of a deed. It did not allege that the lots were valueless, and neither the real value nor the proposed selling price was stated. *Held*, that the indictment was insufficient, as failing to show a real purpose to defraud purchasers out of their money, as a purchaser of a lot worth more than he pays for it is not defrauded, though it is worth less than its represented value.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⊂=48(4).]

W. E. Schwarz and another were indicted for using the mails in furtherance of a scheme to defraud. On demurrer to the indictment. Demurrer sustained.

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

Nathan C. Coghlan, Edwin V. McKenzie, and Elliott M. Epsteen, all of San Francisco, Cal., for defendant.

DOOLING, District Judge. Defendants have been indicted on the charge of using the mails in furtherance of a scheme to defraud. The scheme set out is that defendants should, for the purpose of inducing certain persons to buy Tobin Park real estate and pay defendants therefor, falsely represent, publish, advertise, and declare that Tobin Park property is town property; that Tobin Park is immediately adjacent to San Francisco, and only a 25-minute trip from the civic center thereof; that the lots in Tobin Park are worth from $150 to $200 apiece; that there are streets, curbs, sidewalks, houses, and other improvements on said property; that Tobin Park is a seaside suburb, and has the finest and safest bathing beach on the Pacific Coast; and that, in order to have the property widely known, a num-

ber of lots are to be given to leading members of various communities throughout the state of California—the only expense to the recipients of said lots being the sum of $19.50, which sum is to cover the cost of making the deed to same.

It is alleged that all of these representations were false and fraudulent, and known to defendants to be such. It is further alleged that certain letters, set out in the indictment, were sent through the United States mails in furtherance of the scheme. But it is nowhere averred that the lots in Tobin Park are valueless, nor is the price set out at which it was proposed to sell such lots, nor is the real value of such lots anywhere mentioned, so that, so far as appears from the indictment, the lots which defendants attempted to sell by means of the representations above set forth may have been, despite the falsity of such representations, of much greater value than the defendants endeavored by means of such representations to sell them for, in which case the purchasers would surely not be defrauded out of what they paid for them.

It is immaterial that a purchaser may not get a lot worth $150 for $19.50, although expecting to do so. If he does get a lot worth much more than $19.50 for that sum, he cannot be said to have been defrauded, and there is nothing in the indictment to negative this possibility. In the absence of any averments showing a real purpose to defraud purchasers out of their money, the indictment is insufficient.

The demurrer is therefore sustained.

Ex parte CHUN WOI SAN.

(District Court, N. D. California, First Division. October 30, 1914.)

No. 15676.

1. ALIENS ⟸32(1)—DEPORTATION OF CHINESE—JURISDICTION OF IMMIGRATION AUTHORITIES.

Under Immigration Act (Act Cong. Feb. 20, 1907, c. 1134, § 21, 34 Stat. 905, Comp. St. 1913, § 4270), providing that in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of that act, or that an alien is subject to deportation under the provisions of that act, or of any law of the United States, he shall cause such alien, within three years after landing or entry, to be taken into custody and returned to the country whence he came, a Chinese person found in the country in violation of the Chinese Exclusion Act (Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [Comp. St. 1913, §§ 4315–4323]) may be deported by the immigration authorities, provided such deportation be had within three years from the entry.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸32(1).]

2. ALIENS ⟸32(13)—DEPORTATION PROCEEDINGS—REVIEW BY COURTS.

While, in a proceeding before the immigration authorities to deport a Chinese person, the omnibus charge that he was in the country in violation of the Chinese Exclusion Act was so broad as to convey absolutely no idea of the specific reason for which he was ordered deported, the court would not interfere on habeas corpus, where the whole record made

it apparent that the alien knew what was specifically urged against him and was given an opportunity to meet the specific charge.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⊂⊃32(13).]

3. ALIENS ⊂⊃23(2)—DEPORTATION OF CHINESE LABORERS.

A Chinese person, admitted to the country ostensibly as an attaché of a Chinese official, and thereafter found working in a laundry far from his ostensible chief, was subject to deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 77; Dec. Dig. ⊂⊃23(2).]

Habeas corpus by Chun Woi San. Petitioner remanded. Appeal dismissed, 228 Fed. 1019, — C. C. A. —.

Geo. A. McGowan, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. On the questions presented here the court has reached the following conclusions:

[1] 1. That a Chinese may be deported under the provisions of the Immigration Law by the immigration authorities, if found in this country in violation of the Chinese Exclusion Act, provided such deportation be had within three years from the date of his entry. In deciding the contrary in a former case the court did so without having called to its attention the provision of section 21 of the Immigration Act. Act Feb. 20, 1907, c. 1134, 34 Stat. 905.

[2] 2. The omnibus charge that an alien is here in violation of the Chinese Exclusion Act, as stated by the court in the Case of Lew Lin Shew, 217 Fed. 317, "is so broad as to convey absolutely no idea of the specific reason for which the alien has been ordered deported." But if, from an examination of the whole record, it is apparent, as it is here, that the alien knew just what was specifically urged against him, and was given an opportunity to meet this specific charge, and does so, the court will not interfere on that ground.

[3] 3. The real reason for the order of deportation in the present case is the fact that, while this alien was admitted ostensibly as an attaché of a Chinese official coming to this country for some investigations or purposes in reference to banking, he was found working in a laundry far from his ostensible chief.

4. If one properly come to this country as the body servant or attaché of an official, and have no other right of entry than as such, he may not detach himself from such official, and remain here in the capacity of a laborer.

5. The hearing which resulted in the order of deportation was not unfair.

For these reasons, the petitioner will be remanded.

Ex parte LEONG WAH JAM.

(District Court, N. D. California, First Division. February 15, 1916.)

No. 15937.

ALIENS ⊜32(5)—EXCLUSION OF IMMIGRANTS—GROUNDS FOR EXCLUSION.

Where immigration authorities excluded a person of the Chinese race seeking admission into the country as the son of a native-born American citizen because of the lack of evidence of a spirit of American allegiance on his part or the part of his father, and because neither he nor his father indicated any tendency towards Americanism, without any investigation as to whether or not the father had indicated any such tendency, the hearing was unfair, as this consideration, if properly used against the applicant, should be based upon proof, like any other fact.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⊜32(5).]

Petition by Leong Wah Jam for a writ of habeas corpus. On demurrer to the petition. Demurrer overruled, and writ issued.

George A. McGowan, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. On January 11, 1916, an order was entered sustaining the demurrer to the petition for a writ of habeas corpus herein, and denying such petition. This order was entered under a misapprehension of what the record disclosed. The record of the local immigration office relating to petitioner's application for admission was made by stipulation a part of the petition for the writ. It was the understanding of the court that the local immigration record contained all documents pertaining to the case. This, however, as is conceded by the government, is not the fact. It results from this that the petition presents questions not considered or passed upon by the court in sustaining the demurrer. The order sustaining the demurrer and denying the petition is therefore vacated and set aside, and the court now proceeds to consider said petition and demurrer anew.

Applicant, a person of the Chinese race, born in China, sought admission into this country as the son of a native-born American citizen. His application was denied, and such denial was affirmed upon appeal. The citizenship of the father is not questioned, and in denying the appeal the Assistant Secretary of Labor gives his reasons as follows:

"The father is a citizen by birth. Under the new rules (rule 9f) applicant is not entitled to admission, even though the relationship of father and son be proved. But as he left China before the promulgation of this rule his case will be determined under the previous practice. It is believed by the inspector that the relationship exists. No reason for doubting this conclusion appears, except the surmises of possible coaching, but without evidence to sustain them, and the fact that a witness who testifies to delivering money to applicant's family in 1912–13 in China stated upon his return that he had taken money to nobody. If there were any evidence of a spirit of American allegiance in the case, I should resolve the slight doubt which this discrep-

ancy caused in favor of applicant; but the evidence of Chinese allegiance is so pronounced, applicant being 24 years old and having a family of his own in China, and neither he nor his father indicating any tendency to Americanism, that I am indisposed, by resolving the doubt in applicant's favor, to give him the benefit of this short-cut route to naturalization. Appeal denied."

This court has recently decided in several cases that when the question of relationship between a citizen of the United States and his alleged son, born in China, is determined adversely, for reasons similar to those above set forth, the hearing resulting in such determination is not fair. Here a favorable determination on the part of the examining inspector is set aside by the Commissioner and the Assistant Secretary because of the lack of evidence of a "spirit of American allegiance," not only on the part of petitioner, but also on the part of "his father." The record does not show any investigation as to whether the father has "indicated any tendency to Americanism," and if this consideration could properly be used against petitioner in the investigation of the relationship claimed to exist it should be based upon proof as of any other fact.

The demurrer will be overruled, and the writ will issue, returnable on February 19, 1916, at 10 o'clock a. m.

UNITED STATES v. MOTION PICTURE PATENTS CO. et al.

(District Court, E. D. Pennsylvania. March 9, 1916.)

No. 889.

APPEAL AND ERROR ⊂⊃597(1)—RECORD—FORM.

Act Cong. Feb. 13, 1911, c. 47, 36 Stat. 901 (Comp. St. 1913, §§ 1656, 1657), provides that the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and file in the office of the clerk of the Circuit Court of Appeals, 25 printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of the Circuit Court of Appeals may require, and in such form as the Supreme Court shall prescribe, one of which transcripts shall be certified. Supreme Court rule 31 (32 Sup. Ct. xiii) prescribes the form of printed records and briefs. Equity rule 75 (198 Fed. xl, 115 C. C. A. xl) provides that the evidence to be included in the record on appeal shall not be set forth in full, but shall be stated in simple and condensed form, the testimony being stated only in narrative form, save that, if the parties desire it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness, that the appellant shall present his statement of the evidence, and that, if it be true, complete, and properly presented, it shall be approved by the court or judge. Because of the anticipated bulkiness of the record in a suit in equity, the parties had the notes of the testimony transcribed directly into printed pages and bound into convenient volumes. The record as so printed conformed to rule 31 and to the provisions of the statute. *Held* that, while the record in this shape was found satisfactorily convenient, the District Court could not approve a transcript of the record for transmission to the Supreme Court without the statement in narrative form required by rule 75, unless leave to omit such statement was obtained from the Supreme Court, as it would be an eva-

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

sion of the duty imposed on the District Court to apply the exception contained in the rule as to setting forth parts of the testimony in full to the whole testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627–2631, 2635–2638; Dec. Dig. ⊂=597(1).]

In Equity. Suit by the United States against the Motion Picture Patents Company and others. On petition for order respecting the record on appeal. Petition granted conditionally.

See, also, 225 Fed. 800.

Edwin P. Grosvenor, Sp. Asst. Atty. Gen., of New York City, for the United States.

Charles F. Kingsley, of New York City, Melville Church, of Washington, D. C., and R. O. Moon, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The act of February 13, 1911, was passed to reduce the expense of appellate litigation and in relief of some of the labor involved in it. The present petition invokes the right of defendants to the benefits of the law. To this they are entitled. Rainey v. W. R. Grace & Co., 231 U. S. 703, 34 Sup. Ct. 242, 58 L. Ed. 445.

The taking of testimony was in progress when the present equity rules went into effect. The bulkiness of this part of the record was foreseen. The parties therefore resorted to the very sensible expedient of having the notes of testimony transcribed directly into printed pages and these bound into convenient volumes. This was so done as that the record thus printed conforms to the requirements of rule 31 of the Supreme Court (32 Sup. Ct. xiii) and brings the appellant within the provisions of the statute. Thus far no doubt of the proper course to be pursued could arise. The record would be certified in conformity with the statute. If this were done, however, the testimony and evidence would be returned in extenso as offered and introduced. This brings equity rule 75 (198 Fed. xl, 115 C. C. A. xl) into operation. The requirement of the rule that evidence be put in condensed and the testimony into narrative form would not be met. In the absence of a compliance with the rule in this feature, the court could not certify its approval of a "statement" which was entirely absent. To apply the exception, under which any part of the testimony may be set forth in full, to the whole testimony, would be an evasion of the duty imposed by the rule. The appellant and this court can be relieved of the obligation of rule 75 only by the Supreme Court

To facilitate any application which may be made to that court, we take the liberty of stating the result of our experience with the printed record of the testimony in its present shape to be that we found it satisfactorily convenient. We further state our willingness to approve the record returned in this form, provided the omission of a statement of the evidence in narrative form has the sanction of the appellate court. The prayer of the petition is therefore granted, to the extent that the record as printed and used in the hearing of the case in this court shall be used in the preparation and as part of the transcript of the record of this court in transmitting the record for

review; such printed record being found to comply with the requirements of the act of February 13, 1911. No transcript of the record for transmission to the Supreme Court will, however, be approved without the statement in narrative form required by equity rule 75, unless leave to omit such statement be granted by the Supreme Court.

THE STERLING.

(District Court, W. D. Washington, N. D. February 3, 1916.)

No. 3204.

MARITIME LIENS ⊂=25—SUPPLIES—LIQUORS FOR CREW—"SUPPLIES"—"NECESSARIES."

Wines and liquors furnished for use of the crew of a fishing vessel on a voyage are not "supplies" or other "necessaries" furnished to the vessel, for which a lien may be enforced under Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (Comp. St. 1913, § 7783), even though it is alleged that, owing to the nationality of the crew and the customs of their country, they would not have shipped if the liquors had not been supplied.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31–36; Dec. Dig. ⊂=25.

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

In Admiralty. Suit by E. W. Rigney against the gasoline fishing boat Sterling; the Lumme Bay Packing Company, claimant. On claim of S. P. Starbux, intervening libelant. Decree for respondent.

Wedell Foss and G. H. Simons, both of Tacoma, Wash., for intervener.

G. E. Steiner, of Seattle, Wash., for claimant.

NETERER, District Judge. Intervening libelant alleges, in substance, that the gasoline fishing boat Sterling was being outfitted for a fishing expedition, and that the entire crew, except the master and engineer, were Austrians who had pursued the occupation of fishermen for many years, and that the custom of Austrian fishermen is to be furnished with wines and spirituous liquors, and "that this custom is so ingrained in the Austrian fishermen who have immigrated to this country that even after a number of years it is impossible to induce Austrian fishermen to enter into a contract to engage in fishing unless they are guaranteed their wines and spirituous liquors," and then alleges that $74.95 worth of liquor was sold, and seeks to establish a maritime lien against the vessel.

Claimant files exceptions, upon the ground that the liquors "were neither supplies nor necessaries for the operation of said fishing boat," and that the articles were improper, detrimental, and wholly unnecessary. Are liquors "supplies or other necessaries" under Act June 23, 1910, 36 Stat. 604? The term "necessaries" includes whatever is fit and proper for the service upon which the vessel is engaged, or whatever would have been ordered by a prudent owner, if present. 26

Cyc. 764. It is sufficient if the articles form part of the actual and reasonable outfit of the vessel for the business in which it is engaged. The Plymouth Rock, 19 Fed. Cas. 897. Supplies may be considered of two classes: First, those which are necessary to the navigation of the ship; and, second, those necessary for the venture in which the ship is engaged. A vessel is liable for clothing suitable to the needs and comforts of fishermen upon a voyage. The Fortuna (D. C.) 213 Fed. 285. Sufficient food, suitable clothing, proper shelter, and such luxuries as contribute to the comfort and convenience of the seamen are necessaries. The habits or desires of a particular class of seamen do not fix a criterion by which to measure necessaries. It is the need for the voyage, and not the habits or desires of the seamen, that is contemplated by the act of Congress, supra. While these seamen may have the habit and desire to consume spirituous liquors, other seamen might have other desires craving to be satisfied, and can it be said that the rule is so flexible as to be adjusted to the habits or desires of seamen, rather than necessaries for the navigation of the ship, or for the safety and comfort of the crew? Judge Hanford, in The Robert Dollar (D. C.) 115 Fed. 218, at page 225, said:

"The libel of F. A. Buck & Co. is for the price of liquors and supplies for a bar which was conducted on board the Robert Dollar for the profit of the charterer. It is always optional with the owner of a vessel whether to conduct a bar on board or not, and, as it is not essential to the navigation of the vessel, or to the safety and comfort of passengers, I cannot regard bar supplies as 'necessaries' in the sense in which that word is used in the twelfth admiralty rule. Under that rule, materialmen cannot sue in rem for supplies furnished, other than necessaries."

Whisky is not necessary for the navigation of the ship; nor do the allegations in the libel show it to be necessary to the safety and comfort of the crew. Cases have been cited from other jurisdictions involving statutes of states. The Mayflower (D. C.) 39 Fed. 41; The Shrewsbury (D. C.) 69 Fed. 1017; and The Satellite (D. C.) 188 Fed. 717. These cases, however, do not throw any light upon the issue here.

I do not think that the intervening libelant has brought himself within the provisions of the act of Congress, supra, and the exceptions must be sustained.

AMERICAN R. CO. OF PORTO RICO v. CORONAS.

(Circuit Court of Appeals, First Circuit. March 1, 1916.)

No. 1125.

1. MASTER AND SERVANT ⟸253½—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—RIGHT OF ACTION.

Under Employers' Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66 (Comp. St. 1913, § 8662), declaring that no action shall be maintained unless commenced within two years from accrual of cause of action, the limitation relates, not merely to the remedy, but the right, and it is incumbent upon one suing under the act to allege and prove his action was brought within the time limited.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸253½.]

2. DEATH ⟸39—DEATH OF SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—ACCRUAL OF ACTION.

Under section 6 of the federal Employers' Liability Act, declaring that no action shall be maintained unless commenced within two years from the day the cause of action accrued, the cause of action for death of an employé must, in view of the fact that it can be maintained only by the personal representative for the benefit of the beneficiaries named, be deemed as accruing, not from the date of the employé's death, but from the date of the appointment of the administrator; no one being capable of suing until that time.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 260–284; Dec. Dig. ⟸39.]

In Error to the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Action by Amador Riera Coronas, administrator, against the American Railroad Company of Porto Rico. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Francis H. Dexter, of San Juan, Porto Rico, and Joseph B. Jacobs and Jacobs & Jacobs, all of Boston, Mass., for plaintiff in error.

Jose A. Poventud, of Ponce, Porto Rico, for defendant in error.

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

BINGHAM, Circuit Judge. This is an action under the federal Employers' Liability Act of April 22, 1908 (35 Stat. 65, c. 149 [Comp. St. 1913, §§ 8657–8665]), brought by Amador Riera Coronas, administrator of the estate of Pedro Didricksen, against the American Railroad Company, in the District Court of the United States for Porto Rico, to recover damages resulting from the death of his intestate, who died on the 8th day of December, 1908, because of injuries which he sustained on the 30th of the preceding November, while employed by the defendant in switching and coupling cars on its railroad. Letters of administration were granted the plaintiff on the 12th of May, 1914, and this action was brought the 17th of December, 1914. There was a trial by jury and a verdict for the plaintiff.

The case is here on defendant's bill of exceptions, and the errors assigned are: (1) To the overruling of a demurrer to the declaration, setting forth that the action was barred, in that it was not brought within the two years' limitation of section 6 of the act; and (2) that there was no evidence from which the jury could find that the beneficiaries, the father and mother of the deceased, had suffered any pecuniary loss by his death.

[1, 2] The substantial question in the case is raised by the first assignment of error. The defendant says that the action cannot be maintained for the reason that it was not brought within two years from the death. The plaintiff's contention is that the limitation provided for in the statute does not run from the death, but from the appointment of the administrator.

Section 6 provides:

"That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

And the question is whether the action accrued so that the statute began to run from the death or from the appointment of the administrator, when there was some one in existence who could enforce the liability.

The cause of action here provided for was unknown to the common law. The statute gives a new right for the benefit of certain dependent relatives, to recover the pecuniary loss and damage which they sustained by reason of the death. Michigan Central R. Co. v. Vreeland, 227 U. S. 59, 69, 70, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; Winfree v. Northern Pacific Ry. Co., 227 U. S. 296, 33 Sup. Ct. 273, 57 L. Ed. 518; American R. R. Co. v. Didricksen, 227 U. S. 145, 149, 33 Sup. Ct. 224, 57 L. Ed. 456; Taylor v. Taylor, 232 U. S. 363, 370, 34 Sup. Ct. 350, 58 L. Ed. 638. It provides in terms that the suit shall be brought by the personal representative, and it has been held that the beneficiaries named in the statute, who suffer pecuniary loss, cannot maintain the action. American R. R. Co. v. Birch, 224 U. S. 547, 557, 32 Sup. Ct. 603, 56 L. Ed. 879; Missouri & Kansas Ry. Co. v. Wulf, 226 U. S. 570, 576, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; St. Louis, S. F. & Texas Ry. v. Seale, 229 U. S. 156, 162, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156. The right granted exists only by virtue of the statute, and its scope and effect must be determined therefrom. The language of the act makes it plain that the right and correlative liability thereby established are conditional upon the bringing of the suit within two years from the day the cause of action accrued. The bringing of the action, therefore, within the specified time, is a condition to the exercise of the right, and, if the condition is not complied with, the parties stand, with respect to the wrongful act, as though the statute had not been enacted. The limitation relates, not merely to the remedy, but to the right. Central Vermont Ry. Co. v. White, 238 U. S. 507, 511, 35 Sup. Ct. 865, 59 L. Ed. 1433; Phillips v. Grand Trunk Ry., 236 U. S. 662, 666, 667, 35 Sup. Ct. 444, 59 L. Ed. 774. And it was incumbent upon the plaintiff to allege and prove that his cause of action was brought within the time limited.

The declaration discloses that the plaintiff was appointed administrator within two years prior to the bringing of the suit, but fails to show that he brought his action within two years from the death. If his right of action accrued at the time of the death, and not from his appointment, the declaration was demurrable. Atlantic Coast Line Railroad Co. v. General Burnette, 239 U. S. 199, 36 Sup. Ct. 75, 60 L. Ed. ——; Davis v. Mills, 194 U. S. 451, 454, 24 Sup. Ct. 692, 48 L. Ed. 1067; The Harrisburg, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358; Boyd v. Clark (C. C.) 8 Fed. 849; Theroux v. Northern Pacific R. Co., 64 Fed. 84, 12 C. C. A. 52; Brothers, Administrator, v. Rutland R. R. Co., 71 Vt. 48, 42 Atl. 980; Seitter v. West Jersey & S. R. Co., 79 N. J. Law, 277, 75 Atl. 435; Lapsley v. Public Service Corporation, 75 N. J. Law 266, 68 Atl. 1113; Poff v. New England Telephone Co., 72 N. H. 164, 55 Atl. 891.

It is to be noted that the statute does not require that the action shall be brought within two years from the death, but within two years from the time the cause of action accrued. It is also to be noted that the action is not for the occurrence out of which the death arose, but for the pecuniary damage to the beneficiaries due to the death; so that, in no event, could the cause of action arise until after the death, or be said to exist so that the statute could run until after that time. We may therefore assume that the statute, so far as this cause of action is concerned, did not begin to run until after death had ensued.

It is a general rule of law that where a cause of action arises, as in this case, after death, it is considered as accruing, for the purpose of the running of the statute, only from the time when there is some one in existence capable of suing, and, if no one but the administrator can sue, that the statute does not begin to run until administration is granted. This principle was announced at an early day. The leading English case on the subject is Murray, Administrator, v. East India Co., 5 Barn. & Ald. 204, which has been very generally followed in this country. It was an action by an administrator with the will annexed upon a bill of exchange made payable to the testator, but accepted after his death. The acceptance of the bill and the day of payment were more than six years before suit was brought, but administration was first taken out less than six years before, and it was held that the statute of limitations began to run from the granting of the letters of administration, and not from the time the bill became due, as the cause of action did not accrue until there was a party capable of suing.

In Sanford v. Sanford, 62 N. Y. 553, 554, the court says:

"The term 'cause of action' includes, not only the right proper, but the existence of a person by or against whom process can issue. A cause of action cannot accrue or exist unless there is a person in esse against whom an action can be brought and the right of action enforced. It is well said that 'when there is no person to sue there can be no laches.' A case literally within the words of the statute is without its spirit when it is impossible to maintain a suit at law. Richards v. Maryland Ins. Co., 8 Cranch, 84 [3 L. Ed. 496]. It is directly adjudged that the statute does not commence to run against the representatives of a deceased creditor upon an obligation incurred, or debt becoming due after his decease, until administration is granted upon his estate, there being no cause of action until there is a party capable of suing. Murray

v. East India Co., 5 Barn. & Ald. 204; Bucklin v. Ford, 5 Barb. [N. Y.] 393; Cary v. Stephenson, 2 Salk. 421. In order to put the statute in motion there must not only be a person in esse to sue, but a person to be sued. Davis v. Garr, 6 N. Y. 124 [55 Am. Dec. 387]; Levering v. Rittenhouse, 4 Whart. [Pa.] 130, per Nelson, J.; Wenman v. Mohawk Ins. Co., 13 Wend. [N. Y.] 267 [28 Am. Dec. 464]; Jolliffe v. Pitt, 2 Vern. 694; Douglas v. Forrest, 4 Bing. 686; Benjamin v. De Groot, 1 Denio [N. Y.] 155."

In Collier v. Goessling, 160 Fed. 604, 611, 87 C. C. A. 506, Judge Lurton, speaking for the Circuit Court of Appeals for the Sixth Circuit, said:

"To start the running of a statute of limitation there must be some one capable of suing, some one subject to be sued, and a tribunal open for such suits."

In Fulenweider's Case, 9 Ct. Cl. (U. S.) 403, it was sought to defeat a contract claim against the government on the ground that it was barred by the statute. The act of Congress of March 3, 1863 (12 Stat. 765, c. 92 [Comp. St. 1913, § 1147]), provided:

"That every claim against the United States, if cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues."

It seems that the contractor died before the claim accrued, the services rendered having been completed June 1, 1861. The petition was not filed until March 13, 1873, but adminstration was granted December 19, 1870, and it was held:

"It is a well-settled rule that if, when the right of action would otherwise accrue and the statute [of limitations] begin to run, there is no person in existence who is qualified to sue upon that right, the statute does not begin to run till there is such a person. Angell on Lim. §§ 54–63. For this claim none but a personal representative * * * could sue; and there was no personal representative until December 19, 1870, when the statute began to run, less than three years before this suit was brought."

For other cases and authorities considering the statute of limitations as applied to a contract right maturing after death, see the following: Clark v. Amoskeag Co., 62 N. H. 612; Weiser v. McDowell, 93 Iowa, 772, 776, 61 N. W. 1094; Wenman v. Mohawk Ins. Co., 13 Wend. (N. Y.) 267 [28 Am. Dec. 464]; Walters v. City of Ottawa, 240 Ill. 259, 88 N. E. 651; Tobias v. Richardson, 26 Ohio Cir. Ct. R. 81, 85; Hobart v. Connecticut Turnpike Co., 15 Conn. 145; Parks v. Norris, 101 Mich. 71, 59 N. W. 428; Marsteller v. Marsteller, 93 Pa. 350; 1 Corpus Juris, p. 723, and note 23, p. 1145; 25 Cyc. p. 1065; Wood on Limitations (3d Ed.) p. 440, § 194; Angell on Limitations, c. 7, §§ 54–63; Bouvier's Law Dictionary, "Cause of Action."

In Andrews v. Hartford & New Haven R. R. Co., 34 Conn. 57, the question was, for all practical purposes, identical with the one here presented. The Connecticut statute provided in substance that, where a life was lost by reason of the negligence of a railroad company, such company should be liable to pay damages not exceeding $5,000 nor less than $1,000, to the use of the executor or administrator, to be recovered by him in an action for the benefit of the husband or widow

or children or heirs of the deceased person, as the case might be, and the court, on page 59, said:

"The cause of action here would have been perfect on the happening of the death, and under section 546 would have been barred at the end of one year from the happening of that event, if an ordinary case, or there had been an executor. But it is a rule of law recognized by the court in Hobart v. Connecticut Turnpike Co., 15 Conn. 145, that a cause of action, accruing to an administrator after the death of the intestate, is not complete, and does not *arise* and exist, so that the statute of limitations can begin to run upon it, until an administrator is appointed who can bring suit. And the Legislature seem to have had that rule in view when they enacted the statute; for they did not say that the action should be barred unless commenced within one year from the death, or the happening of the events for which it is given, but unless 'commenced within one year after the *cause* of *action* shall have *arisen*.' Inasmuch, then, as under a well-settled rule no cause of action can *arise* and *exist* in favor of an administrator until he comes into existence as such, and this suit was brought within one year after the plaintiff received his appointment, it was not barred, and the court below erred in sustaining the demurrer."

In Sherman v. Western Stage Co., 24 Iowa, 515, the action was brought by an administrator under the Iowa statute, charging that his intestate's death was occasioned by the negligence of the defendant. In this case all the judges were agreed that, if the statute gave a new cause of action for the death, the right of action would not accrue and the statute of limitations would not attach until an administrator was appointed. The members of the court, however, were not agreed as to whether the statute gave a new cause of action for the death, but the majority was of the opinion that, whether the statute gave a new cause of action for the death or not, inasmuch as the death was substantially instantaneous, a right of action did not accrue to the plaintiff's intestate in his lifetime, and, this being so, the statute of limitation did not attach and begin to run until an administrator was appointed.

In the Circuit Court of the United States for the Southern District of Iowa, Judge Shiras, in Ewell, Administratrix, v. Chicago & N. W. Ry. Co., 29 Fed. 57, reviews the decision in Sherman v. Western Stage Co., supra, and, among other things, says:

"If, however, the statute is to be construed to create, in favor of the estate, a cause of action other and distinct from that accruing to the person injured, then the question to be determined is: When does the statute begin to run as against such an action? The usual rule is that the statute begins to run when the right of action accrues; and, unless otherwise provided in the statute, the right of action is not deemed to have accrued until there is a person authorized to prosecute the same."

In Kennedy v. Burrier, 36 Mo. 128, 130, the Missouri statute (R. C. 1855, p. 648, § 2), which the court had under consideration, did not give a right of action to the personal representative for the wrongful killing of another, but provided that the suit should be brought (1) by the husband or wife of the deceased, or (2) if there be no husband or wife, or he or she fail to sue within six months, then by the minor child or children of the deceased; and it was further provided (section 6) that "every action instituted by virtue of the preceding sections of this act shall be commenced within one year after the cause

of action accrued." The widow failed to bring suit within six months after her husband's death, and the plaintiff, a minor child, brought suit within a year after the six months had elapsed within which the widow could have sued, but more than a year after the death. And the court held that, inasmuch as the widow could have brought suit immediately following the death of her husband, the cause of action accrued and the statute began to run at and from that date. In discussing the question the court said:

"When, then, did the cause of action accrue? We think the cause of action accrued whenever the defendant's liability became perfect and complete. Whenever the defendant had done an act which made him liable in damages, and there was a person in esse to whom the damages ought to be paid, and who might sue for and recover the same, then clearly the cause of action had accrued as against him. When, then, did the liability take place? Evidently at the death of Kennedy. The defendant at that time had done the whole wrong complained of, and there was a person in esse—to wit. Kennedy's widow—entitled to receive and empowered to sue for damages. Then the cause of action clearly accrued at the death of Kennedy, and the statute commenced running from that time."

In Crapo, Administratrix, v. City of Syracuse, 183 N. Y. 395, 76 N. E. 465, the Code of New York provided for an action by an executor or administrator to recover damages for a wrongful act or neglect resulting in death, and required that the action, when brought against a city having a population of 50,000 or more, should be "commenced within one year after the cause of action therefor shall have accrued," and that "notice of intention to commence such action and of the time and place at which the injuries were received" should be "filed with the counsel to the corporation, or other proper law officer thereof, within six months after such cause of action shall have accrued." The notice was filed 18 months after the death and within less than 2 months of the appointment of the administratrix. Action was commenced within 20 months after death and within 5 months after the appointment. If the action accrued at the death, and not when administration was granted, the notice was not seasonably given and the action was not seasonably commenced. O'Brien, J., in discussing the question, said:

"The notice which the statute requires to be served within 6 months after the cause of action has accrued must contain a statement that the party giving the notice *intends to commence an action.* The absence of such a statement vitiates the notice. Curry v. City of Buffalo, 57 Hun, 25 [10 N. Y. Supp. 392]. Who is to give the notice? It is very obvious that inasmuch as no one can bring such an action except a personal representative of the decedent the notice must come from him, and of course he cannot give any such notice until his appointment. A notice served by a stranger, or any one else except a personal representative of the deceased, who alone is entitled to bring the action, would be clearly insufficient, and the defendant could treat it as a nullity. These considerations, that are fairly deduced from a reading of the statute, and other statutes in pari materia, point clearly to the conclusion that the cause of action does not accrue until the personal representative of the decedent has been duly appointed."

In the opinions delivered in the above case, reference is made to the decision in Barnes v. City of Brooklyn, 22 App. Div. 520, 48 N.

Y. Supp. 36, as containing a correct statement of the rule of law here involved. In that case Mr. Justice Bradley said:

"The alleged cause of action in question resulted from the death of the plaintiff's intestate. It did not accrue during his life, and until letters of administration were granted to the plaintiff there was no person in existence capable of bringing an action for the alleged cause. While the right of action was given by the death of the plaintiff's intestate, for the alleged cause of the death, no cause of action could accrue to any party until the appointment of his personal representative. The creation of that relation, therefore, would reasonably seem to be essential to the accruing of a cause of action. And such is the recognized import of the term. See the definition of 'accrue' in Burrill's Law Dictionary. In Murray v. East India Company, 5 Barn. & Ald. 204, it was held that a cause of action upon a bill of exchange, payable to the testator and accepted after his death, did not accrue until his personal representatives came into existence by taking letters of administration. And the Court of King's Bench, by Abbott, C. J., there said: 'Now, independently of authority, we think that it cannot be said that a cause of action exists, unless there be also a person in existence capable of suing.' The leading case in this state upon the subject is Bucklin v. Ford, 5 Barb. [N. Y.] 393, where the defendant was charged with the conversion of personal property of the estate of the plaintiff's intestate after his death. It was there held, as in the Murray Case, supra, that the cause of action could not accrue until there was some person in existence capable of suing. Many cases are there cited in support of that rule. This proposition and the Bucklin Case are recognized, approved, and adopted in Everitt v. Everitt, 41 Barb. [N. Y.] 393, Dunning v. Ocean National Bank, 6 Lans. [N. Y.] 297, Id., 61 N. Y. 497, 503 [19 Am. Rep. 293], Sanford v. Sanford, 62 N. Y. 553, 555, Halsey v. Reid, 4 Hun, 778, and Cohen v. Hymes, 64 Hun, 56 [18 N. Y. Supp. 571]. The only modification of this doctrine is found in the provisions of section 392 of the Code of Civil Procedure. Those provisions have no application to the present case."

In Louisville & N. R. Co. v. Sanders, 86 Ky. 259, 5 S. W. 563, it appeared that the statutes of Kentucky provided that, "if the life of any person or persons is lost or destroyed by the willful neglect of another person, * * * the widow, heir or personal representative of the deceased shall have a right to sue * * * and recover punitive damages for the loss" (Gen. St. Ky. c. 57, § 3); that an action for an injury to the person "shall be commenced within one year next after the cause of action accrues" (chapter 71, art. 3, § 3); and that "if a person entitled to bring any of the actions mentioned * * * was, at the time the cause of action accrued, an infant, married woman, or of unsound mind, the action may be brought within the like number of years after the removal of such disability" (chapter 71, art. 4, § 2). The deceased was killed in February, 1880. He left minor children, but no widow. Administration on his estate was taken out in March, 1880. The action was brought in April, 1885, by the minor children, more than five years after the death. It was held that the action must be brought within one year from the time the cause of action accrued, and that the statutory provision in behalf of the infant heirs was operative only where there was no person in esse, as a widow or administrator, who could sue. The court said:

"The statute says that the suit shall be brought within a year after the cause of action accrues, and not thereafter. Whenever a party has done an act which makes him liable in damages, and his liability is complete, and there is one in esse who can sue therefor and recover, the cause of action has certainly accrued as against the defendant. * * * When Sanders was

killed the wrong was done. When the administrator qualified there was a person in esse who had the right to sue for, recover, and receive the entire damages, leaving no longer in existence the cause of action. The statute then began to run not only against him, *but against the cause of action.*"

The defendant has called our attention to the case of Bixler v. Pennsylvania R. Co., 201 Fed. 553, decided by the District Court for the Middle District of Pennsylvania, January 4, 1913, as holding that the cause of action accrues and the statute begins to run under the federal Employers' Liability Act from the time of the death. In that case the plaintiffs were the father and mother of the decedent, who was instantly killed on the 17th of July, 1910, while in the employ of the defendant and engaged in interstate traffic. The action was begun June 12, 1912. The case came on for trial December 10, 1912. Thereupon the defendant moved to abate the action on the ground that the father and mother could not maintain the suit, and that no action had been instituted by the personal representative within the two years limited by the statute. The plaintiffs, having been appointed administrators of their deceased son's estate, requested leave to appear in their representative capacities. The case does not show when the father and mother were appointed administrators, or whether more than two years had elapsed since their appointment. The court, without much discussion of the matter, was of the opinion that the action accrued and the limitation of the statute began to run from the death, and then proceeded to decide whether the amendment, if allowed, would introduce a new cause of action. In discussing this question, it took the view (1) that the amendment was unnecessary, as the plaintiffs, being the sole beneficiaries, might maintain the action in their own names as well as in their representative capacities, relying for this conclusion upon the decision in Stewart v. Baltimore & Ohio Railroad Co., 168 U. S. 445–449, 18 Sup. Ct. 105, 42 L. Ed. 537; and (2) that the proposed amendment, if allowed, would not be the introduction of a new cause of action, citing Van Doren v. Pennsylvania R. Co., 93 Fed. 266, 35 C. C. A. 282. The District Judge concluded his opinion in these words:

"The motion to abate the action is denied, * * * and, while doubting the necessity of amending, by substituting as parties-plaintiff the parents of the deceased as administrators, it will be so ordered, thereby complying with the practice indicated by the court in the latter case."

It is apparent from this decision that the District Judge entertained the view that the beneficiaries might maintain the action in their own names. If this were true, it would also follow that the action would accrue at the time of death, as the beneficiaries were then in esse and could maintain the suit. The only case cited in the opinion in support of the ruling as to the time when the action accrued and the statute began to run is Dodge v. Town of North Hudson (C. C.) 188 Fed. 489, decided by the District Judge for the Northern District of New York, June 26, 1911. This was an action against a town, with reference to which the statutes of New York provided that:

"No action shall be maintained against any town to recover such damages, unless a verified statement of the cause of action shall have been presented

to the supervisor of the town, within six months after the cause of action has accrued; and no such action shall be commenced until fifteen days after the service of such statement."

In this case it was held that the cause of action accrued, so that the statutory limitation as to notice would begin to run, from the death, and not from the appointment of the administrator, who, under the statute of New York, alone could sue. This was directly contrary to the settled rule of construction reached by the New York Court of Appeals in Crapo v. City of Syracuse, 183 N. Y. 395, 76 N. E. 465, decided January 23, 1896, in passing upon these statutes, which case was not referred to.

In Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, the question as to when the right of action under the statute accrued was not discussed or determined. The point decided was that, if the two years' limitation within which an action could be brought had terminated prior to the time the plaintiff asked leave to appear as administratrix, the desired amendment would not be the introduction of a new cause of action.

In view of the well-recognized rule heretofore pointed out as to when a right of action accrues—which Congress must have had in mind when enacting the present law—and in view of the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that, in the enactment of the present law, Congress declined to adopt such a limitation, and fixed the period from the time the action accrued, we are of the opinion that the proper construction of the statute is that the right of action did not accrue, so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled.

The evidence as to the pecuniary loss sustained by the beneficiaries in whose behalf the suit was brought was conflicting, and the question was properly submitted to the jury.

The judgment of the District Court is affirmed, with costs to the defendant in error.

CONKLING MINING CO. v. SILVER KING COALITION MINES CO.*

(Circuit Court of Appeals, Eighth Circuit. February 12, 1916.)

No. 3977.

1. APPEAL AND ERROR ⟸1009(1)—REVIEW—FINDINGS.

The finding of the chancellor should not be disturbed, unless it clearly appears that he has made a serious mistake of fact, or has fallen into some plain error of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970, 3978; Dec. Dig. ⟸1009(1).]

2. PUBLIC LANDS ⟸114(1)—"PATENT"—CONSTRUCTION AND OPERATION.

A "patent" of mineral land within the jurisdiction of the Land Department is in the nature of a proceeding in rem, and is the judgment of that tribunal upon the evidence before it that the patentee has located

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

*Rehearing denied June 9, 1916.

the tract applied for and made application, posted notice, filed the certificate of improvements, etc., as required by Rev. St. §§ 2324, 2325 (Comp. St. 1913, §§ 4620, 4622), et seq., and is entitled to the land described therein, and it is also the conveyance of the legal title to the patentee in execution of the judgment, concluding the rights of the claimant and of the United States to such land and the unavoidable issues as to the validity, the extent, and the boundaries of the claim.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314, 316; Dec. Dig. ⊂⊃114(1).

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

3. PUBLIC LANDS ⊂⊃106(1)—PATENT—CONCLUSIVENESS—COLLATERAL ATTACK.
The Land Department's adjudication of matters within its jurisdiction, such as its issuance of a patent to land, is, like those of other judicial tribunals, impervious to collateral attack, and voidable only by direct suit for that purpose on the ground of fraud or error of law.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301; Dec. Dig. ⊂⊃106(1).]

4. MINES AND MINERALS ⊂⊃44—PATENT—CONSTRUCTION—PRESUMPTION.
There is a strong presumption that the plain description in a patent of mineral lands was right, and expressed the actual intention of the parties to it.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 130; Dec. Dig. ⊂⊃44.]

5. MINES AND MINERALS ⊂⊃38(16)—PATENT OF MINERAL LANDS—DESCRIPTION —SUFFICIENCY OF EVIDENCE.
In a suit to quiet the title to an undivided three-fourths of a mining claim, the patent of which recited that the plat and field notes were before the department, and which field notes recited that the claim was 1,500 feet long and 600 feet wide, and which plat showed a tract 1,500 feet long and 600 feet wide, and to recover of defendant three-fourths of the value of the ore which it had removed from a stope beneath the surface of plaintiff's claim, evidence *held* not to sustain a finding that the patent did not convey the westerly 135.5 feet of the land described in the patent, and to show that it conveyed, and that the plaintiff owned, a tract 1,500 feet in length and 600 feet in width described in his patent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 102½; Dec. Dig. ⊂⊃38(16).]

6. BOUNDARIES ⊂⊃3(3)—CONTROLLING ELEMENTS—CONFLICT—MONUMENTS.
It is the general rule that in cases of conflict monuments prevail over courses and distances; but such rule, designed only to aid in ascertaining the land which the parties intended to convey, is not without its exceptions.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 6–19; Dec. Dig. ⊂⊃3(3).]

7. MINES AND MINERALS ⊂⊃43—PATENTS—DESCRIPTION—STATUTE—CONSTRUCTION.
Rev. St. § 2327, as amended by Act April 28, 1904, c. 1796, 33 Stat. 545 (Comp. St. 1913, § 4626), to provide that, where patents have issued for mineral lands, those lands only shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent is based, which shall always constitute the highest authority as to what land is patented, and prevail in case of any conflict, passed 12 years after the United States had conveyed a mining claim to its patentee, was not intended to apply thereto, where there was no conflict between the courses and distances and the monuments named in the patent, and to permit

parol evidence to create a conflict between those monuments and the courses and distances.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 125–129; Dec. Dig. ⟸43.]

8. MINES AND MINERALS ⟸31(1)—EXTRALATERAL RIGHTS.

The owner of a mining claim has no extralateral rights beyond the end lines of his claim extended vertically downward, except when by mistake he has located his claim across his discovery vein; extralateral rights being a special privilege.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 75; Dec. Dig. ⟸31(1).]

9. MINES AND MINERALS ⟸38(14)—EXTRALATERAL RIGHTS—BURDEN OF PROOF.

Defendant, claiming the right to ore in a stope beneath the surface of plaintiff's claim, as a part of a fissure vein whose apex was found within and on its strike crossed the side lines of defendant's claims, and in its dip passed through the vertical planes of the end lines of such claims and thence beneath the surface of plaintiff's claim, under the exception that when by mistake the locator places his claim across, instead of along, the vein or lode which he discovers, so that the latter crosses the side lines of his claim, his side lines become his end lines, and he may follow the lode or vein on its dip beyond the vertical plane of the end line of his claim, had the burden of bringing itself within the exception by showing that the discovery vein on each of its three claims extended across, and not along, the claim, and that the locator by mistake placed each claim across, instead of along, its discovery vein.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 101; Dec. Dig. ⟸38(14).]

10. MINES AND MINERALS ⟸38(18)—EXTRALATERAL RIGHTS—SUFFICIENCY OF EVIDENCE.

Evidence in such suit *held* not to sustain the defendant's claim to the ore in a stope beneath the surface of the plaintiff's claim, on the ground that such ore was a part of a fissure vein whose apex was found within, and on its strike crossed, the side lines of the defendant's three claims, and on its dip passed through the vertical planes of the end lines of such claims and beneath the surface of the plaintiff's claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 104; Dec. Dig. ⟸38(18).]

11. MINES AND MINERALS ⟸31(1)—BOUNDARIES—END LINES.

Under Rev. St. § 2322 (Comp. St. 1913, § 4618), giving the locators of claims theretofore located any additional veins existing therein, the end lines of a claim as the locator places them, with the single exception that, when by mistake he locates his claim across, instead of along, the vein he discovers, fix the limit beyond which he may not go in the appropriation of any vein or veins whose apex or apexes are found within the surface lines of his claim, and the end lines of the original discovery vein are the end lines of all the veins discovered within the surface boundaries of his claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 75; Dec. Dig. ⟸31(1).]

Appeal from the District Court of the United States for the District of Utah; John A. Marshall, Judge.

Suit to quiet title by the Conkling Mining Company against the Silver King Coalition Mines Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This is a suit to quiet the title to an undivided three-fourths of the Conkling mining claim, and to recover of the defendant three-fourths of the value

of the ore which it has removed from the Elephant stope beneath the surface of the Conkling claim. The parties to the suit admit that the plaintiff is the owner of the undivided three-fourths of that claim under a patent issued to its predecessor in interest on February 3, 1902, whereby the United States conveyed that claim in the usual way, "bounded, described and platted as follows, with magnetic variation seventeen degrees and twenty minutes east: "Beginning at corner No. 1 a pine post four inches square marked 'U. S. 689 P. 1,' thence first course, north twenty-one degrees and nine minutes west three hundred feet to discovery point, six hundred feet to corner No. 2, a pine post four inches square marked 'U. S. 689 P. 2,' being also corner No. 4 of lot No. 191, the Lincoln lode claim, and corner No. 2 of lot No. 580, the Pirate King lode claim, from which U. S. mineral monument No. 4 bears north thirty-two degrees and fifty-two minutes west nine hundred and thirty-nine and three-tenths feet distant, and a pine tree four inches in diameter marked 'U. S. 689 P. 2 B. T.' bears north thirteen degrees west twenty-eight feet distant; thence second course, south sixty degrees and forty-five minutes west one thousand five hundred feet to corner No. 3; thence third course, south twenty-one degrees and nine minutes east six hundred feet to corner No. 4; thence fourth course, north sixty degrees and forty-five minutes east one thousand five hundred feet to corner No. 1, the place of beginning—said lot No. 689 extending one thousand five hundred feet in length along said Conkling vein or lode, and containing twenty acres and forty-five hundredths of an acre of land more or less."

The defenses were two: First, that the ore was taken from the westerly 135.5 feet of the claim described in the patent and that this part of the claim was not conveyed by the patent, because the posts set by the government surveyor to mark the westerly corners of the claim were only 1,364.5 feet distant respectively from the easterly line of the claim; and, second, because the ore taken from beneath the surface of the Conkling claim was a part of the Crescent fissure vein which had its apex in defendant's Constitution, Cumberland and Monroe Doctrine claims, crossed the side lines of those claims in its course, and, on its dip, extended through the vertical planes passing through their end lines and beneath the surface of the Conkling claim to the Elephant stope, that the end lines of defendant's claims became their side lines, that defendant's claims were prior in time and superior in right to those of the owners of the Conkling claim, and that, therefore, the defendant was the owner of the ore taken from the Elephant stope. Upon final hearing the court below sustained each of these defenses and the plaintiff appealed.

E. B. Critchlow, of Salt Lake City, Utah (Pierce, Critchlow & Barrette, of Salt Lake City, Utah, William D. McHugh, of Omaha, Neb., and William H. King and William J. Barrette, both of Salt Lake City, Utah, on the briefs), for appellant.

William H. Dickson, of Salt Lake City, Utah (A. C. Ellis, Jr., Russell G. Schulder, O. W. Powers, and Thomas Marioneaux, all of Salt Lake City, Utah, on the briefs), for appellee.

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

PER CURIAM. It is a general, but not a universal, rule that monuments mentioned in a description of land prevail over courses and distances, and it was upon this rule that the defendant founded its first defense. The evidence produced to sustain it consisted of the field notes of the survey of the claim which were made on November 1, 1889, by the United States surveyor, which recited that a pine post 4 feet by 4 inches by 4 inches was set at its northwesterly corner and marked "U. S. 689 P. 3," and another at the southwesterly corner of the claim marked "U. S. 689 P. 4," that these posts were 1,500 feet distant from

the easterly line of the claim, the location of which is admitted, and that the area of the claim was 20.45 acres; and (2) the testimony of witnesses that they found these stakes years after the survey 1,364.5 feet distant from the easterly line of the claim. In addition to this testimony a large number of plats and field notes of other claims in the vicinity of the Conkling claim, and some other evidence, was introduced, but the testimony that these stakes were found by two or three surveyors, sometimes lying on the ground and sometimes standing in a mound of stones about 1,364.5 feet distant from the easterly line of the claim, is the most substantial and persuasive evidence that they were originally placed by the surveyor at about that distance from the easterly line.

[1] This testimony and all the other evidence upon this subject has been carefully read more than once and deliberately considered in view of the established rule that the finding of the chancellor should not be disturbed, unless it clearly appears that he has made a serious mistake of fact or has fallen into some plain error of law. The testimony presents two questions: First, may the plain and unambiguous grant by a patent of the United States of a tract of land be revoked or avoided in whole or in part by a collateral attack by means of evidence dehors the patent years after the grant; and, second, if it may be, does the evidence in this case clearly prove that it was not the intention of the parties to the patent that the United States should grant thereby a tract of land 1,500 feet in length, and that it should grant a tract of land only 1,364.5 feet in length, for, after all, the intention of the parties, if it can be lawfully and surely ascertained, must prevail. The court below was of the opinion that the first question did not arise in this case because the patent recited that whereas there had been deposited in the General Land Office "the plat and field notes of survey * * * accompanied by other evidence whereby it appears that the Boss Mining Company did on the twenty-ninth day of December, A. D. 1890, duly enter and pay for that certain mining claim or premises known as the Conkling lode mining claim designated by the surveyor as lot No. 689 and bounded, described and platted as follows [as set forth in the statement preceding this opinion]: Now, know ye, that there is hereby granted by the United States unto the said Boss Mining Company, and to its successors and assigns, the said mining premises hereinbefore described," and that portion of the Conkling lode and all other veins, lodes and ledges the tops or apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 689 extended downward vertically: "* * * Provided that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between the vertical planes drawn downward through the end lines of said lot No. 689;" and the opinion of the court below was that this reference in the patent to lot No. 689 imported into that patent and made a part of the description in the patent the field notes and the calls therein for the posts the field notes described as located at the westerly corners of the claim. In support of this position Rutherford v. Tracy, 48 Mo. 325, 8 Am. Rep. 104, Lodge's Lessee v. Lee, 6 Cranch, 237, 3 L. Ed. 210, and

Keith v. Reynolds, 3 Greenl. (Me.) 393, which hold that where a specific island, town lot, or farm is granted, followed by boundaries which include only a part of it, the entire island, lot, or farm will pass, were cited. Under these decisions, however, the grant of this lot No. 689 according to the plat, followed by a boundary of a part of the lot by courses and distances indicated by the field notes, would convey the entire lot according to the plat which showed the lot to be 1,500 feet in length, although the courses and distances included only a part of it, and that ruling would defeat the defense in hand.

[2, 3] When, however, the origin, nature and effect of a patent and the plain terms of the description in the one in hand are considered it becomes clear that the theory that the reference to the field notes and to the surveyor's number of the lot made the field notes and the calls therein a part of the description, is untenable. A patent of land within the jurisdiction of the Land Department of the United States, and this land was within its jurisdiction, is the judgment of that tribunal upon the evidence before it that the patentee is entitled to the land therein described and the conveyance of the legal title to the land to the patentee in execution of the judgment. The Land Department is a special tribunal vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and its judgment, evidenced by its patent, is conclusive of the right of the claimant and of the United States to such land and of every issue which it was necessary for the land Department to decide in determining those rights. The validity, the extent and the boundaries of the claim in this case, and in every case, are unavoidable issues which it must adjudge in sustaining any part or all of the claim in hand, or any other claim of this character. Its adjudications of matters within its jurisdiction are like those of other judicial tribunals, impervious to collateral attack. They may be avoided only by a direct suit for that purpose on the ground of fraud or error of law, and there is no such proceeding here. Smelting Co. v. Kemp, 104 U. S. at pages 646, 666, 26 L. Ed. 875; King v. McAndrews, 111 Fed. 860, 863, 50 C. C. A. 29; Uinta Tunnel Min. & T. Co. v. Creede & C. C. Min. & M. Co., 119 Fed. 164, 166, 57 C. C. A. 200; Golden Reward Min. Co. v. Buxton Min. Co. (C. C.) 79 Fed. 868, 874; Carson City Gold & S. M. Co. v. North Star Min. Co. (C. C.) 73 Fed. 597, 600; Doe v. Waterloo Min. Co. (C. C.) 54 Fed. 935, 940; Waterloo Min. Co. v. Doe (C. C.) 56 Fed. 685.

The applicant for the land and the patent in this case had the right under the acts of Congress to locate and purchase from the United States a mining claim 1,500 feet long and 600 feet wide, and it is conceded that it claimed and applied for a patent to a tract of these dimensions. In order to entitle it to the patent it was required to locate the tract it claimed and applied for so that its boundaries could be readily traced, section 2324, Revised Statutes of United States, to file in the proper land office an application for the patent together with a plat and field notes of its claim made by and under the direction of the Surveyor General of the United States showing accurately the boundaries of its claim, which should be distinctly marked on the

ground, to post a copy of such plat with a notice of its application for a patent on the land platted, to file an affidavit of two persons that the notice had been duly published 60 days, to file with the register of the land office a certificate of the United States Surveyor General that $500 worth of labor had been expended by the applicant or his grantors in improvements on the claim and that the plat is correct, and to file his affidavit that the plat and notice have been posted. Section 2325, Revised Statutes. Whether or not the applicant has complied with these and other conditions of his right to the land thus specified by the acts of Congress and is entitled to a grant of the land, is the ultimate question which the Land Department is empowered and required to decide in the issue of every patent for such a mining claim as that here in controversy. The proceeding in the Land Department is judicial in its character, in the nature of a proceeding in rem, and its judgment by default, where the proper notice of the application has been given, is as conclusive and impervious to collateral attack as its judgment after a contest. Golden Reward Min. Co. v. Buxton Min. Co. (C. C.) 79 Fed. 868; New Dunderberg Min. Co. v. Old, 79 Fed. 598, 25 C. C. A. 116.

[4-7] Now the proof is uncontradicted that the plat of this claim showed it to be 1,500 feet long and 600 feet wide. The field notes, that plat, proof that a copy of that plat was posted on the land and the certificate of the United States Surveyor General that the plat was correct were required to be, and the legal presumption is that they were, in evidence before the Land Department when it rendered its judgment. The patent itself recites that the plat and the field notes accompanied by other evidence were before it. The field notes recited that the claim was 1,500 feet long and 600 feet wide, that there was a post at each corner and described each post and its location. The plat portrayed the tract 1,500 feet long and 600 feet wide. The patent recites that there was other evidence. On all this evidence the department adjudged and conveyed to the patentee a tract "bounded, described and platted as follows," and then set forth a boundary by course and distance carefully describing the two posts at the east end of the claim mentioned in the field notes, and as carefully disregarding and omitting all reference to the two posts at the west end of the claim mentioned in the field notes and adjudging the second course to be "south sixty degrees and forty-five minutes west one thousand five hundred feet to corner No. 3," the third course to be "south twenty-one degrees and nine minutes east six hundred feet to corner No. 4," and the fourth course to be "north sixty degrees and forty-five minutes east one thousand five hundred feet to corner No. 1, the place of beginning," and adding: "Said lot No. 689 extending one thousand five hundred feet in length along said vein or lode and containing twenty acres and forty-five hundreths." Here was a direct and conclusive adjudication on its face (1) that the field notes and the posts and calls therein were not parts of the description in the patent, but were only a part of the evidence upon which the adjudication was based; (2) that the two posts at the easterly end of the tract mentioned in the field notes marked the easterly corners of the tract conveyed; and (3)

that the tract so conveyed extended 1,500 feet westerly from the easterly line on the courses stated in the description and contained 20.45 acres, without regard to the location of the westerly posts which were described in the field notes, but were not mentioned in the patent. This adjudication was impervious to collateral attack. The description contained in the patent was free from ambiguity and the field notes and parol testimony which were offered in the court below were incompetent in this suit indirectly to revoke and avoid the grant to the patentee of the westerly 135.5 feet of the 1,500 feet which were clearly adjudged and conveyed to it by the patent.

Nor is this all. The court is of the opinion that if all the evidence offered had been competent it would have been insufficient to overcome the strong presumption that the plain description in the patent was right, insufficient to overcome the facts that the plat showed the claim to be 1,500 feet in length and 600 feet in width, that the Surveyor General certified that the plat was correct, that the field notes recited that the claim was 1,500 feet in length and 600 feet in width, that the field notes, the plat and the patent each declare that the area claimed was 20.45 acres, that this is the area of a tract 1,500 feet in length and 600 feet in width, while the area of a tract 1,364.5 feet in length and 600 feet in width is nearly 2 acres less, and the persuasive presumption that the plain description in the patent expressed the actual intention of the parties to it. These considerations have left no doubt that the court below made a mistake in its finding that the patent did not convey the westerly 135.5 feet of the land described in it and have satisfied our minds that it conveyed, and the plaintiff now owns, the tract 1,500 feet in length and 600 feet in width so clearly described in it.

Nor has this conclusion been reached without a deliberate consideration of the general rule that in cases of conflict monuments prevail over courses and distances, and of the amendment of 1904 to section 2327 of the Revised Statutes (10 Stat. Ann. 235), which provides that:

> "Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based. * * * The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern."

But the general rule is not without exception. It is but one of many rules for construing and applying descriptions in conveyances to the land described. The sole object of this and of all other such rules is to aid in ascertaining the land which the parties intended to convey, and where, as in the case at bar, the description in the patent is unambiguous, and the intent of the parties is clear beyond doubt to convey the tract so described, that intent must prevail over this or any other rule of construction or application, the only purpose of which is to aid in ascertaining such intent.

And there are many reasons why the amendment to the statute which has been quoted ought not to be permitted to revoke or modify

the grant of a patent which the United States unquestionably intended to make and did make, and which the patentee applied for, earned and received years before that amendment was enacted. The amendment was passed and approved 12 years after the United States had conveyed this land to its patentee, and it could not by its mere legislative fiat revoke that grant and take from him, or from subsequent purchasers of it from him, the land it had conveyed 12 years earlier, or any part of it. In the second place there is in this case no conflict between the courses and distances and the monuments named in the patent, and parties cannot be and ought not to be permitted to import into a clear and perfect description in the patent by parol evidence 19 years after its issue monuments not mentioned therein to create a conflict between those monuments and the courses, distances and clear description and area stated in the patent, and then by the aid of the amendment of 1904 to destroy or diminish by means of these imported monuments, the grant. It cannot have been the intention of Congress that this amendment should apply to a prior grant under such circumstances as this case presents. And finally the proof that the westerly posts of the official survey upon which this patent was granted were originally set only 1,364.5 feet distant from the easterly line of the claim is not of that certain and satisfactory character which would warrant a court in avoiding, so many years after the issue of the patent, the grant which the United States clearly made. The defendants cannot deprive the plaintiff of the land described in his patent by means of the proof of the finding of these old posts which was introduced in this case.

[8-10] We turn to the second defense. Does the evidence sustain the defendant's claim to the ore in the Elephant stope beneath the surface of the plaintiff's Conkling claim on the ground that this ore is a part of the Cresent fissure vein whose apex is found within and on its strike crosses the side lines of the defendant's Constitution, Cumberland and Monroe Doctrine claims, while on its dip it passes through the vertical planes of the end lines of these claims and beneath the surface of the Conkling claim? Upon the face of the patents this claim is baseless because the owner of a mining claim has no extralateral rights beyond the end lines of his claim extended vertically downward. The defendant concedes this, but invokes the exception to this rule that when by mistake the locator places his claim across instead of along the vein or lode which he discovers, so that the latter crosses the side lines of his claim, his side lines become his end lines and he may follow the lode or vein on its dip beyond the vertical plane of the end line of his claim. But this extralateral right is a special privilege, an exceptional right, and the burden was on the defendant to bring itself within the exception. The burden was on it to prove that the discovery vein in each of its three claims extended across and not along the claim, and that the locator by mistake placed each claim across instead of along its discovery vein. This burden rests on every party who claims a right not common to all which is given only when a prescribed state of facts shall exist

He must prove the existence of the prescribed facts. The "Edith," 94 U. S. 518, 522, 24 L. Ed. 167.

The evidence in this case established these facts: Each of the defendant's claims was patented on March 31, 1883. The plaintiff's claim was located in 1889 or 1890, and was not patented until 1892. The ore in dispute could not be reached by any lode or vein extending on its strike lengthwise of either of defendant's claims and on its dip through the vertical plane of any side line of any of these three claims. The record discloses no claim of the locator of either of these claims, or of any of his successors in interest that through the mistake of any of them the end lines were its side lines during 25 years after these claims were patented. Meanwhile the plaintiff's Conkling claim and many other surrounding claims were located and went to patent. Each of the defendant's claims is 1,500 feet long and 200 feet wide, and on each of them there is a discovery pit or cut near the center of the claim, and more than 400 feet northwesterly of the Cresent fissure, which crosses the claims on its strike about 100 feet northwesterly of the southeasterly end lines of the claims and extends on its dip through the vertical planes of those lines extended downward to the Elephant stope beneath the surface of the Conkling claim. The defendant introduced the testimony of witnesses that at various places beneath the surface of its claims where tunnels had been run and where explorations had been made no longitudinal veins had been found, but that small veins running crosswise of the claims and the large vein called the Crescent fissure vein had been discovered, and the defendant contends that by this testimony it has established by a preponderance of evidence the facts that the locator of each of these claims by mistake placed them across when he intended to place them along his discovery vein. But the portions of the grant beneath the surface of the defendant's claims, which its witnesses examined and in which they found no longitudinal veins, was but a small percentage of the entire ground beneath the surface of these claims. There was a discovery cut or pit on each claim. Witnesses estimated that these cuts were from three to five feet deep. They had caved in. The ground in and under them, or along the course where a longitudinal vein under them would extend, had not been explored or examined by any witness to such an extent that he could testify with actual knowledge that there was no longitudinal vein beneath them.

Defendant's counsel argue, however, that the testimony of these witnesses that they found no longitudinal veins in the small parts of the ground beneath the surface which they examined is sufficient, together with the opinions of these witnesses, to establish the facts that there are no longitudinal veins in the claims and that the only vein or lode there is or ever was in these claims is the Cresent fissure vein, and they insist that since, when these claims were located, nothing was required of the locator but the discovery of a vein or lode of rock in place and the marking of the boundaries of the claim, this evidence is sufficient to sustain the conclusion that the Cresent fissure vein was the discovery vein of each of these claims. The evidence upon the issue here under consideration is not stated and will not be discuss-

ed at length in this opinion, because that course would unduly extend it. It has, however, been carefully read and thoughtfully considered. The legal presumption is, and the probability is, that the locator of the defendant's claims thought he had discovered a longitudinal vein in each of these claims in his discovery cut or pit, or he would not have located his claim lengthwise of such a vein. The fact that he made his discovery pits more than 400 feet northeasterly of the apex of the Crescent fissure cross-vein, which dips southeasterly, and that he did not locate his claims lengthwise of that vein, convinces that the Crescent fissure vein was not his discovery vein, and that it was only a cross-vein in claims whose discovery veins ran lengthwise of the claims, and in the absence of the testimony of the locator himself, or of any witness who knew the facts and circumstances of the discovery of the veins in these claims and of their location, the existence and location of the discovery pits, the location of the claims across and not along the Cresent fissure, the 25 years that elapsed after the patents to these claims were issued before the locator or any successor in interest claimed that any mistake had been made in their location, the subsequent location and patent meanwhile of surrounding claims during these 25 years and the legal presumption that the locator of each of the defendant's claims discovered a vein and located his claim lengthwise thereof, converge with compelling power to force our minds to the conclusion that there is no preponderance of evidence in this case that the locator of any of the defendant's claims placed it crosswise of his discovery vein. And the result is that the end lines of these claims never became their side lines, and the defendant is without right to three-fourths of the ore which is, and to three-fourths of the ore which was, beneath the surface of the Conkling claim.

[11] The end lines of a claim as the locator places them, with the single exception of when by mistake he locates his claim across instead of along the vein he discovers, fix the limit beyond which he may not go in the appropriation of any vein or veins whose apex or apexes are found within the surface lines of his claim, and the end lines of the original discovery vein are the end lines of all the veins discovered within the surface boundaries of his claim. Section 2322, Revised Statutes; Walrath v. Champion Mining Co., 171 U. S. 293, 307, 308, 18 Sup. Ct. 909, 43 L. Ed. 170.

The conclusion which has been reached upon the investigation of the questions already discussed renders the other questions of law and fact in this case immaterial, and the decree below must be reversed, and the case must be remanded to the trial court for further proceedings consistent with the views expressed in this opinion,

And it is so ordered.

UNITED STATES v. EIGHTEEN PACKAGES OF DENTAL INSTRUMENTS.

(Circuit Court of Appeals, Third Circuit. March 6, 1916. Rehearing Denied April 11, 1916.)

No. 1965.

1. CUSTOMS DUTIES ⟸130—VIOLATIONS OF CUSTOMS LAWS—FORFEITURE.

Act Aug. 5, 1909, c. 6, § 28, subsec. 9, 36 Stat. 97, provides that if any consignor, etc., shall attempt to enter or introduce into the commerce of the United States any imported merchandise by means of any fraudulent or false invoices, or any false statements, or any false or fraudulent practice or appliance, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties accruing thereon, such merchandise shall be forfeited. *Held* that, where a consignor of merchandise sent by parcels post attempted by means of a false invoice undervaluing the merchandise to enter and introduce it into the commerce of the United States, such merchandise was subject to forfeiture, though there was no formal entry or custom house proceeding, as the consignor's attempt to introduce the goods into the commerce of the United States was the statutory cause of forfeiture, and the consignor or the forfeiture to which his conduct subjected an importation was not affected by the course the goods thereafter followed, or whether the consignee received them through the customs office or through the post office.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 296–315; Dec. Dig. ⟸130.]

2. TREATIES ⟸11—OPERATION AS TO INCONSISTENT LAWS.

A statute, equally with a treaty, is a law, and, if subsequent to and conflicting with the treaty, supersedes it.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 11; Dec. Dig. ⟸11.]

3. TREATIES ⟸11—INCONSISTENT LAWS—VIOLATIONS OF CUSTOMS LAWS.

The parcels post convention with Germany of September 2, 1899, provides that merchandise packages must be wrapped or inclosed so as to permit their contents to be easily examined by customs officers and postmasters authorized to do so, that they shall be subject in the country of destination to all customs duties and customs regulations in force therein for the protection of the customs revenues, and that the sender of each package must make a customs declaration upon a prescribed form. *Held*, that this in no way prevents the application to merchandise imported from Germany by parcels post of Act Aug. 5, 1909, c. 6, § 28, subsec. 9, relative to the forfeiture of merchandise which the consignor attempts to enter or introduce into the commerce of the United States by means of any fraudulent or false invoice, etc.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 11; Dec. Dig. ⟸11.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Proceeding by the United States against Eighteen Packages of Dental Instruments, claimed by Samuel Rubin. From a decree dismissing the libel (222 Fed. 121), the United States appeals. Decree vacated, libel reinstated, and cause remanded.

Edward S. Kremp, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia Pa., for plaintiff in error.

Walter Evans Hampton, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. Generally speaking, this case involves two questions. Stated in a general way, the first is whether fraudulent importations by parcels post are subject to the same forfeitures as custom house deliveries, or, stated specifically:

"Whether a libel for forfeiture which does not aver a formal entry and subsequent custom house proceedings, but which sets forth in detail an attempt on the part of the consignor to introduce into the commerce of the United States, by parcels post, certain merchandise by means of fraudulent and false invoices, by means whereof the United States would have been deprived of its lawful duties on such merchandise, is insufficient under subsection 9 of section 28 of the act of August 5, 1909."

Stated in a general way, the second question is whether the parcels post convention of 1899, made by this government with Germany, exempts parcel post importations from the forfeitures provided by a subsequent act of Congress, or, stated specifically:

"Whether subsection 9 of section 28 of the act of August 5, 1909, providing, inter alia, for the forfeiture of merchandise if the consignor shall attempt to introduce it into the commerce of the United States by means of fraudulent or false invoices, by means whereof the United States may be deprived of any portion of its lawful duties, applied to merchandise mailed from Germany to the United States under the parcels post convention of September 2, 1899."

The cause arose on a libel filed by the government to forfeit certain packages of dental instruments sent by parcels post from Germany to Philadelphia. Exceptions to the libel were filed by the claimant. Simply as a matter of administration, it might perhaps have been better to overrule the exceptions without prejudice to the claimant's right to renew them in any appropriate form after a trial had settled such questions of fact as might turn out to be in dispute. In this way the whole controversy would have been disposed of more speedily, and the possibility of a second appeal avoided. But, no doubt for reasons that seemed good and controlling, the court below preferred to decide the case solely upon the exceptions. As we are obliged to differ from its conclusion, the case must go back, and therefore may reach us again on a second appeal.

[1] The exceptions to this libel having been sustained by the court below, the libel was dismissed, whereupon the government took this appeal. As amended the libel averred—and for the purposes of this cause we must assume them true—that in April and May, 1913, Edwin Hager consigned by parcels post from Düsseldorf, Germany, 18 packages of dental instruments addressed to Samuel Rubin, Philadelphia, Pa.; that invoices were mailed with the several packages, which made untrue and fictitious statements as to the values of the instruments, such values being the alleged prices at which the instruments were purported to have been sold; that the values thus alleged were $187.02

less than the true dutiable values of the instruments; that Hager sent to Rubin—

"* * * invoices in which the values of the said merchandise was stated correctly and truly; that in addition to the false invoices marked, as aforesaid, with the said packages, Hager mailed duplicates of said invoices directly to said Samuel Rubin."

The libel further averred that Hager—

"* * * did fraudulently and knowingly, as consignor, attempt to enter and introduce into the commerce of the United States, to wit, by parcels post, at the port of Philadelphia, in the state of Pennsylvania, the said dental instruments, by means of fraudulent and false invoices, to wit, by invoices which then and there contained untrue and fictitious statements as to foreign market and true dutiable values, and by means of which the United States would be deprived of a portion of the lawful duties accruing upon the said dental instruments."

It is conceded that, if such goods had entered the United States in due course through the usual custom house channels, they would have been subject to forfeiture under the provisions of subsection 9 of section 28 of the act of August 5, 1909 (36 Statutes, 97, c. 6), quoted below:

"That if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, affidavit, paper, letter, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person or persons shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

It is contended, however, that this section only relates to custom house entries, and not to parcels post. At this point we note that the statutory forfeiture on which this libel is based is an attempt by a consignor to fraudulently introduce merchandise into the commerce of the United States. It is true the libel points out—as in fairness it should for the information of the consignee—certain steps the consignor took. But these facts are not the statutory cause of forfeiture, but incidents or evidence to establish that the consignor was guilty of the forfeiture act, which was a fraudulent attempt to introduce merchandise into the commerce of the United States. It is also to be noted that an attempt by a consignor to fraudulently introduce into commerce was a new cause of forfeiture, which was only made such by the act of 1909.

As showing the wider scope and effect of that act to stop the fraudulent importations possible under earlier tariff laws, it suffices to quote what the Supreme Court said in United States v. 25 Packages of Hats, 231 U. S. 360, 34 Sup. Ct. 64, 58 L. Ed. 267:

"The prior Tariff Act (26 Stat. 131) provided for the forfeiture of goods 'if any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice.' In several cases arising under that act it was held that the language used did not cover the case of fraud by the consignor, nor could the goods be forfeited for the wrongful conduct of any person if the act preceded the making of the documents or taking any of the steps necessary to enter the goods. United States v. 646 Half Boxes of Figs [D. C.] 164 Fed. 778 (1908); United States v. One Trunk [D. C.] 171 Fed. 772 (July, 1909). Under the statute, as thus construed, there was no penalty for the grossest fraud on the part of the consignor, notwithstanding the fact that his invoice valuation was of great importance in determining true value, as a basis for collecting the duty. And even if the consignor was also consignee it had been held that there was a locus pœnitentiæ, so that he might, before entry, substitute a true for a false invoice and thus escape a forfeiture.

"In order to close these loopholes and to make the act more effective, Congress, on August 5, 1909 (36 Stat. 11, 97, c. 6), changed the law so as to increase the number of persons whose fraud should be punished. It also enlarged the scope of conduct for which the goods should be forfeited. Instead of punishing only for the fraud of the 'owner, importer, consignee and other persons,' as under the act of 1890, provision was made for forfeiture for fraud of the 'consignor or seller.' Instead of punishing only for entering or attempting to enter on a fraudulent invoice, it punished an attempt by such means 'to introduce any imported merchandise into the commerce of the United States.' This latter phrase necessarily included more than an attempt to enter; otherwise, the amendment was inoperative against the consignor, against whom it was specially aimed, for he does not, as such, make the declaration, sign the documents, or take any steps in entering or attempting to enter the goods. When he makes the false invoice in a foreign country there is no extraterritorial operation of the statute whereby he can be criminally punished for his fraud. But when the consignor made the fraudulent undervaluation in the foreign country and on such false invoice the goods were shipped and arrived consigned to a merchant in New York, the merchandise was within the protection and subject to the penalties of the commercial regulations of this country, even though the consignor was beyond the seas and outside the court's jurisdiction.

"It was argued that the goods could only be forfeited for the same acts that would support an indictment, and inasmuch as the consignor could not be prosecuted here for making a false invoice in a foreign country, neither could the goods be forfeited for the same conduct in the same place. But while punishment for the crime and forfeiture of the goods will often be coincident penalties, they are not necessarily so, nor is there any inconsistency in proceeding against the res if the wrongdoer is beyond the jurisdiction of the court. The very fact that the criminal provision of the statute does not operate extraterritorially against the consignor would be a reason why the goods themselves should be subjected to forfeiture on arrival here."

Seeing, then, that the statutory forfeiture in this libel is what Hager, the consignor, and not what Rubin, the consignee, did, it necessarily follows that when the goods, fraudulently undervalued and consigned by Hager, arrived at Philadelphia, the port of entry, there was then, to use the language of the Supreme Court quoted above, "an attempt to introduce them into the commerce of the United States." What course the goods thereafter followed, whether Rubin received them through the custom office or through the post office, in no way affected Hager or the forfeiture to which his conduct had already subjected the attempted importation. If Rubin never claimed or received the goods, they could have been forfeited just the same for Hager's fraudulent attempt. Indeed, it is conceded that, if the goods had been con-

signed through custom house channels, they could have been subjected to the statutory forfeiture imposed by the section quoted of the act of 1909. But to our mind there is no more reason for applying that section to custom house than there is to post office importations. Neither one of these government agencies is mentioned in the section. The loss of duties by the government is the same, whether the fraudulent attempt is effected by entry through either channel.

Moreover, there is no reason why the government should limit such dutiable importations to its custom house, when it has extended its mail facilities to carrying merchandise parcels. The fact that this statute does not mention custom houses shows that no limitation was intended, and the statute's inclusive character is indicated by the provisions that it applies to "*any consignor,* seller, owner, importer, consignee, agent, or other person"; that it covers any attempt to introduce "into the commerce of the United States *any* imported merchandise"; that the fraudulent attempt to introduce may be done "by means of *any* false statement, written or verbal"; or "by means of any false or fraudulent practice or appliance whatsoever"; or when the person offending "shall be guilty of *any* willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, or any portion thereof." Deprivation of duties is the mischief sought to be remedied, and forfeiture for an attempt to fraudulently introduce into commerce is the punitive remedy provided. Indeed, as it seems to us, there is no reason why the United States should restrict this statutory self-protective statute to custom house entries, and there is every reason why it should cover the post office system. The extension of the parcels post evidenced a governmental purpose to make its mail system an agency and its post offices places for merchandise delivery. And if the facilities of the post office system are extended by law to consignments of domestic merchandise and by treaty to foreign merchandise, there is no reason why, with the benefit conferred, there should not be imposed such statutory regulations as will prevent post office as well as custom house facilities from being used to defraud the government of the duties which it has imposed on all foreign merchandise introduced into the commerce of the country.

When the act of 1909 was passed, the government had already by its practices and regulations adopted the post office as a recognized agency for the importation of foreign merchandise. For example, article 775 of the Treasury Regulations of 1908, provides:

"Dutiable articles are admitted to the mails exchanged under the various parcels post conventions on the following conditions, viz.: 'The parcels must be so wrapped or inclosed as to permit their contents to be easily examined by customs officers and postmasters duly authorized to do so; the customs declarations provided for by the conventions must contain accurate statements of the contents and value of parcels and be securely attached thereto; the parcels to be subject in the country of destination to customs duties, and to the regulations in force for the protection of the customs revenue, and must conform to the following conditions as to value, weight,'" etc.

Other regulations are referred to in the opinion of the court below, where it is said:

"Customs officers are detailed for service at the post offices and meet the mails on arrival. By T. D. 21698, in 1899, such officers were required to correct the valuations when inadequate or supply them when omitted. Forms for this purpose are provided. Article 775 of the Customs Regulations of 1908 required accurate statements of contents and valuations. Article 815 exempted goods from seizure for undervaluations unless the packages contained cigars or cigarettes. Subsequently formal entry was required in certain cases. In 1909 parcels were limited to a value of $80 and entry required where the foreign market value exceeded that stated by more than 25 per cent., or where the value exceeds $100."

Our answer to the first question must therefore be that the averments in the libel were sufficient.

[2, 3] We turn next to the second question. The postal convention with Germany was made in 1899. The act in question was passed in 1909. It is settled (Horner v. United States, 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266) that a statute, equally with a treaty, is a law, and, if subsequent to and conflicting with the treaty, supersedes it. But in this case there is no necessity for invoking that principle, for there is nothing in the treaty which in any way limits the power of either country to enact its own tariff legislation. On the contrary, the treaty evidences the desire of each country sending merchandise by post to subject it to the customs regulations of the other. For example, article II, after providing for the receipt of merchandise packages, provides it—

"must be wrapped or inclosed so as to permit their contents to be easily examined by customs officers and by postmasters duly authorized to do so."

And article IV says:

"The packages in question shall be subject in the country of destination to all customs duties and all customs regulations in force in that country for the protection of its customs revenues."

And article V provides:

"The sender of each package must make a customs declaration, upon a special form provided for the purpose (see Form 1, A, annexed hereto), giving the address, a general description of the parcel, an accurate statement of the contents and value, date of mailing, and the sender's signature and place of residence, which declaration must accompany the parcel to destination."

This view, namely, that each signatory to this postal convention was in no way to control the customs regulations of the other, is in accord with the subsequent practice of the signatories thereto. Such practice is evidenced by the instructions issued by our own Post Office Department (United States Official Postal Guide, July, 1915, page 99), which provides:

"The Department has not been advised what articles (other than those so designated in the preceding list of 'prohibited articles') are liable to customs duties in foreign countries, and consequently does not exclude articles of merchandise from the regular mails for foreign countries because they may be liable to customs duties in the countries to which they are addressed. They are accepted at the sender's risk. Any country may refuse to deliver dutiable articles received in mails from other countries, and may dispose of them in accordance with the customs regulations of that country.

"The question whether or not an article sent by mail from one country to another is subject to customs duty in the latter country can be decided only

by the country to which the article is sent, and is not affected by any postal convention between said countries. This Department is not authorized to question the decision of foreign officials in such matters any more than foreign officials would be authorized to question the decisions of United States officials respecting the liability to United States customs duty of an article received here in mails from abroad."

It follows, therefore, that the second question must be answered in the affirmative, namely, that section 9 of the act of 1909 applies to merchandise mailed from Germany to the United States under the postal convention of 1899 between those countries. Such being the case, it follows the court erred in sustaining the exceptions and dismissing the libel.

Its decree will therefore be vacated, the libel reinstated, and the cause remanded for further procedure.

CITY OF DES MOINES, IOWA, v. DES MOINES WATER CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1916.)

No. 4462.

1. EMINENT DOMAIN ⟸241—PROCEEDINGS TO ASSESS COMPENSATION—TIME FOR PAYMENT.

While the Iowa statutes make no provision for the time within which an award in a condemnation proceeding shall be paid, if the parties cannot agree, the court may determine the time within which payment shall be made.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 621–625; Dec. Dig. ⟸241.]

2. JUDGMENT ⟸299(1)—MODIFICATION—"FINAL JUDGMENT."

In a proceeding by a city to condemn a waterworks plant and system, a judgment fixing the value of the water plant as of April 1, 1912, giving the city one year in which to make payment thereof, and reserving for future settlement questions as to the value of additions and extensions made subsequent to April 1, 1912, was not an interlocutory but a "final judgment," which the court was powerless to modify, after the term at which it was rendered had expired, with respect to the time within which payment might be made by the city.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 583, 585, 586; Dec. Dig. ⟸299(1).

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

3. JUDGMENT ⟸300—MODIFICATION—DISCRETION OF COURT.

An application for the modification of a judgment in a condemnation proceeding, giving the petitioner one year in which to pay the amount of the award, so as to extend such time, was addressed to the discretion of the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 581; Dec. Dig. ⟸300.]

4. APPEAL AND ERROR ⟸946—REVIEW—DISCRETIONARY MATTERS.

An appellate court is only justified in setting aside an order addressed to the discretion of the trial court if an abuse of discretion clearly appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3812; Dec. Dig. ⟸946.]

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5. JUDGMENT ⇐300—MODIFICATION—DISCRETION.

In a proceeding by a city to condemn a waterworks plant and system, a judgment was entered fixing the value of the plant as of April 1, 1912, giving the city one year in which to pay the award, and reserving for future consideration questions as to the value of additions and extensions subsequent to April 1, 1912. It was necessary for the city to issue bonds, and during the year allowed for payment it submitted the question of issuing such bonds to the voters at three different elections; but, though there was a majority in favor of their issuance at each election, a majority of all the votes cast at the last preceding municipal election was not cast in favor of the issuance of the bonds, as required by statute. *Held* that, even though the judgment was not final, the court did not abuse its discretion in refusing to modify the judgment by extending the time within which the city might make payment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 581; Dec. Dig. ⇐300.]

In Error to the District Court of the United States for the Southern District of Iowa; Arba S. Van Valkenburg, Judge.

Eminent domain proceeding by the City of Des Moines, Iowa, against the Des Moines Water Company and others. From a judgment (218 Fed. 939), denying an application to modify a judgment previously rendered, the city brings error. Affirmed.

The parties occupied in the court below the same relative positions as plaintiff and defendants as they do in this court, and we shall therefore refer to the city as the plaintiff and the water company as the defendant. The facts are, that the city, having been authorized by a vote of the people, in conformity with the laws of the state of Iowa, to purchase or construct a system of public waterworks, instituted proceedings of condemnation under the laws of that state for the purpose of acquiring the system owned and operated by the defendant in the city of Des Moines. In conformity with the laws of that state the Supreme Court of the state, upon a petition of the plaintiff, appointed a condemnation court, which, after a hearing, fixed the value of the defendant's plant at $2,302,522, as of the 1st day of April, 1912. From this finding both parties appealed to the District Court of the county in which the waterworks are situated, as authorized by the laws of the state. Upon the petition of the defendants the cause was removed from that court to the District Court of the United States for that district.

On December 3, 1913, a judgment by consent was entered, fixing the value of the water plant at the sum found by the condemnation court, and giving the plaintiff one year from the date of the entry of the judgment to make payment for the same. The judgment further provided that upon such payment the defendant is required to turn over to the city the said water plant and system, with all its property and equipment, including all additions and extensions made thereto since the 1st day of April, 1912. The judgment then proceeded: "It is further ordered that the value of the additions and extensions to said plant made subsequent to the 1st day of April, 1912, and the amount to be paid to the Des Moines Water Company by the city of Des Moines therefor be reserved for future settlement between the parties or under the rules of practice and procedure in this court, as may later be determined, and the court reserves and retains jurisdiction of this cause for the purpose of making such further orders as may be necessary to the final settlement and determination of all matters pending herein."

On November 19, 1914, the plaintiff filed an application for an extension of time within which to pay the money adjudged to the defendant for the waterworks. The petition, after reciting the proceedings hereinbefore set out, alleges: That at the time these condemnation proceedings were commenced bonds for the purpose of paying the purchase price of the water plant could be authorized by a majority vote of the qualified electors of the

city, voting at an election called for such purpose. While these proceedings were pending, the General Assembly of the state amended that act so as to require the affirmative vote, on the question of the issuance of the bonds, to be as large as a majority of all votes cast at the last preceding municipal election. At the regular municipal election in March, 1914, the question of the issuance of the bonds in an amount sufficient to pay the value of the plant and system, as found by the court of condemnation, was submitted to a vote of the people, and, although there was a majority in favor thereof of 2,538 votes, it was not as large as a majority of all the votes cast at the last preceding municipal election, as required by the amended act referred to. That thereafter on the 1st day of June, 1914, another special election, which had been called for that purpose was had, and, although at that election there was a majority of 2,783 votes in favor of the proposition, it was not a majority sufficiently large to comply with the requirements of the law. That on the 3d of November, 1914, the proposition was again voted on by the voters of the city, and although there was a majority of 1,810 votes in favor of the issuance of said bonds, the affirmative vote was not sufficiently large, as required by law. That for these reasons, and also the fact that the bond market is such that it would be impossible to sell the bonds, if authorized, and receive therefor a reasonable and fair price, and as it would be impossible to have another election in time to authorize the issuance of the bonds, and to sell the same in time to secure the money and pay it into this court on or before the 3d day of December, 1914, provided in the order of the court, it is impossible for the city to comply with said order. That as under the order and judgment of the court the water company is to retain the water plant and system and have the earnings thereof, and is to be paid for all additions and extensions to said plant and system made after April 1, 1912, no loss or damage could be or result to the defendant, if the time for such payment should be extended by the court.

The defendant filed objections to the granting of this extension, assigning three grounds: (1) That the judgment having been rendered by the court at the November, 1913, term, which term has long since adjourned and passed, the court was without jurisdiction to grant the petition. (2) That the allegations in the petition, even if the court had jurisdiction to act on it, are not sufficient in law to warrant the court in granting it. (3) Is practically the same as the second objection, adding thereto, that there is nothing in the petition that, even if it were granted, the plaintiff could acquire the funds with which to comply with the order except by borrowing money upon the issue of bonds, and the authority to issue such bonds having been defeated at three different elections called for that purpose, there is no likelihood that the bonds would ever be authorized by a vote of the people of the city.

Upon a hearing the court refused to grant the extension upon two grounds: (1) That the judgment was final, and the term at which it was rendered having expired, the court is powerless to modify it; (2) the judgment having been entered by consent of the parties, cannot in the absence of fraud or mistake be set aside by rehearing or appeal; nor can it be modified without the consent of the parties. From this judgment of the court this appeal is prosecuted.

H. W. Byers, of Des Moines, Iowa (Eskil C. Carlson and Earl M. Steer, both of Des Moines, Iowa, on the brief), for plaintiff in error.

J. L. Parrish, of Des Moines, Iowa (W. E. Miller, of Des Moines, Iowa, on the brief), for defendants in error.

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

TRIEBER, District Judge (after stating the facts as above). [1] The statutes of Iowa make no provision for the time, within which an award in a condemnation proceeding shall be paid. It would be unreasonable to presume that for that reason this power does not rest somewhere, or in some tribunal. That the condemnor should be re-

quired to make payment within some reasonable time, must be recognized by all, as it is our opinion that, if the parties cannot agree among themselves within what time the money is to be paid, as was done in this instance, the court in which the cause is pending, is the proper tribunal to determine it, giving due consideration to the peculiar circumstances in each case. Unless the time of payment is either fixed by statute, or the power to do so possessed by some tribunal, the condemnor may postpone payment indefinitely, and, as stated by counsel for the defendant in their brief, "forever create a cloud upon the title to property by simply starting a condemnation proceeding, and securing a judgment fixing the value of the property." This may not be done. City of Chicago v. Barbian, 80 Ill. 486. Counsel for the city do not seriously contest this proposition.

[2] It is not disputed by counsel for the plaintiff that, if the judgment entered at the November, A. D. 1913, term, fixing the time within which the plaintiff was to pay for the waterworks, was a final judgment, the court would be powerless to modify it after the term, at which the judgment was rendered, had expired, but it is earnestly insisted that that part of the judgment, which fixes the time, within which the payment by the city was to be made, is only interlocutory, and not final, especially in view of the fact that by the judgment the court retained jurisdiction of the cause for the purpose of making such further orders as may be necessary to determine the value of the additions and extensions to the water plant made subsequent to the first day of April, 1912, the valuation of the plant having been fixed as of that date. We must, therefore, determine whether this was an interlocutory or final judgment.

At first blush, an examination of the authorities on that question, would lead one to believe that there is a hopeless conflict among them, but a more careful examination of the facts in each case shows that this conflict is only apparent and not real, and that in fact there is practically no conflict, at least among the decisions of the Supreme Court of the United States and of this court. Authorities of the Supreme Court, and which, in our opinion, are directly in point are Forgay v. Conorad, 6 How. 201, 12 L. Ed. 204; Wabash & E. Canal Co. v. Beers, 1 Black, 54, 17 L. Ed. 327; Thompson v. Dean, 7 Wall. 342, 19 L. Ed. 94; Winthrop Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. 111, 27 L. Ed. 898; Re Farmers' Loan & Trust Company, 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; McGourkey v. Toledo, etc., R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079.

This court has passed upon this question a number of times and its decisions are without conflict. A leading case in this court is Chase v. Driver, 92 Fed. 780, 34 C. C. A. 668. Judge Sanborn, speaking for the court in that case, after a very careful and analytical review of all the opinions of the Supreme Court on that subject, declared the rule to be that, a decree which orders a judicial sale, or takes the property from one person, and orders it to be delivered to another, is final, although the case is referred to a master to state an account between

the parties, when the main object of the proceeding is to obtain the property in controversy from the party in possession thereof, saying:

"This is almost invariably the case in the foreclosure of a mortgage upon a great railroad, and in the disposition of valuable property involved in litigation among numerous claimants."

The opinion in that case is so elaborate and the citation of authorities so complete that nothing need be added to it. The conclusion there reached has been followed and reaffirmed by this court in a number of cases. Hapgood v. Berry, 157 Fed. 807, 85 C. C. A. 171; Byrne v. Jones, 159 Fed. 321, 90 C. C. A. 101; Home Street Ry. Co. v. City of Lincoln, 162 Fed. 133, 89 C. C. A. 133.

[3-5] But even if the judgment were not final, we would not feel at liberty to set aside the order of the trial court, refusing to grant the extension. It cannot be doubted that the application was one addressed to the discretion of the court, and the rule is well established that, in such a case an appellate court will only be justified to set aside an order addressed to the discretion of the court, if it clearly appears that there was an abuse of such discretion. That there was no such abuse appears beyond question from the statement of facts set out in the petition of the plaintiff.

As the laws of the state of Iowa require the authority to issue bonds, to pay for the waterworks condemned, from the voters of the city expressed at an election called for that purpose, the parties to this action agreed in the judgment entered by consent, that the plaintiff be given the unusual time of twelve months, to pay for the property.

As appears from the plaintiff's petition, the proposition to issue the necessary bonds was submitted to a vote of the people of the city on three different occasions, and although a majority of the voters were in favor of the bond issue at each of these elections, at neither of them was there a majority cast for the proposition of all the votes cast at the last preceding municipal election, as required by the laws of the state. The last election for that purpose was held on November 3, 1914, and it was alleged in the petition that it would be impossible for the city to hold another election in time to raise the money on or before the 3d day of December, 1914, when by the judgment of the court, it had to be paid. And it is further claimed that, as under the judgment of the court the defendant is to retain the water plant system, and have the earnings thereof, and is to be paid for all additions and extensions to said plant and system, no damage or loss could possibly result to the defendant, if the time for such payment should be extended by the court.

A complete reply to this contention is: What guaranty is there that, if the time is extended, the necessary majority could, within a reasonable time, or ever, be obtained, to issue the bonds, which are the only means, as alleged in the petition, the city has, to pay for the waterworks? At three elections the necessary majority could not be obtained. To require the defendant to hold the property subject to such an uncertainty would work great injustice, not only to the defendant, but also to the city, for, under these circumstances, the company may not be inclined to expend the moneys necessary to maintain

the system in that perfect condition so essential for the health of the people of the city and the protection of its property from fire loss. The fact that the court has, by the reservation in the judgment, the right to grant compensation for such additions, betterments and improvements may and probably will lead to further litigation, as the parties may not agree on the amounts expended for such additions, and the necessity for them.

Under these circumstances it can certainly not be claimed with any good reason that the court abused the discretion vested in it by law.

We are of the opinion that the court committed no error in denying the plaintiff's request, and its judgment is affirmed.

GARDNER v. UNITED STATES.

COUDREY v. SAME.

(Circuit Court of Appeals, Eighth Circuit. February 5, 1916.)

Nos. 4219, 4220.

1. POST OFFICE ⊂⊃48(4)—CRIMINAL OFFENSES—FRAUDULENT USE OF MAILS—INDICTMENT.

An indictment, after alleging that defendants fraudulently, knowingly, and unlawfully devised a scheme and artifice to defraud persons and classes of persons therein mentioned and described and the public in general, and for obtaining money and property by means of false and fraudulent pretenses and promises from such persons and classes of persons and the public in general, and thereby defrauding them, set forth with great detail the character of the scheme and falsified the averments by proper allegations. *Held*, that the indictment was sufficient, especially when attacked only by motion in arrest of judgment.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⊂⊃48(4).]

2. POST OFFICE ⊂⊃48(4)—CRIMINAL OFFENSES—FRAUDULENT USE OF MAILS—INDICTMENT.

While, in an indictment for using the mails in the execution or attempted execution of a scheme to defraud, the particulars of the scheme are matters of substance, and must be described with certainty sufficient to show the existence and character of the scheme, and to particularly acquaint accused with the particular fraudulent scheme charged, the scheme need not be pleaded with all the certainty as to the place and circumstances requisite in charging the gist of the offense, the mailing of the letter or other articles in execution or attempted execution of the scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⊂⊃48(4).]

3. CRIMINAL LAW ⊂⊃815(4)—FRAUDULENT USE OF MAILS—INSTRUCTIONS—IGNORING ISSUES.

Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873 (Comp. St. 1913, § 10385), provided that if any person, having devised or intending to devise any scheme or artifice to defraud, to be effected by opening or intending to open correspondence or communication with any person by means of the post office establishment, or by inciting such other person to open communication with him, shall, in and for executing such scheme, or attempting so to do, place or cause to be placed any letter, etc., in any post office, branch post office, etc., or take or receive any such therefrom, he shall be punished as therein provided. On a trial for a viola-

tion thereof, the court charged that to authorize a conviction it must appear that defendants devised a scheme to defraud, and for the purpose of executing it, or attempting so to do, deposited or caused to be deposited in the post office for the purpose of having it sent by mail and in furtherance of the scheme certain letters and circulars, that certain matters were immaterial if defendants devised a scheme to fraudulently obtain money from parties by opening correspondence with them through the mails, and that the questions to be kept in view were whether defendants devised a scheme with intent to defraud, and whether with intent to execute such scheme they deposited or caused to be deposited in the mails certain letters and circulars. *Held*, that this narrowed the issues to the prejudice of defendant, since, under section 5480 as it existed prior to the Penal Code, an intention to effect the scheme by opening or intending to open correspondence through the mails, or inciting other persons to open communication, with defendants, was an essential element of the scheme, and the court erred in refusing an instruction stating as one of the elements of the offense that the scheme was to be so effected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1986; Dec. Dig. ⊂⊃815(4).]

4. CRIMINAL LAW ⊂⊃844(1)—EXCEPTIONS TO INSTRUCTIONS.

An exception to the action and ruling of the court "in giving said instructions and each of them" was no exception at all, as the court's attention was not drawn to any portion of the charge, so that it might be corrected, if necessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025; Dec. Dig. ⊂⊃844(1).]

5. CRIMINAL LAW ⊂⊃846—EXCEPTIONS TO INSTRUCTIONS—JOINT DEFENDANTS.

On the trial jointly of defendants, indicted jointly, but represented on the trial by separate counsel, objections would sometimes be made and exceptions taken by counsel for one defendant, and sometimes by counsel for the other. *Held*, that a request by counsel for one of the defendants for an instruction, and an exception taken by him to its refusal, could be invoked in behalf of the other defendant, as the real object of making objections and taking exceptions is to call the trial court's attention especially to some point of law, and this object was accomplished when one counsel called the court's attention thereto.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ⊂⊃846.]

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

Harry B. Gardner and Harry M. Coudrey were convicted of offenses, and they bring error. Reversed, and new trial ordered.

P. H. Cullen, of St. Louis, Mo. (Thomas T. Fauntleroy and C. M. Hay, both of St. Louis, Mo., and J. C. Pratt, of Winder, Ga., on the brief), for plaintiff in error Gardner.

Walter B. Douglas, of St. Louis, Mo., for plaintiff in error Coudrey.

Arthur L. Oliver, U. S. Atty., and Vance J. Higgs, Asst. U. S. Atty., both of St. Louis, Mo. (W. H. Woodward, Asst. U. S. Atty., of St. Louis, Mo., on the brief), for defendant in error.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. Gardner and Coudrey were jointly indicted and convicted of a violation of section 5480, R. S. U. S., as amended by the act of March 2, 1889. They sued out separate writs of error to review the judgment of conviction, and the same have been

consolidated for the purpose of hearing and decision. Taking up the case of Gardner, No. 4219, we find the following alleged errors properly assigned:

(1) "The court erred in refusing to sustain the defendant's demurrer to the evidence at the close of the whole case as to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment."

(2) "The court erred in overruling the defendant's motion in arrest of judgment."

We pass for future disposition assignment of error No. 1, and dispose of assignment No. 2 by saying that this defendant in his motion in arrest presented no grounds for arresting the judgment.

Coming to the case of Coudrey, No. 4220, we find the following alleged errors properly assigned:

(1) "The court erred in refusing to sustain the defendant's demurrer to the evidence at the close of the whole case, as to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment."

(2) "The court erred in overruling its motion in arrest of judgment."

The court erred in refusing to charge the jury as follows:

(3) "The court instructs the jury that the offense charged against the defendants contains three elements: First, the devising or intending to devise a scheme or artifice to defraud; second, such scheme or artifice to defraud to be effected by opening or intending to open correspondence, by means of the postal service of the United States, with any person or persons, or by inciting the other person to open communication with the person so devising or intending; and, third, for the purpose of executing or carrying into effect such scheme, actually placing a letter in the mails."

Passing assignment No. 1 and coming to assignment No. 2, we find that this assignment directly raises the sufficiency of the indictment, as the principal ground upon which Coudrey moved in arrest was that the indictment or any of its counts did not state facts sufficient to constitute an offense under the laws of the United States.

It is first objected that counts 1 and 2 of the indictment are fatally defective for want of an averment that the defendants mailed the letters set forth in the indictment for the purpose of executing the alleged scheme. We cannot understand this objection, for both counts charge in reference to the mailing of the letters that they were mailed or placed in the post office "in and for the purpose, and with the intention on their part of executing and effecting the said scheme and artifice and attempting so to do." It is next urged that each count of the indictment is fatally defective for want of a specification distinctly setting forth the artifice and fraud, for want of an averment of intent, and because the indictment is vague, uncertain, and blends several distinct schemes in one count and attempts to charge that several different classes of persons were victimized by separate, distinct, and widely varying schemes.

[1] The indictment after alleging that the defendants did fraudulently, knowingly, and unlawfully devise a certain scheme and artifice to defraud certain persons and classes of persons, therein mentioned and described, and the public in general, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from said persons, and said class of persons, and the public in general residing in the United States, and thereby defraud-

ing said persons of the same, and thereby converting the same to their own use and benefit, proceeds with great detail to set forth the character of the scheme, and then falsifies these averments by proper allegations. The character of the scheme and the averments of falsification cannot be set forth within the limits of this opinion, but it may be said generally that the scheme was that Gardner and Coudrey should fraudulently procure the organization of two companies, as corporations, under the laws of the state of Missouri, for the purpose of using the same as a cloak to cover and fraudulently obtain money and property from the persons named in the indictment and others by the means and in the way particularly and at length set forth in the indictment, and for the purposes therein stated.

[2] It is the established rule in this court that while particulars of the scheme are matters of substance and must be described with certainty sufficient to show its existence and character and to fairly acquaint the accused with the particular fraudulent scheme charged against them, the scheme itself need not be pleaded with all the certainty as to time, place and circumstance requisite in charging the gist of the offense, the mailing of the letter or other article in execution or attempted execution of the same. Colburn v. United States, 223 Fed. 590, 139 C. C. A. 136; Gould et al. v. United States, 209 Fed. 730, 126 C. C. A. 454; Brooks v. United States, 146 Fed. 223, 76 C. C. A. 581; Lemon v. United States, 164 Fed. 953, 90 C. C. A. 617; Horn v. United States, 182 Fed. 721, 105 C. C. A. 163. Tested by the above rule we think the indictment is sufficient, especially when attacked only by motion in arrest.

Coming now to assignment of error No. 3, we may say that the charge requested was sound law and applicable to the facts proven, and should have been given unless the trial court gave in its own charge something equivalent thereto.

[3] We have carefully examined the charge of the court as given and we are unable to satisfy ourselves that the trial court gave any charge on its own motion, which we could say was an equivalent for the charge requested. The court did read section 5480 to the jury, but, when it came to construe said section, it said to the jury:

"You will see from what follows that two things must have been done by the defendants, and established to your satisfaction by the evidence in the case before you are authorized to find the defendants guilty. It must appear, first, that the defendants devised a scheme or artifice to defraud; second, that they, the defendants, for the purpose of executing such scheme or artifice to defraud, or attempting so to do, deposited or caused to be deposited in the post office of the United States at St. Louis, for the purpose of having the same sent by the post office establishment of the United States, and in the furtherance of the scheme the letters and circulars mentioned, described and counted on in the several counts of the indictment before you."

The court would seem to have had in mind section 215 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1913, § 10,385]), when using the foregoing language. Again the court said to the jury:

"In the view the court takes of this matter it is wholly immaterial (so far as the present inquiry is concerned) whether the law was or was not strictly complied with in such organization, if you find and believe from the evidence

in the case that the defendants devised a scheme (such as is set out in the indictment, and to which your attention has heretofore been directed by the court) to fraudulently obtain money from the parties mentioned in the indictment, or any of them, by opening correspondence with such persons through and by means of the United States mails, in the name of the companies, legally or otherwise organized."

This language would seem to apply to section 5480, but the court continued and charged as follows:

"In your deliberations keep steadily in view two questions: (1) Did the defendants, or either of them, devise the scheme set forth in the indictment with intent to defraud? (2) Did the defendants, or either of them, with intent to execute such scheme (if you find from the evidence that they, or either of them, devised the scheme), deposit or cause to be deposited in the United States mails the letters, circulars, etc., counted on in the indictment."

We think it conclusively appears from an examination of the whole charge of the court that the defendants were deprived of an instruction that in order to convict the defendants the jury must find that the scheme or artifice to defraud included within it, an intention on their part to effect the scheme by opening or intending to open correspondence by means of the post office establishment of the United States with some other person or persons, or by inciting the such other person or persons to open communication with them. In other words the effect of the charge given by the court was to tell the jury that the defendants could be convicted if they had devised a scheme or artifice to defraud, and for the purpose of executing such scheme, had deposited or caused to be deposited in the post office of the United States at St. Louis the letters and circulars mentioned in the indictment. This would have been sufficient under section 215 of the Penal Code (U. S. v. Young, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. Ed. 548), but the defendants were indicted, tried, and convicted for a violation of section 5480. Under that section it has always been the settled law that, in order to establish an offense, three matters of fact must be charged in the indictment and established by the evidence: (1) That the persons charged must have devised a scheme or artifice to defraud; (2) that they must have intended to effect this scheme by opening or intending to open correspondence with some other person or persons through the post office establishment, or by inciting such other person or persons to open communication with them; (3) and that in carrying out such scheme said persons must have either deposited a letter or packet in the post office or taken or received one therefrom. We cannot escape the conclusion but that the trial court narrowed the issues to the prejudice of the defendants.

[4] There are several assignments of error by the defendant Coudrey based upon the charge of the court as actually given. The only exception appearing in the record to said charge is in the following language:

"To which action and ruling of the court in giving said instructions, and each of them, counsel for defendants, Harry B. Gardner, and Harry M. Coudrey, then and there duly excepted at the time."

It is needless to say that this was no exception at all. The court's attention was not drawn to any portion of the charge so that the same might be corrected if necessary.

[5] It is claimed that assignment of error number three, made by the defendant Coudrey, was based upon a request and exception made by Coudrey alone and that the same cannot be invoked in behalf of the defendant Gardner. Under the facts appearing in this record we do not think this is so. Gardner and Coudrey were jointly indicted and so tried. They were represented it seems by different counsel. Sometimes counsel for Coudrey would make an objection and take an exception, sometimes counsel for Gardner would do the same. When we come to consider that the object of making an objection and taking an exception is to call the attention of the trial court specifically to some point of law that there may be a ruling upon the same in order to have it reviewed in the appellate court, it at once appears that to accomplish the object of the objection and exception it was only necessary that one counsel call the court's attention to it. So far as the real object of making an objection and taking an exception is concerned it would have been idle formality for counsel for each defendant to make the same objection and exception to the same ruling.

It is apparent that as there must be a new trial, it would serve no useful purpose to review the evidence for the purpose of determining whether it was sufficient to sustain a verdict of conviction, as the evidence may be entirely different on another trial.

Judgment reversed and a new trial ordered.

TAYLOR et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1916.)

No. 4501.

INDIANS ⟸15(1)—LANDS—RESTRICTIONS ON ALIENATION.

The Supplemental Creek Agreement of June 30, 1902 (32 Stat. 500, c. 1323), provided that land allotted to citizens of the Creek Nation should be alienable after five years. Act May 27, 1908, c. 199, § 1, 35 Stat. 312, provides relative to the lands of allottees of the Five Civilized Tribes, that homesteads of such allottees shall not be subject to alienation prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions. In 1901, land was allotted to M., and his allotment was subsequently found to contain less land than he was entitled to. The Commissioner to the Five Civilized Tribes accordingly notified him to make a further selection, in default of which the Commissioner would make the allotment, and in September, 1908, he selected additional land, and it was allotted to him. *Held* that, whether or not the act of 1908 is constitutional as applied to lands allotted under former acts, it was operative as to the lands so selected and allotted to M. after its enactment, as such land could not be treated as selected and allotted on the date of the original allotment.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 34, 37; Dec. Dig. ⟸15(1).]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

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

Suit by the United States against C. B. Taylor and others. From a decree in favor of the United States, defendants appeal. Affirmed.

The United States instituted this action to cancel a deed to 5 acres of land, executed on October 5, 1911, to J. S. Eaton, one of the original defendants in this action, by Aaron McNack, who had theretofore been enrolled, as a three-fourths blood Creek Indian, on the approved roll of the Creek citizens by blood. By this deed McNack conveyed 5 acres selected by him on September 23, 1908, and to which a patent was duly executed to him by the principal chief of the Creek Nation, and approved by the Secretary of the Interior. The other defendants claimed under Eaton. Eaton filed a disclaimer to any right, title, or interest in this land, and is not a party to this appeal.

The complaint charges that the land, at the time of the conveyance to Eaton and ever since, was restricted against alienation or sale in any manner, by reason of the provisions of section 1 of the act of Congress approved May 27, 1908, entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes." The act provides, among other things, that the status of the lands allotted to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation, or incumbrance, be as follows: "All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." 35 Stat. 312, c. 199. It is charged in the complaint that these restrictions against alienation have not been removed as to this land, either wholly or in part, and that the conveyance to Eaton was made in contravention of law, and constitutes a cloud upon the title of McNack to said land. The bill then sets out the conveyances to the other defendants who claim under Eaton, and prays that they be canceled.

The defendants, other than Eaton, filed an answer in which they pleaded that McNack on May 9, 1901, attempted to select his allotment to which he was entitled under the acts of Congress and the treaties with the Creek Nation; that the lands selected by and allotted to him, and for which later on a patent was issued to him, was afterwards found to contain only 156.42 acres, when he was entitled to 160 acres; that this discrepancy was discovered by the Commissioner to the Five Civilized Tribes about July 14, 1908, whereupon the Commissioner notified McNack to appear and make further selection within 60 days, and in the event such selection was not made by him within 60 days, the Commissioner would allot him such additional lands as would be necessary to make up his entire quota of the allottable lands of the Creek Nation; that in compliance with this request McNack on September 23, 1908, made the selection of the land in controversy, which was allotted to him on that date; that this 5-acre tract was supplemental to the previous allotment made to him on July 14, 1901, and was intended to have the same status as the land allotted to him in 1901. The answer then alleges that on October 5, 1911, for $500 paid to him by Eaton, McNack and his wife conveyed this 5-acre tract to Eaton, under whom the other defendants now claim title. The answer further states that prior to the passage of the act of May 27, 1908, substantially all members of the Creek Nation had been allotted the lands to which they were entitled; that more than 500 of these Creek citizens were of three-quarters Indian blood, and that since the passage of the act of 1908, only about 10 allotments have been made to Creek Indians of three-quarters blood or more, but less than full-blood, who are on the original rolls as citizens of the Creek Nation; that practically all of the allotments made to the Creek citizens of the class to which McNack belonged, after the passage of the act of 1908, were to supplement previous allotments, where insufficient amounts of land had been allotted, or where the original allottee of said lands had lost

some part thereof by contest or otherwise; that under the provisions of section 16 of the Supplemental Creek Agreement (32 Stat. 500), land allotted to citizens of the Creek Nation of the degree of blood of Aaron McNack, as surplus became alienable five years after the date of the approval of the supplemental agreement, which supplemental agreement was approved on June 30, 1902, ratified by the Creek Indians on July 31, 1902, and proclaimed by the President of the United States on August 8, 1902, whereby all the surplus land of the said McNack became alienable, and that the land in controversy is a part of the surplus land of McNack. That by virtue of this supplemental Creek agreement all the restrictions to alienation were removed from the surplus allotment of McNack, and that the Act of Congress of May 27, 1908, in so far as it attempted to place restrictions upon land, from which restrictions had already been removed, was unconstitutional and void.

The plaintiff filed a motion to strike this answer, upon the ground that the facts set out therein do not constitute a defense. This motion was by the court sustained, and the defendants declining to plead further, a final decree, in conformity with the prayer of the complaint, was entered by the court, to reverse which this appeal is prosecuted.

J. P. O'Meara, of Tulsa, Okl. (R. S. Sherman and James A. Veasey, both of Tulsa, Okl., on the brief), for appellants.

W. P. Z. German, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Atoka, Okl., on the brief), for appellee.

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

TRIEBER, District Judge (after stating the facts as above). On behalf of the appellants it is contended that, as the original selection by McNack was made on May 9, 1901, and the lands allotted to him, and a patent issued therefor under this selection, the five acres in controversy must be treated as a part of that selection, and as if allotted to McNack on May 9, 1901; that as the Supplemental Agreement with the Creek Tribe, approved June 30, 1902 (32 Stat. p. 500, c. 1323), ratified by the Creek Indians on July 31, 1902, and proclaimed by the President on August 8, 1902, restricted the surplus lands, allotted to the Creeks, from alienation for only five years from date of the approval of the supplemental agreement, the act of May 27, 1908, is unconstitutional, and cannot affect the right of McNack to sell the land, after the expiration of the five-year period, and as these lands were not conveyed by him until 1911, his deed conveyed a perfect title to Eaton and the defendants, claiming under him.

To sustain this contention the defendants rely upon Bartlett v. United States, 203 Fed. 410, 121 C. C. A. 520, decided by this court. In that case the original restrictions against alienation had expired before the enactment of the act of May 27, 1908, and we held that it was not within the power of Congress to impose restrictions on the alienation of lands allotted to an Indian, after the restrictions imposed by the prior law, under which the allotment had been made, had expired. Upon appeal to the Supreme Court the case was affirmed without passing on the power of Congress to impose such additional restrictions, after the original restrictions had expired, the court holding that it was unnecessary to pass on that question as the act of May 27, 1908, contained an excepting clause as to restrictions removed by any

prior law. United States v. Bartlett, 235 U. S. 72, 35 Sup. Ct. 14, 59 L. Ed. 137.

But in the instant case the restrictions on alienation of McNack had not expired or been removed, when the act of 1908 went into effect, 60 days after its approval, as the selection and allotment were made after the act of 1908 was in force. While the learned counsel for the appellants attack the constitutionality of the act of 1908, so far as it may affect the lands allotted under former acts, we do not deem it necessary, in view of the conclusion reached, to determine that question. Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; Heckman v. United States, 224 U. S. 413, 436, 32 Sup. Ct. 424, 56 L. Ed. 820; United States v. Knight, 206 Fed. 145, 124 C. C. A. 211, may be examined on that point.

The land in controversy was selected and allotted to McNack after the act of 1908 had become operative. But it is claimed that as this tract was selected and allotted to him to make up the deficiency of his original allotment, it must be treated as if it had been made and allotted to him on May 9, 1901, and therefore the restriction on alienation had expired long before the conveyance to Eaton in 1911.

We are of the opinion that this contention is untenable. Until the selection and allotment were made on September 23, 1908, McNack had no right, title, or interest, whatsoever, either legal or equitable, in and to this 5-acre tract. It was an act of grace on the part of the government that the deficiency in the original allotment was made good. Until the government saw proper to permit him to select this deficiency he had no right, title, or interest, either equitable or legal, to this tract. Until he made the selection no one could tell what particular tract of land would be allotted to him. If he had not made the selection within 60 days after notice, the Commissioner to the Five Civilized Tribes would have made the selection for him. Whether this particular tract would have been selected by him is problematical.

One of the objects of these restrictions on alienation and incumbrance was to induce the Indians to cultivate the lands or at least obtain the rents and profits therefrom, so as to make them self-supporting. Until this allotment was made to McNack he could not do either. When he did make the selection and this land was allotted to him, the act of May 27, 1908, was in full force, and that act made it inalienable until April 26, 1931, except with the approval of the Secretary of the Interior, which was not obtained, when the conveyance was made to Eaton. McNack held the land subject to the restrictions in force at the time he made the selection, and, therefore, the learned trial judge committed no error in sustaining the motion to strike the answer of the defendants.

The decree is accordingly affirmed.

ITASCA LUMBER CO. v. MARTIN.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1916.)

No. 4458.

1. TRIAL ⊂=82—RECEPTION OF EVIDENCE—OBJECTIONS.
Plaintiff had been purchasing millwood from defendant, and had become largely indebted to defendant. He conveyed all of the millwood then owned by him to defendant on June 17, 1911, and took in return a written agreement giving him an option to purchase it at $1.25 a load. He sued defendant, alleging a subsequent oral contract by which he was to sell the millwood for defendant and receive for his services and expenses the proceeds above $20,000. Defendant denied the oral agreement, and alleged that when the sale of the wood to it was made plaintiff was indebted to other persons, and that in consideration of the bill of sale it promised to pay his other debts. Plaintiff denied that defendant agreed to settle or pay any such debts. On redirect examination he testified, over the objection that it was improper and no part of the case, that other creditors were not provided for in the bill of sale. *Held*, that the objection that the evidence was improper was under the circumstances too general and uncertain upon which to found a fatal error, as it could not have been clear to the court what the basis of the objection was.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 194–210; Dec. Dig. ⊂=82.]

2. WITNESSES ⊂=286(2)—EXAMINATION—REDIRECT EXAMINATION.
The admission of the testimony on plaintiff's redirect examination was within the discretion of the trial court.
[Ed. Note.—For other cases, see Witnesses, Dec. Dig. ⊂=286(2).]

3. APPEAL AND ERROR ⊂=882(6)—ESTOPPEL TO ALLEGE ERROR—EVIDENCE ADMISSIBLE UNDER PLEADINGS.
The objection that the evidence was no part of the case was untenable, as it was relevant to a direct issue tendered by defendant, and there was no error in receiving the testimony, especially as the bill of sale itself showed that there was no provision for other creditors.
[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⊂=882(6); Pleading, Cent. Dig. § 1145½.]

4. TRIAL ⊂=60(1)—RECEPTION OF EVIDENCE—PRELIMINARY PROOF.
Plaintiff sued defendant on an alleged oral agreement made June 26, 1911. Defendant denied the making of the oral agreement, and relied upon a written agreement made on June 17, 1911. Over the objection that no proper foundation was laid as to time, M. was permitted to testify to a conversation he had with defendant's manager in plaintiff's presence, which he stated occurred, to the best of his recollection, between June 1st and 15th. Plaintiff, however, had previously testified that this conversation occurred on June 26, 1911. *Held*, that, though the evidence was incompetent if the conversation was prior to June 17th, because all negotiations prior to that date were merged in the written agreement, there was no error in overruling the objection, in view of plaintiff's testimony.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 141–143; Dec. Dig. ⊂=60(1).]

5. TRIAL ⊂=75—RECEPTION OF EVIDENCE—FAILURE TO OBJECT.
The admission of M.'s testimony was not error, even though it was irrelevant and immaterial, where plaintiff's testimony regarding the conversation was introduced without objection, and no objection or motion to strike out for irrelevancy or immateriality was ever made during the trial.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 171–182, 252; Dec. Dig. ⊂=75.]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by John A. Martin against the Itasca Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ernest C. Carman, of Minneapolis, Minn. (R. J. Powell, of Minneapolis, Minn., George T. Simpson, of St. Paul, Minn., and Gordon Cain, of Minneapolis, Minn., on the brief), for plaintiff in error.

Albert H. Hall, of Minneapolis, Minn. (Hall & Tautges, of Minneapolis, Minn., on the brief), for defendant in error.

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

SANBORN, Circuit Judge. Counsel for the Itasca Lumber Company, the defendant below, rely upon two alleged errors in the admission of testimony for a reversal of the judgment against it in this case. The first is that over the objection that the testimony was "improper, no part of the case" the court permitted the plaintiff Martin to testify that "all his creditors outside of the notice to the Itasca Lumber Company were not provided for at all in the bill of sale." The bill of sale referred to was made and dated on June 17, 1911. By it Martin, who prior to that date had purchased of the lumber company all its output of millwood from its sawmills and had become indebted to it in more than $20,000, conveyed to the lumber company all the millwood he owned, said to have been over 20,000 loads, and took from it in return a written agreement dated on that day whereby it agreed to sell to him for $1.25 a load from time to time such parts of this wood as Martin should purchase and pay for daily with cash. Martin had alleged in his complaint that the Lumber Company agreed that he should have the exclusive sale of this millwood and that he should receive for his services as salesman and his expenses all the proceeds of the wood above $20,000, interest on that sum, rental of the woodyard and services of the foreman; that he was daily to pay to the Lumber Company $1.25 for every load he sold; that on July 27, 1912, the company agreed that henceforth he should account and pay over only $1 per load for the wood he sold and that under this agreement and his execution of it there had become due to him a balance of $6,292 and interest. The Lumber Company in its answer denied that it had made any agreement to give him the exclusive sale of the wood, or any other agreement, except the written agreement of June 17, 1911, to give him an option to purchase the wood at $1.25 per load and the modification of that option of July 27, 1912, to the effect that thereafter it would permit him to purchase the wood for $1 per load cash. It alleged that at the same time that it gave this written agreement of option Martin gave his bill of sale of all the wood to it, and that at the same time Martin was indebted to persons other than the defendant and that in consideration of his bill of sale the Lumber Company promised to pay, and subsequently did pay, the debts of the plaintiff to other persons. The plaintiff in his reply alleged that the defendant at the time said bill of sale was made knew that he was indebted to numerous creditors, but that it did not agree to settle or pay any of his

debts, except a few items of wages and expenses upon the woodyards. He denied that there was ever any agreement of sale of the wood to him after June 17, 1911, or any agreement about it except that stated in his complaint which he alleged was made subsequent to June 17, 1911.

[1-3] The case was tried under these pleadings. When the objection was made to the evidence challenged Martin had testified that on June 26, 1911, nine days after the bill of sale and the agreement of option of June 17, 1911, the Lumber Company had orally made the agreement that he should have the exclusive sale of the millwood on the terms stated in his complaint. He had been cross-examined and his testimony that all his creditors outside of the notice to the Itasca Lumber Company were not provided for at all in the bill of sale was introduced on his redirect examination. The only objections to it were that it was "improper and no part of the case." The objection that it was improper was, under the circumstances of this case, too general and uncertain upon which to found a fatal error. It could not have been clear to the court what the basis of this objection was. It might have been that it was improper to introduce this testimony on redirect examination, and if that was the objection, its admission was within the discretion of the trial court. The objection that it was "no part of the case" was untenable by the defendant because it had pleaded and tendered the issue on its own averment that it had assumed at the date of the bill of sale and had subsequently paid the debts of Martin. When this testimony was received the trial was opening, the first witness was on examination, the testimony challenged was relevant to a direct issue that the defendant had tendered, and for the reasons already stated and because the bill of sale itself showed that there was no provision for the other creditors of Martin in the bill, there was no error in receiving the testimony.

[4] The second alleged error is that over the objection "no proper foundation is laid as to time," the court permitted the witness Marsolais to testify to a conversation he had with Gearhard, the manager of the Lumber Company, in the presence of Martin to the effect that Gearhard asked Marsolais to buy the millwood, that Marsolais offered to take it at sixty cents per load, that Gearhard refused to sell at that price but offered to sell for ninety cents a load, and Marsolais declined to accept that offer. The point of the objection was that this conversation was a part of the talk which led up to one of the contracts. If the conversation was prior to June 17, 1911, it was incompetent because all negotiations prior to that date were merged in the written bill of sale and contract of that day. But if it was on June 26, 1911, and before the oral contract which Martin testified was made on that day with Gearhard, it might be admissible. Marsolais had testified that to his best recollection the conversation occurred between the 1st and the 15th of June, 1911, that he and Martin met Gearhead at the latter's office and the conversation took place then and there, and that he never had but one conversation with Gearhard at which Martin was present. If this had been all the evidence in the case as to the time of this conversation when it was offered there might have been some force in the objection to it. But Martin had previously testified

that this conversation occurred on June 26, 1911, before he made his contract with Gearhard on that day to have the exclusive sale of the millwood. In view of Martin's testimony there was no error in overruling the objection to Marsolais' testimony of the conversation.

[5] In the brief of counsel for the Lumber Company it is said that this conversation was irrelevant and immaterial. If it were, the court below committed no error in receiving it because it was first introduced in evidence in the testimony of Martin in the absence of any objection whatever, and no objection to it or motion to strike it out for irrelevancy or immateriality was ever made during the trial.

The judgment below must be affirmed. And it is so ordered.

KAW BOILER WORKS et al. v. SCHULL et al.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1916.)

No. 4485.

BANKRUPTCY ⊂=74—PERSONS WHO MAY BE ADJUDGED INVOLUNTARY BANKRUPTS—AMOUNT OF DEBTS—"DEBT."

Bankr. Act July 1, 1898, c. 541, § 1 (11), 30 Stat. 544 (Comp. St. 1913, § 9585), defines a "debt" as including any debt, demand, or claim provable in bankruptcy. Section 4b provides that any natural person owing debts of $1,000 or over may be adjudged an involuntary bankrupt. Section 17a enumerates, among debts not affected by a discharge, such as are due, as a tax levied by the United States, the state, county, district, or municipality. Section 63a authorizes the proof of debts founded upon open accounts or contracts, express or implied. Section 64 defines debts which have priority, and directs that the court shall order the trustee to pay all taxes legally due and owing. *Held*, that taxes on personal property due when proceedings in bankruptcy are begun are quasi contractual, and are provable debts, to be included in determining whether an alleged bankrupt's debts amount to $1,000.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 108; Dec. Dig. ⊂=74.

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

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

Bankruptcy proceeding by the Kaw Boiler Works and others against Perry A. Schull and another. From an order dismissing the bankruptcy petition, the petitioning creditors appeal. Reversed, with directions.

The appellants filed a petition seeking an involuntary adjudication in bankruptcy of the appellees, partners doing business under the firm name and style of "White Star Laundry." Among the defenses pleaded by the appellees was a denial that the partnership owed debts amounting to $1,000. The matter was referred to a special master, who found that the whole indebtedness of appellees was $1,028.51, of which amount the sum of $62.35 was for taxes due the state, county and city for the years 1911 and 1912, levied on the personal property of the appellees, and which was past due. His conclusion was that "taxes due the city, county and state in the state of Missouri are not provable debts under the Bankruptcy Act, and do not constitute indebtedness to be considered in determining the question as to whether the total indebtedness of the

alleged bankrupt be the minimum amount fixed by the act." Exceptions by the appellants to the special master's conclusion of law were by the District Court overruled, and the petition to have the appellees adjudicated involuntary bankrupts dismissed. From this order this appeal is prosecuted.

John B. Gage, of Kansas City, Mo. (Thomas H. Edwards and Frank Schibsby, both of Kansas City, Mo., on the brief), for appellants.

M. L. Friedman, of Kansas City, Mo. (I. J. Ringolsky, of Kansas City, Mo., on the brief), for appellees.

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

TRIEBER, District Judge (after stating the facts as above). The only question in issue is whether taxes on personal property, due when proceedings in bankruptcy are begun, are debts to be considered in determining the amount of the indebtedness of the alleged bankrupt, which is necessary to maintain a proceeding for involuntary bankruptcy. Ordinarily taxes are not considered strictly as debts. As stated by this court in Crabtree v. Madden, 54 Fed. 426, 4 C. C. A. 408:

"They do not rest upon contract, express or implied. They are imposed by the legislative authority, without the consent and against the will of the persons taxed, to maintain the government, protect the rights and privileges of its subjects, or to accomplish some authorized, special purpose."

Does this definition apply to proceedings in bankruptcy? By reference to the Bankruptcy Act we find that section 1, which defines the meaning of words and phrases used in the act, provides:

(11) "Debt shall include any debt, demand, or claim provable in bankruptcy."

Section 4b of the act provides:

"Any natural person * * * owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt."

Section 17a enumerates debts not affected by a discharge, and among them:

"Except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides."

Section 63a provides among other debts which may be proved:

"Such as are founded upon open accounts or upon contracts express or implied."

Section 64 defines debts which have priority and directs that:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors."

As the trustee is expressly directed by the act to pay the taxes due to the United States, the state, or any of its subordinate public agencies, as a preferred claim, it certainly recognizes it as a liability of the bankrupt, and being such a liability we can conceive of no valid reason why taxes on the personal property of the bankrupts, and which are then due or past due, should not be treated as provable debts,

within the meaning of the Bankruptcy Act. They certainly are quasi contractual. Judge Keener in his valuable work on Quasi Contracts, page 16, says:

"A statutory obligation which does not rest upon the consent of the parties is clearly quasi contractual in its nature."

In Hecox v. Teller County, 198 Fed. 634, 117 C. C. A. 338, this court, after holding that taxes are not in a strict sense "debts" proceeded:

"But it does not follow that taxes are not due and owing from the citizen because they are not debts upon the one hand or because the state has prescribed some method exclusive in its character for their collection."

While the trustee may be authorized to pay the taxes due without the formal proofs required for ordinary debts, the authorities seem to be quite uniform that taxes are provable debts within the meaning of the Bankruptcy Act.

In Re Sherwoods, 210 Fed. 754, 127 C. C. A. 304, it was held:

"While taxes are not in a strict sense debts, they are so regarded in the Bankruptcy Act, and they are 'legally due and owing' on the day they are assessed, even though they may not be payable until after adjudication."

The court in that case cited with approval In re Flynn (D. C.) 134 Fed. 145, and In re Fisher & Co. (D. C.) 148 Fed. 907.

In Re Flynn Judge Lowell held that where the tax was assessed against the bankrupt's property prior to his being adjudged a bankrupt, it is due and legally owing within the provisions of the Bankruptcy Act, which made such taxes preferred claims against the bankrupt's estate.

In Re Fisher & Co., the same conclusion was reached, and this is the view of nearly all text-books on the Bankruptcy Act. Collier on Bankruptcy (10th Ed.) p. 8; Remington on Bankruptcy, § 701; Loveland on Bankruptcy, § 586.

The statutes of Missouri relating to the administration of the estates of deceased persons, contain provisions very similar to those in the Bankruptcy Act, making it the duty of the administrator to pay all taxes due from the estate. Another section of the statute provides for their payment as preferential over other debts.

In State ex rel. v. Mississippi Valley Trust Co., 209 Mo. 472, 108 S. W. 97, the court in a very able opinion held that, while it was not necessary to determine in that case, whether taxes are technically a debt or not, for the purpose of allowance against the estates of deceased persons and classification, they may properly be treated as debts. See, also, Midland Guaranty & Trust Co. v. Douglas County, 217 Fed. 358, 133 C. C. A. 274; Millett v. Early, 16 Neb. 266, 20 N. W. 352.

The fact that a discharge in bankruptcy does not relieve the bankrupt from a tax due the United States, or the state, does not prevent its being a provable debt. Section 17 of the Bankruptcy Act enumerates other liabilities and debts which, although provable, are not affected by a discharge.

In United States v. Herron, 20 Wall. 251, 256, 22 L. Ed. 275, which arose under the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), which contained provisions similar to those in the present act, sections 5067 to 5072 and section 5001, Rev. Stat., it was said by the court:

"Taxes, whether federal or state, may be collected in the ordinary mode, but if not collected and the property of bankrupt passes to and is administered by the assignee, the taxes are then entitled to the priority and preference, provided in the same section of the Bankrupt Act."

And it was expressly held in that case that the fact that a discharge in bankruptcy does not relieve the bankrupt from liability of a debt, does not prevent it from being provable. In Re United Button Company (D. C.) 140 Fed. 495 (affirmed in 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. [N. S.] 961, 9 Ann. Cas. 445), the court in construing section 17 of the act said:

"The exception [in section 17] necessarily relates to provable demands, and, to indulge in tautology, is equivalent to the phraseology, 'except such provable debts, demands and claims against the bankrupt as are by the act excepted.' It is doubtless true that the words 'provable debts' in section 17 are there used in a sense broad enough to include, in the case of taxes, demands against a bankrupt which, although not strictly or technically 'provable,' are nevertheless allowable out of his estate. * * * Thus the taxes enumerated in section 17, 'legally due and owing by the bankrupt,' by section 64 are directed to be paid out of the estate, by section 17 are recognized as 'provable debts,' and are demands of a quasi contractual nature. While strict or technical 'proof' of them is not required, although often presented, there can be no doubt that they are to be treated as provable debts or demands embraced in the class 'founded upon an open account, or upon a contract express or implied.'"

In Crawford v. Burke, 195 U. S. 176, 193, 25 Sup. Ct. 9, 13 [49 L. Ed. 147], the court said:

"We think that section 63a, defining provable debts, must be read in connection with section 17, limiting the operation of discharges. * * * We are, therefore, of opinion that if a debt originates or is 'founded upon an open account or upon a contract, express or implied,' it is provable against the bankrupt's estate. * * * It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63a."

In our opinion taxes are provable debts within the meaning of the Bankruptcy Act, and, therefore, in computing the indebtedness of an alleged bankrupt they should be included.

The order of the District Court is reversed with directions to proceed in conformity with the views herein expressed.

Reversed.

NORTHERN PAC. RY. CO. v. WISMER.

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

No. 2642.

PUBLIC LANDS ⊂=73—RAILROAD GRANT—LANDS OCCUPIED AS INDIAN RESERVATION.

A tract of land which on October 4, 1880, when the Northern Pacific Railroad Company filed its map of definite location, was within a larger tract then actually occupied by a tribe of Indians under an agreement made with representatives of the Interior and War Departments, subsequently ratified, setting it apart as their reservation, which it continued to be until 1910, was not on such date public land "free from pre-emption or other claims," within the grant to the railroad company of July 2, 1864 (13 Stat. 365, c. 217), and did not pass thereunder.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 237; Dec. Dig. ⊂=73.]

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 at law by the Northern Pacific Railway Company against Emma A. Wismer, substituted for George F. Wismer, deceased. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles W. Bunn, of St. Paul, Minn., Edward J. Cannon, of Spokane, Wash., and Charles Donnelly, of St. Paul, Minn., for plaintiff in error.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The sole question in this case is whether the tract of land in controversy, consisting of 80 acres, passed to the plaintiff in error under and by virtue of the act of Congress of July 2, 1864 (13 Stat. p. 365, c. 217). It is in effect conceded that it did, if on the date the railway company definitely fixed the line of its railroad and filed a plat thereof in the office of the Commissioner of the General Land Office, to wit, October 4, 1880, the United States had full title thereto, and the same was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights.

The case is ejectment, and was submitted in the court below upon an agreed statement of facts, from which statement we quote as follows:

"Prior to August 16, 1877, bands of Indians roved about and upon said lands and used the said country for hunting and fishing, and so occupied the same, as they did a considerable scope of country, including the unoccupied and unsurveyed territory now comprising Eastern Washington; that said Indians had not ceded any right or interest in and to any part thereof, if any they had, to the government of the United States.

"That in June, 1877, certain Indian bands and tribes of the northwest country had commenced hostilities against, and were engaged in killing, wounding and outraging, white settlers and destroying their property, and that during said time and for five or six years thereafter, said Indians continued to men-

ace the white population living in Eastern Washington, Oregon, and Northern Idaho, and the military forces of the United States government and said hostile Indians were engaged in actual warfare.

"That the said Indians so engaged in war with the United States during said time sought to induce other Indians at peace with the government to engage in hostilities with them.

"That among the peaceful Indians, which those at war were endeavoring to have join them, were many residing on the lands afterwards set aside as the Spokane Indian reservation, which reservation includes the lands in the complaint.

"That upon August 16, 17, and 18, 1877, a council was held at Spokane Falls, Wash., between the Spokane Tribe of Indians, Colonel E. C. Watkins, who was then and there an Indian inspector, representing the Department of the Interior, acting in his official capacity, and General Frank Wheaton, and Captain M. C. Wilkinson, of the United States Army, representing the War Department.

"That for the purpose of collecting the said Indians belonging to the said tribe on a reservation, there to engage in agricultural pursuits and establish permanent homes, and to extinguish the general Indian title of any of the said Indians to all other lands not within the said reservation, and as a means of influencing said Indians to continue in friendly relations with the whites, to remain at peace with the government of the United States, and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder, the agreement, as set forth in Exhibit A attached to the defendant's answer, was made, which is as follows:

"'In Council at Spokane Falls, W. T.

"'August 18, 1877.

"'We, the undersigned chiefs and head men of the Spokane Tribe of Indians, for ourselves and our people, hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan creek in Washington Territory; thence down said creek to the Spokane river; thence down said river to the Columbia river; thence up the Columbia river to the mouth of Nimchin creek; thence easterly to the place of beginning.

"'And we do further agree to go upon the same by the 1st of November next, with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

"'Names of Witnesses.

"'E. C. Watkins,
"'U. S. Indian Inspector.
"'Frank Wheaton,
"'Bt. Major Gen. U. S. Army,
"'Col. 2nd Infantry.
"'M. C. Wilkinson,
"'Bvt. Capt. U. S. Army,
"'Aide de Camp.

Names.

Whistle-poo-sum	his mark X	Spokane.
Quis-e-me-ow	his mark X	Spokane.
Ah-mi-melechin	his mark X	Spokane.
Cos-to-akan	his mark X	Spokane.
Ora-pa-han	his mark X	Spokane.
Paul	his mark X	Ora-pa-ham.'

"That thereafter, and prior to November 14, 1877, and pursuant to the agreement aforesaid, the said E. C. Watkins, Indian inspector as aforesaid, acting in his official capacity, located such of the said Spokane Indians as were not already resident thereon upon said reservation above described, and said Spokane Indians remained upon and continued in use, occupancy, pos-

session, and enjoyment of said tract described in said agreement and claimed the same as their reservation continuously thereafter until the year 1910.

"That the action of the said E. C. Watkins in locating said Indians upon said reservation was by him reported to the Commissioner of Indian Affairs on November 14, 1877, and said report was, on January 23, 1878, in response to a resolution, communicated by the Secretary of the Interior to the United States Senate, and by the Senate referred to the committee on Indian affairs and ordered printed.

"That about August, 1880, said Indians were much disturbed by the attempts of squatters to locate on land within the limits of said territory so claimed by the said Indians as their reservation, and on the 3d day of September, 1880, for the purpose of carrying out the terms of the agreement entered into at said council, and preserving peace between the Indians and white settlers, Brigadier General Howard, of the Department of the Columbia, made an order, which is as set forth in Exhibit B attached to defendant's answer, which reads as follows:

" 'Headquarters Department of the Columbia.

" 'In Field, Spokane Falls, W. T.

" 'September 3, 1880.

" 'Special Field Orders, No. 8.

" 'Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, inspector of the Indian Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to wit: Commencing at the mouth of the Cham-a-kane creek; thence north eight miles in direction of said creek; thence due west to the Columbia river; thence along the Columbia and Spokane rivers to the point of beginning—the Indians are still expecting the executive order in their case, and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above-described territory, being still unsurveyed, be protected against settlement by others than said Indians, until the survey shall be made, or until further instructions. This order is based upon plain necessity, to preserve the peace until the pledge of the government shall be fulfilled, or other arrangements accomplished.

" 'The commanding officers of Fts. Cœur d'Alene and Colville and Camp Chelan are charged with the proper execution of this order.

" 'By command of Brigadier-General Howard. H. H. Pierce,

" '1st Lieutenant, 21st Infantry, Acting Aide-de-Camp.

" 'Official:

" 'H. H. Pierce, Acting Aide-de-Camp.' "

The agreed statement of facts further shows that the President, by executive order made January 18, 1881, set aside and reserved for the use and occupancy of the Spokane Indians the lands embraced in the foregoing agreement with them and in the order of Gen. Howard, which lands included the tract here in controversy.

As already said, the only question in the case is whether at the time the line of the Northern Pacific Railroad Company was definitely located and the map thereof filed in the office of the Commissioner of the General Land Office, to wit, on October 4, 1880, there was such an existing claim on the part of others to the land in controversy as took it out of the category of public lands, to which alone the grant to the railroad company applied. Speaking of that particular grant the Supreme Court said in the case of Northern Lumber Co. v. O'Brien, 204 U. S. 190, 196, 27 Sup. Ct. 249, 251 (51 L. Ed. 438):

"No lands passed that were not, at the date of the grant, public land; that is, lands 'open to sale or other disposition under general laws,' not lands 'to which any claims or rights of others have attached.' "

In the preceding case of No. Pac. Railroad v. Musser-Sauntry Co., 168 U. S. 604, 608, 18 Sup. Ct. 205, 206 (42 L. Ed. 596) the same court, speaking of the same grant and of lands thereby claimed to have been granted to the railroad company, said:

"Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply 'free from rights,' but 'free from claims,' and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. Northern Pacific Railroad v. Sanders, 166 U. S. 620 [17 Sup. Ct. 671, 41 L. Ed. 1139]. And such is the general rule in respect to railroad land grants."

It is useless to cite the numerous other decisions of the Supreme and other courts to the same effect. Nor is it at all material that the outstanding claim be valid; for the Supreme Court, as well as other courts, have frequently decided that it is not the validity of such claim, but the fact that it existed at the time of the definite location of the railroad, that excluded the lands in controversy from the category of "public lands" to which alone the company's grant attached. Decisions to that effect are also very numerous. See, among them, Newhall v. Sanger, 92 U. S. 761, 765, 23 L. Ed. 769; United States v. So. Pac. R. R., 146 U. S. 570, 606, 13 Sup. Ct. 152, 36 L. Ed. 1091; United States v. So. Pac. R. R. Co. (C. C.) 76 Fed. 134, and cases supra.

Now, looking at the agreed statement of facts in the present case, it is seen that long prior to the grant to the Northern Pacific Railway Company, and as early as 1877, the tract of land in controversy here was included within lands claimed by the Spokane Tribe of Indians, and that on August 16th, 17th, and 18th of the year last mentioned, a council was held at Spokane Falls, Wash., between that tribe of Indians, an Indian inspector, representing the Department of the Interior, and Gen. Wheaton and Capt. Wilkinson, of the United States Army, representing the War Department, with the view to establishing the Indians mentioned on a reservation, and to extinguish the general Indian title of any of the Indians of that tribe to any lands not within such reservation, and as a result of that council an agreement in writing was entered into on the 18th of August, 1877, between the chiefs and head men of the Spokane Tribe, for themselves and their people, and the above-mentioned representatives of the Interior and War Departments of the United States, by which a specifically described tract of land should be set aside as a reservation for the Indians referred to, and accepted by them in lieu of their claim to the larger tract referred to; that thereafter, and prior to November 14, 1877, and in pursuance of the aforesaid agreement, the Indian inspector mentioned, acting in his official capacity, located such of the said Spokane Indians as were not already thereon upon the said specifically described tract, which Indians continued in the possession, use, and enjoyment thereof and claimed the same as their reservation continuously until the year 1910; that the said action of the said Inspector

was reported to the Commissioner of Indian Affairs on November 14, 1877, which report was on January 23, 1878, in response to a resolution, communicated by the Secretary of the Interior to the United States Senate, and by the Senate referred to the committee on Indian affairs and ordered printed; that about August, 1880, the said Indians being much disturbed by the attempts of squatters to locate on lands within the limits of the specifically described tract upon which they had been so located by the Interior Department, for the purpose of carrying out the terms of the agreement entered into by the government officials with the Indians, and preserving peace between them and white settlers, Gen. Howard issued the order of September 3, 1880, above set out, and on January 18, 1881, the President, in further pursuance of the aforesaid agreement between the Indians and the government officials, by executive order set aside and reserved for the use and occupancy of the Spokane Indians the specific tract embraced in the agreement made between the government and the Indians, which specific tract included the piece of land here in controversy, and on May 29, 1908, Congress consummated the aforesaid agreement with the Indians by passing an act authorizing and directing the Secretary of the Interior to cause allotments to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who may rightfully belong on the Spokane Indian reservation and who had not theretofore received allotments, and making provision for the sale of the surplus lands, and various other provisions not important to be mentioned. 35 Stat. 458, c. 217.

So that we have here a case in which it is agreed that on October 4, 1880, the piece of land in controversy, as a part of the tract specifically described as and for a reservation of the Spokane Indians, was in their actual use, occupancy, possession, and enjoyment, and was claimed by them as their reservation, and had been so occupied and claimed continuously since as early as November 14, 1877, which possession was established by the Secretary of the Interior through a subordinate officer, and which claim by the Indians was thereafter continuously recognized, not only by the Interior Department, but subsequently ratified and confirmed by the action of the President as well as by that of Congress. It thus clearly appears that, at the time the line of the Northern Pacific Company was definitely located and the plat thereof filed in the office of the Commissioner of the General Land Office, the piece of land here in dispute was claimed, not only by the Indians, but was claimed by the Secretary of the Interior for them and in their behalf.

The judgment is affirmed.

BURRAS v. CUDAHY PACKING CO.

(Circuit Court of Appeals, Eighth Circuit. February 5, 1916.)

No. 4349.

1. MASTER AND SERVANT ⟸286(18)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an employé's action for injuries, due to the fall of an elevator, evidence *held* insufficient to make a question for the jury as to whether the elevator cable had become so worn and weakened by use prior to the accident as to make it unsafe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1025; Dec. Dig. ⟸286(18).]

2. MASTER AND SERVANT ⟸286(18)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an employé's action for injuries, due to the fall of an elevator, evidence that the elevator was not equipped with a speed governor safety device required by statute did not make a question for the jury as to the employer's negligence without any evidence as to how such a device operated or whether or not it would have prevented the elevator from falling, where it was not claimed that the rule of res ipsa loquitur applied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1025; Dec. Dig. ⟸286(18).]

3. MASTER AND SERVANT ⟸265(2)—ACTIONS FOR INJURIES—BURDEN OF PROOF.

In an employé's action for injuries, the burden of proof was on plaintiff to establish by a fair preponderance of the evidence that the employer was negligent in the particulars alleged in the complaint.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 878, 895, 896; Dec. Dig. ⟸265(2).]

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

Action by Joseph Burras against the Cudahy Packing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Norris Brown, of Omaha, Neb. (Irving F. Baxter, of Omaha, Neb., on the brief), for plaintiff in error.

J. C. Kinsler, of Omaha, Neb., for defendant in error.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. Burras sued the company to recover damages for personal injuries received by him while in its employ, and which he alleged were caused by the negligence of the company. The trial court at the close of all the evidence directed a verdict against him. It is assigned as error that the court erred in so ruling.

The undisputed evidence showed that Burras at the time of the accident was an employé of the company, and had been since 1900. On the 19th day of August, 1913, he had charge of the overhauling gang in the sweet pickle department of the company in its plant at South Omaha, Neb. He was foreman of about 11 men, who worked on the different floors of that department which was in a building four stories

high. On the morning of the day mentioned he was engaged in the line of his duty in taking a load of meat from the first floor of the building to the fourth floor thereof by means of an elevator which he was operating. One Cikota was with him in the elevator. When the elevator was about 14 inches below the fourth floor the rope which was used to raise and lower the same broke, and the elevator fell a distance of 48 feet. The load of meat which was upon the elevator and which was being elevated weighed 700 or 800 pounds. Burras received his injuries by the fall of the elevator. Counsel for Burras say in their brief:

"Let it be understood plaintiff does not contend that any presumption as to the negligent condition of the rope cable can arise from the lone fact that the elevator fell. This is a suit by a servant against the master based on the negligence of the master, and no one contends for the application in any degree of the rule res ipsa loquitur."

This statement of counsel simply admits a well-known rule of law. We therefore must look outside of the mere fall of the elevator to find any case for submission to the jury. The negligence charged in the petition against the defendant company was (a) that the defendant allowed the elevator to become in bad repair, and to become unsafe and dangerous for use; (b) that defendant company failed to equip the elevator with overhead cables of sufficient strength and size to sustain said elevator; (c) that defendant failed to equip said elevator with a speed governor safety device or with any other protection or guard as required by the revised statutes of Nebraska.

[1] It is claimed by counsel for Burras that the testimony of one Joe Halski made it necessary that the case be submitted to the jury. Said testimony is as follows:

"My name is Joe Halski. I reside in South Omaha and have been working in the sweet pickle department of the defendant company for several years. I know Joe Burras. I heard the elevator crash when it fell. After the accident, I examined the rope cable that holds the elevator. I used a ladder to get on top of the elevator where the runner is on the elevator. I examined the rope. I saw it rubbed through, but I did not see the end of the broken rope. I saw the rope rubbed on the pulley and a lot of rubbish from the rope. It was a thick heavy rope. I saw it was broken because there was a lot of rubbish, but whether it was from the end of the rope or the middle of the rope I did not notice that. I examined it after the accident on the same day, but don't remember whether in the forenoon or afternoon. I noticed the rubbish because the rope was not fully wound around the pulley. There was quite a lot of rubbish. The elevator was not running when I went on the roof to examine the rope. The rope broke and that caused the elevator to fall. I saw it rubbed through on that pulley and a lot of rubbish so I know the rope broke. I saw some rubbish around one of the pulleys on the roof and that is what made me think the rope broke."

The examination of the rope by Halski was after the accident. There was no evidence that the rope had been rubbed, or rubbed through, prior to the accident, and the condition of the rope after the accident is as attributable to the fact of the falling of the elevator as any other cause, so that if the case was submitted to the jury on the testimony of Halski it would be upon the theory that the jury might speculate or guess that the rope had become worn and weakened by use

to such an extent as to make it unsafe prior to the accident and this would not be permissible.

[2, 3] It is next claimed that the evidence is positive that the elevator was without a speed governor safety device. When we come to look for this evidence we find that the evidence consists only in the inference which counsel for Burras claims we must draw from the fact that the elevator fell, the claim being that if there had been a speed governor safety device on the elevator it would not have fallen. We are not informed by the record how a speed governor safety device operates, or whether or not, under the circumstances of this case it would have prevented the elevator from falling. Moreover, the contention of counsel invokes the rule of res ipsa loquitur, which he asserts has no application in this case. The burden of proof was upon Burras to establish by a fair preponderance of the evidence that the company was negligent in the particulars that he mentions in his complaint, and in our opinion he not only failed to sustain the burden of proof, but failed to present any evidence at all, outside of the fall of the elevator. Patton v. Texas & Pacific Railroad Company, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Looney v. Metropolitan Railroad Company, 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; American Car & Foundry Co. v. Dietz, 203 Fed. 469, 121 C. C. A. 593; American Car & Foundry Co. v. Onuffrey Schachlewich, 229 Fed. 559, — C. C. A. —; Peirce v. Kile, 80 Fed. 865, 26 C. C. A. 201; Westinghouse Electric Mfg. Co. v. Heimlich, 127 Fed. 92, 62 C. C. A. 92; Cryder v. Chicago, R. I. & P. Ry. Co., 152 Fed. 417, 81 C. C. A. 559; Armour & Co. v. Harcrow, 217 Fed. 224, 133 C. C. A. 218.

Although it cannot affect the disposition of the case we may properly remark that the company introduced evidence tending to show that the rope elevator cable was purchased from Hooven & Allison, of Xenia, Ohio, of good reputation as rope manufacturers; that the purchase was a recent one; that the rope was a two-inch manila transmission rope of the best grade, and that the company in purchasing the rope relied upon the reputation of Hooven & Allison to furnish the best grade of rope. The company also introduced evidence which tended to show that its rope inspector put the rope on the sweet pickle elevator a week or ten days prior to the happening of the accident; that the rope was new when he put it on the elevator; that it was two inches in thickness, and that on the day the accident occurred he inspected the rope at 8 o'clock in the morning and found it in good order. This evidence was not disputed.

We think the ruling of the court below was right and the judgment below, therefore, is affirmed.

THE SAN CRISTOBAL.

(Circuit Court of Appeals, Fifth Circuit. March 2, 1916.)

No. 2732.

SALVAGE ⊂=10—RIGHT TO COMPENSATION—INDIRECT SERVICES.

Libelant's tugs rendered valuable service in preventing the spread of a fire which consumed a lumber mill. At the end of a pier extending from the mill into the river, and 75 feet therefrom, was a dry dock, on which was respondent's steamship. Neither the dock nor the vessel was injured by the fire, nor were any of the services of the tugs rendered to them. *Held*, that the vessel was not liable for salvage services.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 18–20; Dec. Dig. ⊂=10.]

Appeal from the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Suit in admiralty for salvage by the Mobile Towing & Wrecking Company against the steamship San Cristobal. Decree for respondent (215 Fed. 615), and libelant appeals. Affirmed.

Palmer Pillans, of Mobile, Ala., for appellant.

Gregory L. Smith and Harry T. Smith, both of Mobile, Ala., for appellee.

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

PARDEE, Circuit Judge. The appellant filed a libel claiming salvage against the steamship San Cristobal for volunteer services rendered in extinguishing a fire at a sawmill on Pinto Island in the port of Mobile; the San Cristobal being then in a dry dock 75 feet away. The said dock "was raised clear of the water, and the said vessel was in there for the purpose of repair, and had her tail shaft out and was absolutely helpless to protect herself against the risk or danger of fire from without." On exceptions, the District Court dismissed the libel, on the ground that, so far as the San Cristobal was concerned, the services were indirect.

We concur in the opinion and conclusion of Judge Toulmin, found in the transcript and reported in 215 Fed. 615. In support of his conclusion the judge could have cited The H. M. Hayes, P. C. Lush. Ad. R. 360, 5 N. S. Law Times' R. 37, 39, to wit:

"Where a vessel at anchor was in danger of being run into by a vessel which was drifting, and a steam tug made fast to the vessel adrift, thus avoiding a collision, it was held that the service was too indirectly rendered to the vessel at anchor to render her liable for salvage."

The following cases relied upon by the appellant are interesting, but in each the services rendered were direct:

In The Stormcock v. Van Dyke, 5 Asp. Maritime Cases, 19, the services were rendered to the Van Dyke by the Stormcock in pulling away and separating the Queen of Scots, then in collision and entangled with the Van Dyke; the Queen of Scots at the time having

already cut with her prow through the hull of the Van Dyke's quarter above the water line, and each jump was cutting closer and closer to the water.

In The Neshaminy, 228 Fed. 286, — C. C. A. —, the barge lying in a dock was but 10 feet from the engine house on fire, and the dock itself was on fire. The court found that "from the nature, extent, and duration of the fire and its proximity to the barge the danger to the barge was not only to be apprehended, but was actually present," and that the claim was for services rendered the vessel actually in danger, and not a claim based on an indirect benefit incidentally derived from the services rendered to another.

We may note that even direct services rendered in time of danger have not always been recognized as salvage services.

"A steamboat for services performed in towing other steamboats from positions where they were moored at the wharf, and thus preventing them from coming in contact with a steamboat on fire descending the river, is entitled to a compensation for towage, and not to a compensation in the nature of salvage." Stephens et al. v. The Steamboats S. W. Downs and The Storm, 1 Newb. Ad. 458, Fed. Cas. No. 13,411.

The above is the syllabus of the case. The facts were that between the hours of 10 and 11 o'clock in the day the steamboat John Swayze took fire while descending the Mississippi river, opposite Lafayette, and drifted down the current. While enveloped in flames she passed very near the sterns of the many steamboats then lying at the wharf of New Orleans at the foot of Canal and Customhouse streets. Great consternation and alarm were created among those having charge of the boats, and the utmost anxiety was manifested to prevent them from coming in contact with the burning boat. The steamboat Eliza was about to leave port on her voyage up the river and had already raised steam. She first towed out the steamboat Eclipse, and afterwards performed the same service for the Downs and the Storm at the request of those having charge of those boats at the time. The court said (Judge McCaleb):

"While I do not feel myself called upon to decide that this is not a case of marine salvage, I have no hesitation in saying that it is a case where the services performed should entitle the libelants to little more than would be allowed on a quantum meruit, for work and labor performed."

The decree appealed from is affirmed.

THE HELEN.

THE KATHLEEN.

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

No. 2056.

COLLISION ⇐66—TUG WITH TOWS AND OVERTAKING SCHOONER—NEGLIGENCE OF TUG.

A decree holding a towing tug solely in fault for a collision between one of the barges in her tow and an overtaking schooner, on the ground of negligence and the unlawful lengthening of her towing lines, *held* sustained by the evidence.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 84; Dec. Dig. ⇐66.]

Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Suit in admiralty for collision by Charles C. Sparks, as master of the barge Kathleen, against the tug Helen. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 204 Fed. 653.

Howard M. Long, of Philadelphia, Pa., for appellant.

Willard M. Harris, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Sparks, master of the barge Kathleen, filed a libel against the steam tug Helen for damages caused to the barge, as alleged, by the negligence of the Helen while towing the Kathleen. On final hearing Judge Cross, in an opinion reported at 204 Fed. 653, sustained the libel, held the Helen in fault and referred the cause to a commissioner to report damages. After hearing the commissioner reported, and both sides filed exceptions. Their exceptions were heard by Judge Rellstab, who dismissed the same, and thereupon a decree was entered against the Helen in the sum of $1,376.30. From such decree this appeal was taken.

The 41 assignments of alleged error narrow to the Helen's responsibility for the collision and some inconsiderable items in the damages assessed. No questions of law are involved. The case turns on questions of fact. As fully set forth in Judge Cross' opinion, the Kathleen, in tow of the Helen, was struck by the schooner Mary E. Morse in Hampton Roads. Subsequently the Kathleen filed a libel against the Morse schooner in the District Court at Boston. On final hearing in the latter case, Judge Dodge, in an opinion reported at 179 Fed. 945, held the schooner was not in fault and the libel was dismissed. The Helen was not a party to that case. Thereupon the barge filed this libel against the Helen in the district of New Jersey. We thus have in this case the benefit of the very full discussion of the facts by Judge Dodge in the case against the Morse and of Judge Cross

in the case against the Helen. The conclusion of both was that the Helen was responsible for the collision.

A full and patient hearing of this appeal, followed by an examination of the briefs of counsel and the proofs, have satisfied us that the conclusion reached by these trial judges was right, and their independent findings in different cases and tribunals commend themselves to us. The proofs in reference to the collision are so fully stated and discussed in Judge Cross' opinion that in view thereof, and of the light thrown on the general facts by Judge Dodge's opinion, a further statement by this court is needless. It suffices to say on the fundamental question we find no error in the decree of the court below adjudging the Helen in fault. As to the damages the commissioner took full proofs, and his findings are supported by Judge Rellstab. As we have said, nothing but questions of fact are involved in those findings; they have been approved by the court below, and we find no error in them. The time that elapsed between the collision and the proofs in the present case has no doubt made it more difficult for both parties to make as clear showings as they could have done earlier, but such delay as there has been is not chargeable to the barge, a fact that is made clear in Judge Cross' opinion.

After full consideration, the decree below is affirmed.

THE CITTA DI PALERMO. *

(Circuit Court of Appeals, Fifth Circuit. March 9, 1916.)

No. 2842.

SHIPPING ⊂=84(3)—LIABILITY OF VESSEL—INJURY TO STEVEDORE.

A steamship *held* liable for injury to a stevedore's employé by the falling of hatch covers, which were of peculiar construction and not properly placed when the ship was turned over to the stevedores for discharging, which peculiarity of construction was known to the officers of the vessel, but was not known nor readily observable by the stevedores.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 350; Dec. Dig. ⊂=84(3).]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in admiralty by James Robertson against the steamship Citta di Palermo; Walter F. Becker, claimant. Decree for libelant, and claimant appeals. Affirmed.

J. C. Henriques, of New Orleans, La., for appellant.

Frank B. Davenport, Edward Rightor, and Henry W. Robinson, all of New Orleans, La, for appellee.

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

PER CURIAM. On consideration of this case in all its aspects, we conclude that the trial judge was right in his conclusions and decree.

The evidence shows that, when the ship was turned over to the

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

*Rehearing denied April 19, 1916.

Honor stevedores, No. 3 hatch was covered and the covers apparently correctly and safely placed, but further shows that in fact the forward covers of said hatch (of peculiar construction) were not correctly placed according to designs and marks, and were dangerous to use, particularly when the after covers were removed. It also appears that the forward covers were not removed by the stevedores, but, until put in use, remained in place exactly as when the ship was turned over to the stevedores to be loaded. The stevedores had a right to assume that the covers as placed when the ship was turned over to them were properly placed, and, as they were not warned to the contrary, they were not guilty of negligence in using them without close inspection.

The peculiarity of the forward covers and the necessity to have them placed according to marks and numbers was known to the officers of the ship, but was latent so far as the stevedores were concerned, and, as no warning was given at or before the time the said forward covers were put in use, the ship was in fault, and liable for the injury that resulted to appellee when the hatch covers fell.

The decree appealed from is affirmed.

In re VIDAL.

In re RAMIREZ-QUINONES.

(Circuit Court of Appeals, First Circuit. December, 1915.)

BANKRUPTCY ⇐475—PETITIONS TO REVISE—SECURITY FOR COSTS.

The statutes and rules making provision for security for costs on writs of error or ordinary appeals in equity do not apply to petitions to review proceedings in bankruptcy in matters of law, and there is no statute, rule, or settled practice authorizing an application for security for costs on a petition of that character.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 885; Dec. Dig. ⇐475.]

Petition to Revise in Matter of Law the Proceedings of the District Court of the United States for Porto Rico.

In the matter of Felipe Ramirez-Quinones, bankrupt. A petition to revise the proceedings in matter of law having been filed by Ermelindo Vidal, motion is made for security for costs. Petition for security for costs denied.

Jose A. Poventud, of Ponce, Porto Rico, for petitioner.

Harry F. Besosa, of San Juan, Porto Rico, for respondent.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PER CURIAM. This is a petition in the matter of an application to review in the matter of law the proceedings of the District Court of the United States for Porto Rico, concerning certain matters in bankruptcy, and the motion under consideration is one filed by the respondent for security for costs. None of the rules cited by the applicant govern the proceedings in the Circuit Court of Appeals in the

matters mentioned. For writs of error at common law, also for the ordinary appeals in equity, the statutes of the United States, or the rules of the courts, make provisions for security for costs on allowance of the citation, or subsequent thereto. We have no statute, or rule, or any settled practice, giving a right to a respondent or appellee to apply for security for costs on a petition of this character, and we hesitate to initiate such a practice. We also refrain from laying down any rule which would prevent the Circuit Court of Appeals from requiring such security in an especially meritorious case. It is enough to add to what we have said that the present case has no special features.

The petition for security for costs is denied.

ELLIOTT CO. v. LAGONDA MFG. CO.

(Circuit Court of Appeals, Third Circuit. January 28, 1916.)

No. 1962.

1. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—TURBINE.
   The Elliott & Faber patent, No. 874,174, for a turbine for use in operating a boiler tube cleaner, and No. 983,032, for a modification thereof, granted to the same patentees on a divisional application, which relate especially to the casing or shell inclosing the motor, disclose invention and are valid; also *held* infringed.
2. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—ROTARY MOTOR.
   The Elliott patent, No. 983,034, for a rotary air motor for operating a boiler tube cleaner, is for a structure which is novel and useful, and involves invention; also *held* infringed.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Elliott Company against the Lagonda Manufacturing Company. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 222 Fed. 946.

Bakewell & Byrnes, Clarence P. Byrnes, and George H. Parmelee, all of Pittsburgh, Pa., for appellant.

Staley & Bowman, Paul A. Staley, and Percy Norton, all of Springfield, Ohio, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This appeal involves the validity and infringement of certain claims of three several patents, viz.: No. 874,174, granted December 17, 1907, to W. S. Elliott and F. M. Faber, for a turbine; No. 983,032, granted January 31, 1911, to said W. S. Elliott and F. M. Faber, for a turbine; and No. 983,034, granted January 31, 1911, to said W. S. Elliott, for a motor. At an earlier stage of this case the District Court, in an opinion reported at 205 Fed. 152, held the defendants were estopped by a certain license agreement from

contesting the validity of such patents, and accordingly entered a decree adjudging them valid. On review by this court (214 Fed. 578, — C. C. A. —) it was held the defendants were not estopped, and the cause was remanded to the District Court to receive proofs on the subject of validity. This was done, and on final hearing that court filed an opinion reported at 222 Fed. 946, and entered a decree dismissing the bill. Thereupon this appeal was taken.

[1] These patents concern tube cleaner motors, which travel through boiler tubes and cut and remove the stonelike crust which forms in such tubes by the action of heat on the mineral salts contained in the water. This layer lessens steam space and increases fuel consumption. In a general way it may be said such appliances consisted of a turbine of smaller diameter than the tube and actuated by water passing through a hose to which the turbine was connected. To the shaft of such turbine is attached a revoluble, toothed, swing arm, which delivers rapid blows and cuts out the scale, and which, by reason of its universal joint attachment to the shaft, is enabled to follow the bonds and curves of the tube. Without entering into detail, it suffices to say that motor tube cleaners went into general use and proved a very considerable stimulus to the use of water tube boilers. Their use, however, when applied to heavy scale, developed certain weaknesses, due to the very high speed at which they ran and to the heavy longitudinal thrusts to which the machine was liable. The proofs show the unusual strains and vibrations to which this necessarily small mechanism was subjected. In that regard the testimony is:

"The cutting head attached to the motors strikes blows in rapid succession against the scale within the tubes. The speed of say a four-inch machine—water driven—when running empty with 150 pounds pressure of water will develop a speed of 10,000 to 12,000 revolutions per minute. When running loaded, the speed will be inversely as the load, dropping as low as 2,000 to 2,500 revolutions per minute. One of our four-inch turbines, with 150 pounds working pressure, will develop from 3 to 3½ horse power, as shown by brake tests. When developing this amount of power the speed is in the neighborhood of from 4,000 to 5,000 revolutions per minute, depending upon the type of the machine. When these machines are connected with the drill through the universal coupling, from actual observation the drill strikes from two to three blows every revolution. As action and reaction are equal, this blow is transmitted to the universal coupling, and thence to the shaft in the motor—the universal coupling acting in a measure to lighten the reaction against the shaft. Combined with the hammer blow there is a torsional resistance transmitted to the shaft, on account of the scale in the tube being indented by the hammer blow. The hammer blow of the tool cuts into the scale, which has a tendency to lock the tool within the groove so cut, thereby causing a resistance, preventing the machine from turning, and the inertia of the moving parts, combined with the pressure on the wheel due to the water, breaks away these grooves, and in doing so creates an enormous torque momentarily. Assuming that the machine is in operation in a fairly heavily scaled tube, using the drill as the cutting head, these momentary vibrations, due to the cutting of the tool into the scale, are equal to from 10,000 to 30,000 vibrations per minute, depending upon the speed. Again, when the tool strikes against a heavy projection of the scale, if the scale is hard, it frequently stops the machine instantly, so that the power developed by the machiue during this instance might be several times the capacity of the machine in the way of normally developed power, because the energy due to the inertia of the moving parts is overcome by the projection of the scale; as well as the

energy given the machine by the water pressure back of it. In view of these conditions, it is a pretty difficult matter to state to what extent this vibration exists, but we have had a great many cases where the three-quarter inch shaft had been broken or twisted off, due to the momentary stopping of the machine, which reacts against the moving parts."

The proofs further show that numerous constructions, covering several years of experimentation, failed to discover any means of overcoming these difficulties. The small area to which the motor was restricted, the high speed necessary to successful use, and the rapid and powerful thrust to which its parts were subjected, made the construction of a motor fitted to remove heavy scale a very difficult problem. In the art as developed up to the time of the motor patent here in suit, ball bearings had been used to minimize friction, and multi-part shells, united by threads and screws, employed. Both these features, viz., ball bearings and screw-connected parts, were elements of weakness. In ball bearings it was the wear incident to the constrained use of small-sized balls, and that the ball-bearing supports were unscrewed by the excessive vibrations. So, also, the threads and screws uniting the shell or tube and the interior bearings worked loose under vibrating strains. These experiments covered more than two years. A number of machines for heavy work were built and proved failures, and as a result the radical departure from prior methods was resorted to of wholly discarding both multi-part shells and ball bearings. This move finally terminated in a solid shell, with integral webbing, in which the shaft was provided with a long bearing. The solid shell obviated multi-part separation, and the long bearing spread the shafts thrust and dispensed with ball bearings. That this motor was not a mere obvious, mechanical step, but was the gradually approaching evolution which came from much experiment and numerous failures, is shown by the proofs. As illustrative of this we quote from the testimony bearing upon the relation of the shell to the water supply, which was but one of the numerous factors to which due regard had to be given. In that regard Elliott, one of the patentees, testified:

"The development of this machine resulted in our using a rear and front bearing, and I remember distinctly the discussions that we had and the difficulties encountered in the designing of a suitable front bearing to withstand the vibrations. From our experience in the past we fully realized the importance of making a machine out of one piece, in order to resist the vibratory effect of the cutting heads; but the trouble was to get rid of the water, as the efficiency of a turbine is very largely affected by the velocity of the water leaving the wheel. If the area for discharging this water was too small, we had doubts in being able to get rid of the water and develop enough power on the tool. We also had to take into consideration the strength of the machine, which had to be strong enough to provide an internal support for the bushing without affecting the water flow. For instance, if the area of the hole in one case was 50 per cent. as great as it would be in another case, then the loss would be four times as great with the small opening, as compared with the larger opening, and consequently more water would have to be used to do a given amount of work; and at that time objections were being made to the amount of water used with our older types of machines. We also realized that the support for the bearing for the front part of the shaft must be such as to withstand any vibration, and at the same time enable us to force the bushing in under pressure sufficiently high to hold it in without the use of threads, set screws, etc., as we had found that the use of

a screw was a thing to be avoided in the manufacture of a tube cleaner motor. It was for these reasons, then, that we finally adopted the two thin webs, as thin as we could make them and secure proper strength for supporting the bushing; and while theoretically we would have some loss due to frictional discharge even with these thin webs, yet the loss would not be as great as if we used webs not longitudinal, but provided with the same strength. In fact, as I remember it, had we used the common form of web or spider, the loss in frictional discharge would have made the machine impracticable. We were at this time compelled to use a very much higher water pressure than we did in the older days. When we first started to build water motors, it was hard to get 100 pounds of water pressure to operate it with; whereas in 1904 we were called upon to furnish machines to operate with from 150 to 300 and 400 pounds pressure, and to-day 200 pounds is very common. At the time the first double bush-bearing machine was built, it was put into operation on a plant having in the neighborhood of 400 pounds pressure to operate it, and this pressure was used. As the energy utilized on a water motor is proportional to the square of the velocity leaving it, it is apparent, as I have already indicated, that a very large opening must be provided to get rid of the water after it leaves the wheel; and when you put 400 pounds hydrostatic pressure on one of these motors, or 250 pounds, for that matter, a very much larger amount of water would enter the wheel than would be the case if only 100 pounds were used. All of these facts influenced us in the development of the longitudinal webs, and the making of the shell and front support of the machine of an integral piece, or making it in such way that the vibration would not destroy the support of the bushing."

These features of a one-part frame and a long-shaft bearing, or an integral frame, were embodied in principal patent No. 874,174, and in No. 983,032, a divisional application of No. 874,174. In their specification of No. 874,174 the patentees describe their invention as follows:

"The object of the invention is to provide a simple and efficient turbine and shaft which will be longer lived than formerly, and in which the shocks upon the cutting head are largely absorbed or cushioned before they can reach the turbine wheel. Heretofore in this class of devices, when used in connection with cutting heads, the shocks and jars upon the head have caused rapid deterioration of the turbine driving device, making the turbine short-lived. Our invention greatly reduces this difficulty, and consists in the construction and arrangement of parts as hereinafter more fully described and claimed.

"In the drawings, referring to the form of Figs. 1, 2, and 3, 2 represents

Fig. 1.

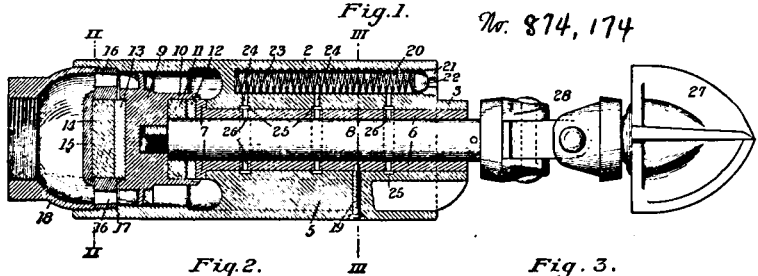


Fig. 2.

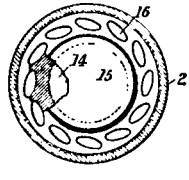
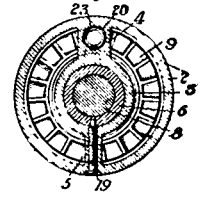


Fig. 3.



the cylindrical turbine casing having an inner concentric shell *3*, which is preferably cast integrally with the casing to which it is connected by the opposite webs or ribs *4* and *5* as shown in Fig. 3. Within the inner shell *3* we preferably place a bushing or lining *6* having a rear shouldered portion *7* which fits against the rear end of the inner shell, this shell being shorter than the casing, and projecting beyond the front end of the casing in this form. Within the bushing *6* fits the turbine shaft *8*, the rear end of which is screwed or otherwise secured to the turbine wheel *9*. This turbine wheel is preferably provided with a circular recess in its front portion, forming an angular flange *10* within which is seated the ring *11* of lignum vitæ. This lignum vitæ bears against a ring *12* which fits against the rear end of the shoulder of the bushing. At the rear end of the turbine wheel it is provided with a shallow circular recess containing a plate *13* fitting upon a circular lignum vitæ block *14*, which is fitted into a recess in the stationary portion *15* of the turbine. This stationary portion *15* is provided with the usual ports *16* and is preferably of ring form, fitting against a shoulder *17* in the rear end portion of the casing, and pressed against said shoulder by the screw coupling *18* which is secured into the rear end of the casing. The bushing *6* is held against rotation by any suitable means, such as the screw *19* extending through one of the webs and entering a hole in the bushing, or it may be pressed in. * * *

"The advantages of my invention result from the simplicity and solidity of the construction. A long outbored bearing is provided between the external tool and the turbine wheel, which cushions the jars and shocks, thus greatly saving the wear of the turbine. The thrust bearings absorb the end thrust of the shaft, and the lignum vitæ and metal washers are long-lived and give little friction. The oiling device affords a steady supply of oil to the long shaft bearing, and the device is compact and strong. The washers may be metal or wood, and may be varied in size, shape, and number."

This device resulted in making the casing from a single solid piece of forged steel by so "hogging" it out as to leave integral, radial webs which, when properly bushed, furnished a long bearing for the shaft. At the same time, by making these webs long and narrow, they secured by such length adequate strength to support the bearing without making the webs so wide as to interfere with the needed free-water outlet. As to the vital character of these long narrow webs the proof as quoted above is:

"Had we used the common form of web or spider, the loss in frictional discharge would have made the machine impracticable."

On this device were granted, inter alia, the claims here involved, viz.:

"1. In a turbine, a barrel or casing having inwardly projecting longitudinal webs integral therewith, and a removable bushing or bearing supported by said webs, substantially as described.

"2. In a turbine, a barrel or casing having inwardly projecting longitudinal webs integral therewith, a removable bushing or bearing supported by said webs, and a movable turbine member in the rear of the webs having a shaft extending through the bushing, substantially as described.

"3. In a turbine, a barrel or casing having inwardly projecting longitudinal webs supporting a bearing, said bearing having a removable bushing, substantially as described.

"4. In a turbine, a barrel or casing having inwardly projecting longitudinal webs supporting a bearing, said bearing having a removable bushing, and a movable turbine member in the rear of the webs having a shaft extending forwardly within the removable bushing, substantially as described.

"5. In a turbine, a barrel or casing having inwardly projecting integral webs supporting a bearing, said bearing having a removable bushing, a movable turbine member having a forwardly extending shaft within the re-

movable bushing, and means for lubricating said shaft, substantially as described.

"6. In a turbine, a barrel or casing having inwardly projecting webs supporting a bearing, a removable bushing in said bearing, a rear turbine wheel having a shaft extending forwardly within the bushing, and supply channels arranged to supply a lubricant to the shaft, substantially as described.

"7. In a turbine, a barrel or casing having inwardly projecting webs supporting a bearing, a removable bushing for said bearing, a turbine wheel having a forwardly projecting shaft within the bushing, a stationary turbine member secured within the casing at the rear of the turbine wheel, and rear nozzle or supply chamber secured at the rear end of the casing, substantially as described."

"16. A turbine having a casing with inwardly extending radial webs for a part of its length, a removable bushing carried by the webs, a turbine shaft fitting within the bushing, a turbine wheel in the rear of the radial webs, and a removable stationary turbine portion clamped against a casing shoulder in the rear of the turbine wheel, substantially as described."

"20. A turbine having a casing with integral inwardly projecting webs or ribs extending for a part only of its length, a removable concentric bushing supported by the ribs or webs, and a turbine at the rear of the bushing and having a shaft fitted therein, said parts having a feed channel to supply a lubricant to the shaft, substantially as described."

It will be noted that the above drawing and the quoted specification described a device with a long bearing, integral with the casing, located in front of the motor wheel and which was the only bearing the shaft had. For, as stated in the part quoted:

"Within the bushing *6* fits the turbine shaft *8*, *the rear end of which is screwed or otherwise* secured to the turbine wheel *9*."

In addition, however, a device similar to the above, but with a second and rear bearing is also illustrated in Figs. 4, 5, 6, and 7, wherein the shaft is carried through and to the rear of the wheel and has another bearing in the stationary part of the motor. As to this device the specification says:

"I do not claim herein specifically the forms of Figs. 4, 5, 6, and 7, as the same are pending in another copending application, No. 350,246, filed December 31, 1906."

This latter application was embodied in patent No. 983,032. The two patents, therefore, while divided in prosecution, together constitute one general subject-matter. The specification of this second patent, which, as we have said, shows both a forward and rear bearing for the shaft, states:

"The advantages of the invention result from the simplicity, strength and long life of the structure. A long outbored bearing is provided between the external tool and the turbine wheel, which cushions the jars and shocks, thus saving wear on the turbine. The extending of the shaft within or through the stationary member and the providing of bearings in front of and in the rear of the turbine wheel gives a strong and efficient bearing construction, especially in connection with the long outbored bearing."

Without entering into a full description, it suffices to say that in this construction the front shaft bearing, instead of being extended through substantially the whole length of the shell as shown in Fig. 1 of pat-

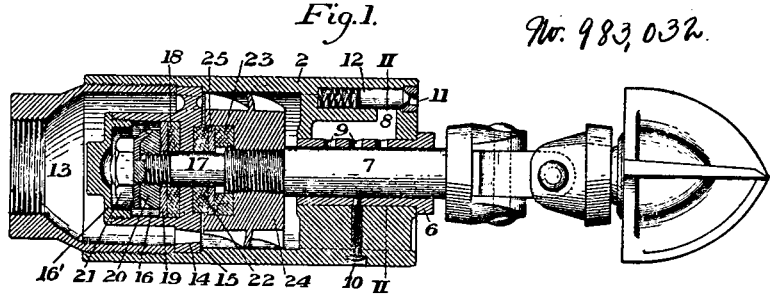
ent No. 874,174, is here shortened to the length shown at 7 in Fig. 1 of No. 983,032, while the rear reduced portion *17* of such shaft extends back so as to have a rear bearing, or, as the specification says:

"A thrust bearing is thus provided for the shaft on both sides of the stationary turbine portion."

It will be apparent that the heavy leverage action on the shaft, when subjected to the intense lateral strain imparted at high speed, would tend to make the shaft cant or wabble to some extent, even when it was sustained by a long bearing. It will therefore be evident that giving the shaft a second and rear bearing would tend to further distribute the strain and stabilize the shaft. In this regard the patentees are warranted in saying as they do in the specification:

"The extending of the shaft within or through the stationary member, and the providing of bearings in front of and in the rear of the turbine wheel gives a strong and efficient bearing construction, especially in connection with the long outbored bearing."

This second or rearward bearing gave a dual shaft bearing to the art, and this element, together with the locking of the stationary turbine member, which carried the rear bearing in fixed relation to the shell which carried the front bearing, made the structure, as a whole, a practically solid body and its two bearings practically immobile. The device by which these two bearing agencies were locked to each other by a third member constitutes another element of interrelated combination. By referring to Fig. 1 herewith shown it will



be seen that coupled to the hose which supplies the motive power to the motors is the rear supply chamber *13*. This latter member is not directly subjected to the shaft thrust or bearing pressure. The vibratory motion to which it is subjected is simply the structural vibration of the whole mechanism and not the thrust strain imparted by a direct attachment to the bearing. The significance of this is shown by the testimony. In the experimenting to which we have referred the hose coupling was screwed up against the rear bearing, which was stationed in the stationary part. It is apparent that this combination subjected the hose screw connection to the direct thrust of the shaft on the bearing. The coupling, therefore, instead of being an independ-

ent lock, was in effect but a dependent part of the bearing. Referring to such a device, Elliott, one of the patentees, testified:

"We decided that the first machine of this type which we would build would utilize the principle of applying the hose coupling as a lock nut. Therefore, in the first machine built the rear bearing was journaled in the stationary part behind the wheel and held in place by screwing the hose coupling up against it. We found, however, that this was only a partial solution of the trouble, as the vibration of the rear end of the shaft bearing against this stationary part or nozzle piece, caused the hose coupling to work loose."

This difficulty was overcome by screwing the nozzle coupling *13* into the rear end of the casing, and against, but not to, the stationary turbine member *14*, which latter has also a smooth outer surface which fits against shoulder *15* of the casing. By this construction, and such connection to the casing, the nozzle is not subjected to direct shaft thrust, but serves as a fixed nut lock and holds the rear bearing stable. This member *13*, while serving to hold the motor and rear bearing in place for working conditions, may also be detached and permit the motor being taken out through the rear of the shell. This device was embodied in claim 1, which reads as follows:

"1. A rotary motor having a casing, a revoluble motor element therein, a shaft carrying said motor element and projecting forwardly and rearwardly therefrom, a bearing member carried by the casing for the forwardly projecting portion of the shaft, a ported admission member removably secured in the rear portion of the casing and carrying a bearing for the rearwardly projecting portion of the shaft, and a hollow inlet member detachably connected with the casing and engaging the admission member to normally retain it against rearward movement, substantially as described"

—and in various combinations in the other claims here involved, viz., 4, 5, 6, 7, 9, 11, 13, 15, 16, 22, 23, 30, and 31 to 41, inclusive.

We are therefore of opinion the devices described in the several claims of these two patents here in issue were novel, useful, and inventive. We further find they are embodied in the defendant's device.

[2] It remains to consider the third patent, No. 983,034, one of the devices of which is shown in the accompanying patent Figs. 1 and 2:

No. 983,034

Fig. 1

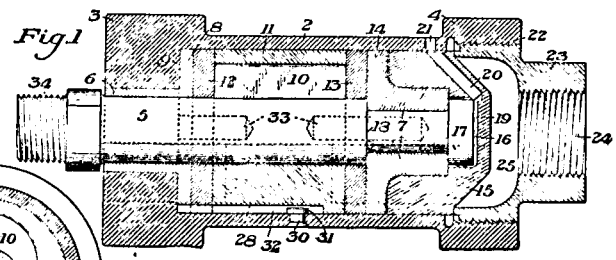
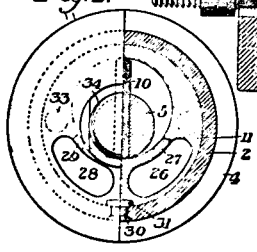


Fig. 2.



The motor is an air motor, not a turbine, anl is actuated by air or other motive fluid acting on the piston blade *10*. In adapting solid piece casings, such as we considered in the former patents, to use in an air motor with a revolving blade, such as here shown, it is apparent that, to prevent pressed air escape, there must be an accurate angle between the inner surface of the front cylinder head and that of the cylinder wall, in order that such angle should properly coact with a corresponding angle on the blade To mechanically make such angle in the inside of the front head of the solid shell was difficult, if not, indeed, impossible. It was also important that the cylinder walls and head be internally hardened to meet the wear caused by the rapid traveling blades. These difficulties were met and overcome by the device of patent No. 983,034 here in suit. Without entering into minute details, we may say that Elliott's device consists substantially in building up from the open, rearward end of a solid outer shell, provided with an integral front head, an inner cylinder composed of parts already hardened and which when put in place were locked in place and formed an angle which accurately fitted that of the blade. In Fig. 1 the solid, one-piece outer shell with a head adapted for a forward shaft bearing is numbered *2*. The bushing of the front bearing is numbered *6* and its flange, numbered *8*, right angles so as to seat forwardly against shoulder *9* of head *3*. Against this bushing flange is placed the circular, hardened disk *12*. This disk is introduced from the rear, open end of the shell and forms the front end of the cylinder. Abutting against the periphery edge of this disk is the hardened, inner cylinder *11* which is also introduced from the rear, open end of the outer shell, and is locked against rotation by numbers *30* and *31* in Fig. 2. Against the rear end of cylinder wall *11* a rear end or head is built up by the hardened, circular plate or disk *13*, introduced from the rear, open end of the outer shell. This latter head is seated against the flange *14* of bushing *7*, which latter surrounds the rear bearing *18* of the motor shaft. In this manner an accurate angle is formed by the junction of cylinder wall *11* and end plate *13* to coact with a corresponding angle on blade *10*. The end bushing *7*, abutting at its front end against shoulder *18*, and at its rear end against shoulder *17* of the reduced section of shaft *5*, tends to prevent shaft-play in either direction. The inner cylinder and other parts of the mechanism are locked in place by the device referred to in patent No. 983,032, and the whole forms a unitary, co-operating combination. The device, as embodied in claims 10, 11, 13, 14, and 15,[1] we find to be novel and useful and to involve invention.

[1] "10. In a portable rotary motor, a portable outer casing having an integral head at its forward end, and open at the rear end, a motor cylinder removably seated in said casing and removable through the open rear end, means for holding the cylinder from rotary movement within the casing, a motor shaft having a forward bearing in the integral head, a motor element connected to said shaft, and a removable bearing and admission member having a bearing for the rear end of the shaft, said shaft, motor element and rear bearing all being removable through the rear end of the casing, together with means

Without describing the defendant's motors in detail, it suffices to say we find they infringe the claims in issue on these several patents.

The decree below will therefore be set aside, and the case remanded, with instructions to enter a decree adjudging the several claims of patents Nos. 874,174, 983,032, and 983,034, here in issue, valid and infringed.

for normally securing said parts against endwise rearward movement, substantially as described.

"11. A rotary motor comprising an outer casing or shell having an integral head at one end carrying a shaft bearing, said shell being open at the other end, a cylinder inserted in the casing from the open end thereof and secured against rotation, a stationary ported admission member inserted through the open rear end of the outer casing, and a rotary motor element within the cylinder, substantially as described."

"13. A rotary motor comprising an outer portable casing or shell having a bush bearing carried at one end thereof, and of smaller diameter than the casing, said shell being open at the other end, a cylinder inserted in the casing from the open end thereof and secured against rotation, a stationary ported admission member inserted through the open rear end of the outer casing, means for securing said member in place, and a rotary motor element within the cylinder.

"14. A rotary motor, comprising an outer casing or shell open at one end and having an integral head at the opposite end provided with a shaft bearing therein, an open-end cylinder removably seated in said casing or shell, a removable head within the opposite end portion of the casing or shell, and also having a shaft bearing, a securing member engaging the removable head and holding it in place, and a piston shaft journaled in said heads and carrying a piston blade, said cylinder, removable head and piston shaft and blade being all removable through the open end of the casing or shell when the securing member is removed.

"15. A rotary motor comprising an outer casing or shell having an integral head at one end carrying a shaft bearing, said shell being open at the other end, a cylinder inserted in the casing from the open end thereof and secured against rotation, a stationary ported admission member inserted through the open rear end of the outer casing, a rotary motor element within the cylinder, and means for locking the stationary ported admission member in place."

ELLIOTT CO. v. ROBERTSON.

(Circuit Court of Appeals, Third Circuit. January 28, 1916.)

No. 1950.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—ROTARY AIR MOTOR.
The Elliott patent, No. 1,045,134, for a rotary air motor, for operating boiler tube cleaners, the essential feature of which is a vent to the atmospheric air to allow the escape of compressed air, which accumulated at the rear end of the shaft and checked its speed, discloses invention and is valid. The Elliott, Mills & Holt patent, No. 1,019,771, and the Mills & Conn, No. 1,053,055, for minor improvements thereon, by changing the direction of the vent and in introducing a lubricant into the motor fluid, are void for lack of invention. The first-named patent also *held* infringed.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—TURBINE.
The Elliott & Faber patent, No. 983,032, for a turbine, for operating a boiler tube cleaner, *held* valid and infringed.

Appeal from the District Court, of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Elliott Company against John F. Robertson, trading as the John F. Robertson Company. Decree for defendant, and complainant appeals, with cross-appeal by defendant. Reversed in part.

For opinion below, see 219 Fed. 899.

Bakewell & Byrnes, Clarence P. Byrnes, and G. H. Parmelee, all of Pittsburgh, Pa., for appellant and cross-appellee.

Gifford & Bull, J. Edgar Bull, and Chas. S. Jones, all of New York City, and Synnestvedt, Bradley, Lechner & Fowkes, of Philadelphia, Pa., for appellee and cross-appellant.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Elliott Company, the owner of six separate patents hereinafter referred to, filed a bill against John F. Robertson, trading as John F. Robertson Company, wherein infringement of said patents was charged in the sale of certain rotary air motors for cleaning boiler tubes. Two of the patents were subsequently withdrawn, and the case proceeded on Nos. 983,032, 1,019,771, 1,045,134, and 1,053,055. The court below, in an opinion reported at 219 Fed. 899, dismissed the bill on the ground the several claims of such patents were either invalid or not infringed. Thereupon the Elliott Company took this appeal.

[1] The art here concerned is that of devices for cutting the scale from boiler tubes. Such devices consist generally of three distinct features: First, an interior motor or turbine; second, a compact motor-inclosing shell; and, third, a scale-cutting exterior attachment actuated by the motor. The scale-cutting exterior attachment was the subject of litigation in one of the District Courts of this circuit, and a reference to that case (Liberty Mfg. Co. v. American Brewing Co., 155 Fed. 900) avoids a present restatement of that element of the cleaner.

The second element, namely a compact motor-inclosing shell, was the subject-matter involved in another case in this circuit and a reference to the opinion of the lower court (Elliott v. Lagonda Mfg. Co., 222 Fed. 946) will likewise obviate a present restatement of that element. This case involves the remaining element, viz., the motive power of the cleaner. For a long time such motors were water turbines, and such motors were used in the apparatus involved in the cases referred to above. The present case involves motors using air, which have only come into use in this art in the last few years. It was recognized that air motors would be more desirable in cleaner service than water turbines. In that regard the proof is:

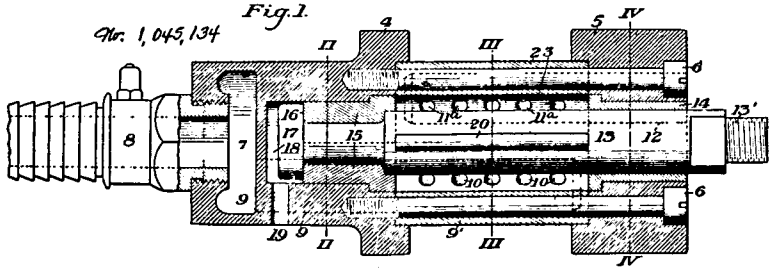
"Air motors are advantageous over water motors, because easier to operate; there being no water to contend with, they develop a great deal more power and cost much less to maintain."

The proofs show that the plaintiff began the use of air motors in cleaners in 1906 with the sale of 3 air motor machines, and within three years their business had grown to over 300 per year. When it came, however, to the use of rotary air motors, a serious difficulty was encountered, in that, while such a motor would start off under load at the required high speed, it would soon, for some unaccountable reason, slow down and fail to develop the necessary power. For example, one Van Ormer, in patent No. 969,010, devised the rotary motor hereafter shown. It so attracted the attention of the complainant company that it purchased Van Ormer's patent and began to develop it commercially. In that respect the proof is:

"The first motor that we attempted to build on a commercial scale is that of Van Ormer, No. 969,010, dated August 30, 1910. The first difficulty that we encountered on this motor was that, in putting it on the test ways, it started in at a very high speed, but after running a few seconds the speed began to dwindle, and toward the end of the run of say a minute the speed was very much lower than at the beginning."

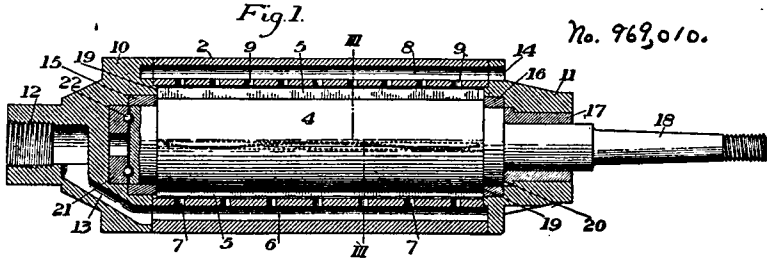
This difficulty was overcome by the device shown in patent in suit No. 1,045,134, for a rotary motor, applied for by W. S. Elliott January 20, 1908, and granted November 26, 1912, and illustrated in the herewith Fig. 1:

Fig. 1.



From this construction it will be seen that *3* is a closed, eccentrically located piston chamber, in which the blade *20* is rotated by compressed air introduced from admission chamber *9*. The piston shaft *13* has a front bearing journaled in bushing *14* and a rear bearing journaled

in bushing *15*. This rear bearing *15*, being reduced in size, thrust shoulders *16* at one end and corresponding, but unnumbered, thrust shoulders at the other end, prevent endwise thrust movements. Turning at this point to the accompanying drawing of Van Ormer's patent, No. 969,010 it will be seen it shows a rotary air motor of the same



general type, actuated by compressed air and having a forward and rear bearing for the shaft. Under the strain of operative thrust the rear end of shaft *4* would press on thrust plate *21*, but Van Ormer prevented their contact by what he calls anti-frictional balls. His words are:

"Seated between the rear end of the shaft *4* and the thrust plate *21* in the admission head are a series of anti-friction balls *22*, which also form a thrust bearing for the shaft."

This was the Van Ormer device, which complainant undertook to make commercially, and which, as the proofs show, was unable to maintain its initial speed. In the light of after events, the occult reason for this unaccountable action becomes clear. In interposing these anti-friction balls to receive the end thrust of the shaft and prevent such shaft from contacting with thrust plate *21*, Van Ormer left a narrow space or crevice between the thrust plate and the shaft into which the compressed air from the piston cylinder gradually crept through the rear shaft bearing and there accumulated. The proofs satisfy us that it was this gradually increasing accumulation of compressed air at the end of the shaft which in time reduced the speed of the shaft. When once discovered, the defect was solved in a simple, but effective, manner by Elliott's device in the patent now under review.

Turning to the drawing from that patent, it will be seen that Elliott relieved the pressure of accumulated compressed air at the rear end of the shaft by venting the chamber to atmospheric pressure. In that regard the patent says:

"The piston shaft is of reduced diameter within the rear bushing *15*, forming a thrust shoulder *16* within said bushing, and its inner end has a head or collar *17* which turns in a space or chamber *18* within the head *4*. This space or chamber is formed with a vent opening *19* which leads outwardly from said chamber to the atmosphere. The purpose of this vent opening is to relieve the piston shaft from the effect of any accumulation of air which might otherwise occur in the space or chamber *18* by reason of leakage from the cylinder through the rear bushing *15*."

Such venting for the purpose indicated was wholly new in the use of rotary air motors in boiler tube cleaners, and was at once recognized as a thing of value in that art. It became the subject of a protracted interference proceeding between Elliott, Darlington, Mills, Conn, and Van Ormer, in which Elliott finally prevailed, and was awarded, inter alia, the claims of broad character found in those here in issue.[1] We find nothing in the art to forestall Elliott's conception, and it seems to us his application was timely after his reduction to practice, which followed his experimentation. We are also of opinion the device was inventive in character. Elliott's contribution was in discovering the existence of an unvented pocket or chamber and the benefits that would accrue from venting it. The art owes to him the creation of a vented chamber at the shaft end, which did away with injurious shaft-bearing, compressed air escape. In that regard Professor Wagner well says:

"This patent is for providing means for relieving the air pressure at the end of the piston shaft in a rotary air motor. Mr. Williams argues that it was merely an act of mechanical skill to make an opening to relieve the air pressure. In view of the fact, however, that no vent was provided in Troxler, McIntosh, or Van Ormer, where a similar accumulation of pressure must have occurred, according to Mr. Williams' own statement, it seems reasonable to suppose that there was some invention in discovering that a pressure did exist at the end of the piston shaft, and did produce detrimental friction, and that a vent hole might be used to relieve this pressure, and thus eliminate the detrimental friction."

We accordingly hold the claims in question are valid.

But while we so regard this patent, we cannot accede to the appellant's contention that patents No. 1,019,771 and No. 1,053,055, which are based upon the vented chamber of No. 1,045,134, are also valid.

[1]The claims awarded were as follows:

"1. In a rotary motor, a piston shaft, a rear bearing for said shaft, an air space adjacent to said bearing, and means for venting said space, substantially as described.

"2. A rotary motor having an air space at the rear end of the piston shaft, and means for venting said space, substantially as described.

"3. In a motor, a piston shaft and an air chamber adjacent to one of the bearings of said shaft, and having a vent opening leading therefrom, substantially as described.

"4. In a motor, a cylinder having a longitudinally extending admission port, ported heads fitted to the ends of the cylinder and detachably secured thereto, said heads having bearings for the motor shaft, and the rear head having an admission chamber therein, the rear head having a vent opening therein communicating with the rear shaft bearing, substantially as described.

"5. A rotary motor having a chamber containing a motor element, a shaft on which said element is mounted, said shaft having front and rear bearings, the front end of the shaft extending beyond the front bearing for attachment to a tool, and the rear bearing terminating and being inclosed within the rear end of the motor, means for admitting working fluid to the cylinder through its rear end, and means for relieving the accumulation of fluid at the rear end of the shaft, substantially as described.

"6. A rotary motor having a fluid supply pipe connected at its rear head, and having a longitudinally extending port leading to the cylinder, a motor shaft having its axis parallel to the axis of the supply pipe, the rear bearing for said shaft being located in front of the supply pipe connection, and there being an air space adjacent to the end of said shaft, substantially as described."

In practice it was found that the venting of this chamber was in one feature objectionable, because the air was vented in the face of the operator. Thereupon the obvious expedient was adopted of venting the chamber into the exhaust, which vented at the forward end of the motor. We find no error in the court below holding the claims which were based on this mechanical change invalid.

So, also, in regard to patent No. 1,053,055, we agree with the court below in holding the claim of this patent was invalid. Carrying lubricants in a motor fluid was a well-recognized method of lubricating motors, and one of the incidental advantages disclosed by the use of Elliott's vented chamber was that, as compressed air passed from the piston chamber to the venting chamber, it oiled the bearing. Under the terms, "means for introducing lubricant into the motor chamber and causing it to mix with the motor fluid, whereby some of the lubricant will be carried to the rear bearing by pressure leakage," the patentee of No. 1,053,055 now sought to monopolize this well-known practice when it came to be applied to a motor with a vented chamber. If sustained, the practical effect of this would be that if one had a license to use Elliott's vented chamber, or, to put it in the words of his first claim, "in a rotary motor, a piston shaft, a rear bearing for said shaft, and air space adjacent to said bearing, and means for venting said space," and desired to lubricate such motor by the well-known method of air and lubricant mixture, he could not do so without paying tribute to another patentee for using that old and well-known method of oiling. We agree with the court below that the claim here in issue, numbered 10, is invalid.

Turning next to the infringement of the patent first discussed, viz., 1,045,134, the defendant's motor is shown in the accompanying drawing, in which number *11* is the front and number *12* the rear bearing, which has no outlet leading from the extreme end. Its construction, therefore, is like Van Ormer, in that the compressed air leaking along the rear shaft bearing would in time work its way back of the crevice between the shaft end and the thrust plate. But such

SECTION THROUGH EXHAUST PORT.

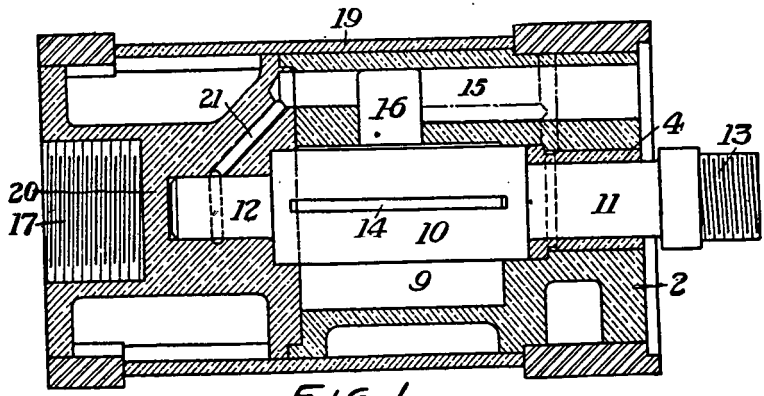


FIG. 1.

rearward passage of the air is prevented by the defendant journaling midway the groove shown in the figure, from which gathering groove passage *21* allows escape of the compressed air to the atmosphere. Since compressed air follows any avenue leading to normal atmosphere, it obviously could not further follow the bearing, so as to accumulate at the rear, but would take the path of least resistance, which it finds in the atmospheric vent. When the rearwardly traveling compressed air reaches the midway vented groove, it is shorn of its harmful power. The defendant's vent simply forestalls, midway of the bearing, what Elliott did at the bearing end. Unless physical laws be suspended it is obvious that if the defendant's vent were closed, and another placed at the rear of the bearing, there would be no functional difference in the substituted vent's power to relieve air compression. The relief of compressed air pressure lies in the fact of outlet, and not in outlet location or form.

The claims of Elliott's patent here in issue are variously described as an "air space adjacent to said bearing," "an air space at the rear end of the piston shaft," "the rear head having a vent opening therein communicating with the rear shaft bearing," "means for relieving the accumulation of fluid at the rear end of the shaft," etc. These several statements show that Elliott's venting disclosure had a wider range of appropriate description than the restriction of it to the one precise form in which he illustrated it and showed it could be practically applied. And, indeed, referring only to the single phrase, "an air space at the rear end of the piston shaft," we may fittingly quote the language of this court in Carnegie Steel Company v. Brislin, 124 Fed. 221, 59 C. C. A. 651, where it is said:

"Again, the claim of the patent in suit, as well as the description contained in the specifications, requires a feed roller table, pivoted at its outer end. Interpreted reasonably, this, of course, does not mean the very tip of the outer end, *but the functional outer end for the purpose of pivoting.*"

To our mind the defendant's outlet is at the functional end of the rear bearing, because it is there for the functional purpose of preventing objectionable air compression at the end of the shaft—for it is obvious, unless there was mid-shaft venting there would be end-shaft compression. So holding, we must adjudge defendant infringes.

[2] It remains to consider patent No. 983,032, granted to Elliott & Faber for a turbine. That patent we have discussed at length in an opinion of even date in Elliott Company v. Lagonda Company. By reference to such opinion we avoid needless repetition. As there shown, that patent is not for a turbine, or any form of motor, but concerns the second subdivision stated at the outstart of this opinion, viz., the motor-inclosing shell. In that regard the plaintiff's expert properly says:

"The invention is not particularly concerned with the theory of the operation of the motor, but relates to the construction of a casing and the manner of attaching the parts within the casing, so that the severe hammering action to which the machine is subjected may not loosen the connections. Consequently the invention is applicable to any form of motor which may be used to drive a boiler tube cleaner and enters the tube with the cleaner head. The particular feature of the Elliott & Faber invention (No. 983,032) is the

provision of the casing within which a ported stationary admission member carrying the rear bearing for the rotary element of the motor is located and held in place and securely locked by some means such that, when the locking member is removed, the stationary partition member may be removed from within the casing through the rear end."

It will be noted that the two claims here in issue [2] are directed to the particular features of an exterior casing for a dual bearing motor, the rear bearing of which is locked in the shell and is removable through the rear opening end of the shell when the holding means is unlocked. This feature of the patent was fully discussed in the opinion of even date above referred to. Placing claim 35 on defendant's structure, we find in such structure "a rotary motor having a casing." It has "a revoluble motor element within the casing." It has "a shaft supporting said motor element, and extending forwardly and rearwardly therefrom," and has the feature of "the forwardly projecting portion of the shaft having a bearing within the casing." Turning to the shaft bearing, we find that, like the claim, the defendant also has "a ported admission member carrying a bearing for the rearwardly projecting member of the shaft," and in screw-threaded and locked tie rods, not shown in this figure, but which clamp the two heads together, defendant uses "means whereby said member is normally held against rearward movement." And in this bearing member of defendant's motor, removable through the rear end of the casing when the tie rods are unclamped, it embodied the claim element of "said member being removable rearwardly from within the casing through its open rear end when the securing means are removed."

In accordance with the foregoing views, it follows that, in so far as the decree below dismissed the bill as to patents Nos. 1,019,771 and No. 1,053,055, it is affirmed; that in so far as it dismissed the bill as to patents Nos. 1,045,134 and No. 983,032, it is reversed. The cause will therefore be remanded, with instructions to reinstate the bill as to the two latter patents and to enter a decree adjudging claims 35 and 36 of No. 983,032, and claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, and 16 of No. 1,045,134, valid and infringed, and directing an accounting. The costs in this court and the court below will be divided.

[2] "35. A rotary motor having a casing, a revoluble motor element within the casing, a shaft supporting said motor element and extending forwardly and rearwardly therefrom, the forwardly projecting portion of the shaft having a bearing within the casing, a ported admission member carrying a bearing for the rearwardly projecting portion of the shaft, and means whereby said member is normally held against rearward movement, said member being removable rearwardly from within the casing through its open rear end when the securing means are removed, substantially as described.

"36. A rotary motor comprising a casing, a front bearing therein, a ported stationary member closing the rear part of the casing and containing a shaft bearing, said ported member being removable through the rear end of the casing, a shaft journaled in the bearings, a rotary element carried by the shaft and located between the bearings, and clamping means for locking the ported stationary member in place, substantially as described."

AMERICAN BRAKE SHOE & FOUNDRY CO. v. UNITED STATES BRAKE SHOE CO.

(Circuit Court of Appeals, Third Circuit. February 14, 1916.)

No. 1974.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—BRAKE SHOE.

The Gallagher patent, No. 651,031, for a brake shoe, claim 5, the gist of which is the reinforcement of the ductile metal lug of the prior Robischung patent by projections from the cast metal of the shoe, was not anticipated, is novel and useful, and discloses invention; also *held* infringed.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the American Brake Shoe & Foundry Company against the United States Brake Shoe Company. Decree for defendant, and complainant appeals. Reversed.

The following is the opinion of the District Court:

In this patent suit there is little difficulty in reaching a conclusion. The validity of United States patent No. 651,031, to J. D. Gallagher, under date of June 5th, 1900, for a brake shoe, is involved, as well as the question of infringement.

The function of brake shoes is to retard revolution of car wheels when pressed against them. Because of the needed friction, coarse cast iron is used in their construction. Because of the tendency of cast iron to fracture when subjected to heavy jars or blows, it has long been customary to cast the metal upon or around a plate or some other suitable piece of steel or wrought iron, which helps to form the back of the brake shoe, and at the same time has the function of preventing a substantial part of the cast metal, if it be fractured, from falling into a switch or frog of the railroad. The brake shoes are attached to the heads of the brake beam, and by the operation of the latter in some approved way bear against the surfaces of the wheels. As a means of attaching the brake shoes to the heads of the brake beams, lugs of various kinds have been made and used as an integral part of the brake shoes. If the lug were made wholly of cast iron, it would have a greater tendency to fracture than any other part of the shoe, because it is a comparatively small part of the brake shoe extending therefrom, and therefore liable to break when carelessly handled before keyed to the head, and because the key is driven in by a heavy hammer, thereby causing a strain at the top of the lug. It has therefore been customary to form the lug around steel or iron of some kind other than cast iron. Such other iron or steel in the lug has sometimes been of the same piece as that used in the back of the brake shoe, and has sometimes been of a separate piece, attached, however, to the other. In either case, however, the cast iron is under, around, and over the lug (except where the key is intended to enter), thus keeping the softer metal in proper shape, while the softer metal, on the other hand, keeps the cast iron free from fractures which would soon render the brake shoe useless.

Turning to the patent in suit, we find the patentee, in explanation of the nature of his alleged invention, uses the following language: "I have found after much experiment that a back for a brake shoe may be made out of mild steel and formed in dies, so that the back and all the fastening devices for attaching the shoe to the brake head are in one piece, that this back may be attached to a cast iron wearing face in such a way that the cast iron of the wearing face will reinforce the lugs or other fastening devices, thus stiffening them and insuring against bending, and this shoe thus made may be worn down until the back itself is wholly worn away, even down to the brake head. While I have used mild steel in my experiments, and consider it the best metal

to be used for this purpose, and shall use it in my description of the shoe, it is obvious that any other metal that is capable of being formed in dies and has sufficient toughness or tenacity may be used in its stead. I refer especially to metals capable of being formed in dies, for the reason that, while other methods of making the back of this invention may be used—such, for instance, as making them out of malleable iron—and such a back would, if the fastening devices were reinforced by a rigid metal, be within this invention, still I do not now consider such a back practical on account of its great expense."

The only claim relied upon by the plaintiff is claim 5, which is as follows: "5. A brake shoe having one or more fastening devices to attach it to the brake head made of a ductile metal reinforced in their projecting portions by projections from the cast metal of the shoe, substantially as described."

It is urged that that claim is broad enough to cover a construction wherein the plate of ductile metal and the loop of ductile metal forming the lug are not of the same piece, but are separate pieces. A careful reading of the entire patent and a study of the drawings made part thereof, fails to reveal a suggestion that Gallagher intended to disclose what the plaintiff now relies upon. The plaintiff has never made lugs upon the brake shoes manufactured by it in accordance with the design of the patent in suit. The ductile metal used by the plaintiff in the construction of the backs and lugs of the brake shoes manufactured by it is in two separate pieces, the part used for the back being in the form of a plate cut from sheet metal, and the part used for the formation of the lug being bent around the plate and all reinforced by the cast iron forming the entire shoe.

The Gallagher patent in suit, if by any possibility it can be deemed valid, is limited to the integral construction of the ductile metal parts. But the Gallagher patent was anticipated by United States patent No. 495,269, to Robischung, under date of April 11, 1893, for a brake shoe. What has been heretofore called a plate of ductile metal is called by Robischung in his patent a skeleton on which the shoe is cast. This skeleton (line 65, page 1, of his patent) "may be used conjointly with the lug *B*, or independent thereof, and may be integral with the lug (see Fig. 4), or otherwise connected therewith (see Fig. 6), as preferred." This is clearly a disclosure of all that appears in claim 5 of the patent in suit. There is no evidence in the case tending to show that the brake shoe of the patent in suit is better than the brake shoe of the Robischung patent. Indeed, the specific construction of neither is used to-day by either plaintiff or defendant. It is hard to understand how either of these patents could have been issued, unless it be that the Patent Office has not before it what is going on in the foundries and machine shops throughout the country. It is a matter of common knowledge that shapes of castings are infinite in their variety, and that, where strength is required in any part of a large or small casting, it has been customary to cast the iron around some other or different metal of selected quality and shape.

The bill must be dismissed, at plaintiff's costs. Let a decree be presented.

Frederick P. Fish, of Boston, Mass., and Paul Synnestvedt, of Pittsburgh, Pa., for appellant.

J. C. Sturgeon, of Erie., Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the bill in the suit before us, the American Brake Shoe & Foundry Company, the owners of patent No. 651,031, granted June 5, 1900, to Joseph D. Gallagher, for a brake shoe, charged the United States Brake Shoe Company with infringement thereof. On final hearing the court below held the patent invalid. From a decree dismissing the bill, the American Company took this appeal.

Gallagher's patent concerns brake shoes for cars and locomotives. The strains on such shoes in the heavy equipment of modern railroading are enormous, the proofs showing that they are forced against the wheel with as much as 20,000 pounds pressure, and the wheel drag on them is from 2,000 to 5,000 pounds. Cast iron has proved best adapted to meet this strain. Prior to Gallagher's device, the cast iron shoes in common use were cast with an integral cast iron lug. By means of a key passing through an opening in such lug, the shoe was attached to the brake beam.

The objections to a cast iron shoe are shown in the testimony. Speaking of the action of air brakes, a witness says:

"The shock to the brake shoe was such that it was very apt to break at the angle formed by the lug and the back of the shoe, that being always the weakest place in the casting, and it would also break when worn thin or worn half through; it was liable to break anywhere and the result of the break was that the broken portion, which wasn't attached to the break head, would fall onto the track, and might get into a frog, and repeatedly accidents happened."

To increase the life of the shoe, chilling the cast iron was tried. This developed further weakness, the testimony being:

"When the shoes were chilled the top of the lug, which was only three-eighths of an inch thick, and sometimes, due to rather poor work, not so thick, they would be apt to break through in throwing on the heap or in the keying of the brake shoe to the head. That key is driven in by a heavy hammer, and of course the strain is up against the top of the lug. Now, if this is a little weak, that would be cut out by the leverage, the wedge action."

The patentee in his specification fairly sets forth the mischiefs incident to cast iron lugs, when he said:

"There has been a great tendency of the fastening and other lugs on these shoes to break either under the strain of service or in handling the shoes during the shipment, and this has been especially true of chilled shoes, owing to the character of the metal from which they are necessarily cast."

Attempts were made to overcome this difficulty. These are fairly summarized in the application of the patent:

"Some inventors have inserted in the casting rods running longitudinally of the shoe, some steel mesh and some wires, while others may employ backs of malleable iron [this manifestly refers to Robischung's device, referred to below], wrought iron, or steel. All of these devices have the effect of more or less strengthening the shoe and of rendering less liable a break across the shoe, but none of these has done so perfectly, and most of them have been so expensive as to prevent their use. All of them have had either one or two serious defects—either no attempt was made to make the lugs on the back of the shoe of ductile metal, in which case they retained their liability to break off in use or handling; or the lugs were formed wholly of ductile metal, in which case the lugs were exceedingly apt to be bent in the rough handling that such castings undergo before use, and when it was attempted to attach them to the brake head they would not fit, and were therefore useless.

In view of these difficulties, the patentee well said:

"The ideal shoe, of course, is one which is practically unbreakable in handling or when worn thin, and one which at the same time cannot in any part be bent out of shape by rough usage, and which can also be cheaply made."

These three factors—first, practical unbreakableness; second, nonliability to bending; and, third, cheapness—were, as we shall see, all happily met by the device of the patent in suit. Before turning, however, to the mode in which Gallagher sought to overcome these difficulties, reference should be made to the attempt of Robischung, in patent No. 495,269, granted April 11, 1893, to solve one of these difficulties. By reference to that patent, it will be seen that Robischung inserted in his shoe castings a back of malleable iron or steel, which strengthened the shoe; but this attaching lug made the shoe impracticable, because, being made entirely of ductile metal, it was liable to bend. And it is apparent that, when the lug is bent, its key opening will be out of alignment when the key is attempted to be inserted. That Robischung made a valuable contribution to the art, in imbedding in the body of the back of the brake shoe a ductile metal back, is quite apparent, and in that respect Gallagher made no additional contribution to the art; but it is equally apparent that, if the development of the art had ended with Robischung's ductile metal back, the art would still be using brake shoes of the old type, as indeed it did for the seven years from 1893, when Robischung's patent was granted, until 1900, when Gallagher patented his device. This patent of Robischung was bought by the plaintiff in this case, and attempts were made, without success, to commercially introduce it. In that respect the uncontradicted testimony of Gallagher, the present patentee, is:

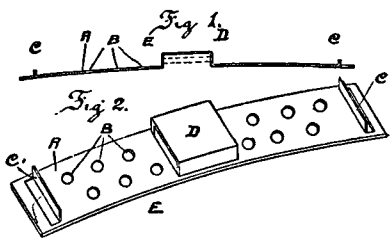
"Robischung described and claimed a perfect commercial back, because he made it of any kind of malleable metal, and there has been no material improvement on the Robischung patent back since his patent; but his lug was impossible. I had used in experiments in the Lappan Company malleable iron hooks on drivers' shoes, to make a form of attaching them, and they were impracticable. They took up too much space. The Robischung lug was too massive. Insert that in a shoe, and it goes down, in order to get a perfect grip, half to three-quarter ways the width of the shoe, and it renders the shoe so fragile that it is of no earthly use. That is one of the Robischung shoes. If I would take that and drop on it another shoe, it would break right in two. Q. You mean the lug? A. Yes, right over the lug."

From this testimony it will be seen that although Robischung's patent was purchased at a large price, and attempts were made to use it, while it had some valuable suggestions, it resulted in no practical brake shoe, and had made no impress whatever on the art in the seven years following its grant. Recognizing the desirability of the ductile metal lug as one which would not break when keyed up or bend in handling, Gallagher's idea was to retain Robischung's ductile back and ductile lug, and in this way secure the lug and body toughness requisite to prevent breakage. But he went a step further. He overcame what Robischung had not, and what made it a failure, viz. the liability of Robischung's ductile lug to be bent out of shape, and so prevent its alignment with the key. Gallagher, therefore, introduced the wholly novel idea of reinforcing the ductile lug with metal raised from the cast metal of the shoe. This simple and novel cast metal lug reinforcement gave the ductile lug the stiffness necessary to prevent it from bending. In essence, Gallagher's device was coupling ductile metal lug strength with cast metal lug immobility. His mere mechanical

change was small in size, but large in function, in that he changed from an unsafe to safe agency the link between the brake shoe body and the brake beam. This link, strong in its tensile and unbreakable in its cast iron metal, made a dependable connecting link, which in a novel and efficient way coupled the brake shoe body to the power.

The device of Gallagher centered in his reinforced lug. This reinforced lug was his contribution to the art, and it was cast iron reinforcement that made possible the elimination of a breakable cast metal lug. He took the metal back of Robischung, but, instead of adopting his ductile lug, he reinforced it with cast metal, and thereby solved the problem. The gist of Gallagher's device, and of the claim here in issue, consists of fastening devices "made of ductile metal reinforced *in their projecting portions by projections from the cast metal of the shoe.*" This is freely admitted by the witness Gallagher, whose testimony is:

"Q. You have stated that you purchased the Robischung patent while you were connected with the complainant company. Do you recollect at this time what you paid for this patent? A. I paid $25,000 for it. Q. I further gather from your testimony that in your patent here in suit you don't pretend to describe any improvement on the Robischung back, do you? A. No, sir. Q. As I understand, your invention consists of an improvment of the Robischung lug? A. Wholly. Q. You practically use, and have used since the purchase of this Robischung patent, the Robischung back, have you not? A. Yes, sir. Q. Did you ever use the Robischung lug as described and shown in the Robischung patent? A. Never."



Referring to Gallagher's patent, it will be seen he provides a back *A,* made of a tough steel, which is pressed by dies into the various shapes shown in the several figures. This back contains openings *B B,* through which the molten metal may flow in casting, and has a central lug *D,* passing through the keyhole *E* of which the shoe is keyed to the brake head. Gallagher's preferred method of casting his shoe and obtaining the desired amount of molten metal to reinforce the ductile metal lug is thus set forth in his patent:

"I prefer to do this in the following manner: I first prepare the mold just as I would if I intended to make a solid cast iron shoe, only I have on the pattern small bosses corresponding with but larger than the holes or the rectangular apertures *B B* in the back. When the mold is formed, I insert into the mold at the back or top of the shoe the back, being careful to so place it that, where narrower than the shoe, the iron will flow around its edge and imbed it firmly in the cast metal, and insert in the keyhole *E* a core of the exact size of the required keyhole, and I anchor this back in any of the usual ways. When this is done, I close the mold and pour in the molten iron, which forms the body *F* of the shoe. This molten iron flows through the holes behind the end lugs *C C* and forms a backing or reinforcement for these lugs, as shown by the dotted lines *G G* in Fig. 5. It also flows through the holes or rectangular apertures *B B* and into the depressions behind them, made by the small bosses on the pattern, and forms the bosses shown at *H H* in Fig. 5. It also flows up into the lug *D* around the core *R* and reinforces

the steel shells of the lug *D* as shown at *I* in Fig. 5. It also flows around the edges of the back where narrower than the shoe."

The result of this operation is summarized by Gallagher in this statement:

"Thus in this one operation I both firmly attach a back to the face of the shoe and I also strongly reinforce and stiffen the lugs on the back on which the greatest strain comes in service and in handling."

On this device the claim here in issue, 5, was granted for:

"A brake shoe having one or more fastening devices to attach it to the brake head made of a ductile metal reinforced in their projecting portions by projections from the cast metal of the shoe, substantially as described."

In making its commercial shoe, the complainant has in the assembling and casting of the shoe availed itself of the Robischung device of assembling the lug and the supporting back separately. But this separation ends while the shoe is being cast, for when ready for use the cast metal makes a unitary structure of back, lug, metal body, and metal lug reinforcement. This is quite fully set forth in the testimony, where Gallagher says:

"If I understand the question correctly, you mean to ask me what invention is in my patent over the Robischung. The invention lay in taking the uncommercial idea and making it commercial. The Robischung device, so far as the back alone was concerned, was commercial. The Robischung device, so far as the lug was concerned, was impossible, both from the standpoint of mechanics and from the standpoint of cost. I took the general Robischung idea and made a commercial product. Now, you might think that the mere bending up of the back or the forming of a steel lug was all that was necessary; but that is not true. If you form the back with the lug, as is shown in one of the figures of my patent, or if you use a separate steel loop, as I subsequently used in the commercial making of the shoe, and did nothing more, the back or lug, unprotected, projecting from the cast iron, was altogether too fragile for its service use. It might be very pretty in a picture, but it wouldn't do in service. In order to make it serviceable, in order to enable its use in a commercial way, that ductile metal back or lug had to be stiffened by some metal, and the obvious metal to use was the metal of the shoe. Now, in order to make the thing commercial, I took the cast metal of the shoe and brought it up into and around the steel lug. That stiffened the steel lug, and that is the invention of the patent."

The device has gone into extensive use. The proofs show that:

"We made in 1902 probably half a million to a million of shoes. * * * Since 1902 we have made over fifty millions of those steel type reinforced lug shoes, and a number of millions of shoes that had modifications of that, but steel reinforced backs and lugs, which are not included in that fifty million. The result has been that the old form of shoe with a cast iron lug has practically disappeared from the market, except under certain minor individual uses."

In our judgment, Gallagher's device was novel, useful, and inventive, and his fifth claim valid.

Turning to the question of infringement, we find the body of the defendant's shoe is made of cast iron, in which is embedded a wrought iron back extending the length of the shoe. The defendant's lug consists of a strip of wrought iron, which is looped around the back plate and projects above the body of the shoe. When the shoe is cast, this

loose metal lug becomes fixed in place, and is reinforced by projections of the cast metal of the shoe, which not only fill all the space within the loop not occupied by the keyhole, but also reinforce it externally. The test of the alleged infringement is the finished structure ready for use. In that respect, we have in the defendant's brake shoe all the elements of claim 5, namely, the "brake shoe, having one or more fastening devices to attach it to the brake head, made of a ductile metal reinforced in their projecting portions by projections from the cast metal of the shoe, substantially as described." The mere fact of the loop and back being separate before casting, and in the form shown in Robischung's device, does not relieve it from infringement. If the defendant confined itself to Robischung's device of a simple tensile metal lug, it would not infringe. But it did not stop there. It took Robischung's separable ductile metal lug, and reinforced it with Gallagher's projections from the cast metal of the shoe. The result is that, when its shoe is in permanent usable form, we then find the ductile separable loop is fixedly seated in place, and is reinforced in its projecting portions from the cast metal of the shoe. No matter what its initial form, it is this final reinforcement of the projecting portions of the ductile loop by cast iron from the body of the shoe that determines its infringing character.

Finding both validity and infringement, the decree below must be reversed, and the record remanded, with directions to enter a decree adjudging the fifth claim of Gallagher's patent valid, and ordering an accounting.

HANSEN v. SLICK.

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

No. 1953.

1. PATENTS ⊂=328—INVENTION—METHOD OF REWORKING WORN FORGED CAR WHEELS.

The method of reforging worn car wheels embodied in the Slick patent No. 1,055,672, *held* not to disclose invention in view of the fact that the reshaping is done by the use of the presses previously invented and used to press new wheels from steel blanks and by substantially the same operation.

2. PATENTS ⊂=51(1)—PATENTABLE "INVENTION"—PRODUCT OF TECHNICAL SKILL.

Modern conditions have made high engineering and mechanical skill ordinary incidents in many industries, and in such highly developed broad arts it is not everything that is beyond mechanical work that is to be deemed invention, but the general public for whose benefit the patent system was created are entitled to the benefit of such technical skill as an incidental advance of commercial pursuits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66, 67, 69, 74; Dec. Dig. ⊂=51(1).

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

3. PATENTS ⊂=51(1)—PATENTABLE INVENTION—MECHANICAL SKILL.

Substantial advance, marked improvement, progressive steps in an art, however beneficial, are not in themselves evidence of invention, but are

to be expected, and as the art progresses more engineering skill, more mechanical progress, but less invention, are naturally to be looked for.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66, 67, 69, 74; Dec. Dig. ⊂=51(1).]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by John M. Hansen against Edwin E. Slick. From a decree dismissing the bill, complainant appeals. Affirmed.

For opinion below, see 216 Fed. 164.

James I. Kay, Robert D. Totten, and Kay, Totten & Powell, all of Pittsburgh, Pa., for appellant.

C. C. Linthicum and Franklin M. Warden, both of Chicago, Ill., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. [1] In this case a bill in equity, under the provisions of R. S. U. S. 4915 (Comp. St. 1913, § 9460) was filed by John M. Hansen against Edwin E. Slick. The bill alleged that Hansen was the first inventor of a method of reworking worn forged car wheels, and applied for a patent therefor on June 13, 1908; that he was thrown into interference on certain claims with Slick, the outcome of which was that the Court of Appeals of the District of Columbia decreed said Slick was the first inventor, whereupon a patent was refused Hansen, and patent No. 1,055,672, was granted Slick. The bill prayed that Hansen be decreed adjudged entitled to a patent, that the Commissioner be authorized to issue one to him, and that Slick be perpetually enjoined from asserting any claim to the alleged invention. On final hearing, the court below, in an opinion reported in 216 Fed. 164, held Hansen was the first to invent the method; that he acted with due diligence in reducing it to practice, but that it did not involve invention. It thereupon entered a decree adjudging that as between the parties Hansen was the prior inventor, but that the bill be dismissed "because the subject-matter in issue in this case is not patentable to either of the parties." Thereupon Hansen took this appeal.

As the question of invention is fundamental, it will be first considered. The subject-matter of this controversy is the steel wheel used on railroad cars. In the past the wheels in common use were cast iron; but, with the development and cheapening of steel, the steel car wheel entered into use. Following this, Mr. Hansen and his associates conceived the idea that car wheels could be pressed from blocks of steel in powerful presses. They accordingly designed such presses, obtained patents for them, and began the construction of such presses and works suited for their operation. It was during this designing and constructing period the idea occurred to Mr. Hansen that, as their presses were fitted to initially press a steel car wheel from a block of steel, they were equally well suited to reform or repress a wheel that had been once used, and thereby fit it for use again. As the practice of initially pressing a wheel from a block was well known, it will be apparent that the only thing new in repressing

was the idea of repressing, and not the method of doing it. Whether used to press or repress, a car wheel press operated in the same way. Take, for example, the generic claim for reshaping which was in interference, viz.:

"The herein described method of re-forming a worn car wheel, consisting in heating the worn wheel and forging the same to increase the diameter and reshape the tread and reshape and thicken the flange."

It is evident that the operation here described is precisely the same in function as in original pressing, and the only difference in product is that, when a block of steel is used as the blank, the product is a new shaped wheel; but when a worn wheel is used the product is a reshaped one. In both cases the method and function employed is the pressure of an immobile exterior die to an interior mobile piece of steel; in one case a steel blank, in the other a worn wheel. Moreover, it will be seen that obviously the instant there was conceived the idea of reshaping a worn wheel the invention, if invention there was, was complete, and, with the known ways of pressing car wheels then in existence, there was no call for further inventive originality in finding a way to do it.

It will further appear that the practice of placing some extra reserve metal on some part of the wheel when originally made, which reserve metal could be used to make up for wear, a practice which both parties contend evidences invention, was not a part of the original conception. Turning to the proof, Hansen's testimony shows that, when he got the idea of repressing an old wheel, that and that alone constituted the invention. The test was simply the use of recognized agencies to carry out the plan. Thus Hansen says:

"When the idea of reforging worn car wheels occurred to me, that is, by forcing the metal in the rim outwardly and the hub inwardly, the whole thing was done, as the very die processes which we had been working on and in accordance with which we proposed to make new wheels, would apply to this reforging process. We, of course, knew the requirements of the railroads and buyers of wheels, that is, that they would require different thicknesses of rims and different sizes of bores, and as we developed the die system they were made with this in mind, and as an illustration, take a car wheel which had been made on our 2¼-inch rim dies, the same wheel could be reforged on our 1⅞-inch rim dies."

So, also, in speaking of his telling the witness Bierman of his plan, Hansen says:

"I remember saying to him at the time that the thought occurred to me that by our system of car wheel forging we are able to reforge worn wheels."

Referring to Hansen's first disclosure to him, Christianson, the chief engineer of the Forges Steel Wheel Company, who was preparing the plans for the presses for pressing wheels, says:

"I thoroughly understood what Mr. Hansen had in mind as well as if working drawings had been made for this purpose, and it didn't seem any difficulty whatever to me, inasmuch as the dies we had already designed would do this work. * * *

"Q. 38. Do you mean that you talked this over about making the reforging part of your scheme for making forged steel wheels on the day that you showed him the completed tracing of the tempering device, that is, August 11, 1906? A. I understood it so, yes.

"Q. 39. And did you talk over including this as part of the general scheme at other times after your first conversation on the subject of reforging car wheels? A. Yes, Mr. Hansen brought that question up several times; that is, he would try to reforge a wheel as soon as he had an opportunity to do so. However, this did not impress itself very forcibly on my mind on account of having all the appliances necessary to do his work already designed. In other words, it required no further consideration on my part."

That the subsequent manufacture of the wheel was a process of mechanical detail, the usual process of getting the die and the metal properly adjusted and proportioned, is apparent from Christianson's testimony:

"Q. 55. About when did they succeed in producing a full-sized wheel? A. On the 25th of May, 1908, we got ready to press the first full-sized wheel, and in this first experiment we found that we did not get the wheel complete. There were many imperfections, and amongst other things we did not succeed in getting a full hub; nor did we get a full tread and flange. The web of the wheel was fairly well formed. The broken outline shown on 'Hansen's Exhibit Drawing of First Wheel Pressed' shows the contour shape of the wheel we attempted to make. The continuous irregular line *B* shows the wheel we made. The line *C* shows the wheel we finally succeeded in making in conjunction with the broken line. In other words, by change of the dies we took the material as originally forged from back of the rim, such as at *D*, and caused it to fill the upper part of the die as at *E*, and we took the metal back of the flange, as at *F*, and caused it to fill out the flange as at *G*.

"Q. 56. About when did you succeed in producing a complete wheel, and was it exhibited any place? A. We succeeded in producing the first really perfect wheel about the 10th of June, 1908. I recollect us having to express, or having to send the wheel by express, to the Master Car Builders' Convention at Atlantic City, which opened the 16th of June, 1908.

"Q. 57. Did you have a number of experiments working with the dies and changing their shape to produce what you call the really perfect wheel? A. Yes, we had quite a good many.

"Q. 58. Were any changes made in the size or weight of the blanks? A. Yes, a good many changes were made also in the thickness of the blanks principally at that time. By forging the wheel we found that quite a lot of the material got lost somewhere that we could not account for, and in consequence we did not get full tread and flange of the wheel. To remedy this, and in order to be able to use the blanks provided, we changed the dies so as to increase the thickness of the rim in order to get sufficient material to fill out the tread and flange." * * *

"XQ. 66. Did Mr. Hansen after August 11, 1906, disclose any other or further features of the proposed reforging method than those which he mentioned in the first talk in August, 1906? A. No, there was no other matter talked of, and the subject was to me at all times very clear as to what was meant."

That Hansen's idea was an addition of dies and presses then planned is also proven by Christfield, the mechanical engineer of the company, who says:

"A. About the latter part of July, 1906, Mr. Christianson handed me a sketch showing an idea of Mr. Hansen for a tempering device to temper the tread and flange of wheels by means of water working against the tread and flange. I understood at that time that this device was for the purpose of prolonging the life of the wheel. This sketch I laid aside for the present, as I was very busy designing or working up detail drawings, schemes, etc., of machinery, which was to enter into the manufacture of forged steel wheels. About August 9, 1906, Mr. Christianson came to me and told me to drop everything that I had in hand and proceed with making a drawing for the tempering device referred to. This drawing was completed on August 11, 1906, and is the drawing 'Hansen's Exhibit Drawing August 11, 1906.' On that day Mr.

Hansen and Mr. Christianson were in my office at Butler, and, in speaking of the merits of the device, Mr. Christianson made some objection, stating that he thought that by cooling the tread in this manner it would work hardship on the web of the wheel, in a sense it would weaken the structure at that point. Mr. Hansen then made the suggestion that we reforge the wheels, and in making this suggestion he took his pencil and marked on the tracing the probable wear from service, and also the manner in which we could arrange our dies for reforging. I remember distinctly at the time that he made this remark, and in showing how this could be done, that he said it was an easy matter for us to reforge wheels, as it was practically a part of our process of manufacture, and all that would be necessary would be to increase the upper or central die in diameter outward and decrease the diameter at the hub. The same would apply to the bottom dies, by increasing the diameter of die back of the tire and decreasing the diameter of die at the hub. As stated above, he so marked the drawing.

"Q. 18. What effect did Mr. Hansen say this reforging would have upon the worn wheel? A. He stated that this would prolong the life of a wheel by forcing it to its original diameter. The railroad companies would get more use from the wheels.

"Q. 19. What effect did he say it would have upon the tread and flange? A. I cannot recall him saying just what effect this would have upon the tread and flange, except that by forcing outwardly it brings the wheel to its original diameter and can be returned and placed in service.

"Q. 20. Did he state why he wanted to reforge the hub portion inwardly? A. Yes. The reason for reforging the hub inwardly he stated it would decrease the size of the bore or wheel fit, thereby giving sufficient metal to rebore, and the wheel then could be placed upon the axle from which it was taken."

Christfield also shows the subsequent steps consisted of manufacturing details:

"A. Our first experiment was made on May 25, 1908, as shown in 'Hansen' Exhibit Drawing of First Wheel Pressed.' While this wheel did not come up entirely to our expectations, we were pretty well pleased with what we had developed, and proceeded to change the size of blank to enable us to more readily fill the area required to make a perfect wheel."

In the argument of the case, great stress is placed on the fact that, as now made, steel car wheels have a reserve of metal in the web of the wheel which in repressing is pressed into the hub and tire; locating this reserve metal in the new wheel is urged as evidencing invention. But that this was not part of the original conception, but an obvious mechanical expedient, which subsequent manufacturing developed, is shown by the proofs. In that regard the testimony of Christfield is:

"XQ. 44. On August 11, 1906, when Mr. Hansen first disclosed this reforging idea to you, did he say anything about providing an excess of metal then? A. There was nothing said about providing any excess of metal for the purpose of reforging wheels. His idea was, as I understood, that we would take any wheel that we made, and after same had been in service would reforge the wheel, bringing it to its original diameter of tread and flange, filling out the tread and flange to its original line; also, would make the bore or eye of the wheel to its original diameter before same had been worn, by increasing our dies at the back of the tire both top and bottom, and increasing the metal of the same dies at the hub, thereby decreasing the diameter of the hub, this would make the rim of the wheel less in thickness, the diameter of the hub less in diameter, the diameter of the bore or eye of the wheel less in diameter, which would permit boring the wheel and placing it upon the same axle from which it was removed."

In other words, the original dimensions were to be restored, not by using reserve metal, but by the use of dies of increased proportions.

To the same effect is the testimony of Allman, manager of the works, who says:

"A. During the building of the furnaces and the gas flues, Mr. Hansen was in Butler, and during a conversation he mentioned to me that he had an idea for reforging wheels which were worn in service to bring them back to the original diameter. * * * During our conversation, I asked him what his ideas were, and he took a piece of paper from his pocket and sketched off a wheel, and then drew new lines on the inner part of the rim, top and bottom, and the outer part of the hub, which would increase the diameter of the wheel on the inside and decrease the diameter of the hub on the outside, and he said that by using the original sized piercing tool the wheels could be rebored for wheel fit."

The testimony of Bierman, the secretary of the company, makes clear that Hansen's idea was to press an old wheel by reducing the thickness of the rim and then enlarging the inner diameter. In that regard, he says that Hansen said:

"That one of the things that was possible with our method of making wheels was that after a wheel had been worn we could take and use dies for forcing out the rim and of course reducing the thickness of the rim in doing that, and he said that we could take what we called our two or three wear wheel and and reforge it into what we called our one wear wheel or 1⅞-inch rim wheel, and he made a sketch at the time showing what he meant."

His testimony is that Hansen likened his proposed process to the repressing of rails, saying:

"He spoke of it on possibly three or four different occasions, at one time also saying that the same idea could be applied to the reforging of worn car axle, and that a worn rail could also be brought back to its original surface by using rolls, providing in the first place there had been enough metal provided at the back of the head of the rail to permit of doing that."

[2, 3] Did this change involve invention? The question of invention is a relative one and is to be considered, not as an abstract theory, but as a concrete, practical question in a particular art. Modern conditions have made high engineering and mechanical skill ordinary incidents in many industries, and such technical skill is to be regarded as the incidental advance of commercial pursuits. It follows therefore that such advance in the art as results from this skill the public is entitled to avail itself of as a fruit of mechanical growth and advance. In such highly developed broad arts it is not everything that is beyond mechanical work that is to be deemed invention; but the general public, for whose benefit the patent system was created, are also entitled to the benefit of those who are skilled in such art. "Invention" is what rises to a higher plane than skill, both engineering and mechanical. It will therefore be seen that when it comes to a question of monopolizing for 17 years the fitting of worn car wheels to further use, such monopoly should be restricted to such novel acts as are beyond the sphere of skilled engineering and mechanical steps in such art. Moreover, we must not lose sight of the fact that one of the usual way marks of invention is that it generally follows futile ef-

forts of those skilled in an art to solve some recognized difficulties. Substantial advance, marked improvement, progressive steps in an art, however beneficial, are not in themselves evidence of invention. They are to be expected, and, as the art progresss, more engineering skill, more mechanical progress, but less invention, are naturally to be looked for. It is when skill and progress stop abreast of an obstacle that inventive genius intervenes and invents.

Applying these principles to the case in hand, we are clear that the conception of reshaping steel car wheels, for which Slick and Hansen here contend, was the result of progressive manufacturing thought applied to the new problems incident to the use of pressed steel car wheels. Such wheels had come into use and in many ways had proven their superiority over cast wheels. The objection to them was their cost. The matter of reshaping and reusing steel articles worn by service was new neither to the mechanical arts generally nor to railroad practice in particular. That a steel appliance could be reheated, repressed, and made fit for reuse, was a well-recognized principle in the steel art. It is true that a man might devise some particular kind of heat treatment or some particular mechanical means of pressing, and cover such a particular way of doing it; but for any one to blanket, in any particular steel art, the whole subject of using pressure to reform or reshape worn appliances in that art, would be to retard instead of stimulate advance therein. Yet that is exactly what is sought to be here done, for, taking the claim we have already quoted in substance, it is a sweeping claim for repressing worn car wheels, since it is obvious that no wheel can be repressed unless it is done by "heating the worn wheel and forging the same," and no such pressure can be exerted which, if the die allows it, will not "increase the diameter of and reshape the tread, and reshape and thicken the flange."

Now the use of dies and rolls in the steel art for the general purpose of redistributing metal to fill worn surfaces was well known. The use of steel rails on railroads had already suggested the economic necessity of rerolling worn rails instead of selling them for scrap. This had resulted in building up a rerolling industry that had grown to such proportions as to warrant the court in the United States Steel Case (D. C.) 223 Fed. 55, citing it as one of the factors preventing control over steel rail prices, viz.:

"It will also be noted that the practice of rerolling rails, an industry that has lately sprung into existence (volume 10, p. 4028) and grown to large proportions, enables railroads to have old rails rerolled into lighter sections, has, in its simple mills, created another factor by which the railroads can protect themselves."

Without entering into details, it suffices to say that the general mechanical means used to press a worn car wheel are similar to those used to reroll a worn out steel rail. For illustration, take patent No. 522,228, for a process of renewing old steel rails, granted to McKenna in 1894, 12 years before Hansen. It clearly points out the practice in rerolling of transferring metal from one part of a rail to make up a worn place in another part. Thus the patent says:

"My invention is intended to take advantage of the discovery I have made, which is that, when rails are taken from the track as being no longer serviceable, a very small proportion of the metal has been lost by attrition, but the rails have become unserviceable owing to the displacement of the metal by the blows of the wheels in passing over them. Therefore, in adapting these rails to further use, it is only necessary to replace the metal thus displaced and to reduce the cross section slightly, keeping the rail of a standard height, so that the renewed rail will be adapted to be used interchangeably with original rails."

This patent shows the general problem of rerolling steel appliances had been taken up by railroads, and that its method of doing it involved the practice of redistributing metal. That the mechanical principles used were the same in rerolling a rail, reshaping a car axle, or repressing a car wheel, was recognized by those familiar with the art, and is shown by the testimony of Bierman quoted above, who in that respect said that Hansen, when explaining his conception, said:

"That the same idea could be applied to the reforging of worn car axle, and that a worn rail could be brought back to its original surface by using rolls, providing, in the first place, there had been enough metal provided at the back of the head of the rail to permit of doing that."

In that regard we think the original view of the Patent Office was right, when, refusing to accept this device as involving invention, the Examiner reported:

"For applicant to apply substantially the same method to the reworking of a car wheel which has sufficient metal in any of its portions is considered to be obvious, especially in view of the fact that it is old to rework a rail in order that it may be again utilized."

Moreover, this conclusion is in harmony with other facts in the case. There was no long-felt want in the art, no period of abortive experimenting. As soon as the steel wheel became a part of railroad equipment and the need of some reduction in price to enable it to compete with cast wheels had become a necessity, the situation was promptly met by two independent skilled minds in the art, and that without approach through experiment; Hansen seeing that the patented presses, then designed, for originally shaping the original wheels, could be utilized for reshaping them when worn, and Slick in the same way realizing he could do it by the use of rolls. That two men, skilled in the car wheel art, should each independently, at once and without experimentation, see the feasibility of reshaping worn wheels by substantially the same general mechanical pressing means, is in itself suggestive that the skill of the art was sufficient to meet the situation without recourse to the field of invention; and that Hansen so regarded it, and that he was subsequently forced to patent, in self-protection by Slick's attempt to patent it, is to our mind rather indicated by the proofs. We have already shown by the uncontradicted testimony that when Hansen made his conception in August, 1906, he regarded it as complete and perfect, so that he and those to whom he disclosed it understood it perfectly. Indeed, the presses to carry it out were already designed. That he was then in position to apply

for a patent if he felt he had made an invention, and that experimentation, test, or practical reduction to practice were not prerequisites to an application, is simply and uncontrovertibly shown by the fact that without any such acts he subsequently did apply for a patent in 1908. In view of these suggestive facts, we incline to the view that Mr. Hansen merely regarded the reshaping of worn car wheels as a further use and possibility of the great presses they were then constructing, and that Slick's subsequent attempt to patent worn car wheel reshaping and blanket the whole art, drove Hansen as a self-protecting step to show that if, as Slick contended, the device involved invention that he (Hansen), and not Slick, was the first to conceive it. Indeed, the attitude of mind of one who believed he had made an invention, and that he would patent it, is not testified to as being Mr. Hansen's when, as Christfield testified, Mr. Hansen told him of his idea, left a drawing embodying that idea with the witness, with the remark "that I should keep this idea in mind and at some future date, when we had an opportunity, to reforge worn wheels that had been in service, we would then give the idea a test."

It must not be overlooked that this case is one which calls for close scrutiny by a court before decreeing the validity of either Slick or Hansen's claim to patent monopoly. Both of them are interested in asserting the device involved invention, and no one before the court is interested to contest it. Standing as the court must under such circumstances as the only protection this great art has, to see it is not subjected to unwarranted monopoly, we have felt constrained to set forth our views at length in support of the very able opinion of the court below, instead of affirming the case, as we might well have done on that opinion. Without quoting at length from such opinion, we may say we concur with the views expressed by Judge Orr when he said:

"It is, of course, beyond question that the reshaping of old car wheels to allow of their use in the same manner as new wheels are used and in association with new wheels is of great value. The measure of economy, while not definitely fixed in the evidence, must surely be great. It is true that the treatment of worn out car wheels does not appear to have been adopted, or even considered as feasible, until about the time the parties to this suit filed their applications in the patent office. This court has concluded that the reason for the failure to reshape worn out car wheels was the doubt that existed as to the durability of the reshaped wheel. This is fairly found from the evidence when taken in connection with the disclosures of the prior art.

The retreatment of metal articles, which have already been subjected to heavy use, has always presented the problem as to whether or not, after retreatment, the mechanical and physical properties of the metal remain the same. In other words, it was doubted whether a different crystallization or a different chemical relation might not exist in the retreated article which had not existed in the article as originally made. Such doubts could only be resolved by careful tests, and especially by the important test of use. So far as the flow of metal is concerned, no doubt has ever existed that metal at greater or less degree of heat would flow under pressure. * * *

"The evidence discloses that used articles of steel and iron have been retreated to bring them again to the necessary length, and that others have been re-treated to bring them again to the necessary width. That others again may be brought to the same circumference was to be expected. A

search of the patent for something peculiar in the treatment proposed by the patents is in vain. The used wheel 'is reheated to the ordinary forging or rolling temperature.' Pressure is then applied as needed. If the process of rolling be used, the pressure of the rolls is given as required. If the process of forging by dies is used, the same is true.

"In the consideration of the question here presented with the utmost care and with a realization that all the witnesses called were favorable to invention, yet the court cannot find anything substantially new in the patent. The use of great presses is old. The use of dies with different shapes with which the pressed metal is bound to conform is old. The only thing that is new is the fact that people began to use old processes in order that old wheels may be renewed and subjected to a longer life. The treatment of worn out car wheels was a mere step in the art of subjecting metals under pressure to force them to reach the desired dimensions. That such treatment has resulted in great economy should not control the judgment of the court upon the question of invention. * * * It is therefore the duty of the court to dismiss the bill because invention is not found."

The decree below dismissing the bill on the general ground the patent lacks invention will be affirmed. This view renders it unnecessary to decide the question of priority between the parties.

WALKER BIN CO. v. C. SCHMIDT CO.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1916.)

No. 2667.

PATENTS ⊂=211(2)—LICENSE—CONSTRUCTION OF CONTRACT.

A license contract under a patent *held* terminable at will by either party, and defendant *held* liable as an infringer after the revocation of the license by complainant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 307–309; Dec. Dig. ⊂=211(2).]

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

Suit in equity by the Walker Bin Company against the C. Schmidt Company. Decree for defendant, and complainant appeals. Reversed.

Ernest Howard Hunter, of Philadelphia, Pa., and Guy W. Mallon, of Cincinnati, Ohio, for appellant.

C. W. Miles and Pogue, Hoffheimer & Pogue, all of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This case, while in the ordinary form of an infringement suit, actually presented to the court below the single question whether a once existing royalty contract between the parties remained in force and left defendant liable only as a licensee for that accruing royalty which it was quite willing to pay. The case thus

turned upon the rightfulness and effectiveness of plaintiff's attempted cancellation of the so-called license. On this issue the court below found for defendant, and dismissed the bill; plaintiff appeals.

The terms of the royalty contract are found in a series of letters exchanged; and the question is: "Did the parties intend to make a contract for the full term of the patent, or intend to make one revocable at will by either?" The patent has now expired, and a full discussion of the reasons which lead to inferring one or the other intent would not be useful. From all the correspondence, read in the light of the natural conduct of business men, we are compelled to think that either party was at liberty to cancel—as plaintiff did—and hence that, for its later conduct, defendant became liable as an infringer.

The decree below must be reversed, with costs; but, as no remedy, except accounting, remains after the patent's expiration, and as the course of the argument before us indicates that plaintiff is uncertain of its right to recover more than the agreed royalty, the parties may have an opportunity to end the litigation now. If within 30 days counsel reach an agreement and file a stipulation as to the amount due, the mandate will contain a further direction that a decree be entered for plaintiff in the amount so stipulated.

LEWIS et al. v. PARSONS NON-SKID CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916.)

No. 2274.

PATENTS ⊂=328—INFRINGEMENT—ARMOR FOR PNEUMATIC TIRES.

The Parsons patent, No. 723,299, for armor for pneumatic tires, *held* infringed by the device of the Frambach & Carrington patent, No. 1,096,101.

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 Parsons Non-Skid Company and the Weed Chain Tire Grip Company against Edward D. Lewis, Thomas D. Garvin, Matthew J. Frambach, the E-Z-On Chain Tire Protector Company, and the Hartley Manufacturing Company. Decree for complainants, and defendants appeal. Affirmed.

George Mankle, of Chicago, Ill., for appellants.

Victor Elting, of Chicago, Ill., and Frederick S. Duncan, of New York City, for appellees.

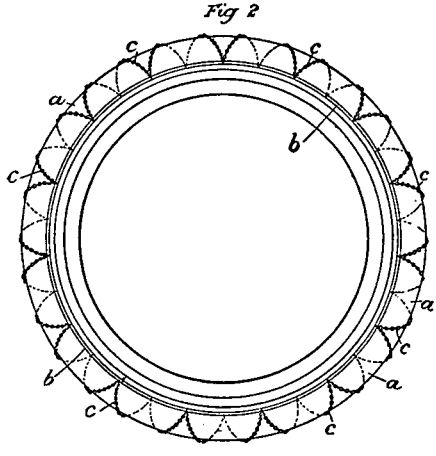
Before KOHLSAAT and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge. The District Court adjudged appellants to have infringed the six claims of patent No. 723,299, granted to H. Parsons for "armor for pneumatic tires" on March 24, 1903, and ordered an accounting. The patent was sustained by us in Ex-

celsior Supply Co. and Motor Appliance Co. v. Weed Chain Tire Grip Co., Harry D. Weed, and Parsons Non-Skid Co., Limited, 192 Fed. 35, 113 C. C. A. 1. Its validity is here conceded. Claim 6, which is typical of all the claims and fully sets out the subject-matter in suit, reads as follows, viz.:

"Antislipping or protective means for the peripheries of wheels, pulleys or the like, comprising two rings or annuli at opposite sides of the wheel, and an antislipping or protective medium consisting of a chain or chains secured to the rings and extending across and around the periphery of the wheel, said parts being disconnected from but retained on the wheel whereby the antislipping or protective medium is free to move or shift its position around the periphery thereof."

Fig. 2 of the drawings of the patent is here reproduced as follows:



The Parsons device in suit consists of two side members of chain or other flexible material, such as wire cable, located, when in position, at opposite sides of the tire and far enough down the tire to prevent either side member being accidentally pulled over the periphery and off the tire. These two side members are connected at frequent intervals by cross members, preferably in the form of chains, that extend from one side member across and around the periphery of the tire to the other side member, forming, with the side members, a kind of a metal trough, readily put in and removed from position on the tire. In practice the device is applied with sufficient snugness to enable the cross members near the bottom of the tire to hang slightly free from the tread of the tire. When in motion, the chain grip, being greater in circumference than the tire will creep upon the tire, each part changing its position relative to the tire.

The main purpose of the grip, it is claimed, that is, the prevention of the skidding of the automobile, is accomplished by reason of the fact that as each cross chain is brought successively between the tire and the roadbed, it is pressed partly into the roadbed and partly into the rubber of the tire, thus temporarily locking the wheel to the roadbed and effectively preventing skidding.

Parsons was the first to recognize the fact that creeping was inevitable, and to make provision for it in an antiskidding device. He also discovered that its presence was not undesirable in the application of means to prevent skidding. In the prior art it was supposed that the antiskidding device should be secured against creeping by being anchored in some way to the tire or wheel. Thus creeping was largely

avoided, but the penalty for opposing the natural law of two concentric peripheries in motion was always exacted—the tire was destroyed. This, Parsons sought to and did avoid.

The infringing device is claimed to be constructed in accordance with patent No. 1,001,518, granted to Frambach & Carrington for a tire protector. Fig. 1 of the drawings of this patent is as follows, viz.:

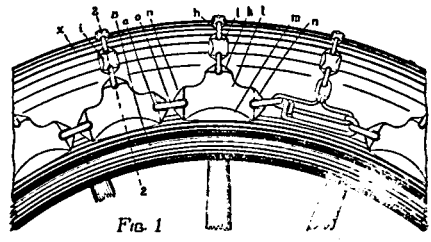


Fig. 1

As a matter of fact, the device of the appellants is that of patent No. 1,096,101, granted to Frambach & Carrington May 12, 1914, for an "antislipping device," as will be seen from Fig. 1 of the drawings of that patent, herewith reproduced:

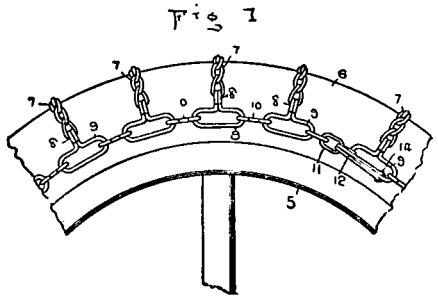


Fig. 1

In the last-named patent the solid metal shield links of the side chains, as shown in patent No. 1,001,518, are skeletonized, just as are those of appellants. This seems to be the main difference between the two patents of Frambach & Carrington, and constitutes, so far as we can discover, the main ground for changing the name of the devices from "a tire protector" to an "antislipping device." In their last-named specification they say:

"Our invention relates to new and useful improvements in antislipping devices, and more particularly to antislipping devices adapted to be used in connection with pneumatic, cushion or other forms of vehicle tires. The object of our invention is to provide an antislipping device which will at all times be held in close engagement with the tire."

As will be seen from the drawing, appellants used the metallic chain trough or cradle of Parsons, claiming the following differences: Their cross chains are applied taut and snug fitting; their peripheral chain is composed in part of what Frambach & Carrington in patent No. 1,096,101 call O-shaped links *9;* the ends of the wire from which each link O is constructed are extended to form a hook to engage the cross chain; these O-shaped links of the circumferential chain are united into a chain by means of ordinary links *10.*

The one claim of patent No. 1,096,101, aforesaid, reads as follows, viz.:

"A non-skidding wheel attachment consisting of a pair of companion side chains adapted to be placed against the sides of a vehicle wheel tire, said side chains comprising major links having relatively large closed loops and terminal normally contacting open spring hooks extending laterally thereof, the loops normally lying in bodily contact with the side of the tire, relatively

short minor links connecting the contiguous ends of the major links in proper relation to each other, and tread chains having loose detachable end connection with the terminal hooks and holding said major links yieldingly closed."

The two claims of said patent No. 1,001,518, are mainly devoted to the description of the solid so-called shield links.

The specification of patent No. 1,096,101 says:

"* * * By forming the links 9 in the manner shown, the side walls of the tire will be sufficiently armored to protect the same from wear when the vehicle wheel happens to go into ruts or is run over a very rough roadway."

The function of protection we find to be negligible in appellants' device, since the body of the shields shown in patent No. 1,001,518 are skeletonized to a degree which leaves them little or no more effective as protectors than are the chains of Parsons.

In the later patent, No. 1,096,101, the specification says:

"By forming the links 9 in the manner shown in the drawing, the same may be placed under considerable tension so that the antislipping device will be maintained tight upon the tread of the wheel at all times."

Patent No. 1,001,518 makes no mention of this feature. We gather from the record that the benefit arising from this function is also negligible in appellants' device, and that the Parsons chain possesses the same advantage, if it be such.

It is not shown that any particular degree of close-fitting of the device is desirable. Both devices under consideration tend to tighten the fit and slow up the creeping in case of quick braking or rapid starting in slippery places. Whatever tightening of the devices occurs, arises from the distortion of the cross chains and consequent pulling of the side chains out of alignment. It seems to be common to both devices. It is shown that even when placed snugly upon the tire, the cross chains become slack and pendent when about to contact with both the tire and the surface of the roadway. Thus these chains in appellants' device, under such circumstances, act exactly as do those of appellees—they form a non-skidding tread under the wheel. This was one of the main features of Parsons' chain, as stated in our opinion in the Excelsior Case.

At first, appellants claimed that their device provided against creeping, but at length creeping was conceded, though claimed to be less in degree than in Parsons. The law of the combination, that is, the principle of the operation of the concentric wheels of different size, when in motion, necessarily is that the larger will move faster than the lesser, and creeping must necessarily occur. Any provision for preventing this movement must result pro tanto in an abnormal strain somewhere. The evidence shows that the strain is apt to disrupt the tire. By adapting the antiskid appliance so that it may obey the law of its association with the tire, the wear upon the tire which would be caused by the links bearing thereon, always in the same place, is avoided. Parsons discovered and brought these principles forth. Appellants have appropriated them with slight attempt at concealment. The chain side members differ only in the form of the links and not in substance. Nor are their functions essentially different. The cross

chains are and operate the same in both devices. The creeping is provided for in both, since in both the antiskid structure is free to travel as fast as impelled by the law governing the combination.

We conclude that appellants' device constituted an infringement of the patent in suit.

The decree of the District Court is affirmed.

YANCEY v. ENRIGHT et al.

(Circuit Court of Appeals, Fifth Circuit. February 24, 1916. Rehearing Denied April 19, 1916.) No. 2779.

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—SEINING APPARATUS.
The Yancey patent, No. 919,109, for a seining apparatus for closing and hauling in a seine in shrimp fishing, while for a combination of old elements, covers the first practical and successful machine, and, in view of its superior utility over anything in the prior art in providing an unrestricted free way for the lead lines and thus avoiding the clogging of the machines, is entitled to the benefit of mechanical equivalents to perform such function. As so construed, *held* infringed.

2. PATENTS ⊜245—INFRINGEMENT—PATENTS ENTITLED TO BENEFIT OF DOCTRINE OF EQUIVALENTS.
The doctrine of mechanical equivalents is not confined to pioneer patents, but may be applied to secondary patents as well if they exhibit a degree of invention and show a distinct and valuable advance in the art which entitles them to its application.
[For other cases, see Patents, Cent. Dig. § 386; Dec. Dig. ⊜245.]

3. PATENTS ⊜243—INFRINGEMENT—UNITING TWO ELEMENTS INTO ONE.
Uniting two elements of a patented combination into one piece, without change of function or method of performance, does not avoid infringement.
[For other cases, see Patents, Cent. Dig. §§ 382-384; Dec. Dig. ⊜243.]

4. PATENTS ⊜245—"MECHANICAL EQUIVALENT."
Where two devices do the same work in substantially the same way and accomplish substantially the same result, they are "mechanical equivalents," even though they differ in name, form, or shape.
[For other cases, see Patents, Cent. Dig. § 386; Dec. Dig. ⊜245.
For other definitions, see Words and Phrases, First and Second Series, Mechanical Equivalent.]

5. PATENTS ⊜237—INFRINGEMENT—MECHANICAL EQUIVALENTS.
A fixed sliding guide is the equivalent of a rolling guide.
[For other cases, see Patents, Cent. Dig. §§ 374, 375; Dec. Dig. ⊜237.]

6. PATENTS ⊜240—INFRINGEMENT—ADDING IMPROVEMENT TO PATENTED DEVICE.
The addition of an improving feature does not excuse the appropriation of another's invention covered by a patent.
[For other cases, see Patents, Cent. Dig. § 379; Dec. Dig. ⊜240.]

Pardee, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in equity by Arthur Yancey against John W. Enright and others. Decree for defendants, and complainant appeals. Reversed.

This was a bill in equity, filed on behalf of the plaintiff, who is appellant here, seeking to restrain the defendants, who are appellees here, from using an alleged infringing device of a patented machine to close and haul from the bed of the water seines used for catching shrimp. Upon the hearing in this

court, appellant abandoned all claims of all his patents, except claims numbered 1, 2, and 4 of a patent issued to him on April 20, 1909, and numbered 919,109. The appellees deny the validity of appellant's patent, for alleged want of novelty, and also deny infringement in the use of the device, attributed to them. The court below dismissed the bill, determining that appellant's patent was valid, but that appellees' device did not infringe it, since it was not entitled to the benefit of the doctrine of equivalents.

John Dymond, Jr., and A. Giffen Levy, both of New Orleans, La. (E. Lloyd Posey, of New Orleans, La., of counsel), for appellant.

John C. Hollingsworth, of New Orleans, La. (Philip H. Mentz, of New Orleans, La., of counsel), for appellees.

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

GRUBB, District Judge (after stating the facts as above). [1] The fourth claim of appellant's patent, numbered 919,109, expresses the idea of his invention in these words:

"In seining apparatus, the combination of means for converging and directing upwardly the lead lines of a seine, comprising a plurality of sets of suitably mounted closing and guiding rollers, said sets of rollers being spaced apart to allow of the passage of foreign matter apt to tangle in the web, adjacent to the lead lines."

The novelty, if it exists, lies in a method of arranging and spacing the rollers, which help close and haul in the seine, which avoids the clogging of the machinery by foreign matter encountered by it, while the lead lines are passing the rollers, during the process of closing and hauling in the seine. Before the use of machines for closing and hauling seines in catching shrimp, the method had been for the fishermen to let the lead line pass under their feet, while they stood on the bed of the water. Aside from objections of discomfort to the fishermen, this method limited the catching of shrimp to waters so shallow as not to exceed the stature of a man. The purpose of closing machines was to overcome such objections and limitations. The appellant's patent 919,109 was not a pioneer in the art of seine fishing. A patent in 1895 in the art had been issued to Hommerberg, two to Lindsay in 1897, and three to the appellant, prior to the issuance of the one in suit, and an application for one had been made by Jackson, also before the issuance of the patent in suit, but abandoned. These constituted the prior art in April, 1909, when the patent, numbered 919,109, was issued to appellant. The aim of all was to avoid the necessity of closing and hauling in the seine by men standing on the bed of the water, and to permit it to be done from the surface of the water by a machine anchored on the bed of the water or supported and attached to the boat. None of the devices covered by any of the prior patents had been successful in practice, and for one and the same reason. In all of them, the free way, for the seine, in its passage, was limited to the diameter of the lead line, and while this was sufficient, in the absence of obstruction from foreign matter, it was found, in practice, that the stoppage of the machine by foreign matter, such as shells, seaweed, and folds of the net, was so frequent as to destroy the utility of the machine. The obstructions could only be removed by a descent to the bed of the water. In this state of the art, the appellant entered with the patented device involved in

this litigation. Its aim was to avoid the clogging of the machine, and it accomplished this by providing an unrestricted free way for the passage of the lead line on one side, by having but a single-sided contact for it. The prior art furnished only a restricted free way of the width of the diameter of the lead line, if not expressly, by necessary implication at least, since theretofore the lead line had been kept confined only by contact on both sides of it, and would have become inoperative if the points of contact had been substantially wider apart than the diameter of the line. The appellant's idea, therefore, measured the difference between practical success and failure. The previous devices were proved valueless in practical seining. The appellant's device in suit accomplished the purpose of closing and raising the seine without requiring the fishermen to stand on the bed of the water while it was being done, and, while not perfect, was susceptible of commercial use and was, in fact, so used. We have no difficulty in agreeing with the court below that the appellant's patent numbered 919,109 was a valid one.

It is contended, however, that it was not a pioneer patent and was a combination patent, and for that reason the patentee was not entitled to the benefit of the doctrine of mechanical equivalents, and the appellees, using different means to bring about the same results, with their device, were not chargeable with infringement. It must be conceded that appellant's device, covered by patent numbered 919,109, was not the first in the art of machines for closing seines, and not in that sense a pioneer patent. It was, however, the first practical and successful seining machine used in the shrimp industry, and the first to obviate the fatal defect of the prior art, which consisted in the clogging of the machine by obstructions, while the seine was being closed and raised. It was a pioneer to the extent that it contained the first and vital element of unrestricted free way, which successfully prevented clogging, and first made the machine operative. The appellant is entitled to the benefit of all that is included in the discovery of a machine giving unrestricted free way, and we do not think he should be deprived of this benefit because the successful device is due to a combination of old elements. It is true that the appellant's machine has no new single element. The result is attained by a combination or plurality of rollers, the purpose of which is to converge the lead lines and direct them upwards to the surface of the water. There is no new element in the rollers, and means of converging and directing the lead line upwards were then old in the art. The former combinations, however, were all handicapped by a restricted free way for the lead line, which in them passed between parallel rollers or their equivalents and were made operative only because of contact therewith on each side, with the inevitable result that all obstructions, while passing through this narrow space, stopped the process the machine was intended to accomplish and rendered it useless. The combination of the appellant, involved in this suit, added the feature, entirely new and unknown in the prior art, that it accomplished by a combination of sets of rollers the converging and upward directing result with a single or one-sided contact, which left an unrestricted free way for the passage of obstructions on the side on which there was no contact, and so permitted the passage of obstructions without

clogging the machine. The sets of rollers were so arranged by appellant that the lead line, in converging and ascending, pressed only against the side on which there was contact, and was held in place and operative by this one-sided pressure against the rollers, as points of contact. Is the inventor of such a decided improvement in the art entitled to the protection of the doctrine of mechanical equivalents, though the result is accomplished by a combination of elements, all of which are old, and the patent is a secondary rather than a primary one in the art?

In the case of National Hollow Brakebeam Co. v. Interchangeable Brakebeam Co., 106 Fed. 693, 45 C. C. A. 544, the Circuit Court of Appeals for the Eighth Circuit said:

"One who invents and secures a patent for a machine or combination, which first performs a useful function, is thereby protected against all machines and combinations which perform the same function by equivalent mechanical devices; but one who merely makes and secures a patent for a slight improvement on an old device or combination, which performs the same function after as before the improvement, is protected against those only who use the very device or improvement he describes or mere colorable evasions thereof. In other words, the term 'mechanical equivalent,' when applied to the interpretation of a pioneer patent, has a broad and generous signification, while its meaning is very narrow and limited when it conditions the construction of a patent for a slight and almost immaterial improvement. Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 440, 23 C. C. A. 223, 231, 40 U. S. App. 482, 498; Stirrat v. Manufacturing Co., 61 Fed. 980, 981, 10 C. C. A. 216, 217, 27 U. S. App. 13, 42; McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930; Railway Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053; Brill v. Car Co., 90 Fed. 666, 33 C. C. A. 313, 62 U. S. App. 276.

"But the great majority of patents falls between these two extremes. They are neither for pioneer inventions nor for improvements so slight as to be almost immaterial. While they do not evidence the first or the last step in the progress of the art to which they relate, they often mark signal advances and protect useful improvements. The doctrine of mechanical equivalents conditions the construction of all these patents, and in determining questions concerning them the breadth of the signification of the term is proportioned in each case to the character of the advance or invention evidenced by the patent under consideration, and is so interpreted by the courts as to protect the inventor against piracy and the public against unauthorized monopoly. Schroeder v. Brammer (C. C.) 98 Fed. 880; McSherry Mfg. Co. v. Dowagiac Mfg. Co., 41 C. C. A. 627, 101 Fed. 716, 721; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 C. C. A. 375; Miller v. Manufacturing Co., 151 U. S. 186, 207, 14 Sup. Ct. 310, 38 L. Ed. 121; Penfield v. Chambers Bros. Co., 92 Fed. 639, 647, 34 C. C. A. 579, 587; McCormick Harvesting Machine Co. v. Aultman, Miller & Co., 69 Fed. 371, 16 C. C. A. 259, 37 U. S. App. 299; Muller v. Tool Co., 77 Fed. 621, 630, 23 C. C. A. 357, 366, 47 U. S. App. 189, 204.

"The doctrine of mechanical equivalents is governed by the same rules and has the same application when the infringement of a patent for a combination is in question as when the issue is over the infringement of a patent for any other invention. Schroeder v. Brammer (C. C.) 98 Fed. 880; Imhaeuser v. Buerk, 101 U. S. 647, 653, 25 L. Ed. 945; Griswold v. Harker, 62 Fed. 389, 391, 10 C. C. A. 435, 437, 27 U. S. App. 122, 150; Thomson v. Bank, 53 Fed. 250, 253, 3 C. C. A. 518, 521, 10 U. S. App. 500, 509; Seymour v. Osborne, 11 Wall. 516, 542, 548, 20 L. Ed. 33; Gould v. Rees, 15 Wall. 187, 189, 21 L. Ed. 39; Fay v. Cordesman, 109 U. S. 408, 420, 3 Sup. Ct. 236, 27 L. Ed. 979; Water-Meter Co. v. Desper, 101 U. S. 332, 25 L. Ed. 1024; Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601; Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; National Cash-Register Co. v. American Cash-Register Co., 53 Fed. 367, 373, 3 C. C. A. 559, 565, 3 U. S. App. 340, 357; Belding Mfg. Co. v. Challenge Corn-Planter Co., 152 U. S. 100, 14 Sup. Ct. 492, 38 L. Ed. 370.

"Mere changes of the form of a device or of some of the mechanical elements

of a combination secured by patent will not avoid infringement, where the principle or mode of operation is adopted, unless the form of the machine or of the elements changed is the distinguishing characteristic of the invention. Watch Co. v. Robbins, 64 Fed. 384, 396, 12 C. C. A. 174, 187, 22 U. S. App. 601, 634; New Departure Bell Co. v. Bevin Bros. Mfg. Co. (C. C.) 64 Fed. 859."

In the case of Westinghouse v. Boyden, 170 U. S. 537–561, 18 Sup. Ct. 707, 718 (42 L. Ed. 1136) the Supreme Court said:

"This word (pioneer), although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before."

In the case of Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 415, 28 Sup. Ct. 748, 749 (52 L. Ed. 1122) the Supreme Court was called upon to review its prior decisions, which were thought to limit the doctrine of mechanical equivalents to pioneer or basic patents as distinguished from secondary or improvement patents, and expressed its conclusion as to what had been decided in these words:

"It is manifest, therefore, that it was not meant to decide that only pioneer patents are entitled to invoke the doctrine of equivalents, but that it was decided that the range of equivalents depends upon and varies with the degree of invention."

[2] We conclude that the application of the principle of equivalents is not confined to pioneer patents, but may be applied to secondary patents, as well, if they exhibit a degree of invention that entitles the patentee to its application; and that the inventor of a combination device is as much entitled to the doctrine of equivalents as any other inventor, provided his combination exhibits the requisite degree of invention.

In view of the fact that owing to the nondiscovery in the art of seine fishing of a device that would avoid the clogging of the machine, up to the time of the issuance of the patent in suit, the prior inventions had all been practically and commercially worthless, and that the appellant in his device, covered by the patent in suit, first discovered a practical method of avoiding the clogging of the machine, and by so doing made it first possible to close and haul in the seine from the surface, as distinguished from the bed, of the water, we think his patented device in question was a marked step in advance in the art, and showed a degree of invention that entitled him, as the patentee of it, to the benefit of the principle of mechanical equivalents as against imitators of his device. Appellant's machine "first performed a useful function," and is to be "thereby protected against all machines and combinations which perform the same function by equivalent mechanical devices."

We come then to consider the question of infringement. It is conceded by the appellant that the means used by the appellees to accomplish the closing and hauling in of the seine, without the clogging of the machine during the operation, are different from those covered by the patented device of the appellant. If there is infringement, it is

because the means so employed in the device used by the appellees are the equivalents of the means employed in the appellant's device, covered by the patent in suit. The remaining question is as to whether the two devices are equivalents.

In the case of Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935, the Supreme Court defined "equivalents" and provided a test for the courts in determining whether or not they existed, in these words:

"Except where form is of the essence of the invention, it has but little weight in the decision of such an issue; the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result.

"Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained.

"Inquiries of this kind are often attended with difficulty; but if special attention is given to such portions of a given device as really does the work, so as not to give undue importance to other parts of the same which are only used as a convenient mode of constructing the entire device, the difficulty attending the investigation will be greatly diminished, if not entirely overcome. * * *

"Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape."

[3, 4] It is conceded that the horizontal and vertical sets of rollers in appellant's patented device perform the identical function that is performed by the spiral slot of the alleged infringing device. That function is the converging and directing upwards of the lead lines in such a way as to provide for a single-sided contact between the lead lines and the machine, with an unrestricted free way on the other side, for the passage of shells and other obstructions. In the case of each machine, this is accomplished by so arranging the contact of the lead line with the machine, as that pressure is exerted to hold the lead line against the points of contact, on one side, leaving the other side free for the passage of obstructions. In the prior art, there had been contact on both sides, and a passage for obstructions limited to the diameter of the lead line. In the patented device, this result is accomplished by means of horizontal rollers to converge the lead lines and vertical rollers to direct them upwards. In the alleged infringing device, the result is accomplished by means of a spiral slot, open on the side on which there is no contact, curving so that the lead line contacts with it, at points corresponding to the horizontal and vertical rollers, and with the same pressure to hold it in position and keep it operative. The two devices "do the same work in substantially the

same way, and accomplish substantially the same result," and are therefore mechanical equivalents, "even though they differ in name, form, or shape." They differ in the fact that the patented device is composed of separate parts, while the infringing device is in one piece. The fact that the infringing device closes in the open space between the vertical and horizontal rollers in the patented device, so as to make one piece instead of more, changes only the shape and form; the rollers in the patented device could be similarly enclosed "without change of function or method of performance." Uniting two elements into one does not avoid infringement. Walker on Patents (4th Ed.) page 308; Lambert v. Lidgerwood, 154 Fed. 372, 83 C. C. A. 350–354.

[5] Nor does the omission of rollers from the alleged infringing device avoid infringement. The sliding contact of the latter is the equivalent of the rolling contact of the former. A fixed sliding guide has been held the equivalent of a rolling guide. National Tube Co. v. Mark, 216 Fed. 507–514, 133 C. C. A. 13. It is true that the infringing device is in one respect an improvement over the patented device. The difficulty with the patented device is that, when the lines are slackened, the seine becomes disengaged from the machine, and the machine inoperative, with the necessity of the fishermen descending to the bed of the water. This is overcome by keeping the lines taut while the seine is being closed and hauled in. The slot of the infringing device operates more effectually to keep the lines engaged with the machine, during the process of closing and hauling in the seine, adding a feature of value to the art, as represented by the patented device of the appellant.

[6] The addition of an improving feature does not excuse the appropriation of the appellant's invention, covered by the patent, since we have construed the appellant's idea to be more than a mere improvement in form, and a distinct and valuable advance in the art. Walker on Patents (4th Ed.) p. 309; Comptograph Co. v. Mechanical Accountant Co., 145 Fed. 331, 338, 76 C. C. A. 205; Stebler v. Riverside Heights Orange Growers Ass'n, 205 Fed. 735, 739, 124 C. C. A. 29.

Our conclusion is that the appellant's patent, numbered 919,109, is valid, and is entitled to the protection of the principle of mechanical equivalents, because of the degree of invention exhibited by it; that the device used by the appellees is, in respect to the means adopted for providing an unrestricted free way for the passage of obstructions, the mechanical equivalent of the patented device of the appellant and an infringement thereof.

The decree dismissing the bill of complaint is therefore reversed, and the cause remanded for further proceeding in conformity with this opinion.

PARDEE, Circuit Judge, dissents.

MacARTHUR CONCRETE PILE & FOUNDATION CO. v. SIMPLEX CONCRETE PILING CO. et al.

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

No. 2002.

PATENTS ⇐328—INVENTION—CONCRETE PILES AND PROCESS OF MAKING SAME.

The Shuman patents, No. 739,268, for a process of making concrete piles, and No. 733,288, for a removable pile for forming concrete piling, are void for lack of invention in view of the prior art.

Appeal from the District Court of the United States for the District of Delaware; Edward G. Bradford, Judge.

Suit in equity by the Simplex Concrete Piling Company and the Simplex Foundation Company against the MacArthur Concrete Pile & Foundation Company. Decree for complainants, and defendant appeals. Reversed.

For opinion below, see 227 Fed. 107.

Melville Church, of Washington, D. C., for appellant.

Howson & Howson and Charles Howson, all of Philadelphia, Pa. (Hubert Howson, of New York City, of counsel), for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This case involves the use of cement to form building piles, and is an instance of one of the many new uses to which cement has lent itself, owing to that plastic capacity by which it may be carried to any desired point, and to its hardening capacity by which it is there converted into a solid structure. These qualities of temporary plastic movement and permanent solidity led to its substitution for stone masonry to form piers for buildings. To that end holes of a desired depth and area were dug, and into the hole was poured or grouted cement, which at once hardened and formed the pier. If it was desired to carry the pier above ground, a frame pattern of the desired size was used. If walls, instead of piers, were desired, long trenches were dug, and the entire underground foundations of buildings were made from cement. In the same way cellar walls were built, the cement foundation trenches being carried below the cellar floor, and from there upward the outside of the cellar wall was formed against the earth and the inside against a frame boxing. If the ground excavated was liable to cave, the obvious remedy was to shore it by an interior structure. From the use of cement piers as a foundation to buildings, it was to be expected the building art would naturally advance to deeper foundations, in the shape of piles.

Such advance is happily illustrated in the Journal of the Royal Institute of British Architects for 1894. Before quoting from that article, and leaving the cement art, we may say that the oil and gas drilling art had thoroughly developed the whole subject of underground drilling, and the casing or sheathing of drilled holes for hundreds and

indeed thousands of feet underground, so that such wall-protected hole afforded ingress and egress for drilling tools, sand bailers, fishing tools, pump rods, and also for the location within such casing of an inner tubing, which cased or sheathed a hole of still smaller diameter beyond where the casing of the larger dimension ended. The general features of this well-developed drilling art are outlined in a decision in this circuit in 1892, reported in Masseth v. Palm (C. C.) 51 Fed. 824. Returning to the article in question, printed and illustrated below, we see how underground cement piers were made:

"From F. De J. Clere (F.), Wellington, N. Z.

"Though Wellington, N. Z., is one of the best situated capital cities in the world as a commercial distributing center, it has had the great drawback of possessing but little level land for building purposes within reasonable distance of its wharves and jetties. This being the case, reclamation has been resorted to, and the best sites, extending over many acres, were a few years ago covered with the water of the harbor to a depth of from 12 to 15 feet. The material used for reclamation was loose rock and clay taken from the hillsides in the vicinity, and offers a poor foundation for brick buildings. Generally piles of Podocarpus totara (a very lasting timber) have been driven to a solid bottom and then covered with concrete. Some 14 years ago the acting colonial architect, Mr. Burrows, used concrete piles as a foundation for the Supreme Court building, but for some reason or another the experiment was not repeated until a few months ago, when my firm again used the same materials for the foundation of a four-floored brick warehouse for Messrs. Sharland & Co. Whether our modus operandi was the same as that of Mr. Burrows I cannot say; but, feeling that our experience might be of service in other cases, I am venturing to send you this record of the matter. The building we were to erect was a wholesale drug store, 100 feet long by 40 feet wide, and having three floors above the ground, the walls being of brick of ordinary thickness, resting on a good concrete foundation, which rested in its turn on concrete piles. The 'plant' required to put these piles in position consisted of two steel 'cylinders' as sketched, a wooden 'dolly' of Australian iron bark, an ordinary derrick and 25 cwt. monkey, and donkey engine and winch, and for each pile a cast-iron shoe (weighing 72 pounds each), formed as shown in fig. 1.

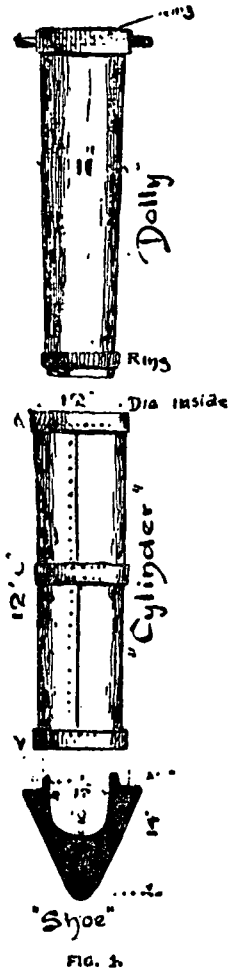


FIG. 1.

"After excavating for the concrete footings the shoe of the pile was placed in position, and the cylinder lowered onto it; a small portion of sand was then thrown in to form a cushion for the 'dolly,' and a 'grummet,' or ring of rope, was placed between the top ring on the 'dolly' and the top of the cylinder, in order to prevent the jar burring the latter. The whole pile was then driven in the ordinary way two feet into the solid original bottom of the harbor, and the 'dolly' withdrawn from the cylinder and the next cylinder driven. The first cylinder was then pumped dry and filled with concrete, and by means of a rope passing through blocks hung above it, and carried to winch of donkey engine, the cylinder was drawn, and the semi-liquid concrete left in the ground in the

shape of a pile about 13 inches in diameter. The second cylinder was then treated in the same way. The piles in the long stretches of walling were spaced about three feet apart and arranged as in Fig. 2; but when they had to be closer we found it necessary to leave the cylinders in the ground, as the power at the contractor's disposal was not sufficient to draw them out of the lightly compressed soil.

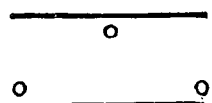


FIG. 2.

"These cylinders, having to be driven only once, were made of thinner material than the rest. It should be noted that as the concrete had to spread out as the cylinder was drawn, a 12-foot long cylinder was required to make a 10-foot long pile; and I would here note that the reason why the second cylinder was driven before the first one was drawn was in order to prevent the soft concrete in the latter from being damaged by the pressure of the second cylinder.

"The stuff used for the reclamation being porous, we found that the tide rises and falls in the trenches as in the harbor; hence the necessity of pumping out the cylinders, and it was very noticeable that at high tide the cylinders were much more easily drawn than at low. The number of piles driven in a day averaged seven."

From this article, which was in substance republished in this country in the Engineering Record of December 29, 1894, it will be seen that the driving of holes for subterranean piles, the leaving in the hole of a therewith driven casing, or the withdrawing of the same and the filling of the hole or casing with cement, was a well-understood and successful practice in the art. Nor was the art confined to land. It was a common practice to build cement piers in water as a support for bridges, wharves, and the like, by first constructing a cofferdam, pumping the water therefrom and constructing a cement pier within the cofferdam.

So also the use of submarine piles was well developed, as will be seen by reference to Queensland patent No. 1,025 of 1890, granted to French for "improvements in the construction of piles and mode of driving hollow piles and the formation of concrete pillars thereby." In his specifications, the patentee states his invention relates to piles used either on land or water and that his "invention consists essentially in a hollow pile having a strong metal shoe, and although many forms of piles may be adopted, the principle remains the same, and by describing one form of pile, other forms will be readily understood." French's drilling device was a conical-shaped, cast-iron shoe with a hollow cup on its upper side, on the bottom of which hollow the driving stem or "dolly" struck. To this shoe the sheet iron cylinders are attached in one of several suggested ways, and as it receives the impact of a monkey or weight dropped from the ordinary pile driving derrick, the shoe, accompanied by the attached casing, is driven into the ground. "When driven to a desired depth, the 'dolly' is withdrawn and the pile filled up with concrete." It will thus be seen that French's construction left both the casing and the pointed shoe in the ground, where they became a part of the pile, while in Clere's device the shoe and the casing could be left in the ground, or the casing could be withdrawn and nothing left in the ground but the pointed shoe. Upon his device the broad claim was given to French for "the formation of concrete pillars

by means of hollow tubing or casing driven in the manner hereinbefore described, which when driven are afterwards filled up with concrete."

From this it will be seen that the preliminary driving of holes in the ground as a location for subsequently locating piles was well understood, and the use of cement as a filling for such holes was also understood and practiced. In this developed state of the art, the present patentee, Shuman, applied for the patents here involved. They are divisional applications—No. 739,268, granted September 15, 1903, being for a process of making concrete piles, claims 1, 3, 9, and 10 being here involved; No. 733,288, granted July 7, 1903, being for a removable pile for forming concrete piling, claims 5 and 9 being here involved. A study of these patents shows that in process, drilling means, or cement piles in place, Shuman disclosed nothing novel. His pile, when in place, was simply the solidified cement, which hardened in the hole made by French and Clere. The hole in which he placed his cement was no different from theirs, the casing could be withdrawn, left in for part of the depth, or for all of it. In all three the method of pouring in the cement was the same.

As we have said, the disclosures in the patent are simply of things well known in the art. For example, he says his invention relates to "that method of forming piles of cement or concrete which consists in first driving a preparatory pile into the ground, then withdrawing said preparatory pile, and then filling the opening formed thereby with concrete or cement in fluid or plastic form, which when it becomes set forms the permanent pile." His stem or "dolly," which he calls a preparatory pile, "is in the form of a metal tube, although it may be a solid pile of wood or metal." This stem is "provided at the top with a suitable driving head *2* and at the bottom with a point *3*, which in the present instance is detachable from the pile." The point is "also of so much greater diameter than said pile *1* that there is no likelihood of the latter coming into contact to any material extent with the walls of the opening formed by driving the pile," and "the withdrawal of the pile is also facilitated, since such withdrawal is not interfered with by frictional hold of the earth upon the pile." The stem and the casing combine to prevent "access of water or silt to the opening formed on said preparatory pile in the firm ground beneath or for preventing the caving in of the walls of the opening when the latter is being formed in unstable ground. The specification further says:

"When the desired depth of opening has been formed, the pile *1* can be withdrawn, leaving the point *3* at the bottom of the opening."

The point may be either attached to the stem, in which case it can be withdrawn, it can be unattached to the stem, or it can be rivetted to the casing, in which latter event it will remain in the hole. The specification closes with this statement:

"I prefer in all cases to remove the cofferdam casing from the opening after the withdrawal of the preparatory pile, so that the concrete of which the permanent pile is composed will directly engage the earthy walls of the opening. Such withdrawal of the cofferdam casing is permitted, even when the nature

of the ground is unstable, by first filling the concrete into the lower end of the cofferdam and then withdrawing the latter, either slowly and continuously, or intermittently, a little at a time, so as to permit the concrete to flow out from the lower end of the cofferdam into the opening above the point 3; sufficient head of concrete being always maintained in the lower end of the cofferdam to prevent any caving in of the walls of the opening as said cofferdam is withdrawn."

To our mind, it is clear that in none of these statements is any patentable difference or advance over French's and Clere's practices shown. The main difference is the point of engagement between the stem end and the cast-iron driving shoe. In French the upper side of the shoe is cup-shaped, and in this cup the stem enters and strikes on the cup bottom. Thus French in his patent says his shoe is "a cast-iron shoe *D* pointed like a Paliser shell and slightly larger than the pile at its greatest diameter." In Clere's device the shoe is cup-shaped also, and the stem or "dolly" enters this cup and strikes the bottom; a thin layer of sand being thrown in to cushion the blow. In Shuman there is a reversal in these engaging elements; the cup or hollow being placed in the stem and a shoulder raised on the solid shoe adapted to enter the hollow of the engaging stem. That this construction is mechanically better than Clere or French is apparent. The shoe, being subjected to the driving blow, is the part under greatest strain. Putting a deep hollow in such cast-iron shoe necessarily weakened it. Clere recognized this, and minimized it by a slight layer of sand to deaden the jar of the stem blow. By transposing the engaging elements, and placing his cup cavity in the stem, and thus substituting a solid for a hollowed point, Shuman made a mechanical, but not an inventive, improvement. Indeed, we are satisfied that, had the patent authorities been advised of the state of the working art, as shown by French and Clere, Shuman's patents would never have been granted.

We are therefore constrained to hold the claims before us are invalid, and to remand the case to the court below, with directions to enter a decree dismissing the bill.

In re SOBOL.

(District Court, S. D. New York. November, 1915.)

1. BANKRUPTCY ⊂=317—ASSIGNEES—COMPENSATION.
Where an assignment for the benefit of creditors has been alleged as an act of bankruptcy, the sole duty of the assignee is to preserve the estate, and, ordinarily, to preserve it intact, for the trustee when elected, and he is not entitled to compensation merely by virtue of his office, but can only claim compensation measured by the extent of his labors in preserving and keeping the estate for the trustee.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 493–495; Dec. Dig. ⊂=317.]

2. BANKRUPTCY ⊂=317—ASSIGNEES FOR BENEFIT OF CREDITORS—LIABILITY.
Where an assignee under an assignment for the benefit of creditors, which had been alleged as an act of bankruptcy, employed an auctioneer,

who summarily sold a part of the goods intrusted to his care, to pay a bill for expenses rendered by him, the assignee was responsible for this act of the auctioneer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 493-495; Dec. Dig. ⟸317.]

In Bankruptcy. In the matter of Solomon Sobol, bankrupt. On motion to confirm the report of a special master. Report confirmed.

E. M. Kaiser, of New York City, for trustee.
J. N. Helfat, of New York City, for assignee.

HOUGH, District Judge. This case, though upon a very small scale, is illustrative of the difficulties and dangers to which parties are subjected who venture to proceed under an assignment when they know that the act of making the assignment has been alleged as an act of bankruptcy, and that they will therefore certainly face an accounting in this court for what is done under the assignment.

Experience has shown that a majority, if not a very large majority, of assignments for the benefit of creditors made within this jurisdiction are executed largely for the purpose of increasing the amount of fees thought to be obtainable from the estate, although it is likewise true that any lawyer finds it much easier to cause an assignment to be executed than to go through the preliminary and badly paid labor of preparing schedules in bankruptcy.

It is not intended by the foregoing to criticize or make any accusation against the assignee in this case, who is known to the court and has not infrequently been made its representative, viz., a receiver.

[1] But all persons, and especially all lawyers who become assignees under our state practice, are bound to recognize not only the letter but the spirit of the Supreme Court ruling in Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, 10 Am. Bankr. R. 1. That spirit is that their sole duty is to preserve the estate, and ordinarily to preserve it intact for the uses and purposes of a trustee when elected. They are not entitled to compensation merely by virtue of their office; their sole claim to any reward is measured by the extent of their labors in preserving and keeping the estate for the purposes aforesaid.

[2] Not only must members of the bar recognize the measure by which their services as assignee and as attorney for assignees will be estimated, but they should carefully remember that the scale of charges for the services of watchmen, auctioneers, appraisers, and the like has been established by a long course of rulings in the bankruptcy court. In this instance an auctioneer was employed who rendered a bill for expenses (apparently in lotting the goods and the like) and then, when he did not get his bill paid when and as he preferred, summarily sold a portion of the goods intrusted to his care at prices which may or may not have been sufficient. For such a case of taking the law into one's own hands there is no remedy at all unless the assignee be made (as he has been made here) responsible for the acts of the agent (the auctioneer) whom he deliberately chose.

As has been said before, the whole amount of money here involved

is trifling. For that reason the case serves well as an opportunity for insisting upon the necessity of holding an assignee to as strict an accountability as a trustee and not permitting the incurring by him of expenses or the taking of risks in respect of the property in his charge which would not be permitted in the case of a trustee or bankruptcy receiver.

I fail to find in the report of Mr. Willis any instance in which, if this assignee had been an accounting trustee, he would not have been accorded exactly the treatment here shown.

The report is confirmed.

Ex parte OWE SAM GOON.

(District Court, N. D. California, First Division. May 17, 1915.)

No. 15802.

1. HABEAS CORPUS ⟸85(1)—REVIEW OF PROCEEDINGS TO DEPORT ALIENS.
While the District Court will not prescribe rules of evidence for deportation proceedings before the immigration authorities, where the jurisdiction of such authorities depends upon the establishment of the fact that the alien entered the country within three years, the court on habeas corpus will consider the character of the evidence by which jurisdiction is sought to be established, though not, perhaps, the weight of the evidence.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. ⟸85(1).]

2. ALIENS ⟸32(6)—DEPORTATION PROCEEDINGS—EVIDENCE.
In a proceeding to deport a Chinese laborer, who came to the country in 1873 or 1874, and registered and received a certificate as a Chinese laborer in 1894, on the ground that he was in Mexico within three years, and must have entered the country within that time, his right to remain in the country could not be made to depend upon the fact that a resident of Mexico not produced at the hearing, but who testified before an immigration inspector in another city, had identified a photograph of the alien as that of a person seen in Mexico within three years.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⟸32(6).]

Petition by Owe Sam Goon for a writ of habeas corpus. On demurrer to the petition. Demurrer overruled, and writ issued.

Joseph P. Fallon, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. The petitioner, a native of China, came here in 1873 or 1874. In 1894 he registered and received his certificate as a Chinese laborer. He was arrested in Tucson on February 19, 1915, having been found in a refrigerator car, together with a fellow countryman. His case was heard by the immigration department, and not before a commissioner or judge, on the theory that he had recently entered the United States from Juarez, Mexico. To establish this fact one Pasqual Carrion of Juarez testified on February

26th, before an immigration inspector at El Paso, that he had seen petitioner a number of times in a laundry at Juarez, the last time being in August or September of 1914. This testimony was not taken in the presence of petitioner, but the witness Carrion identified a photograph of petitioner as that of the man seen by him in the laundry at Juarez.

Under Chinese Exclusion Act May 6, 1882, c. 126, 22 Stat. 58, a Chinese alien unlawfully in the country is entitled to a hearing before a commissioner or judge before he may be deported. At such hearing the ordinary rules of evidence are generally applied. Under Immigration Act July 4, 1864, c. 246, 13 Stat. 385, however, *any* alien may be deported after a hearing before the immigration officers at any time within three years after the date of his entry into the United States, if such entry shall have been in violation of law. The claim here is that, as petitioner was identified as having been in Juarez as late as August or September of last year, he must have entered from there in violation of law, as he did not enter through any of the immigration channels. He was not found on the Mexican border, and the only evidence that he had been out of the United States within the three years was the evidence of Carrion, who did not see the petitioner himself for the purposes of identification, but only a photograph.

[1] The court does not undertake to prescribe rules of evidence for the immigration department, but in a case like the present, where the very jurisdiction of the department depends upon the establishment of a certain fact, which fact, when established, takes the alien's case out of the jurisdiction of the courts of the United States, where it is placed by the Chinese Exclusion Law, the court is entitled to regard, not perhaps the weight of the evidence, but certainly the character of the evidence, by which such a transfer of jurisdiction is effected.

[2] In the case at bar we have a Chinaman, resident of this country for 40 years, having a laborer's certificate entitling him to remain, who is not found near the Mexican border line, and who is ordered deported, without being confronted by the witness upon whose testimony the jurisdiction of the immigration department to make the order depends. In my judgment, while affidavits, and ex parte statements, and statements not under oath have been held admissible in proceedings by the immigration department looking to the exclusion or deportation of aliens, the right to remain here of a Chinese person so long a resident of the United States, and who is fortified by the possession of that evidence of his proper presence here, which the law requires should not be made to depend upon the fact that some resident of another country, not produced at the hearing, has identified a photograph, when such identification is the only thing which could deprive the alien of his right to be heard before a commissioner or judge, where such identification would not be admissible as evidence at all.

Holding these views, I am constrained to overrule the demurrer to the petition, and direct the issuance of the writ.

The demurrer is therefore overruled, and the writ will issue as prayed for.

Ex parte TOM YUEN.

(District Court, N. D. California, First Division. December 13, 1915.)

No. 15933.

1. ALIENS ⟸32(1)—DEPORTATION OF CHINESE—RIGHT TO JUDICIAL HEARING.
A Chinese laborer could not be deported, except after a hearing before a commissioner, with the right of appeal to the District Court, unless he had entered the United States within three years of the hearing.
[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸32(1).]

2. ALIENS ⟸32(6)—DEPORTATION OF CHINESE—EVIDENCE OF ENTRY WITHIN THREE YEARS.
In a proceeding to deport a Chinese laborer, who had been in the country for years, and registered and received a certificate of residence in 1894 the fact that he was in Mexico within three years, and must have entered the country within that time, necessary to give jurisdiction to the immigration authorities, could not be proved by the ex parte statements of witnesses who based their statements upon photographs, and were never confronted by the alien sought to be deported.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⟸32(6).]

Application by Tom Yuen for a writ of habeas corpus. On demurrer to the petition. Demurrer overruled, and writ issued.

John L. McNab and Timothy Healy, both of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Caspar A. Ornbaum, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. Petitioner is a Chinese laborer, who has been in this country for many years. He was registered in New York on March 2, 1894, and at that time received a Chinese laborer's certificate of residence, which he had in his possession at the time of the hearing which led to the order of deportation that he is contesting in this proceeding. He has had no hearing before a commissioner or court.

[1] The proceedings leading to the order for his deportation were had before an immigration inspector, on the theory that some time in December, 1914, and January, 1915, he was in Juarez, Mexico, and that therefore he must have entered this country within three years. To establish that fact the statement of one Acosta is relied upon. Acosta, who is a police officer in Juarez, Mexico, in an ex parte statement before an inspector in El Paso, declared that he recognized a photograph shown him as that of a Chinese whom he had seen in Juarez in the latter part of December, 1914, and the early part of January, 1915. The photograph shown him is a photograph of petitioner. Unless petitioner has entered the United States within three years of the date of the hearing, he may not be deported, except after a hearing before a commissioner, with the right of appeal to the court.

[2] I have had occasion to hold before this that the fact which gives jurisdiction to the immigration officers to hear and determine

these matters—that is, entry into the United States within three years—cannot be established by ex parte statements of witnesses in Mexico, who base their statements upon photographs, and are never confronted by the alien sought to be deported. In the absence of fair proof of such entry within three years, the only tribunals that can order the deportation of a Chinese laborer are the commissioners and the courts. I think the right of a laborer who has been long in this country to remain here is too important a right to be taken from him upon the ex parte statement of a resident of a foreign country who is never produced before him.

The demurrer to the petition will be overruled, and the writ will issue, returnable December 18, 1915, at 10 o'clock a. m.

UNITED STATES v. GIN DOCK SUE.

(District Court, N. D. California, First Division. October 8, 1915.)

No. 5493.

1. ALIENS ⟸23(1)—DEPORTATION OF CHINESE PERSONS—DEFENSES.
That a Chinese person sought to be deported was a merchant or an attaché of the Chinese consular office did not prevent his deportation, where his status as such was acquired subsequent to his entry into the country surreptitiously, by escaping from detention quarters after he had been denied permission to land.
[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸23(1).]

2. ALIENS ⟸23(1)—DEPORTATION OF CHINESE PERSONS—DEFENSES.
A Chinese person's right to enter the country as a returning merchant was a matter to be established regularly before the immigration officers at the time he applied to enter, and if their proceedings were unfair he might have appealed to the courts; and where, instead of doing this, he chose to enter the country by escaping from detention quarters after he had been denied permission to land, he was subject to deportation.
[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸23(1).]

Deportation proceeding by the United States against Gin Dock Sue. From an order of deportation, defendant appeals. Affirmed.

George A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Caspar A. Ornbaum, Asst. U. S. Atty., both of San Francisco, Cal.

DOOLING, District Judge. In July, 1908, Gin Dock Sue applied for admission at the port of San Francisco as a returning Chinese merchant. On August 26, 1908, his application to land was denied, and on appeal the order denying his application was affirmed. He then applied for a rehearing, but on November 26, 1908, and before such application was heard, he escaped from the detention quarters, and has ever since been within the United States. On December 8, 1908, his application for a rehearing was denied by the following order:

"San Francisco, Dec. 8, 1908.

"This man escaped from Pacific Mail Steamship dock and is a fugitive. Application for rehearing denied."

Having been later found in this country, he was arrested, and after a hearing before the commissioner was ordered deported. From the order of deportation an appeal was taken to this court.

[1, 2] It is urged here, as it was urged before the commissioner, that respondent is a merchant, and that he is an attaché of the Chinese consular office in San Francisco. But whatever status he may have as an attaché of the consulate has been acquired since his escape from the immigration officers in 1908. I do not think that this method of entry into the country can be cured by thereafter becoming attached to a consular or other office. As to his mercantile status, if it existed before his escape, that was a matter to be established regularly before the immigration officers at the time that he applied to enter. If their proceedings were unfair in the investigation of that question, he might then have appealed to the courts. Instead of doing so, he chose to enter the country by escaping from custody. If the status was acquired after such escape, he can no more be heard to urge it here, as giving him a right to remain in this country, than he can be heard to urge his connection with the consulate. The law will not put such a premium upon surreptitious entries into the country as to permit one so entering to acquire a right to remain.

The order of deportation is therefore affirmed.

NAYLOR et al. v. FOREMAN-BLADES LUMBER CO. et al.

(District Court, E. D. North Carolina. January 1, 1916.)

No. 337.

1. CANCELLATION OF INSTRUMENTS ⟸34(1)—LACHES—LOSS OF EVIDENCE.

Complainants brought suit for the cancellation of a deed purporting to have been executed by them seven years before, and which they claimed had been forged by, or at the instance of, their grandfather. They admitted having acquired knowledge of the deed five years before suit, and while the grandfather and the person before whom their acknowledgment purported to have been taken were living; but their grandfather died during such time, and the person who certified to the acknowledgment shortly after suit was commenced, and before trial. There was evidence that the uncle of complainants, who was their representative and legal advisor, communicated with his father and with such other person in regard to the matter; but it was not shown what they claimed, or what transactions took place in respect thereto. During such time the deed was also accidentally destroyed by fire, and one of the defendants under a deed of which complainants had knowledge cut and removed the timber from the land. The evidence was also unsatisfactory in other respects, and many facts in regard to the bringing of the suit, which should have been frankly disclosed, were withheld. *Held* that, under the facts shown, the unexplained delay in bringing suit constituted such laches as deprived complainants of the right to invoke the aid of a court of equity, and required that court to remit them to their remedy by an action at law; defendants being in possession.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 49, 50, 52; Dec. Dig. ⟸34(1).]

2. EQUITY ⟸64, 72(3)—MAXIMS—LACHES—DEATH OF PERSONS CHARGED WITH MISCONDUCT.

Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no

excuse for his laches in asserting them; and the rule is especially to be enforced where the right to relief is based on the alleged fraud or criminal acts of persons who have died during the period of delay.

[Ed. Note.—For other cases, see Equity, Dec. Dig. ⊂⊃64, 72(3).]

In Equity. Suit by Harold J. Naylor, Clara C. Cole, and Lillian F. Naylor against the Foreman-Blades Lumber Company and Mary Robbins. Dismissed without prejudice to an action at law.

S. Brown Shepherd, of Raleigh, N. C., and M. H. Tillitt, of Norfolk, Va., for plaintiffs.

E. F. Aydlett, of Elizabeth City, N. C., for defendants.

CONNOR, District Judge. The jurisdiction of the court is sustained by reason of diversity of citizenship. The equitable jurisdiction of the court is found in the character of the relief invoked. The subject-matter of the controversy is a tract of land, chiefly valuable for the timber standing and growing upon it, at the time of the transactions disclosed in the pleadings and evidence, lying and being situate in Pasquotank county, N. C., containing 2,500 acres and, with the timber, of value largely in excess of $3,000, alleged by plaintiffs to be "more than $100,000."

The bill charges: That plaintiffs Harold J. Naylor and Clara C. Cole, the children of plaintiff Lillian F. Naylor, are seised in fee of the lands in controversy. That defendant Mary Robbins asserts title thereto, claiming to be the owner, and in possession thereof, by virtue of certain deeds to which special reference is hereafter made. That defendant Foreman-Blades Lumber Company, claiming the right to do so by reason of purchase from defendant Mary Robbins, entered upon the land and cut and removed timber therefrom of great value. Plaintiffs Harold J. and Clara C. pray: That the alleged deeds under which defendant Mary Robbins claims title be declared invalid and canceled, being a cloud upon their title. That defendant Foreman-Blades Lumber Company account for the timber cut and removed from the land and pay to them the value thereof. Plaintiff Lillian F. Naylor avers that her coplaintiffs are the owners of the land, and that, by virtue of the reservation of the timber thereon in the deed executed by her to them, she is the owner of and entitled to recover of defendant Foreman-Blades Lumber Company, the value thereof. She further says that, if her coplaintiffs are not the owners of the land, she is seised thereof in fee, and asks that the deeds under which defendant Mary Robbins claims be canceled. The question whether there is not a misjoinder of parties plaintiff, and the bill multifarious, is not raised by the defendants.

Passing these questions, it becomes necessary to examine the deeds under which plaintiffs and defendants claim title. Prior to March 24, 1896, Harvey Terry was the owner of a large body of timber land, containing 12,338 acres, in Mt. Hermon township, Pasquotank county, N. C., known as a part of the "Great Park Estate," or "Terry's Manor." A survey of this land was made by H. T. Greenleaf and recorded in the office of the register of deeds of said county. The plat shows that the tract was divided into squares, numbered from

1 to 318, containing 400 acres each. The description in the several deeds hereinafter set out refer to this survey.

On March 24, 1896, Harvey Terry conveyed the entire tract of 12,338 acres to Thomas H. Robbins, of Brooklyn, N. Y.; the consideration recited in the deed being "one dollar and other valuable considerations." On June 16, 1896, Thomas H. Robbins conveyed to his son, W. A. Robbins, a portion of the tract containing 1,160 acres. On June 16, 1896, T. H. Robbins conveyed to his daughter, plaintiff Lillian F. Naylor, a portion of the tract containing 1,160 acres. On November 11, 1897, W. A. Robbins conveyed the same land to his mother, Adelia Robbins. On December 8, 1897, plaintiff Lillian F. Naylor conveyed the land conveyed to her by Thos. H. Robbins to her mother, Adelia Robbins. Each of the deeds recites a consideration of "one dollar and other valuable considerations," and are duly recorded in the office of the register of deeds of Pasquotank county.

On August 31, 1897, plaintiff Lillian F. Naylor executed to her father Thomas H. Robbins a power of attorney, empowering him as her attorney in fact "to convey, mortgage, and make any other disposition which he should deem proper, all real or personal property, lands, timber of whatsoever nature, now owned, or to be owned, by me in the state of North Carolina." This power of attorney was duly recorded in Pasquotank county September 9, 1897. On January 3, 1898, Thomas H. Robbins and his wife, Adelia, conveyed the entire tract of 12,338 acres to Annie Champion, for the same recited consideration. On January 29, 1898, Annie Champion conveyed the entire tract to plaintiff Lillian F. Naylor for the same recited consideration. On May 1, 1898, Lillian F Naylor, for the same recited consideration, conveyed to plaintiffs Harold J. Naylor and Clara C. Cole (then Naylor) the portions of the tract numbered on said plat from 1 to 62 inclusive, containing 2,500 acres. On April 25, 1902, Lillian F. Naylor, for the same recited consideration, conveyed to Lewis Leavens the entire tract conveyed to her by Annie Champion, containing 12,338 acres. This deed contains no exception of the portion conveyed to plaintiffs May 1, 1898. All of these deeds are duly recorded.

The registry of deeds of Pasquotank county discloses the registration of a deed from plaintiffs Harold J. Naylor and Clara C. Cole to their mother, Lillian F. Naylor for the portion of the original tract which was conveyed to them by said Lillian F. Naylor May 1, 1898. This deed bears date January 1, 1906; consideration recited, "two dollars"; acknowledged before V. Comfort, commissioner of deeds, February 14, 1906; certificate of T. Hartzheim, clerk of Kings county, N. Y., Supreme Court, February 14, 1907; ordered to registration upon the certificates attached by the clerk of the superior court, and recorded in the office of the register of deeds of Pasquotank county, February 21, 1907.

Plaintiffs Harold J. Naylor and Clara C. Cole aver that they never signed or acknowledged the execution of this deed. They allege that, if said deed purported to be signed by them, such signatures were forged. On May 31, 1907, Lillian F. Naylor, by Thomas H. Robbins, her attorney in fact, conveyed the same land to defendant Mary Rob-

bins, then Mary Brandeth; the recited consideration being $2,500. On August 8, 1907, Thomas H. Robbins and his then wife, Mary Robbins, in consideration of $10,000, conveyed to defendant Foreman-Blades Lumber Company, the standing timber on said land, of the dimensions named in the deed. This deed was duly proven and recorded August 12, 1907, in the office of the register of deeds of Pasquotank county. The corporation was given five years within which to cut the timber. It began cutting during the year 1909 and finished April, 1911. These deeds were duly recorded.

The controversy, primarily, centers upon the charge made by plaintiff Lillian F. Naylor that her father, and by Harold and Clara that their grandfather, Thomas H. Robbins, on January 1, 1906, forged, or caused to be forged, the names of plaintiffs Harold J. and Clara C. to the deed found on the record to Lillian F. Naylor, and that Virgil Comfort, the commissioner, who certified that they acknowledged their signatures in his presence, was a party to, and actively participated in, the commission of the forgery. The charge is clearly made and clearly denied. So far as the plaintiffs Harold J. Naylor and Clara C. Cole are concerned, the establishment of this charge is essential to their claim of ownership of the land in controversy. The claim of Lillian F. Naylor is dependent upon the establishment of other contentions.

Before proceeding to examine the evidence upon which the decision of this vital question is based, and the relief prayed by plaintiffs sought to be established, it will be well to note a few facts in respect to which there is no controversy. The plaintiffs paid nothing to Thomas H. Robbins, nor to their mother, for the land. Thomas H. Robbins died December 26, 1911. Virgil Comfort died December 7, 1913. Neither Mrs. Naylor nor either of the other plaintiffs, at any time, listed the land for taxation, nor paid any tax thereon. Virgil Comfort, the commissioner, who certified that the execution of the deed was acknowledged before him, also took the probate of the other deeds herein set forth, except that from Terry to Robbins and Robbins, attorney for Mrs. Naylor, to Mrs. Brandeth. Plaintiffs have never been in possession of, or exercised control over, the land. They allege that Mrs. Robbins claims to be in possession, and she admits that she is in possession, claiming under the deed executed to her May 31, 1907.

The original deed, which purports to have been signed by plaintiffs Harold J. and Clara C. January 1, 1906, was burned in the dwelling of Thomas H. Robbins when it was destroyed by fire December 22, 1910. The bill herein was filed November 12, 1913. It is manifest that, for some reason, Thomas H. Robbins, who purchased the entire tract from Terry March 24, 1896, kept the title thereto in transit, with two exceptions, within his immediate family, retaining at all times control of the title and of the land. Mrs. Naylor says that he put the title in her "to hold for him." She says that the 2,500 acres was given to her "in consideration of being cut off by my husband's uncle's will; that is why it was given to me"; that Annie Champion "was a dummy that my father used, so that she could go on bonds and be liable; that the title was placed in her for him."

The testimony upon which plaintiffs rely to establish the charge of

forgery is largely that of Mrs. Lillian F. Naylor, William A. Robbins, and themselves. It appears that Mrs. Naylor was, during the time of the transactions in controversy, a widow, and that she and her children, together with her brother, William A. Robbins, resided at 178 Garfield Place, Brooklyn, until Harold left home, when about 18 years old. Mrs. Naylor was general guardian for her children, and her brother, W. A. Robbins, was at all times her and their attorney. Mrs. Naylor says that her daughter was born May 21, 1884, and her son October 25, 1885; hence he was not of full age on January 1, 1906. He left home when 17 or 18 years of age, going to California, and from there to Denver, finally going to Ft. Worth, Tex.; that he was there January 1, 1906; that he was at home during the spring of 1905; that he made his next visit home after her daughter was married, which was in April, 1906; "it was the next spring; it must have been in 1907."

Mr. Robbins, in his deposition, testified that "the first time he [Harold] visited Brooklyn, after he took up his residence in Ft. Worth, was in 1909; he had been in Ft. Worth all that time." Mrs. Naylor, who heard Mr. Robbins testify, was recalled and testified, in her deposition, that she was mistaken in saying that her son came home during the spring of 1907; that it was 1909. It will be observed that she had fixed the date as being "the spring after my daughter was married," and this, she says, was in April, 1906. Harold J. Naylor says that he was in Brooklyn about a month during May, 1909; that he was in Ft. Worth during the months of January and February, 1906, and in this he is strongly corroborated. It is conceded that Clara C. Cole, then Naylor, was with her mother in Brooklyn on January 1, 1906. She admits that her mother wrote her of the existence of the deed "four or five years" prior to November, 1914, and in this she is corroborated by her mother and her uncle.

Harold says that he first heard of the deed "eight months or a year ago." This statement was made in his deposition October 6, 1914. Mrs. Cole testifies, upon her deposition, November 6, 1914, that she saw her brother, according to her recollection, "in Ft. Worth a year ago last January; the next time two or three years before that in Brooklyn, N. Y., and the next time as much as four years before that in Brooklyn." She is asked, "Then, according to your best recollection, the third time from this that you saw your brother was some eight or nine years ago in Brooklyn?" to which she answered:

"Yes; it was all of ten years ago." "Have you not seen him, then, but three times in ten years?" "No." "How many times have you been to Brooklyn, N. Y., since April, 1906?" "I have been there a number of times; I don't know how many." "Have you averaged once a year?" "Sometimes I would stay almost a year there." "About how much of the time since April, 1906, to this time, have you spent in Brooklyn, N. Y.?" "Maybe, all told, a year."

Harold J. Naylor, under cross-examination, upon his deposition taken October 6, 1914, was asked and answered the following questions:

"When did you first hear that you ever had any deed for any of the land in controversy?" "Eight or ten months ago." "That was the first time that

you ever heard that your mother conveyed any lands to you?" "Yes." "Who gave you that information?" "My uncle, William A. Robbins." "Where does he live?" "In Brooklyn, N. Y." "How did he come to give you that information?" "In a letter he stated to me that the property had been deeded to me and my sister, and that the timber was being taken off, and that he thought it was up to us to assert our rights." "Have you the letter?" "I have," "Will you furnish a copy of it to be filed with your deposition?" "I think I can. I am pretty sure I had it. I think I have it." "Will you furnish a copy of it to be filed with your deposition?" "Yes." [No copy of the letter is filed.] * * * "Mr. Naylor, Lillian F. Naylor lives where?" "In Brooklyn, N. Y." "Does she and your uncle live together?" "They do." "How long since you saw your mother?" "I saw her last summer, in September." "Where?" "In Brooklyn, N. Y." "Was that before you brought suit?" "That was after." "Did you have any conversation with your uncle and your mother about bringing this suit when you were in Brooklyn last summer?" "I did not think it was necessary, as I understood the suit was already instituted." "My question is: Did you ever have any conversation with either your uncle or your mother about this suit?" "Not that I remember." "Did you have any conversation with your uncle about arrangement with the Richmond Cedar Works?" "None at all." "Is your uncle paying the expense of this lawsuit?" "I understand—in fact, I know—that he made an agreement with the lawyers under contract with contingent." "He is to be responsible for the cost?" "Not that I know of." "When did you see your mother before last September?" "About 1903, about a year before I came to Ft. Worth." "Are you and your sister on friendly terms?" "Yes." "Has there ever been any unfriendly terms between your mother and you and your sister?" "No."

The bill herein was verified by plaintiff Harold J. Naylor June 10, 1913, and filed November 12, 1913. Mrs. Naylor says that, when informed by her brother of the existence of the deed, she told him, a practicing attorney, to do what he thought best, and wrote her daughter, asking her "if she ever signed such a deed, and she said she never had." She further says that, "when I first knew it, I spoke to her about it." Mrs. Cole was then 23 years of age and Harold was 22. To the question whether she saw her father, or had any communication with him, after learning of the existence of the deed, she said, "Once." This question was asked on direct examination, and no further inquiry was made in that respect.

The deposition of W. A. Robbins was taken and read in evidence. He says that he has been acting as counsel and was also appointed guardian for plaintiffs Clara and Harold—was counsel for Mrs. Naylor, guardian; that he spoke to plaintiffs, during their minority, of the deed executed by their mother, conveying the land to them. After testifying in regard to Harold's visits to Brooklyn, he concludes:

"Harold left Brooklyn—I saw him off on the train—in 1904. His first visit after that was in August, 1905. At that time he was living in Colorado; he was here only a few days; then he returned West, and the second time he came back to Brooklyn was in May, 1909. It may have been 1908. He made another visit afterwards; that was in September, 1913."

Mrs. Naylor says that he came to Brooklyn the spring after her daughter was married—April, 1906. It is true that, after hearing her brother's evidence, she says that she was mistaken; that his visit was in 1909. Harold is asked, "Where did you see your mother before last summer?" and answers, "About 1903; about a year before I came to Ft. Worth." He says that he spent a month and four days

in Brooklyn in April and May, 1909. Mrs. Cole says that she spent three or four months in Ft. Worth, Tex., "two years ago in January." This statement was made November 25, 1914. Mr. Robbins says that he has been "acting continuously as attorney for these children and his sister"; that "she has frequently, many times," talked to him about the property. "The first time I knew of the existence of any such deed was some time in the winter of 1908. I had written to the register of deeds of Pasquotank county, asking him to examine the records, and if he found any conveyance from the children to send me copies of the instruments, and he returned me copies of certain papers. That was the first time I knew of the existence of this deed. I informed my sister of what I had found, and told her about the deed I found had been recorded from her children to her, and asked her if she knew anything about it; and she said, 'No,' and I instructed her to write to the children, and find out at once if they had signed the deed. I wrote immediately; as soon as I found out, I wrote to my father, and also to Mr. Comfort"—by registered letter; have letter press copies, which were produced and filed. These letters were taken from the letter book of Mr. Robbins. The book was not produced. From these letters it appears that on April 8, 1908, he wrote his father, Thomas H. Robbins, Washington, D. C.:

"Dear Father: The delay in making this reply to your letter of the 23d of last January is due to the fact that I have been waiting the completion of the examination of the title to the land in Pasquotank county, North Carolina, owned by the children. The revelations disclosed are staggering, actually sickening, on account of the probable criminal consequences to those responsible for the existence of these deeds. We have consulted over this latest transaction, weighing the terrible consequences, and, in view of past transactions, together with your statements to Lillie, when you last talked with her, we have decided you have gone too far, and have come to the painful conclusion to commence an action to set this alleged Naylor-Naylor deed aside on the ground of forgery, unless the children and Lillie are restored within the next few days to the same rights and position they enjoyed as to this land in connection with all persons at the time when the alleged deed from the children to their mother purports to have been dated. Nothing whatever has yet been said to the Foreman-Blades Lumber Company, in order that you may have no obstacles in your way to an adjustment of matters with them, as has just been suggested, which will not really arise when once the facts are made public. But unless this restoration is made speedily, or immediate steps taken for that purpose, I shall have to initiate matters myself to have those rights restored by court, in which case I shall have no control over the other probable results. All this is without waiving any right or claim on the part of Lillie for an accounting from yourself and the grantee mentioned in the deed, bearing date May 31, 1907, you made and claim to have executed as attorney for her, to recover the consideration mentioned therein in case it is found necessary or desirable thus to collect the same. And I am further instructed by Lillie to give you notice that any and every power of attorney from her to you has been revoked by her by a duly executed revocation dated March 11, 1908, and recorded March 14, 1908. I do not agree with you at all as to what are the rights of the children to this timber tract. The considerations to uphold the deed are numerous, valuable, and ample. The deed was made at your own suggestion, and received in good faith and credence, absolute and without any secret reservation or understanding; nor did you consider there was any such at the time you filed your schedule in bankruptcy, or the same would have appeared among the assets you claimed. It has been only since that we have heard any such claim. As a matter of fact, the only actual reservation appears in the deed itself; a possible logging contract, subject to an accounting to the chil-

dren for the value of the timber when removed, which was not to last indefinitely. You write that the children and Lillie have never paid any interest or taxes upon the land. Even so; you seem to forget that I never received one cent in consideration for the 1,160 acres or more I owned of the most valuable part of the tract, which I turned over for your benefit. It was intended, upon making the conveyance to the children, that the burden of any mortgages covering their tract should rest upon the balance of the tract covered by such mortgages, as by law is the case, under the principle of inverse order of alienation. Any equities as to taxes the children stand ready to adjust when the time arrives for a settlement of this matter. The validity of the alleged Naylor-Naylor deed will not stand even the first test, for at its date Harold was *not yet of age* and was in Texas at the time it purports to have been acknowledged in New York. Comfort, too, has thus made himself criminally answerable in this matter, and it will be useless for him to appeal to me to abandon action to set this deed aside when once started. My duty is to the children and Lillie.

"Very truly your son, Will."

The postal receipts show that this letter was received by Thomas H. Robbins April 9, 1908. On the same day Mr. Robbins wrote Virgil Comfort:

"Dear Mr. Comfort: It has been lately discovered that there is a paper on record in the office of the register of deeds for Pasquotank county, N. C., which purports to be a deed dated January 1, 1906, executed by Clara C. Naylor and Harold J. Naylor to Lillian F. Naylor, conveying some 2,500 acres of timber land in said county. These said named grantors claim they never signed nor acknowledged the execution of this paper, so it will doubtless be my painful duty to bring an action to set this paper aside on the ground of forgery, unless my father can succeed in restoring these parties to just the same rights they enjoyed at the time this paper is dated, a proposition which I have just written him, but which I fear cannot be carried through, even if he should realize the necessity for it, which I hardly expect until too late, after the facts have become public. Once these facts come out, and there will doubtless be criminal prosecutions following at the instance of the Foreman-Blades Lumber Company, a matter that exceedingly worries me. But even so my duty rests with my niece, nephew, and sister. As I am going to wait only a few days to have this matter adjusted in the way I have suggested, it seems to me if you can think of any other way out of the trouble, which has escaped me, that it would be of vital interest to you to see me at once about it, for the acknowledgments, I should add, purport to have been taken before you, which was a physical impossibility, since Harold J. Naylor was then, as now, living in Texas. I do not care to discuss this disagreeable affair at my office, but expect to be at home every evening up to half past 7, excepting next Friday."

This letter was received by Comfort on April 9, 1908. Immediately following the production of the letter press copies of those two letters, plaintiff's counsel asked Mr. Robbins the question: "As counsel, what action did you take in the matter?" To which he answered, "I had suit brought; employed counsel and brought suit." He is not asked, and nothing is said, in respect to any reply to the letters, if any was received, nor of any interview with Comfort, pursuant to the invitation to visit the witness. The only evidence indicating what, if any, meeting was had with his father is in response to the question whether he saw his father "much after that," to which he responds, "From 1902 I saw very little of my father; he was seldom at the house; in the last six or seven years of his life I don't think he was there many times." It is evident, from the first lines of the letter to his father, that, prior thereto, some correspondence was had between them

in regard to this land. He refers to his delay in answering a letter of January 23d. This letter is not produced, nor its absence accounted for. Mr. Robbins expresses his dissent from the attitude of his father in regard to the children's claim to the property.

Mr. Robbins, on April 8, 1908, charges his father with the crime of forgery, depriving his grandchildren of a tract of land of 2,500 acres, "worth more than $100,000," as they allege, calling upon him to make some adjustment of the matter under a threat to institute suit, which will result in criminal proceeding, "in a few days." He also charges the official who certified the acknowledgment of the execution of the deed with criminal conduct, with a similiar threat. Without any explanation, without a suggestion as to the action of the parties charged with at least two felonies, he waits five years and eight months, until the father, who lived more than three years thereafter, is dead, before instituting suit. The commissioner, who lived more than five years, died within less than a month after the bill was filed. That Clara C. Cole knew of the existence of the deed is admitted. Although Harold J. Naylor says that he learned of it only "eight or ten months" prior to October 6, 1914 (December, 1913), he verified the bill June 10, 1913. His mother says that she wrote "them" very soon after learning of the deed, according to the directions of her brother, and he (Mr. Robbins) says that Mrs. Naylor informed him that she had communicated "with her daughter and son immediately after he had given her the information about these deeds." She told him that she had communicated with them "shortly afterwards—it may have been two or three weeks." Mrs. Naylor says that she has heard from her son "every week since he left home." In his letter to Comfort, Mr. Robbins writes: "These said named grantors claim that they never signed nor acknowledged the execution of this paper."

It is unthinkable that a son deliberately charged his father with forgery, and threatened to prosecute him, before he had received from the alleged grantors a denial of the execution of the deed by them. He says, in his letter, that they "claim that they had never signed it." It is difficult to resist the conclusion that Harold J. Naylor is mistaken—that his memory is at fault—when he says that he first heard of the existence of the deed "eight or ten months, or probably a year," before he testified (October, 1914). It may, for the purpose of this discussion, be safely concluded that all of the parties interested, and their uncle and attorney, knew, not later than April 8, 1908, of the existence of the deed. It is manifest that they were not restrained by the consideration of relationship, regard for their father, or the result to him, of the exposure of his alleged criminal conduct. It is difficult to reach the conclusion that any man would rest under the charge of forgery, made by his own son, with the threat of exposure "in a few days," or that Comfort was willing to remain quiescent under the threat made by a lawyer, who, as his letter stated, had weighed the consequences to his own father, to prosecute a charge which, if true, would have subjected them both to a term of the state prison. The copies of deeds and other evidence, introduced in this case, show that he had been the trusted friend of Thomas H. Robbins and his

family, taking the acknowledgment of the various deeds to and from each other. He lived more than five years after the charge was made, with an invitation to visit W. A. Robbins at his home, for the purpose of suggesting some way of adjusting the matter. The bill was verified June 10, 1913, but not filed until November 12, 1913. Why, after taking this action, was this delay? Why was not the bill filed and the deposition of Comfort taken before his death? He lived two years after the death of Thomas H. Robbins. His age and the condition of his health does not appear. Why was not suit brought, as threatened, and the production of the original deed demanded, and thereby, if true, the forgery demonstrated. The transaction, with all of the "conveying" and "reconveying" of this land, is clouded in mystery.

On April 25, 1902, Lillian F. Naylor conveyed the entire tract of 12,338 acres to Leavens, making no exception of the 2,500 acres which she had theretofore conveyed to her children, and on September 1st of the same year Leavens conveyed the tract to Thomas H. Robbins. Mrs. Naylor's description of Annie Champion as a "dummy" is significant. It is evident that nothing of value passed between the grantors and grantees, and that the control of the land and timber at all times remained in Thomas H. Robbins. It appears, from some of the deeds and contracts in evidence, that mortgages on the land were outstanding for large amounts, and from the letter of W. A. Robbins to his father that Thomas H. Robbins, at some time during the period when the title was in transit, "filed schedules in bankruptcy." Neither of the plaintiffs, nor W. A. Robbins, their kinsman and attorney, at any time, listed the land for taxation, nor paid the taxes thereon. Mr. Robbins says that in 1908 he wrote some officer in regard to the taxes. No letter in that respect is produced, although he said that he had a copy; "that no taxes were due." They knew that, on May 1, 1907, Thomas H. Robbins, acting under the power of attorney executed by Lillian F. Naylor, had conveyed the land, for a recited consideration of $2,500, to Mary Brandeth, with whom he very soon thereafter intermarried. They also knew that on May 8, 1907, Thomas H. Robbins and Mary Robbins sold the timber to the defendant Foreman-Blades Lumber Company. All of these deeds were put to record immediately after their execution. On December 1, 1908, Mr. Robbins wrote the Lumber Company:

"My clients, Clara C. Cole, formerly Clara C. Naylor, and Harold J. Naylor, have only lately discovered, while negotiating a sale of their property in Pasquotank county, N. C., being about 2,500 acres of what is more commonly known as the Great Park Estate, or Terry Tract, that you are claiming the same under an alleged deed purporting to have been made by them to Lillian F. Naylor, bearing date January 1, 1906, and recorded in the office of the register of deeds for Pasquotank county, in Liber 30 of Deeds, at page 642. I am instructed by them to notify you that they do not recognize, acknowledge, or ratify in any way any such instrument or alleged conveyance upon the grounds, among many others, that the same was never executed by either of them (upon the face thereof the alleged acknowledgment appears to have been taken by a *commissioner of deeds* and not by some official authorized to take it); that at the date of said instrument and the alleged acknowledgment thereof Harold J. Naylor was a minor; that there was never any delivery of said instrument; that no consideration has ever been paid or received for the same. My clients have always claimed and as-

serted, and still claim and assert in full, all the rights, title, and interest they acquired under and by virtue of the deed to them from the said Lillian F. Naylor, dated May 1, 1898, and recorded June 13, 1898, in the said register's office, in Liber 19 of Deeds, at page 288. I am further instructed to notify you that they will hold you and your agents for all damages they have received, or may receive, by reason of any trespass, waste, or cutting or removing any timber from the land in question by you, or your agents, and that you and your agents are hereby forbidden to commit any such trespass or waste, or to cut or remove any timber from said premises. The reservation in said deed to them was simply a logging contract, giving a right of entry to cut timber then standing, which contract long since expired, any operation thereunder to be accounted for, and the net proceeds to be paid over to them. The said Lillian F. Naylor first learned of the record of said alleged deed at the same time it was discovered by her children. She never authorized or requested any such conveyance, and never paid anything for it. If you care to purchase my client's right, title, and interest to protect yourselves, I am willing to stop present negotiations for a reasonable time to entertain any reasonable proposition from you; otherwise, I shall proceed to consummate pending negotiations, if possible, or, failing in this, to take such steps as will be advisable to protect my client's interest and to recover any damages sustained by them to the premises."

Passing the unexplained fact that this letter is written eight months after the letters to Thomas H. Robbins and V. Comfort, it will be noted that Mr. Robbins says that his clients "have only lately discovered, while negotiating a sale of their property," the existence of the deed, and that he is "instructed by them" to notify the lumber company of their claim; whereas, Harold J. Naylor, at least twice in his deposition, says that he heard of the deed "eight or ten months" previous to October, 1914. This is the first and only reference in any of the letters, or the evidence, of a negotiation for the sale of the property. It is also worthy of note that, although the charge is made in the letters to Thomas H. Robbins and V. Comfort that the deed of January 1, 1906, is a forgery, Mr. Robbins, who, as an intelligent attorney, must have known that a statement of that charge to the lumber company would have put its officers at once upon inquiry and sent them to his father, who resided in Washington City and had the deed in his possession, makes no such charge in his letter. It would seem that he carefully avoids doing so. It is true that he says that his clients do not "recognize" any such "instrument" "upon the grounds, among many others, that the same was never executed by either of them." If he had said no more, the reasonable inference would have been that they denied *signing* the deed; no other reasons were necessary. He must have known that the *execution* of a deed involves something more than *signing*. That he did so, and had the distinction in his mind, is indicated by the reasons which he assigns for the claim that the deed was not executed. He says that it appears on the face thereof that the alleged acknowledgment was taken by "a commissioner of deeds, and not by some official authorized to take it"; that at the date of the instrument "Harold J. Naylor was a minor"; that there "never was any delivery of said instrument"; and that "no consideration was ever paid or received for the same." Why place the claim of his clients upon four grounds, three of which any intelligent lawyer would have advised the lumber company were invalid, and the other suggesting a plea of infancy, when the real ground was con-

clusive and easily ascertainable; every person having knowledge of its truth being alive and easily within reach of the officers of the lumber company. The alleged forged deed was then, and continued for two years thereafter, in existence. He refers to "present negotiations," and says that, unless some "reasonable proposition" is made within "a reasonable time," he will "proceed to consummate pending negotiations, if possible, or, failing in this, to take such steps as will be advisable."

In the search for a satisfactory explanation of this mysterious series of transactions, the question arises: What negotiations were pending, and with whom? It will be recalled that, in his letter to Thomas H. Robbins of April 8, 1908, Mr. Robbins writes that:

"We have decided you have gone too far, and have come to the painful conclusion to commence an action to set this alleged deed aside on the ground of forgery, unless the children and Lillie are restored *within the next few days* to the same rights," etc.

In his letter to Comfort he says:

"I am going to wait only a few days to have this matter adjusted in the way I have suggested," etc.

Was this the negotiation referred to in the letter to the lumber company? Was the father, charged by his children with forgery, and his alleged accomplice, negotiating "an adjustment" of the "matter" for eight months, and was the negotiation still "pending"?

It will be observed that, in his letter to Thomas H. Robbins of April 8, 1908, W. A. Robbins expressly reserves the right "on the part of Lillie for an accounting from yourself and the grantees mentioned in the deed, bearing date May 31, 1907, you made and claim to have executed as attorney for her to recover the consideration mentioned therein, in case it is found necessary thus to collect the same." This language refers to the deed executed by Thomas H. Robbins, under the power of attorney of Lillian J. Naylor, to Mary Brandeth.

Defendant Mary Robbins testifies that she had known Thomas H. Robbins "since she was 12 or 13 years old; had known Harold J. Naylor and Clara C. Cole for about twenty years; met Mrs. Robbins and her children at same time; they spent Saturdays and Sundays at my sister's, where I spent the summer." She says that she knows the handwriting of Harold J. Naylor and Clara C. Cole; has seen them write "many times." She is shown the copy of the deed purporting to have been executed by them, and says that she has seen the original "a great many times; * * * handled it—in my home, Mr. Robbins' home—among Mr. Robbins' business papers"; that she saw it in Washington, and afterwards on the farm; that on December 22, 1910, the house was destroyed by fire; nothing was saved; the original deed was destroyed; it was probated by Virgil Comfort, commissioner of deeds. He lived in Brooklyn. He was her brother-in-law. She says that, in her opinion, the signatures on the original deed were the genuine handwriting of Harold J. Naylor and Clara C. Cole. Mr. Robbins had possession of numerous deeds of Mrs. Naylor and the children, when they held other property. She married Thomas H.

Robbins July 2, 1907. V. Comfort died December 7, 1913. "I think he took the probate of most of Mr. Robbins' papers, of every kind, for about 20 years." Witness was Thomas H. Robbins' housekeeper before she married him. He died December 26, 1911. Robbins bought this land through her father and brother-in-law. Stephen Swade was her father. Thomas H. Robbins conveyed the land to her "in this way: I had a mortgage on a large tract of land, and as there was not enough, quite, to meet my mortgage, I waived part in the mortgage, and Heimick & Allworth deeded me a small interest in the tract—the 2,300-acre tract. It was conveyed to me because I had relinquished a part of the mortgage on the land." She says that her mortgage was on the 12,000 acres for $30,000, and she got $12,500.

A deed is introduced from Marshall Allworth and Frank Heimick to Mary Robbins for the 2,500 acres in controversy, bearing date December 17, 1906, recorded August 7, 1907. It appears that they had, by assignment from Thomas H. Robbins and the Elizabeth City Lumber Company, some interest in a timber contract. These conveyances serve no other purpose than to further confuse the situation. They tend to corroborate Mary Robbins in the statement that she had some financial interest in the property. She was divorced from her first husband. While Mrs. Robbins is not contradicted by any witness in respect to any fact to which she testifies, her testimony, like that of the other witnesses, must be weighed in the light of her interest, and such other tests as either weaken or strengthen it. She appears to be a woman of some 60 years of age and of fair intelligence. She was examined orally before me. There was nothing in her demeanor subject to criticism. Her testimony, in regard to the possession of the deed by Thomas H. Robbins, and the date and manner of its destruction, is not contradicted. The inference which would reasonably be drawn from Thomas H. Robbins' possession is neutralized by the fact that he appears to have retained possession of the deeds relating to this land. None of the originals are produced, tending to sustain the view that he was, at all times, the real and beneficial owner, and that the various grantors and grantees were "dummies."

The burden of proof to sustain the allegation that Thomas H. Robbins forged, or caused the names of plaintiffs Harold and Clara to be forged, to the deed of January 1, 1906, is upon the plaintiffs; they having so alleged in their bill. In regard to Clara C. Cole, the proof of the averment rests upon the accuracy of her memory, with such corroborating circumstances as are disclosed by the evidence. She was in Brooklyn at the date upon which the deed purports to have been signed and acknowledged. As to Harold J. Naylor, there is very strong corroborative evidence that, on January 1, 1906, and February 14, 1906, he was in Ft. Worth, Tex., working with Swift & Co. There is confusion in his own mind, and that of his mother and uncle, as to the dates of his visits to Brooklyn.

The defendants, besides relying on the contention that plaintiffs have failed to carry the burden of proof and establish the truth of their allegation, rely upon the statute of limitation. Without pausing to consider the effect of the statute in force in this state, prescribing the

period of time within which an action must be instituted on account of alleged fraud, the question of laches is presented. This question is pertinent from two viewpoints: (1) In weighing and estimating the value of the evidence introduced by plaintiffs to sustain the charge that the deed was a forgery. (2) Assuming that the weight of the evidence tends to support the allegation, are plaintiffs entitled in a court of equity to the relief prayed for, or should they be remitted to an action at law?

[1] It is open to plaintiffs, in an action at law against Mary Robbins for the recovery of possession of the land, and against the Foreman-Blades Lumber Company for the trespass in going upon the land and removing the timber, to try the issue before a jury. Being out of possession, it is not clear that they are entitled to invoke the equitable jurisdiction of the court by a bill to cancel the deed. United States v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110. Complainants allege that defendant Mary Robbins "claims to be in possession" of the land. She admits that she is in possession. It is not easy to see why, in an action of ejectment, the validity of the deeds may not be tried before the jury. The jurisdiction may be sustained, however, under the provisions of section 1589, Revisal 1905 (N. C.). Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; New Jersey & N. C. L. & L. Co. v. Gardner-Lacy L. Co., 178 Fed. 778, 102 C. C. A. 220; Id. (C. C.) 190 Fed. 861.

The question presented, at the threshold, is whether the plaintiffs have been guilty of such laches as should bar them from equitable relief. It is not necessary, in dealing with this question, to inquire, except by way of analogy, whether they are barred by the statute in force in North Carolina (Revisal, § 395, subsec. 9), which bars an action after three years "for relief on the ground of fraud or mistake"; the cause of action not being deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake. In an action of ejectment, of course, plaintiffs would not be barred, if the deed was relied on by defendants in their claim of title, from attacking it upon the allegation that it was forged; they would simply say, "non est factum."

[2] When, however, they appeal to the equitable power of the court to cancel the deed as a cloud upon their title, the party claiming under it being in the adverse possession of the land, the effect of the delay upon their right to demand relief is dependent upon other considerations.

"Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. A court of equity has always refused to aid stale demands, when the party slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; when these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718.

"Acquiescence is an important factor in determining equitable rights and remedies in obedience to the maxim, 'He who seeks equity must do equity,' and

that 'he who comes into equity must come with clean hands.' * * * Acquiescence in the wrongful conduct of another, by which one's rights are invaded, may often operate upon the principle of, and in analogy to, estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would be otherwise entitled. This form of quasi estoppel does not cut off the party's title, nor his remedy at law; it simply bars his right to equitable relief and leaves him to his legal actions alone. In order that this effect may be produced, the acquiescence must be with knowledge of the wrongful acts themselves, and of their injurious consequences." Pomeroy, Eq. §§ 816, 817.

This doctrine is illustrated and enforced in numerous cases. A citation of a few, with reference to their analogy to the conditions found in this record, will be appropriate. In Jenkins v. Pye, 12 Pet. 251, 9 L. Ed. 1070, it is said:

"Lapse of time, and the death of the parties to the deed, have always been considered, in a court of chancery, entitled to great weight, and almost controlling circumstances, in cases of this kind."

This was a bill to set aside a deed alleged to have been obtained by undue influence. It was said:

"The general doctrine is established on a very firm footing as the doctrine of this court."

The time elapsing in that case was much longer than here.

"The rule is peculiarly applicable when the difficulty of doing entire justice arises through the death of the principal participants in the transaction complained of, or of the witness or witnesses, or by reason of the original transaction having become so obscured by time as to render the ascertainment of the exact facts impossible." Fetter's Eq. 43.

Judge Staples, in Harrison v. Gibson, 23 Grat. (Va.) 212, discussing the doctrine, says:

"If, from the delay which has taken place, it is manifest * * * that any conclusion to which the court can arrive must at best be conjectural, and that the original transactions have become so obscured by time and the loss of evidence and the death of parties as to render it difficult to do justice, the court will not relieve the plaintiff. If, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim."

In Lawrence v. Rokes, 61 Me. 38, Barrows, J., says:

"If by the laches and delay of the complainant it has become doubtful whether the other parties can be in a condition to produce the evidence necessary to a fair presentation of the case on their part, or it appears that they have been deprived of any just advantage which they might had if the claim had been put forward before it became stale and antiquated, or if they be subjected to any hardship which might have been avoided by more prompt proceedings, although the full time may not have elapsed which would be required to bar any remedy at law, the court will deal with the remedy in equity as if barred."

Buchanan, J., in Selden's Ex'rs v. Kennedy, 104 Va. 826, 52 S. E. 635, 4 L. R. A. (N. S.) 944, 113 Am. St. Rep. 1076, 7 Ann. Cas. 879, says:

"It has always been a principle of equity to discourage stale demands, and laches is often a defense wholly independent of the statute of limitations. But the rule is adopted because, after great lapse of time, from death of parties,

loss of papers, or death of witnesses, there is danger of doing injustice, and there can be no longer a safe determination of the controversy."

This doctrine, the wisdom of which is vindicated by the experience of the great chancellors of both England and America, has its foundation, not only in a sense of justice to the living, but the peace and welfare of society, and justice to the character and memory of the dead. Chief Justice Fuller in Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134, expresses this truth with elegance and force, saying:

"In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. The hour glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused."

The following language of Judge Merrick is quoted by the Chief Justice, supra:

"Where there has been a change of circumstances with reference to the parties and the property, and still more where death has intervened, so that the mouth of one party is closed, and those who represent his interests are not in a predicament to avail of the explanations which he might have made, out of the charities of the law and in consideration of the fact that fraud is never to be presumed, but must always be proved, and proved clearly, the courts limit very much, in such cases, the measure of time within which they will grant relief, because the presumption comes in aid of the dead man that he has gone to his account with a clear conscience."

In Harwood v. Railroad Co., 17 Wall. 78, 21 L. Ed. 558, a bill was filed five years after the sale of property alleged to have been procured by fraud and collusion. Mr. Justice Hunt said:

"We are also of the opinion * * * that there has been too great delay in initiating this suit, and that no sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as they progressed. Their knowledge of the mortgage sale is expressly admitted. The allegation of ignorance is, in general terms, of the fraudulent acts and arrangements. They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. For aught that appears, they have slept upon their knowledge for several years. Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case."

In Godden v. Kimmell, 99 U. S. 201, 25 L. Ed. 431, it is said, quoting with approval Mr. Justice Field:

"Where there has been laches * * * or long acquiescence in the assertion of adverse right, he [plaintiff] should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; and, if he does not, the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or any formal plea of the statute of limitations contained in the answer."

So, quoting Mr. Justice Swayne, it is said:

"Limitations of the kind are dictated by experience and are founded on a salutary policy, as the lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and the other means of judicial proof."

In Townsend v. Vanderwerker, 160 U. S. 171, 186, 16 Sup. Ct. 258, 262 (40 L. Ed. 383), Mr. Justice Brown says:

"The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

In Galliher v. Cadwell, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738, it is said:

"It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

It is sometimes held that delay to institute suits charging near relatives with fraudulent conduct is explained by natural and creditable feelings. This would be peculiarly true in a case wherein a man's children and grandchildren are charging him with a gross fraud—a felony. However creditable to them such sentiments may be, they cannot be indulged at the expense of innocent third persons, who have dealt with the property under a reasonable belief, either that the father was not in fact guilty of the crime, or that the children had determined to suffer loss rather than expose him, or that some adjustment of the matter had been made "in the family." In MacKall v. Casilear, 137 U. S. 556, 11 Sup. Ct. 178, 34 L. Ed. 776, this phase of the case is dealt with. There the son was seeking to have, in a suit in equity, a deed canceled upon the allegation that it was procured by the "active, actual, and intense fraud" of his father. The suit was brought five years after the death of the father. To the explanation offered for the delay the Chief Justice said:

"If that laches could in any respect be * * * excused by reason of his expectations from his father, we cannot allow him to plead that, because these expectations in part failed of realization through some external cause, therefore he is any the less bound, so far as his dead father is concerned, by a delay which would be otherwise fatal. The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. * * * The time for this son to have attacked his father on the ground of fraud was prior to his father's death; yet no movement was made to set aside these alleged fraudulent conveyances until five years after that event transpired. * * * Of course, it must be admitted that an affectionate son would feel a natural reluctance to make a charge of fraud against his father; but where the time consumed in overcoming this is prolonged, as in this instance, we cannot recognize the relationship as sufficient explanation of the laches. * * * The excuse for the delay is that complainant protested against Casilear's claim and notified him that he would not submit to the sale; but the mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded."

This language is strikingly appropriate to the facts disclosed in this record. It would seem that either plaintiffs felt but little interest, or

had but little confidence, in their claim to property which they allege to be of value "of more than $100,000." Neither of the plaintiffs are able to tell who is bearing the expense of the litigation or how it originated. Harold says that his uncle made some terms with counsel "with a contingent." When Mr. Robbins is asked, "Who have you had to advise with you about commencing this suit before you employed counsel?" plaintiffs' counsel said, "I object, I cannot advise him to answer." He said:

"I have taken advice of several." "Then you were to pay the expense of the suit?" "I was not a party." "Have you executed any bonds in the matter?" "No."

Neither of the plaintiffs of record have done so. There is no suggestion, although questions were propounded, inviting explanation why, after waiting five years, during two of which Thomas H. Robbins was alive, and all of which V. Comfort lived in the same city with Mrs. Naylor and her brother, at the particular time this suit was brought, plaintiffs were aroused from their repose and decided to charge in the record their ancestor, in his grave, with the crime of forgery. Even then, no one appears to be willing to assume liability for the cost, and the case is brought into the world of litigation, with no other fatherhood than a contract "with a contingent." It is true that Mr. Robbins says that a definite amount was to be paid, and, "at the option of counsel, a percentage on the amount recovered." There is no purpose to criticize this arrangement, or question its propriety; but a suit in equity of such grave import to the memory of the dead and the property rights of innocent purchasers for value, it would seem, should come into the court with an unquestioned parentage. It should, at least, have a sponsor who was willing to assume liability for the cost.

When parties come into a court of equity, they should not withhold information pertinent to the case, but should bring with them all of the knowledge or information in their power, and produce all of the letters, papers, documents, or other means of enlightening the court which are in their possession, to the end that the very truth may be established. Although, in a number of instances, plaintiffs say that they have, or think they have, letters corroborating their statements, or sustaining their memories, no such letters are produced. These, together with many other circumstances, which it is not practicable to note at length, may of themselves be of slight importance; but when, as in this case, the transaction is enveloped in so much doubt, the charge made is so grave, rendered more so by the relation existing between parties, and the long delay, that every fact and circumstance explanatory of the course pursued by the plaintiffs should have been produced. When the parties in interest are near relatives, and the evidence relied upon is peculiarly and exclusively in their knowledge, and the rights of third parties are involved, courts of equity have always required a frank, full disclosure, and, when possible, supported by corroborative evidence from disinterested persons, or of facts and circumstances. The evidence here is, in many respects, depend-

ent upon the memory of the parties in interest, or closely related to them.

It is difficult to understand why the deed is dated January 1, 1906, purports to have been acknowledged February 14, 1906, and the certificate of the clerk of the Supreme Court, dated February 14, 1907—a year, to the day, thereafter—recorded February 21, 1907. It is possible that, in registering it, a mistake was made as to the date. Mrs. Naylor first thought her son was at home in the spring of 1907. It is difficult to understand why the certification of the official character of V. Comfort was delayed for a year. The other deeds were probated and registered very soon after their date. Of course, this is mere conjecture; but, because of the course pursued by the parties, any conclusion to which we arrive is conjectural. It is in this condition of the evidence, that the delay to act promptly when the allegation, if true, could have been proven to absolute demonstration, that it becomes the duty of the court to scrutinize closely every fact and circumstance which may throw light upon the case. It is because they delayed action until the witnesses are dead, and the original deed destroyed, that the court finds that "there is danger of doing injustice and there can be no longer a safe determination of the controversy," and the "welfare of society demands the rigid enforcement of the rule of diligence."

If the plaintiffs and their counsel, because of natural and creditable feelings, preferred to let the charge rest in the keeping of their household, rather than execute their threat to expose their aged father, and subject him to criminal proceedings, they must be "remitted to the repose from which they should not have been aroused," not alone because "of the charities of the law," but because others have acquired rights which they might have protected if called to their defense promptly. The conduct of the plaintiffs entitles the defendants, especially the Foreman-Blades Lumber Company, to invoke the principle which a great judge said lies at the foundation of all fair dealing between men. If one, whose duty it is to speak, refrains from doing so when the truth may be established, he should, when death, time, and changed conditions have rendered it impossible to do so, keep silent. It is not material whether this rule of conduct is based upon the principle of estoppel, or laches; they are both founded upon the same reason and produce the same result.

There is, however, another well-recognized principle upon which courts of equity refuse to grant relief, where there has been long and unexplained delay. If there was, originally, cause of complaint against the alleged wrongdoer, the delay may be accounted for upon the probability that there has been a settlement, and satisfaction has been made. There is abundant ground upon which a base this presumption here. The threat to initiate proceedings "in a few days" is accompanied with the alternative, unless an adjustment is made, the terms of which are suggested.

Mr. W. A. Robbins, in his letter to the Foreman-Blades Lumber Company, says that negotiations were "pending"; he does not say with whom, or their character. If he had done so in his letter, or in

his evidence, the atmosphere would have been very much clarified. It appears from the letters, and for manifest reasons, that Mr. W. A. Robbins, representing the plaintiffs, desired to have an adjustment of the matter after he learned the existence of the deeds, especially the one to Mrs. Brandeth and the Foreman-Blades Lumber Company.

Mrs. Naylor says that she saw her father "once" after discovering the existence of the deed of January 1, 1906. Mr. Robbins says that he did not see his father "very much" after that. Neither of them are asked whether the charge made by them that the deed was a forgery was mentioned or discussed by them. They were not examined before me, although Mr. Robbins was present at the argument and filed a brief. That it was understood and expected that Thomas H. Robbins should deal with the land, although the legal title was in Mrs. Naylor, as his own, is evident from the terms of the power of attorney executed by her August 31, 1897. He is empowered to "grant, bargain, sell and mortgage all real and personal property, lands, timber, of whatsoever nature, now owned or to be owned by me in the state of North Carolina, or any part of said property, for such price and on such terms as to him shall seem meet," and to make, execute, and deliver deeds, mortgages, etc. It is difficult to conceive of a more comprehensive or inclusive power of attorney. It was not revoked until March 11, 1908.

It is not an unreasonable conclusion to draw from the letters of W. A. Robbins to his father and V. Comfort, and to the Foreman-Blades Lumber Company eight months thereafter, that some settlement or adjustment was made between Thomas H. Robbins and W. A. Robbins, representing Mrs. Naylor and her children. That this was in the mind of Mr Robbins, when he wrote his father and Comfort, is manifest. In his letter to the lumber company he expressly says that some negotiations are pending, and that he is willing to stop them "for a reasonable time to entertain any reasonable proposition" from the company; otherwise, he would "proceed to consummate pending negotiations, if possible, or, failing in this, to take such steps as will be advisable to protect my clients' interest."

In the absence of any explanation of this language, the questions arise: What, and with whom, were negotiations pending, and of what character? Why were no further steps taken? It is reasonable to infer that the negotiations were "pending" between the only parties interested in reaching an adjustment. There is not a scintilla of evidence that any other persons knew of the deeds, or were interested in the property or its ownership. In the absence of any explanation of the language of these letters from the only persons living, or who could give such explanation, the Foreman-Blades Lumber Company are entitled to rely upon all reasonable presumptions which arise upon the record made by plaintiffs and their representatives. It had, on August 8, 1907, paid $10,000 for the standing timber, with the privilege of cutting and removing within five years; their deed was registered four days after its date. There was no secrecy in the transaction. The company began cutting the timber in 1909, and finished in April, 1911. There was neither haste nor delay on its part.

It is suggested that the condition of the public record was sufficient to put the company on notice that Thomas H. Robbins had committed forgery. I am unable to see anything disclosed by the record to suggest that the deed purporting to have been made by plaintiffs to their mother was a forgery. There is nothing on the record to suggest any fraud in the deed from Robbins, attorney for Mrs. Naylor, to Mary Brandeth. This is the first deed found on the record which recites a valuable consideration. There is no suggestion in any of the letters that such a claim was made. On the contrary, Mr. Robbins, in his letter to his father, writes him that:

"All this is without waiving any right or claim on the part of Lillie for an accounting from yourself and the grantee mentioned in the deed, bearing date May 31, 1907, you made and claim to have executed, as attorney for her, in case it is found necessary or desirable thus to collect the same."

There is no suggestion here of a disaffirmance of the deed on the part of Mrs. Naylor; but, on the contrary, her brother and attorney gives notice that she will call upon him for an accounting and payment of the purchase money. It may be that this was the subject-matter of the negotiations pending on December 8, 1908. It is manifest from the language of Mr. Robbins' letter to his father that the latter had assumed "an attitude" in regard to the children's interest in the land in which his son did not "agree at all."

Without further pursuing the discussion, I am of the opinion that the plaintiffs Harold J. Naylor and Clara C. Cole are not entitled to the equitable relief invoked in the bill. The bill, as to them, will be dismissed, without prejudice to the pursuit of such legal rights and remedies, in an action at law, as they may be advised.

As the Foreman-Blades Lumber Company are not asserting any title or claim to the land, or any timber standing and growing thereon, the decree disposes of the case as to them, unless the claim asserted by Mrs. Lillian Naylor can be maintained. While she is joined as party plaintiff, she does not specifically assert any title to the land, insisting that the deed of January 1, 1906 is invalid, for the reason set forth in the bill. She does, however, allege, and it is true that in her deed to her children of May 1, 1898, is found the following language:

"But the said party of the first part reserves the right to enter upon and cut the timber thereon."

It seems, as if to further complicate the title to this land and create further confusion in regard to the ownership thereof, that on September 29, 1900, while the legal title was in her, she, together with her father, Thomas H. Robbins, and his then wife, entered into a contract with the Elizabeth City Lumber Company whereby they sold and conveyed to the company all of the timber on the entire tract of land. Following description of the land is a clause whereby Mrs. Naylor agrees to cut and deliver the timber to the mill of the lumber company, of certain dimensions, with a recital that the company holds a second mortgage on the land for $6,100 and interest, and an agreement to take up a first mortgage held by Terry, and a further agreement that the company will advance to Mrs. Naylor, for meeting the

expense of cutting and delivering the timber, $3 per 1,000 feet. There are a number of other covenants and agreements in the contract not material to any question raised in this case. There is a further provision that, if Mrs. Naylor should fail to cut and deliver the timber, the company should have the right to enter upon and cut the timber upon the terms and conditions set forth. The proceeds of the timber, after discharging the liens thereon, are to be paid to Mrs. Naylor. On April 25, 1902, Mrs. Naylor conveyed the entire tract of land to Lewis Leavens. This deed contains no exception, nor reference to the contract made with the Elizabeth City Lumber Company. On September 1, 1902, Leavens conveyed the land to Thomas H. Robbins.

On November 17, 1903, Robbins conveyed to the Naval Stores Manufacturing Company, in consideration of 498 shares of the capital stock of said company, all of the live and all of the dead timber on said land of the dimensions named therein. On May 25, 1905, Thomas H. Robbins and the Elizabeth City Lumber Company assigned to Frank W. Heimick and Marshall H. Allworth "all their right, title and interest in and to" the contract of September 29, 1900. Robbins, on February 28, 1905, conveyed the entire tract to L. E. Dodge, in consideration of $90,000, "evidenced in part by the assumption of four certain mortgages and in part by cash and other valuable considerations." On March 31, 1905, he executed another deed to Dodge in substitution of the first deed, containing a fuller description, and excepting the land in controversy, conveyed by Mrs. Naylor to her coplaintiffs. On April 15, 1905, the Elizabeth City Lumber Company, in consideration of $40,000 to be paid on May 15, 1905, assigned to Thomas H. Robbins all of its right, title, and interest in and to the contract of September 29, 1900. The payment of this sum was to be in full settlement "of all claims and demands between all the parties, neither holding anything against the other." On April 28, 1905, Dodge conveyed to Heimick and Allworth the entire tract (excepting the land in controversy). On June 13, 1905, Thomas H. Robbins, in consideration of $77,000, executed to Heimick and Allworth a quitclaim deed for all of the land included in sections 63 to 318, inclusive, being the entire tract, excepting the land in controversy.

In the light of the decree dismissing the bill as to plaintiffs Harold J. Naylor and Clara C. Cole, and defendant Lumber Company asserting no title to the land, nor timber standing upon it, there is no question presented as between Mrs. Naylor and the lumber company, of equitable cognizance, unless, as she alleges, there is, by reason of the various contracts and conveyances introduced in respect to the timber, a trust relation entitling her to call on the company for an accounting. This relation, she insists, grows out of the contract made by her and her father with the Elizabeth City Lumber Company, of September 29, 1900, whereby that company became liable to account for and pay over to her the price of the timber cut, after paying and discharging the mortgages and liens thereon. This contention would present a number of more or less interesting questions, some of which are discussed in the brief. It is difficult to thread one's way through this labyrinth of deeds, contracts, etc. It would seem, however, that when

she made the contract with the Elizabeth City Lumber Company, September 29, 1900, she had parted with the legal title to the portion of the land conveyed to her children. She had reserved the right to enter upon and cut the timber thereon. Whether this was a reservation of the timber, and assignable, or whether it was a mere personal privilege to enter upon and cut so much of the timber as she might need for her personal use, are debatable questions. The decision of them is not material here, because when the deed of January 1, 1906, is made to her by her children, which pro hac vice must be treated as valid, she became the owner of the land and timber, and the merger of the two gave her a complete title to both, which passed by the deed executed by Thomas H. Robbins, as her attorney in fact, of May 1, 1907. I am of the opinion that, as said by Mr. Robbins in the letter to his father April 8, 1908, the contract of September 29, 1905, "was a possible logging contract" which had "long since expired."

It was partially, and in very essential respects, executory. It is very doubtful whether any rights in it passed by assignment. The evidence in regard to what was done under it is obscure and uncertain. It is manifest that it would be impossible to deal with it as outstanding in this case. To undertake to treat the defendant Foreman-Blades Company as having cut the timber on the land in controversy under its terms and provisions, from 1909 until April, 1911, would necessitate bringing into the record a number of parties who have, by assignment and otherwise, become interested in, and expended money upon, the entire tract and the timber thereon. It appears that mortgages and judgments securing large debts have been discharged. The bill is not drawn upon any such theory. In paragraph 9, the deeds of January 1, 1906, May 31, 1907, and August 8, 1907, are set forth; and in paragraph 10 it is alleged that, under the said deeds, "the corporation defendant claims adversely to your orator's title, and has no other title to the timber than the alleged deeds set out," etc. The defendant lumber company, denying the charges in regard to the forgery of the deed of January 1, 1906, alleges that it purchased the timber from Thomas H. Robbins and Mary Robbins, and claiming the title thereto under the deed executed by them August 8, 1907, entered upon, cut, and removed the timber prior to the beginning of this suit. It is manifest that neither plaintiffs nor defendants were relying upon or making any reference in their pleadings to the contract of September 29, 1900, or any of the various deeds and assignments relating to it.

Eliminating this phase of the case, the pleadings and evidence, upon plaintiffs' own showing, disclose no controversy between Mrs. Naylor and the Foreman-Blades Lumber Company, cognizable in a court of equity. If, as contended by plaintiff, the deed from Harold J. Naylor and Clara C. Cole to her is a forgery, the sole interest which she had in the timber was based upon the reservation in her deed to them. If, on the contrary, the deed to her is valid, she was the owner of the land and timber, and remained so until Thomas H. Robbins, as her attorney, conveyed it to Mary Brandeth. If, as she contends, this deed was void, either because, by reason of the several deeds executed by her, the power of attorney was revoked, or because it was fraudulent

in fact, and she continued to be the owner of the land and timber, the entry by the lumber company during the year 1909, and cutting the timber therefrom, was a trespass for which she has a full and adequate remedy at law. There is, in no aspect of the case, any trust relation. The measure of damages for the alleged trespass is well settled, and the ascertainment of the amount peculiarly a question for a jury.

Counsel for defendants urge with force the contention that Mrs. Naylor, having conveyed the entire tract to Leavens by her deed of April 25, 1902, is estopped to claim title as against him, or those claiming under him; hence, if by the deed of Harold J. and Clara C. of January 1, 1906, the land in controversy was conveyed to her, she cannot set up the title thus acquired against those claiming under Leavens, who conveyed to Thos. H. Robbins by deed dated September 1, 1902, so that whatever title Mrs. Naylor had at the time she conveyed to Leavens, or acquired thereafter, vested by estoppel in him, and by his deed Robbins acquired a perfect title which he conveyed, as to the standing timber, to the Foreman-Blades Lumber Company. Hallyburton v. Slagle, 132 N. C. 957, 44 S. E. 659.

It is doubtful whether the questions raised by Mrs. Naylor and discussed by her counsel are presented upon the pleadings, or could be properly joined with the cause of action set out by her coplaintiffs—whether, if set out, the bill would not be subject to demurrer because multifarious. As the entire evidence was before the court, and to bring this unfortunate controversy to an end, so far as the questions presented are cognizable in a court of equity, or at least enable the court of last resort to do so, I have deemed it proper to dispose of all of the phases presented.

A decree will be drawn dismissing the bill without prejudice to the plaintiffs pursuing such course in actions at law as they may be advised. The defendants will recover their cost.

In re MULLINGS CLOTHING CO.

(District Court, D. Connecticut. March 3, 1916.)

No. 3613.

1. BANKRUPTCY ⊂=318(4)—CLAIMS—CLAIMS FOR "RENT."

A claim by a bankrupt's lessor for the difference between the rent which the bankrupt had agreed to pay for leased premises and the amount which a new tenant had agreed to pay was a claim for "rent," though called by the lessor a claim for damages from the breach of an agreement to lease.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 482; Dec. Dig. ⊂=318(4).

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

2. LANDLORD AND TENANT ⊂=194(2)—SURRENDER OF PREMISES—ACCEPTANCE—LIABILITY FOR RENT.

A corporation, having a lease expiring October 1, 1914, entered into a written agreement for a lease for five years from October 1st at $1,000 per month. Thereafter, in an action to wind up its affairs, a receiver was appointed, who, prior to October 1st, repudiated the lease and notified the

landlord of his refusal to be bound thereby. He remained in possession until October 23d, on which day the premises were turned over to J., to whom the receiver had sold the corporation's stock, fixtures, etc., and J. occupied the premises with the landlord's knowledge and consent until the last Saturday of November, when his property was removed. The keys were left on the premises for the landlord, and he immediately entered and continued in possession until about March 1st, when he leased them to a new tenant for a term beginning March 1st. The receiver paid rent until October 1st, and by agreement with the landlord paid $800 as rent for October, and J. paid the same amount for November. The landlord did not demand payment of any rent under the new lease, but after an adjudication in bankruptcy in December he filed a claim for breach of the contract of lease. *Held*, that the landlord accepted the surrendered premises, and had no allowable claim, since, where a landlord takes possession after a surrender by a lessee and lets the premises to another person, he will be deemed to have accepted the surrender, unless facts are shown sufficient to rebut this inference, and no such facts were shown.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 788; Dec. Dig. ⊂⊃194(2).]

3. LANDLORD AND TENANT ⊂⊃181—RENT—NATURE OF "RENT."

"Rent" is a sum stipulated to be paid for the use and enjoyment of land; the occupation of the land being the consideration for the rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 730; Dec. Dig. ⊂⊃181.]

4. LANDLORD AND TENANT ⊂⊃202(1)—RENT—WHEN RENT ACCRUES.

As a general rule rent does not accrue to a lessor as a debt until the lessee has enjoyed the use of the land, though the liability does not always depend upon the actual occupancy of the premises during the time for which recovery is sought.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 802, 803, 805; Dec. Dig. ⊂⊃202(1).]

5. LANDLORD AND TENANT ⊂⊃194(1)—LIABILITY TO PAY RENT—EXCUSES.

Nothing but a surrender, a release, a waiver, or an eviction can wholly or partly absolve a tenant from the obligation of his covenant to pay rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 788, 789; Dec. Dig. ⊂⊃194(1).]

6. LANDLORD AND TENANT ⊂⊃195(2)—LIABILITY TO PAY RENT—ACCEPTANCE OF NEW TENANT.

Where a lessor has consented to a change in the tenancy and received rent from the new tenant, he cannot afterwards charge the original tenant for rent accruing subsequent to such change.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 792, 793; Dec. Dig. ⊂⊃195(2).]

7. LANDLORD AND TENANT ⊂⊃194(2)—LIABILITY TO PAY RENT—"ABANDONMENT" AND RE-ENTRY.

Where a tenant abandons premises, and the landlord without protest enters and resumes possession, such act will generally be construed as constituting a surrender by implication of law; and an "abandonment" will always be found where the circumstances are such as would justify the landlord taking immediate possession upon the tenant's relinquishment thereof.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 788; Dec. Dig. ⊂⊃194(2).

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

8. BANKRUPTCY ⊂=314(2)—CLAIMS PROVABLE—CLAIMS FOR RENT.
Any amount due for rent of premises used by a bankrupt tenant as well as any periodical payments reserved in a lease which have accrued at the time of the filing of the petition in bankruptcy, are claims presentable and allowable against the bankrupt estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 470; Dec. Dig. ⊂=314(2).]

9. BANKRUPTCY ⊂=347—COSTS OF ADMINISTRATION—RENT.
Where a receiver or trustee in bankruptcy actually occupies leased premises, rent for such occupancy and use is payable by the receiver and allowable as part of the cost of administration, not because of any reservation of rent in the lease, but because the use of the premises was considered necessary to the preservation of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 538; Dec. Dig. ⊂=347.]

10. BANKRUPTCY ⊂=314(2)—CLAIMS PROVABLE—"ABSOLUTELY OWING."
The status of a claim at the time of filing a petition in bankruptcy, and not at any subsequent time, fixes the right of its owner to share in the distribution of the estate of the bankrupt; and if it be owing at the time of the filing of the petition, it may be proved, but if it becomes due subsequently, even if before adjudication, it is not a claim to be considered as one "absolutely owing."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 470; Dec. Dig. ⊂=314(2).

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

11. BANKRUPTCY ⊂=314(2)—CLAIMS PROVABLE—EQUITIES.
Where a bankrupt's lessor, in negotiating the lease, was interested in nothing but his own personal welfare, and entered into the lease on terms which apparently were largely to his own advantage, and to the disadvantage of the bankrupt, and it appeared probable that the premises could not be rented to any one else on terms equally as beneficial to himself as those he obtained from the bankrupt, there were no equities in favor of his claim for rent accruing subsequent to bankruptcy, as one seeking equity must do equity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 470; Dec. Dig. ⊂=314(2).]

12. BANKRUPTCY ⊂=318(4)—CLAIMS PROVABLE—CLAIMS FOR RENT.
Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 (Comp. St. 1913, § 9647), authorizes debts to be proved which are a fixed liability absolutely owing at the time of the filing of the petition, whether then payable or not, or which are founded upon contract, and section 63b provides that unliquidated claims may be liquidated as the court shall direct, and then allowed. Gen. St. Conn. 1902, § 4045, provides that on destruction or substantial injury to leased premises the tenant is excused from paying rent while the premises remain out of repair. A lease contained no provision whereby, in case of insolvency, receivership, or bankruptcy proceedings, rent covering any time subsequent to such event would become immediately due, but provided that, on neglect to pay rent for 10 days after it became payable, the lease would become ipso facto terminated, and the landlord might retake possession, and that the lessee might assign the lease at its pleasure without any further responsibility for rent. *Held*, that in view of these provisions, and the provisions of the statute, any claim for rent accruing subsequent to bankruptcy, or for damages from the breach of the agreement to lease, was not only unliquidated, but contingent, and not provable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 482; Dec. Dig. ⊂=318(4).]

In Bankruptcy. In the matter of the Mullings Clothing Company. On petition by John B. Mullings for a review of certain rulings of the referee. Rulings sustained.

Lawrence L. Lewis, of Waterbury, Conn., for petitioner.

Terrence F. Carmody and William J. Larkin, Jr., both of Waterbury, Conn., for trustee.

THOMAS, District Judge. This is a petition brought by John B. Mullings to review certain rulings of the referee made in relation to a claim which the petitioner attempted to file and prove against the bankrupt estate of the Mullings Clothing Company. The essential facts, practically undisputed, are as follows:

On July 25, 1913, the bankrupt corporation was and for many years prior thereto had been conducting a general clothing and men's furnishing business in a store belonging to the petitioner under the terms of a written lease which expired October 1, 1914, in which it was provided, among other things, that the corporation should pay rent for the premises at the rate of $800 a month.

On said July 25, 1913, the parties entered into a written agreement for a lease of the premises for a further period of five years beginning at the expiration of the old lease, to wit, October 1, 1914, by the terms of which the corporation was to pay the petitioner rent at the rate of $1,000 per month during the five-year period agreed to in the new lease.

On August 19, 1914, the directors of the bankrupt corporation voted "to discontinue the business and wind up its affairs." A few days later all stockholders joined in an action, returnable to the state court, praying for the appointment of a receiver to take charge of the business of the corporation and wind up its affairs.

Pursuant to that action, and on August 21, 1914, Carl A. Macomber was appointed by the state court temporary receiver, and on October 19, 1914, he was confirmed as permanent receiver. The court authorized the receiver to take charge of and continue the business of the corporation until the same should be disposed of by order of court. The receiver qualified and took possession of the assets and the business of the corporation.

On the 18th of September, 1914, acting upon the advice and order of the superior court, the receiver repudiated the contract of lease, refused to be bound by its terms, and notified the petitioner of such action. Counsel for both parties admit that a complete repudiation of the lease by the receiver took place.

The receiver continued to occupy the petitioner's premises until October 23, 1914. On that day he turned the keys of the store over to J. H. James, to whom the receiver sold all of the corporation's stock, fixtures, etc., in accordance with an order of the superior court. Thereupon James took possession and continued to occupy the premises with the knowledge and consent of the petitioner until the last Saturday of November, 1914, when all of James' property was removed therefrom. The keys were left on the premises by one G. E. Donnelly, formerly secretary of the corporation, in order that the

petitioner might get them. Immediately thereafter the petitioner obtained the keys, entered the store, and continued in possession of the premises until about March 1, 1915.

On January 23, 1915, the petitioner entered into a new contract of lease of said premises with a new tenant, in which it was provided among other things, that the term of the new lease should begin March 1, 1915, and that the annual rental should be $9,000, payable in monthly installments of $750; this being the most favorable price the petitioner was able to obtain. James paid the petitioner $800 as rent for the use of the store for the month of November, 1914.

The receiver paid rent to the petitioner from the date of his appointment until October 1, 1914, as required by the terms of the old lease. For the month of October he paid him $800, in accordance with a stipulation which the attorneys for both sides entered into, and which became the basis of an order passed by the state court, which stipulation was as follows:

"Stipulation.

"In the matter of the amount to be paid by the receiver to the landlord, John B. Mullings, for use and occupation of the store and premises in the property of said landlord, Mullings, by the receiver of the Mullings Clothing Co. during the month of October, 1914.

"It is hereby stipulated by and between counsel for the receiver and counsel for said Mullings, by and with the consent of the court, that the receiver shall pay $800, and that same shall be accepted by said Mullings in full for his claim against said receiver on that account."

No evidence was produced to show that the petitioner ever demanded payment of any portion of the rent required by the terms of the new lease from either the receiver or any officer of the corporation after the state court had appointed the receiver; and no claim has been made in these bankruptcy proceedings that any sum for rent was due or had become payable from the corporation to the petitioner at the time of the corporation's adjudication in bankruptcy. There is also nothing to show that the petitioner ever filed a claim with the state court receiver for any damages which he may have suffered by reason of a breach of the contract of lease on the part of the bankrupt corporation then in the hands of a receiver.

On December 30, 1914, the Mullings Clothing Company was duly adjudicated a bankrupt, upon its own petition filed on that day, and the matter was referred to the referee in bankruptcy for New Haven county. The first meeting of creditors was held January 18, 1915, and at this meeting counsel for the petitioner offered for proof a claim against the bankrupt estate in the sum of $20,000 damages, claimed for breach of the contract of lease, although at this time the premises had not been relet. Objection to the filing of the claim was made by the attorneys for creditors, on the ground that the claim was one for rent of the premises under the lease repudiated by the receiver of the state court, and was therefore, at most, an unliquidated claim. The referee sustained the objection and refused to permit the claim to be filed or voted until testimony was offered sufficient to show that the claim was one allowable by the Bankruptcy Act, and ad-

journed the first meeting in order to give counsel for the petitioner an opportunity to produce such testimony.

At the adjourned hearing the petitioner attempted to show by competent witnesses the reasonable rental value of the premises for a period of five years beginning October 1, 1914, as compared with the rent reserved in said repudiated lease covering the same period; it being contended by counsel that he had the right to do this in order that the referee might ascertain and liquidate the amount of the damage caused petitioner by the breach of the lease agreement. Counsel further claimed that the difference thus shown, amounting to $15,000, should be found as the damage actually sustained by the petitioner.

Technically speaking, there had not been, up to this time, any petition filed with the referee requesting him to ascertain and liquidate the damage, though petitioner's counsel had indicated his willingness to have the referee ascertain and liquidate the damage. The referee, however, sustained the objection to the evidence, refused to admit that offered, and denied the petitioner the privilege of filing and voting his claim on the question of electing a trustee.

Eight days after John B. Mullings filed his petition asking that the loss to him by the breach of the lease be ascertained and liquidated by the referee and that he then be permitted to file for allowance so much of the claim as the referee might find was due. The trustee's attorney objected, and filed a motion to dismiss the petition. Thereupon the petitioner, with leave of the referee, filed an amended petition showing that since the first hearing the premises had been leased as above stated to another tenant for a five-year period from March 1, 1915, at a yearly rental of $9,000, payable $750 monthly. Thereupon the trustee's attorney filed another motion to dismiss this petition, and after due hearings had the referee granted the motions and dismissed both petitions.

The lease in question contained no provision whereby, in case of insolvency, receivership, or bankruptcy proceedings any portion of the rent reserved therein, covering any time subsequent to such event, would become immediately due, and be an ascertained and fixed liability or debt due from the corporation and presentable against its estate. It did provide, however, that in case the rent should remain unpaid for 10 days after the same became payable under the terms of the lease that the lease would thereby terminate, and the lessor might then recover possession of the premises in the manner prescribed by the Connecticut statute relative to summary process, and that the necessity of demand on the part of the lessor for the rent and for re-entry for condition broken, as at common law, as well as to that of the actual notice to quit as required by the statute, were expressly waived by the lessee. Another provision gave the corporation the right to assign the lease and to sublet the premises for the purpose of conducting any similar business, or for a dry goods or millinery business.

The petition for review raises the question whether the petitioner's claim is one provable under section 63, subdivisions "a" and "b" of the Bankruptcy Act, the essential parts of which read:

"(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

In the judgment to be rendered here the court must follow the decision of the Circuit Court of Appeals for this Circuit in the Matter of Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270. But aside from that decision there seem to be various reasons why the rulings of the referee must be sustained.

[1] The petitioner says that his claim is not one for loss of rent, but asserts that it is one for the recovery of damages caused by breach of an agreement to lease, and that the damage is to be measured by the difference in the amount of rent which the bankruptcy corporation agreed, by the terms of the lease, to pay for the whole term and the amount which the new tenant, now in the premises, has agreed to pay for the balance of the term covered by the same lease. But with whatever name the petitioner has chosen to clothe his claim it must, in any event, be considered as one for rent only. Miller v. Benton, 55 Conn. 529, 13 Atl. 678.

[2] The petitioner's action relative to the control of the premises after they were surrendered to him, coupled with the fact that at no time did he protest the repudiation of the lease by the receiver of the state court, or in fact any other act which the receiver did in relation to the premises; the petitioner's acceptance, also without protest, of the sum which the receiver paid him for use of the premises during the month of October, 1914, and the like sum of $800 paid him by James for his occupancy of the store during the month of November; his failure to make any claim in the state court receivership proceedings for damages because of the breach of contract of lease as well as his subsequent failure to make any demand for rent on the receiver or any one connected with the corporation previous to the commencement of bankruptcy proceedings—all seem to me to be the strongest kind of evidence to refute the petitioner's claim and to justify the referee's conclusion that the petitioner intended to accept and actually did accept the surrendered premises, and had repossessed himself thereof as of his former estate long before the filing of the petition in bankruptcy, and that as a consequence he was not the holder of any allowable claim against the bankrupt corporation at the time he sought to file that which now forms the basis of the controversy here.

It seems to be well settled that, where a landlord takes possession of property after its surrender by a lessee and lets it to another person, he will be deemed to have accepted the surrender, unless facts are shown sufficient to rebut this inference. Kerr on Real Property, § 1287; Underhill v. Collins, 132 N. Y. 269, 30 N. E. 576; Miller v. Benton, supra. No facts having been shown to bring the petitioner within the exception, it must be held that he accepted possession of

the premises when surrendered. Hence he could not have been injured by the ruling of the referee in respect to this feature of the case.

[3-7] Rent is a sum stipulated to be paid for the use and enjoyment of land; the occupation of the land being the consideration for the rent. As a general rule, however, rent does not accrue to the lessor as a debt until the lessee has enjoyed the use of the land, though the liability therefor does not always depend upon the actual occupancy of the premises during the time for which recovery is sought. Nothing but a surrender, a release, a waiver, or an eviction can in whole or in part absolve a tenant from the obligation of his covenant to pay rent, though a release may be implied from the conduct of the parties, and where a lessor has consented to a change in the tenancy and received rent from the new tenant, he cannot afterwards charge the original tenant for rent accruing subsequent to such change. Where the tenant abandons the premises, and the landlord, without protest, enters and resumes possession, such act will generally be construed as constituting a surrender by implication of law. An abandonment will always be found where the circumstances disclosed are such as would justify the landlord taking immediate possession of the premises upon the tenant's relinquishment of the same.

[8] It goes without saying, however, that any amount which may have been due for rent of premises used by a bankrupt tenant, as well as any periodical payments reserved in a lease which have accrued at the time of the filing of the petition in bankruptcy are claims presentable and allowable against the estate. In re Ladue Tate Mfg. Co. (D. C.) 135 Fed. 910; In re Saxton Furnace Co. (D. C.) 142 Fed. 293. They are so presentable and allowable because they are definite and fixed liabilities owing at the time of the commencement of the bankruptcy proceedings.

[9, 10] Where a receiver or trustee in bankruptcy actually occupies the leased premises, rent for such occupancy and use is payable by the receiver and will be considered a preferred claim in favor of the landlord, not because of any reservation of rent mentioned in the lease, but because the use of the premises was considered necessary to the preservation of the estate, and the amount paid by the receiver or trustee for such occupancy will be allowed as part of the cost of administration. In re Hersey (D. C.) 171 Fed. 1001; In re Youdelman-Walsh Foundry Co. (D. C.) 166 Fed. 381. The status of a claim at the time of filing the petition in bankruptcy, and not at any subsequent time, fixes the right of its owner to share in the distribution of the estate of the bankrupt. If it be owing at the time of the filing of the petition, it may be proved; but if it becomes due only after the filing of the petition, even if before adjudication, it is not a claim to be considered as one "absolutely owing." Board of County Commissioners v. Hurley, 169 Fed. 92, 94 C. C. A. 362; Phœnix National Bank v. Waterbury, 197 N. Y. 161, 90 N. E. 435; Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664. Rent on a lease for years, unaccrued at the time of adjudication, cannot be proved as a claim in bankruptcy. In re Rubel (D. C.) 166 Fed. 131.

[11] The petitioner makes no pretense that the breach of the contract of lease was caused by or resulted from the filing of the petition in bankruptcy, but rather that it was caused by the action of the corporation in starting the winding-up proceedings in the state court and by the act of the state court receiver in repudiating the lease. So that the decision in the case of the National Wire Corporation (D. C.) 166 Fed. 631, cited and relied upon by the petition is not, as it seems to me, at all in point. In view, however, of the fact that counsel for the petitioner lay great stress upon the equities which arose in that case, and now claim that they should be applied here, it might be well to remember that the damages there claimed were based upon the fact that a certain amount of wire was contracted to be furnished the claimants by the bankrupt corporation, and on account of the latter failing to keep its engagements claimants were caused a lot of trouble, and were also obliged to pay an advanced price for wire purchased by them from another concern. The referee held, and the District Court sustained the ruling, that the claimants were entitled to compensation because the wire was not furnished, and that the compensation should be measured by the difference between the contract price and the advance price which the claimants were obliged to pay for the wire purchased from the other concern.

The facts and circumstances of that case and the one here are so entirely different that the view taken by Judge Platt can have, as I view it, no possible bearing upon the decision which I am called upon to render here. There the facts disclosed equities so strongly in favor of the claimants that the court was fully warranted in giving them solicitous consideration, while here we find that Mullings was not adverse to entering into an agreement with the corporation for a lease of his property on terms which very much appear to have been largely to his own advantage and to the disadvantage of the corporation. There is nothing in the case which indicates that petitioner, in negotiating the lease, was interested in anything but his own personal welfare; and subsequent events tend to show that he would have found it next to impossible to rent the premises to any one else on terms equally as beneficial to himself as those he obtained from the corporation. "He who seeks equity must do equity" is the maxim which applies, if the equities of the case are to be urged.

The case of In re Frederick L. Grant Shoe Co., 130 Fed. 881, 66 C. C. A. 78, referred to and urged by petitioner to support his contention, was a claim for damages for breach of warranty in the sale of personal property, where the damages were certain, but the amount unliquidated. It was held there, of course, that the amount of the damage could be liquidated, and when found by the court the claim could be filed. There was nothing in that case to indicate the impossibility of ascertaining the real damage which the claimant had sustained, while in the matter here under consideration it appears that until the expiration of the whole period covered by the lease in question it would be impossible to tell whether the breach of contract of lease would or would not prove to be of advantage to the petitioner.

[12] Where a claim is presented for breach of a contract of lease

wherein payments of rent for future occupancy have been reserved, as in the present case, an entirely different situation is presented. By the terms of the lease in question it will be noted that upon the neglect of the bankrupt corporation to pay any monthly payments of rent reserved therein for a period of 10 days after the date when the same became payable, as well as for other causes not necessary to mention here, the lease was to become ipso facto terminated, and the petitioner would then have the right to repossess himself of the leased premises. It was also provided that the lessee might assign the lease at its pleasure, and, if it did, no further responsibility for rent to become due subsequently could be claimed against it. It is provided by section 4045 of the General Statutes of Connecticut, Revision of 1902, that in the event of certain happenings as to the destruction or substantial injury to premises during the period covered by a lease the tenant is excused from paying rent for the occupancy of such premises during the time they remain out of repair. All these matters tend to the conclusion that any claim for damages based upon the breach of such a lease must necessarily be contingent. A test as to whether a claim is really contingent or simply one unliquidated or unascertained by legal proceedings would seem to be this: Have all the facts necessary to be proved to fasten liability already occurred? If so, the claim is not contingent, although the liability and the extent of damages may not yet have been ascertained by proper legal proceedings. As long, however, as it remains uncertain whether a contract would ever give rise to an actual duty or liability and there is no manner of removing the uncertainty by calculation, it is too contingent to be a provable debt. Remington on Bankruptcy, § 641.

Petitioner's counsel, in their very elaborate and exhaustive brief, have shown remarkable astuteness in their attempt to extricate their client from the embarrassing situation in which they find him because of the decisions of the Supreme Court of Errors of Connecticut in Wells v. Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599, and Miller v. Benton, supra. In the first of these cases application was made to the state court and a receiver appointed to take charge of and wind up the affairs of the defendant corporation. The receiver afterwards refused to assume or adopt a certain unfulfilled contract which the corporation had long before entered into with the plaintiff, who claimed that by the receiver's abandonment of the contract he had bound the estate in his hands to respond for the damages which such abandonment had occasioned, and that therefore plaintiff was entitled to have the extent of the damages caused him allowed as a general claim against the estate which was found to be insolvent. The court held, however, that it was the privilege of the receiver, in acting for the best interests of the estate and its creditors, not only to elect what contracts he would assume or reject, but to make the election without in the least subjecting the fund required for the satisfaction of existing claims of creditors to a charge for damages, and that such election could not result in allowing plaintiff to present a general claim entitling him to share with other creditors in the assets of the estate. The court said, further, that if the law were otherwise there might be danger

that a portion of an insolvent estate needed to pay creditors, where claims were already fixed ones, would be thus exhausted to their injury; that in such a case the rights of a claimant for damages, based upon the breach of a contract caused by such act of a receiver, were simply subordinated to those of others standing in a higher position, and that the equity of the rule was quite apparent, as no one would suffer any loss unless the insufficiency of the estate's assets compelled it; that another way of exhausting it was, "where such insufficiency was found to exist, creditors holding claims, the liability for which had become fixed before the receiver's appointment, should not be obliged in any degree to yield to those of others who might seek to secure to themselves profits which the future, by reason of a good bargain, might have in store for them." The court also held that because there did not appear to have been such an out and out act on the part of the Manilla Company as to indicate an intention to renounce its obligations under the contract, and no such unequivocal act by the plaintiff showing his acquiescence in such renunciation before the commencement of receivership proceedings, no breach of contract had in fact occurred before the receivership proceedings, and that the trial court had committed error in finding that a matured claim had existed prior thereto based on such breach. Consequently it was held that the plaintiff's claim was not allowable for proof as a general claim. Judge Prentice, who wrote the opinion, intimated, however, that an after-accruing claim, such as the plaintiff's, might be payable out of any balance left in the receiver's hands after the satisfaction of general claims existing at the date of his appointment and before such balance was returned by the receiver to the debtor. In Lippitt v. Thames Loan & Trust Co., 88 Conn. 185, on page 206, 90 Atl. 369, on page 376, Judge Wheeler says:

"No debt can arise against an insolvent estate in the hands of a receiver. From this principle comes the general rule that only claims as then existing can be recognized as obligations of the estate."

In Miller v. Benton, supra, the court held that where a lessee gives notice of his refusal to comply with the terms of his lease in so far as concerns the payment of rent (unless the lessor joins with him in rescinding the contract), the act of the lessee does not constitute such a breach as will permit an action to lie for damages occasioned by such breach, but that the lessee is nevertheless liable for rent as such when it becomes due.

In whatever light we may view the situation presented because of the decisions in these two cases, we must, of necessity, come to the conclusion that it is sufficient to defeat the petitioner's claim in the case at bar.

The petitioner further relies upon Board of Commerce of Ann Arbor v. Security Trust Co., 225 Fed. 454, 140 C. C. A. 486. In that case the Board of Commerce of Ann Arbor, Mich., and the Climax Specialty Company, then located at Schenectady, N. Y., entered into an agreement whereby the board agreed to procure for the company a factory site at Ann Arbor without cost to the company

and to advance it sufficient money (up to $7,500) to cover the cost of moving the company's plant to Ann Arbor. The board also agreed to dispose of the first $75,000 of a $100,000 bond issue of the company. The company guaranteed that for the first year after its removal to Ann Arbor, which was on January 1, 1911, its pay roll for the factory employés alone would, during the first year amount to at least $50,000, during the second year $75,000, and for each year during a five-year period thereafter $150,000, and that in case its pay roll for factory help during any two consecutive years would not equal that which it agreed it would amount to (barring strikes, labor troubles, fire, and any other cause over which the company had no control), it would pay to the board, as trustee, $10,000 as liquidated damages for this breach of its contract. The company continued to operate its factory only until May 10, 1911, and on July 24th of that year was adjudicated a bankrupt on its own petition. The board presented a claim for $10,000 to the estate, and objection to its allowance was made by the trustee. The question was whether the claim was one owing at the time of the commencement of the bankruptcy proceedings. The court upheld the right of the board to have its claim allowed, and Judge Hollister, writing the opinion for the Circuit Court of Appeals, said that, the court having found that the corporation's adjudication in bankruptcy had created an anticipatory breach of the contract, the right to sue became coincident with the bankruptcy, and that as a consequence it would seem that the fixed sum which had been agreed upon by the parties, and which the court construed as liquidated damages, and not as penalty, might be proved, either under subdivision 1 or subdivision 4 of section 63 of the Bankruptcy Act. From the very fact that the court found the claim there presented to be liquidated and unsatisfied, it would seem that the owner in any event should have been allowed to prove it.

In re Stern, 116 Fed. 604, 54 C. C. A. 60, was an appeal from the judgment of the District Court adjudicating the Manhattan Ice Company a bankrupt, because certain persons who had sustained damages by the breach of executory contracts whereby that corporation had agreed to furnish them ice covering a period of years at a certain price per ton, a portion of the full period covered by the contract not having then expired, were allowed to join as creditors in the bringing of an involuntary petition in bankruptcy against the corporation upon their showing that they had already been damaged to a considerable extent by the corporation's refusal to carry out its agreement to furnish them ice, and because they had been unable to obtain ice at as low a price from any other party. Judge Townsend, in his opinion upholding the decision of the District Court, went into an extensive review of the cases on both sides of the question as to what should be considered as provable debts under sections 63a and 63b of the Bankruptcy Act. But it would take a very much strained construction of the opinion in that case to enable one to find anything in it which could be taken as indicating any error on the part of the referee in the rulings made by him in the matter now under consideration.

At first glance, the opinion in People v. St. Nicholas Bank, 151 N. Y. 592, 45 N. E. 1129, also cited by the petitioner, would impress one with the idea that that case supports the petitioner's contention; but a careful reading of the opinion discloses that the question there turned upon the difference in the limited powers conferred by the statutes of New York as an assignee for the benefit of creditors and the more liberal ones conferred by other sections of the same statutes on receivers of insolvent corporations, taken together with the large discretionary powers vested in courts appointing such receivers and to whose orders they were expected to conform.

But why continue to traverse fields afar in the endeavor to seek the light necessary to aid us in reaching the right conclusion here? Many of the cases referred to by the petitioner, which he claims sustains the principles of law urged upon the court, are cases in which damages were claimed by lessees because of refusal on the part of the lessors to permit the lessees to enjoy the use of the premises leased to them, or were cases where indorsers or holders of promissory notes, etc., which had not yet become payable, but were outstanding obligations, were permitted to file claims against bankrupt estates, while in others, like In re Neff, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349, the facts were such that little analogy can be found to exist between them and the matter in question here.

Whether or not the case of People v. St. Nicholas Bank should be considered a precedent in favor of the propositions urged by the petitioner matters not, for I feel bound to follow the principles of law laid down by the highest state court in this district in Wells v. Hartford Manilla Co., supra. See also People v. Metropolitan Surety Co., 205 N. Y. 135, 98 N. E. 412, Ann. Cas. 1913D, 1180. And, as before stated, my decision must in the main be governed by the opinion of the Circuit Court of Appeals for this Circuit in Roth v. Appel, supra, wherein Judge Noyes, who wrote the opinion of the court, said:

"The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor, so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of debitum in præsenti solvendum in futuro. On the contrary, the obligation upon the rent covenant is altogether contingent. * * * It follows from these principles that rent accruing after the filing of a petition in bankruptcy against the lessee is not provable against his bankrupt estate as 'a fixed liability * * * absolutely owing at the time of the filing of the petition,' within the meaning of section 63a (1) of the Bankruptcy Act of 1898. It is not a fixed liability, but is contingent in its nature. It is not absolutely owing at the time of the bankruptcy, but is a mere possible future demand. Both its existence and amount are contingent upon uncertain events. * * * Even under the Bankruptcy Acts of 1841 and 1867, which, unlike the present act, expressly permitted the proof of contingent demands, claims for unaccrued rent were not provable. * * * The present bankruptcy statute * * * does not provide for the proof of contingent claims. * * * Section 63b adds nothing to the class of debts provided under 63a. It merely permits the liquidation of an unliquidated claim provable under the latter provision."

In view of the circumstances of this case I have deemed it necessary to discuss at much length the several points raised by the petitioner in his exhaustive brief, in order to properly dispose of the whole question, which might, with propriety, have been disposed of on the authority of Wells v. Hartford Manilla Co., Miller v. Benton, and Roth v Appel, supra.

The conclusion is imperative—and sound, as I view the law—that the referee properly granted both motions to dismiss, and his rulings are sustained.

Decree accordingly.

In re CARTHAGE LODGE, NO. 365, I. O. O. F.

(District Court, N. D. New York. March 11, 1916.)

1. BANKRUPTCY ⊜43—WHO MAY BECOME VOLUNTARY BANKRUPTS—"PERSON"—"CORPORATION"—BODY.

Bankr. Act July 1, 1898, c. 541, § 4a, 30 Stat. 547, as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797, and Act June 25, 1910, c. 412, §§ 3, 4 (Comp St. 1913, § 9588), provides that any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits thereof as a voluntary bankrupt. Section 1, cl. 19 (section 9585), defines "persons" as including corporations except where otherwise specified. Section 1, cl. 6, defines "corporation" as meaning all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and as including limited or other partnership associations organized under laws making the subscribed capital alone responsible for debts. Const. N. Y. art. 8, §§ 1–3, authorizes the formation of corporations under general laws, and defines "corporations," as used therein, as including all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. Benevolent Orders Law (Consol. Laws N. Y. c. 3) § 2, provides that either of the orders therein specified, including a lodge of Odd Fellows, may at any regular meeting elect three trustees; and sections 3 and 5 give such trustees power to hold and convey, under the direction of the lodge, all of its property, sue for and recover it, manage its property, etc. *Held*, that such a lodge, which has filed articles or a certificate of incorporation evidencing the election of trustees in accordance with the statute, is a body having some of the powers and privileges of private corporations not possessed by individuals or partnerships, and may file a voluntary petition in bankruptcy, though not designated as a corporation by the statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38; Dec. Dig. ⊜43.

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

2. CORPORATIONS ⊜31—CREATION—CONSTRUCTION OF LEGISLATIVE ACTS.

To constitute a legislative grant of corporate powers and franchises no certain forms are required.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 101, 102; Dec. Dig. ⊜31.]

3. BANKRUPTCY ⊜44—VOLUNTARY PETITION—SIGNATURE.

Where a voluntary petition in bankruptcy on behalf of a lodge of a fraternal order was duly authorized by a vote of the lodge itself and purported to be the petition of the lodge, and the trustees of the lodge, by whom it was signed, were by statute vested with the corporate powers,

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and were authorized by a vote of the lodge to execute and file such petition, the petition was sufficient, though signed in the name of the trustees, instead of the name of the lodge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 43–46; Dec. Dig. ⊂⊃44.]

In Bankruptcy. In the matter of Carthage Lodge, No. 365, Independent Order of Odd Fellows, bankrupt. On application to vacate the adjudication and dismiss the petition. Application denied.

This is a motion or application by certain of the creditors of Carthage Lodge, No. 365, Independent Order of Odd Fellows, which has been adjudicated a bankrupt, to vacate and set aside the adjudication and dismiss the proceedings, on the ground mainly that a subordinate lodge of Odd Fellows, organized and existing under the laws of the state of New York, is neither a person nor a corporation, nor subject to nor entitled to the benefits of the Bankruptcy Act of 1898, as amended in 1910, and cannot be adjudged a bankrupt under the provisions of said act.

W. B. Van Allen, of Carthage, N. Y., for the motion.

Porter & Porter, of Carthage, N. Y., opposed.

RAY, District Judge. [1] December 10, 1915, Carthage Lodge, No. 365, Independent Order of Odd Fellows, of the village of Carthage, Jefferson County, N. Y., filed its voluntary petition in bankruptcy praying that:

"Wherefore your petitioner prays that it, the said Carthage Lodge, No. 365, Independent Order of Odd Fellows, may be adjudged by the court to be a bankrupt within the purview of said acts"

—referring to the acts set out in the petition. The petition says:

"The petition of Carthage Lodge, No. 365, Independent Order of Odd Fellows, of the village of Carthage, Jefferson county, N. Y., and district of Northern New York, and state of New York, and having its principal place of meeting and business at said village of Carthage, in said district and state, respectfully represents."

The petition then states:

"That said Carthage Lodge, No. 365, Independent Order of Odd Fellows, is a benevolent order, incorporated, organized, created, and existing under and by virtue of the law of the state of New York known as the Benevolent Orders Law, and that it has had its principal place of meeting and the place for the transaction of its business at the village of Carthage, Jefferson county, N. Y., for the entire period of time during the six months next immediately preceding the filing of this petition."

The petition then sets out that the Carthage lodge owes debts which it is unable to pay in full, and that it is willing to surrender all of its property for the benefit of its creditors, and desires to obtain the benefits of the acts of Congress relating to bankruptcy. The petition then states:

"That at a regular meeting of said Carthage Lodge, No. 365, Independent Order of Odd Fellows, held in its lodgerooms in the village of Carthage, Jefferson county, N. Y., on the 10th day of August, 1915, a resolution was then and there duly and legally adopted and entered in the minutes of said meeting consenting to be adjudged bankrupt, within the purview of the act of Congress relating to bankruptcy, and empowering and directing the trustees of said

Carthage Lodge, No. 365, Independent Order of Odd Fellows, in their name and in the name of said Carthage Lodge, No. 365, Independent Order of Odd Fellows, to execute and file a petition praying that such an adjudication be made, a copy of which resolution is hereto annexed and is hereby referred to as forming a part of this petition."

To the petition was annexed the schedules in accordance with law. This petition was signed:

"By Herman J. Starkweather, Thomas W. Da Foe, J. F. Arthur, Trustees of Carthage Lodge, No. 365, I. O. O. F."

It was duly verified by these trustees on the 19th of November, 1915. A certified copy of the resolution referred to, authorizing the institution of the bankruptcy proceedings, is also annexed to the petition. In signing and executing same the trustees did not sign the name "Carthage Lodge, No. 365, Independent Order of Odd Fellows." However, adjudication was actually made on the petition.

The articles of incorporation or certificate of incorporation of said Carthage Lodge, No. 365, Independent Order of Odd Fellows, reads as follows:

"Whereas, the members of Carthage Lodge, No. 365, I. O. O. F., chartered by and under the jurisdiction of the Grand Lodge of the State of New York are desirous of having the benefit of chapter 377 of the Laws of 1896, entitled 'An act in relation to benevolent orders, constituting chapter 44 of the General Laws,' and acts amendatory thereof and supplementary thereto:

"Now, therefore, we, the undersigned officers of said Carthage Lodge, do hereby certify that at a regular meeting of said Carthage Lodge, No. 365, I. O. O. F., held in their rooms at Carthage, Jefferson county, N. Y., on the 6th day of March, 1906. F. M. Galloway and M. C. Paul and E. C. Lovjoy were duly elected as trustees for said lodge for the purposes of said acts, in accordance with the constitution and general rules and regulations of the Grand Lodge under the jurisdiction of which said Carthage Lodge is chartered and in conformity to the by-laws of said Carthage Lodge, and that the persons so elected then were and now are members of said Carthage Lodge, No. 365, I. O. O. F., in full membership and in good and regular standing therein.

"We further certify that the said trustees so elected were and have been divided by lot by the officers making this certificate of election as follows: E. C. Lovjoy, for one year. M. C. Paul, for two years. F. M. Galloway, for three years.

"We further certify that each of said trustees has duly accepted said office and qualified as such.

"In witness whereof, we, the undersigned, the Noble Grand, Vice Grand, and Recording Secretary of Carthage Lodge, No. 365, I. O. O. F., being the first three elective officers of such lodge, have hereunto signed and acknowledged this certificate of election, and affixed the official seal of said lodge hereto, this 6th day of March, 1906, and file the same for the purposes hereinbefore specified.

"[Seal.]

J. E. Gay, N. G.
"W. H. Sylver, V. G.
"A. C. Root, R. S.

"State of New York, County of Jefferson—ss.:

"On this 6th day of March, 1906, before me personally appeared Jesse E. Gay, William H. Sylver, and Arthur C. Root, to me known to be the same persons mentioned and described in and who executed the foregoing instrument, and they severally duly acknowledged that they executed the same.

"[Seal of Notary.] Leander E. Bossout, Notary Public."

This certificate or article of incorporation was filed and recorded in the office of the secretary of state of the state of New York on the

14th day of March, 1906. Thereafter this lodge did business as authorized by its charter or articles of incorporation and the laws of the state of New York, and incurred debts and obligations which it was unable to pay, and as to this there is no question or dispute. The unsecured debts of the lodge amounted to $16,686.91.

By chapter 11, Laws of 1909 of the state of New York, entitled "An act relating to benevolent orders," constituting chapter 3 of the Consolidated Laws, it is provided, "This chapter shall be known as the 'Benevolent Orders Law,'" and

"Sec. 2. *Organization.* Either of the following orders: * * * A lodge of Odd Fellows, duly chartered by and installed according to the general rules and regulations of the Grand Lodge of the Independent Order of Odd Fellows of the state of New York * * * —may elect at any regular communication, convocation, encampment or other regular meeting thereof, by whatever name known, held in accordance with the constitution and general rules and regulations of such grand lodge, * * * three trustees for such lodge. * * *

"Sec. 3. *Powers.* Such trustees may take, hold and convey by and under the direction of such lodge, * * * all the temporalities and property belonging thereto, whether real or personal, and whether given, granted or devised directly to it or to any person or persons for it, or in trust for its use and benefit, and may sue for and recover, hold and enjoy all the debts, demands, rights and privileges, and all buildings and places of assemblage, with the appurtenances, and all other estate and property belonging to it in whatsoever manner the same may have been acquired, or in whose name soever the same may be held, as fully as if the right and title thereto had been originally invested in them; and may purchase and hold for the purpose of the lodge, * * * other real and personal property, and demise, lease and improve the same. They may also issue their bonds or other evidences of indebtedness in such amounts and for such time and in such form as they shall determine for the exclusive purpose of raising money to pay for any real estate purchased and held by them, and for the improvement of the same, as hereinabove provided, and may mortgage such real estate for the purpose of securing the bonds or other evidences of indebtedness so issued by them. The proceeds of such bonds or other evidences of indebtedness shall be applied exclusively to pay for such real estate and the improvement thereof. Every such lodge, * * * may make rules and regulations, not inconsistent with the laws of this state, or with the constitution or general laws of the grand lodge or other governing body to which it is subordinate, for managing the temporal affairs thereof, and for the disposition of its property and other temporal concerns and revenue belonging to it, and the secretary and treasurer thereof, duly elected and installed according to its constitution and general regulations and law, shall, for the time being, be ex officio its secretary and treasurer. * * *

"Sec. 5. *Powers of Trustees.* Such trustees shall have the care, management and control of all the temporalities and property of the lodge, * * * and they shall not sell, convey, mortgage or dispose of any property except by and under its direction, duly had or given at a regular or stated communication, convocation, encampment or meeting thereof, according to its constitution and general regulations. They shall at all times obey and abide by the directions, orders and resolutions of such lodge, * * * duly passed at any regular or stated communication, convocation, encampment or meeting thereof not in conflict with the constitution and laws of this state or of the grand body to which it shall be subordinate, or of such lodge."

By section 4a of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, amended February 5, 1903, June 15, 1906 (34 Stat. 267, c. 3333 [Comp. St. 1913, § 9648]), and June 25, 1910, it is provided that:

"*Any* person except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

Turning to section 1 of the same act, "Meaning of Words and Phrases," (19), we find:

"'*Persons*' shall include corporations, except where otherwise specified, and officers, partnerships and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations." Comp. St. 1913, § 9585.

Section 1 (6) says:

"'Corporations' shall mean *all bodies* having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall *include* limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association." Comp. St. 1913, § 9585.

It is clear, therefore, that *any corporation or partnership* is entitled to the benefits of the act, and may file a voluntary petition in bankruptcy, except a "municipal, railroad, insurance or banking corporation." The Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), as to those entitled to the benefits of the act, was narrower than is the act of 1898, as amended in 1910, as that act of 1867 limited the benefits of the act in case of voluntary bankrupts to "moneyed, business, or commercial corporations." The corporations entitled to the benefits of the act of 1898 as voluntary bankrupts are not limited to moneyed, business, or commercial corporations. Municipal, railroad, insurance, and banking corporations only are excluded from the benefits of the act of 1898, as amended, as *voluntary* bankrupts. When we come to subdivision "b" of section 4, we find that *only* moneyed, business, or commercial corporations, excepting therefrom municipal, railroad, insurance and banking corporations, may be proceeded against in *involuntary* bankruptcy.

The question then is: Is the Carthage Lodge, No. 365, Independent Order of Odd Fellows, of Carthage, N. Y., a person or corporation within the meaning of said bankruptcy act? Such lodge certainly has some of "the powers and privileges of private corporations not possessed by individuals or partnerships." It is a creation of the statutes of the state of New York. Its purposes, generally speaking, are benevolent or charitable in character. It has power to elect trustees to manage its affairs. These trustees may take, hold, and convey, under its direction, all the temporalities and property belonging to it, whether real or personal, and may sue for and recover, hold and enjoy same in whatsoever manner the same may have been acquired, and may demise, lease, and improve all such property, real or personal. These trustees hold for the lodge, and are subject to its directions. It may make rules and regulations for managing its temporal affairs and for the disposition of its property, etc. There is no express power to incur debts generally, but this power for corporate purposes is plainly implied, and its property is liable for the payment of such debts.

In 1 Morawetz on Private Corporations, § 1, pp. 1 and 2, it is said:

"A corporation was described by Chief Justice Marshall, in the Dartmouth College Case, as 'an artificial being, invisible, intangible, and existing only in contemplation of law.' A corporation has also been designated a legal entity, a creature of the law, a legal institution, a fictitious or political person. These and similar definitions have received the approval of many eminent authorities.

"According to Kyd, a corporation is 'a collection of many individuals united into one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive according to the design of its institution, or the powers conferred upon it, either at the time of its creation or any subsequent period of its existence.'

"This definition is not inconsistent with that given by Chief Justice Marshall, when correctly understood. Kyd describes a corporation as a collection of many individuals authorized to act *as if they were one person.* Chief Justice Marshall, on the other hand, treats the collection of individuals constituting the corporation as a united body, and personifies it, while he considers the individuals who together compose this body merely as component parts. It is apparent that both definitions describe the same thing regarded from different points of view."

[2] To constitute a legislative grant of corporate powers and franchises no certain forms are required. Mahoney v. Bank of Arkansas, 4 Ark. 620; Del. Div. Canal Co. v. Commonwealth, 50 Pa. 399; Walsh v. Trustees of N. Y., etc., Bridge, 96 N. Y. 427; Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; Bow v. Allenstown, 34 N. H. 351, 69 Am. Dec. 489; 1 Morawetz on Private Corporations, § 18, p. 19. In 1 Morawetz, § 18, supra, it is said:

"No certain forms are necessary to a grant of corporate franchises, unless required by the Constitution. Any expression showing an intention on the part of the legislature to confer the right to exercise corporate powers is sufficient, and this intention may be deduced from the whole of the legislative act. The use of the word 'incorporate,' or a similar expression, is not necessary. Thus the statute chartering the Arkansas State Bank contains no express words incorporating any particular persons, but provided that the management of the bank should be under a given number of directors, to be chosen by the Legislature, and conferred the usual banking powers upon them. This was held to incorporate the directors, inasmuch as they could exercise the powers conferred upon them only in a corporate capacity."

In 10 Cyc. 145, it is said:

"In order that an aggregate body should be regarded as a corporation, it is not necessary that it should be called such in its charter or governing statute." Oliver v. Liverpool, 100 Mass. 531, affirmed 10 Wall. (U. S.) 566, 19 L. Ed. 1029; Edgeworth v. Wood, 58 N. J. Law, 463, 33 Atl. 940; Westcott v. Fargo, 6 Lans. (N. Y.) 319, affirmed 61 N. Y. 542, 19 Am. Rep. 300; Fargo v. Louisville (C. C.) 6 Fed. 787.

It follows that it is not necessary that the statute itself call its creation a "corporation" in order to make it one.

Created by statute, a lodge of the Independent Order of Odd Fellows has a name of its own and power to purchase and own property, incur and pay debts, and to sue and be sued. It is composed of an

association of individuals, which by statute is made an "entity." These persons act as one body and under one name, for the common good, with statutory powers and duties. In 29 Cyc. 14, it is said:

"Beneficial or fraternal societies may be formed by voluntary association, but statutes expressly authorizing the incorporation of such societies are not uncommon."

In 10 Cyc. 143, will be found a citation of many cases defining a corporation, and this lodge in question here is a corporation within each and every one of them. Thus 1 Dillon, Mun. Corp. (3d Ed.) § 18, defines a corporation as:

"A *legal* person with a special name, composed of such members and endowed with such powers, and such only, as the law prescribes."

In 1 Kyd, Corp. 13, approved in many cases, a corporation is defined as:

"A collection of many individuals, united into one body, under a specific denomination, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual."

In Coyle v. McIntire, 7 Houst. (Del.) 44, 88, 30 Atl. 728, 730 (40 Am. St. Rep. 109), we have this definition:

"A legal institution, devised to confer upon the individuals of which it is composed powers, privileges, and immunities which they would not otherwise possess."

In Horn Silver Mining Co. v. New York, 143 U. S. 305, 312, 12 Sup. Ct. 403, 404 (36 L. Ed. 164), it is said, speaking of a corporation:

"Its creation (except where the corporation is sole) is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members, without dissolution, and with a limited individual liability."

In 1 Remington on Bankruptcy (2d Ed.) § 80, page 104, it is said, and correctly:

"It will be observed, with regard to the voluntary bankruptcy of corporations, that the amendment of 1910 is broader than the old law of 1867, inasmuch as *any* corporation, 'except a municipal, railroad, insurance or banking corporation,' may, under the amendment of 1910, petition for its own adjudication as bankrupt, whether or not it be a 'moneyed, business or commercial corporation,' whilst, under the old law of 1867, only 'moneyed, business or commercial corporations' could do so; and yet, on the other hand, the amendment of 1910, so far as relates to the involuntary bankruptcy of corporations, is not so broad as the old law of 1867, because it excepts 'municipal, railroad, insurance and banking corporations.' "

What is true of an educational institution or corporation is of course true of a fraternal, a benevolent, or any other institution organized under the laws of the state and having the attributes of a corporation within the terms and meaning of the Bankruptcy Act. Remington says in the same section quoted from:

"Thus it is possible that an educational institution, although neither a moneyed, business, or commercial corporation, may voluntarily petition for its own adjudication as bankrupt under the amendment of 1910, though not subject to involuntary bankruptcy."

But this is equally true of wage-earners and farmers, who are not subject to involuntary bankruptcy, but may become voluntary bankrupts. Indeed, if a business, a moneyed, a trading, or a manufacturing institution organized under and pursuant to the laws of the state and owning property and owing debts is entitled to the benefits of the Bankruptcy Act, it is difficult to understand why an educational, beneficial, fraternal, or charitable institution organized under the laws of the same state and owning property and owing debts lawfully contracted may not have the benefits of the act. Certainly it is no more in the interest of the general public that the one have the benefits of the act than that the other have. Why should the latter class of corporations mentioned be ruined and driven out of business by the burden of their debts, while the business, commercial, manufacturing, and moneyed corporations are permitted to take the benefits of the Bankruptcy Act and start business anew? I do not think Congress intended any such differentiation, and I am not aware of any rule of public policy which requires a construction of the Bankruptcy Act different from the one I am giving it. In fact, I am unable to see that the statute is at all equivocal.

Within section 4a, read with section 1 (6) and section 1 (19), all corporations are persons, and within the purview of the act, except municipal, railroad, insurance, and banking corporations, and entitled to the benefits of the act as voluntary bankrupts, and, as stated, the law does not concern itself with the nomenclature in the statute creating such corporations. If it did, a lodge of Odd Fellows created under the laws of Massachusetts would be entitled to the benefits of the act, if there called "a corporation," while such a lodge, with exactly the same powers and privileges, would not be if created under a precisely similar statute of Pennsylvania, if in such statute called a beneficial association or by some other name. The question is: Is it a corporation within the meaning and intent and definition of the Bankruptcy Law? The bankruptcy law has prescribed what "bodies" or associations of persons shall be deemed a corporation within its meaning, and this law is paramount. That an association of a considerable number of men under a common name, with a constitution and by-laws, and with power to elect governing trustees, and recognized by the statutes of the state as a single body or "entity," and given power to own real and personal property and sue and be sued, and act by its trustees duly elected as a single body, is a *body* having some of the powers and privileges of private corporations not possessed by individuals or partnerships, cannot be doubted. Such a *body* is differentiated from a partnership. In 1 Bouvier a corporation is defined as:

"A *body* consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of members."

In 7 Am. and Eng. Encyclopedia of Law (2d Ed.) 645, it is said:

"It is well settled that no particular form of words or expression is essential to the creation of a corporation. If the legislative intention to clothe an association of persons with rights, privileges, and powers to be enjoyed and exercised under a collective name, and for designated purposes, and in a corporate capacity, is clearly manifested, the association is by implication a corporation."

In Thomas v. Dakin, 22 Wend. (N. Y.) 94, the court said, after citing cases:

"The principle of these and the like cases is that words of the king (Legislature) granting that a body of men shall have the power to hold property or enjoy privileges amount by the force of the phrase, by operation or implication of law, to the creation of a corporation."

Sections 1, 2, and 3 of article 8 of the Constitution of the state of New York read as follows:

"*Corporations, Formation of.*—Section 1. Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

"*Dues of Corporations.*—Sec. 2. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law.

"*Corporation, Definition of term.*—Sec. 3. The term corporations as used in this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

It will be observed that the Constitution of this state uses the words "associations and joint-stock companies," while section 1 (6) of the Bankruptcy Act uses the single word "bodies," which is more comprehensive. Clearly under this provision of the Constitution of the state a lodge of Odd Fellows is a corporation, whether so named in the act creating it or not, for it is an "association" of members having the powers heretofore specified.

[3] As to the signing of the petition, I think it sufficient. The corporate powers seem to be vested in the trustees of the lodge, and the petition was duly authorized by a vote of the body itself, and on its face is "the petition of Carthage Lodge, No. 365, Independent Order of Odd Fellows, of the village," etc., and of the trustees, and is signed by the trustees, who by resolution were authorized to sign.

The application to vacate the adjudication and dismiss the bankruptcy petition and proceeding is denied, and there will be an order accordingly.

WINTHROP et al. v. FELLOWS, Atty. Gen., et al.

(District Court, E. D. Michigan, S. D. August 5, 1915. On Motion for Preliminary Injunction, January 31, 1916.)

1. CORPORATIONS ⇐34(6, 8)—STATUTE IN FORCE AT TIME OF INCORPORATION.
A corporation organized under the laws of a state, its stockholders, and all others claiming under it by right of representation, are estopped to attack the validity of a provision of the act under which it was incorporated, and which thus became a part of its charter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 92, 94–96; Dec. Dig. ⇐34(6, 8).]

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2. CARRIERS ⟸18(6)—STATUTE REGULATING RATES—SUIT TO ENJOIN ENFORCEMENT—RIGHTS OF BONDHOLDERS.
Holders of mortgage bonds of a railroad company cannot maintain a suit to enjoin the enforcement of a state statute fixing rates unless it is shown that the mortgage trustee, representing all the bondholders, has refused to bring the suit.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. ⟸18(6).]

3. CARRIERS ⟸18(6)—STATUTE REGULATING RATES—SUIT TO ENJOIN ENFORCEMENT.
The trustee under a railroad mortgage, which is in process of foreclosure while the railroad is in the hands of receivers, has no such interest in the future earnings of the road as to entitle it to question the validity of a rate statute, unless it is clearly shown that the mortgaged property is not of sufficient value to pay the mortgage debt after satisfying precedent liens.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. ⟸18(6).]

4. CARRIERS ⟸18(6)—STATUTES REGULATING RATES—INJUNCTION AGAINST ENFORCEMENT.
The rule is imperative that the operation of state statutes governing railroad passenger rates should not be enjoined, unless the confiscatory character of the rate is clear; and this rule is especially applicable to injunctions before final hearing.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. ⟸18(6).]

5. CARRIERS ⟸18(6)—STATUTE REGULATING RATES—INJUNCTION AGAINST ENFORCEMENT.
The showing made on application by the trustee in a railroad mortgage, which was in process of foreclosure, for a preliminary injunction restraining the enforcement of a passenger rate statute, considered, in connection with the report of the receivers of the earnings of the road under the statute for the preceding year, and *held* insufficient to establish the fact that the road operating under the statute would not earn a fair return upon an investment representing the sum necessary to be realized at the sale of the property to cover complainant's mortgage debt and precedent liens, and therefore not to warrant the granting of an injunction on the ground of threatened confiscation in whole or in part of the mortgage bond investment in question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. ⟸18(6).]

In Equity. Suit by Beekman Winthrop, Frederick Winthrop, Charles W. Cox, individually and as executor of the will of Mark T. Cox, William J. Wilson, and the Farmers' Loan & Trust Company, trustee, against Grant Fellows, Attorney General of the State of Michigan, Cassius L. Glasgow, Lawton T. Hemans, and Charles S. Cunningham, members of the Michigan Railroad Commission, Paul H. King and Dudley E. Waters, as receivers of the Pere Marquette Railroad Company, and the Pere Marquette Railroad Company. On motions for preliminary injunction. Denied.

Cadwalader, Wickersham & Taft and Geller, Rolston & Horan, all of New York City, and Frank H. Watson, of Detroit, Mich. (George W. Wickersham, Henry W. Taft, Edwin P. Grosvenor, Frederick

Geller, and Edward H. Blanc, all of New York City, of counsel), for complainants.

Grant Fellows, Atty. Gen., and David H. Crowley and L. W. Carr, Asst. Attys. Gen., for defendants.

Before KNAPPEN and DENISON, Circuit Judges, and SESSIONS, District Judge, sitting under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1913, § 1243]).

PER CURIAM. The Farmers' Loan & Trust Company is trustee under the consolidated mortgage given by the Pere Marquette Railroad Company in 1901. The individual complainants are holders of bonds secured by that mortgage and by the later refunding mortgage of 1905 (or by both of these mortgages), as well as by one or more of certain divisional mortgages antedating the consolidated mortgage. Two of the complainants are also holders of stock of the Pere Marquette Railroad Company. The bill attacks the two-cent passenger fare provision of the 1907 and 1911 amendments to the Michigan railroad statute (P. A. Mich. 1907, p. 59; P. A. Mich. 1911, pp. 476–478) as confiscatory.

[1] The present Pere Marquette Railroad Company was organized in December, 1907. At that time the statute of 1907 which is attacked was in force, and was a part of the act under which the railroad company was incorporated, and thus constituted a material part of its charter. The amendment of 1911 did not change or affect the rates of fare which the Pere Marquette was permitted to charge for the transportation of passengers. It follows that the railroad company, its stockholders, as such, and all claiming under it by right of representation, are effectually estopped to question the validity of the statute here under consideration. Having sought and accepted the rights and privileges thereby granted and conferred, they must perform the duties and obligations therein imposed. Grand Rapids & Indiana Ry. Co. v. Osborn, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598; Commissioner of Railroads v. G. R. & I. Ry. Co., 130 Mich. 248, 89 N. W. 967; Interstate Ry. Co. v. Massachusetts, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555. The last word upon this subject is found in the decision of the Supreme Court in the very recent rate case of Northern Pacific R. R. Co. v. North Dakota, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735:

"As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted."

Complainants have invoked the principle declared in Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 367, 14 Sup. Ct. 1047, 38 L. Ed. 1014, Id., 154 U. S. 420, 14 Sup. Ct. 1062, 38 L. Ed. 1031, and Reagan v. Mercantile Trust Co., 154 U. S. 413, 414, 418, 420, 14 Sup. Ct. 1060, 1062, 38 L. Ed. 1028, 1030, that the trustees under a railroad mortgage, whose security extends, as here, to franchises and income, have an equitable interest in the fair earnings of the road, and are entitled to maintain suit to avoid the destruction or impair-

ment of their security through the enforcement of confiscatory rates of fare.

[2] We are concerned with this question only so far as it may apply to the Farmers' Loan & Trust Company as trustee under the consolidated mortgage. The trustees of the prior divisional and subsequent refunding and other mortgages have not been made parties, and, upon this record, cannot be represented by individual bondholders. It does not appear that the trustees have refused or that they are unwilling to act. The case is not within federal equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix), for here the mortgage trustee is normally the official representative of the bondholders. The trustee under the consolidated mortgage being properly before the court, it is immaterial whether the individual holders of bonds secured by that mortgage are properly joined with the trustee as parties plaintiff.

Confining the inquiry to the rights of the consolidated mortgage bondholders: The case presented differs from the situation in the Reagan Cases in the fact that there the railroads were under no disability to attack the rate statutes under consideration and joined in the prayer for relief, while here the railroad company is estopped from complaining of the rates, and defendants object that the mortgage bondholders are asking the court to compel the railroad company to do that which it cannot lawfully do. Another difference is that the Reagan Cases involved the whole schedule of rates, passenger and freight, and so affected the entire railroad income, while here only a fraction of the income is involved.

We think, however, that in view of the frame of the bill and the facts to which we shall presently call attention it is unnecessary to consider the propositions involved in this contention; and we must not be understood as expressing or intimating any opinion thereon. It will be time enough to consider them when, if ever, the record is such as to make their decision necessary. We shall for the present asume, for the purposes only of this opinion, that upon a suitable bill and upon a suitable showing the consolidated mortgage bondholders would be entitled to complain of a passenger rate found to be in fact confiscatory.

[3] This situation, however, is presented: The consolidated mortgage is in process of foreclosure in this court. The Farmers' Loan & Trust Company, as trustee, has elected to declare the mortgage and the bonds secured thereby presently due and payable. By so doing it has radically changed the character of its security and of its dependent rights. Before such election and declaration the mortgage trustee and bondholders were entitled to periodical payments of interest upon their bonds for upwards of 35 years to come, and thus had a direct interest in the revenue of the railroad, from which their interest would be payable. They are now entitled to the immediate payment of their bonds, and not to future installments of interest. Their mortgage has ceased to be primarily a future interest-bearing security, and has become a present investment, whose value depends entirely upon the amount of money which may be realized from a present sale of the mortgaged property. The consolidated mortgage

and all prior incumbrances, with interest, amount to less than $45,000,000.

An important (and, if decided in the negative, a controlling) question presented by the motion for preliminary injunction thus is: Do the bill and the supporting affidavits show that unless the receivers are permitted, during the pendency of this suit, to put into force the statutes existing previous to the 1907 amendment, enough cannot be realized upon the foreclosure sale to pay in full the consolidated mortgage bonds after satisfying the antecedent liens, and, as incidental to the question just stated, that the putting of such higher rates in force would directly benefit the consolidated mortgage bondholders. As to these questions, we think the burden of proof rests upon complainants.

The bill is framed largely upon the theory that the railroad company is entitled to earn a fair return upon its capital devoted to its intrastate passenger business, and that the statutory rates in question are practically confiscatory of that investment. It is obvious that such consolidated mortgage bondholders, being now interested only in realizing their mortgage debt, are not concerned with the sources of the railroad's income, except so far as such income is necessary to the collection in full of the mortgage debt; in other words, the bondholders cannot get relief by merely showing that passenger rates are confiscatory. If their mortgage is collectible in spite of the alleged confiscatory rates, they are not concerned with that question. The case differs from the West Virginia Passenger Fare Case, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745, and the North Dakota Case, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735.

Do the bill and affidavits allege that unless the existing statutory passenger rates are enjoined pending suit the consolidated mortgage bonds cannot be collected in full? The bill alleges that the "fair and present value of the physical properties" (exclusive of franchises and good will) of the entire Pere Marquette Railroad system is $78,545,241, and of that part of the system in actual use for railroad purposes in the state of Michigan $68,609,709, and, further, that:

> The "fair value of all the railroad properties, franchises, and assets of every description of the Pere Marquette in the state of Michigan, which are now being used for the convenience of the public, exceeds the said sum of $68,609,709, and that the fair value of the railroad properties, franchises, and assets of every description of the Pere Marquette Railroad system, which are now being used for the convenience of the public, exceeds said sum of $78,545,241."

Defendants urge that these allegations amount to an affirmative showing that the value of the railroad properties is more than sufficient to pay off the consolidated mortgage bonds and all antecedent lien; and, if this is so, complainants obviously have no right to the relief asked. We need not and do not decide this question, for we think the bill and affidavits, taken together, fail to make it sufficiently appear that without the injunction asked for the mortgaged property will not yield sufficient to meet the full payment of the consolidated mortgage bonds. While there is a showing that the entire railroad property has

for several years failed to realize a sufficient net return above operation to pay the interest upon the consolidated mortgage bonds and all prior obligations, there are no definite allegations bearing upon the issue whether the property will sell for enough to meet the bonds with which we are here concerned. This consideration is one of substance; for while defendants' motion to dismiss the application, and their failure to make counter showing of facts, amount to an admission, for the purposes of this hearing, of the allegations of the bill and affidavits, they amount to no more than that, and in view of defendants' insistence that the bill alleges the value of the railroad property to be sufficient to permit payment of the mortgage in question we cannot assume that defendants would admit the allegation that the consolidated mortgage is uncollectible without the injunction asked. These considerations, in our judgment, forbid the granting of the motion for injunction upon the present showing. We shall not, however, now formally deny it, but shall give plaintiffs an opportunity to amend their bill and supplement their showing, so far as they are able and may be advised, to meet the views we have expressed.

The case is an important one, both to the public and to the private financial interests involved, and we are not inclined to dispose of the application in the absence of the fullest showing of all pertinent facts. There are, however, a number of practical considerations which admonish us that injunction should not be granted unless actually and clearly necessary to plaintiffs' protection. Among these considerations is the fact that, while the purchaser at foreclosure sale may have the right to operate the road for a time at least without reincorporation under the existing law (and thus by a formal submission to the existing passenger rates), it is apparent that such indefinite operation is, as a practical proposition, likely to be more or less unsatisfactory; further, were relief to be granted, it could only be by insuring that the increased fares permitted by the pre-existing statute of 1889 (P. A. Mich. 1889, p. 282) be applied directly to the benefit of the consolidated mortgage and the precedent liens. Again, an order of sale in the receivership proceedings (as distinguished from the foreclosure proceeding) has already been entered, to take place in the coming autumn, and, if had at that time, any order we might make in the interest of the consolidated mortgage bondholders might prove futile. We do not, however, express any opinion as to whether these or other difficulties are insurmountable, but refer to them only as indicating the necessity of making reasonably sure that the temporary injunction, if granted, would bring substantial benefit to those alone rightfully concerned in it.

It follows from what we have said that, if complainants do not desire to take advantage of the permission for amendment, but see fit to stand upon their present showing, an order denying the motion for injunction will be presently entered.

On Motion for Preliminary Injunction.

By our opinion filed August 5, 1915, we held (a) that the Pere Marquette Railroad Company, by virtue of its incorporation under the act

of 1907, is estopped to complain of the two-cent passenger fare provisions of the 1907 and 1911 amendments to the Michigan railroad law (P. A. Mich. 1907, p. 59; P. A. Mich. 1911, pp. 476–478) here assailed; (b) that the Farmers' Loan & Trust Company, as trustee under the consolidated mortgage, is the only party entitled in this suit to so complain; (c) that by electing to declare the mortgage and the bonds secured thereby immediately due and payable, and instituting foreclosure proceedings for their collection, the mortgage has become merely a present investment, whose value depends entirely upon the amount of money which may be realized from a present sale of the mortgaged property; (d) that if the mortgage is collectible in spite of the alleged confiscatory passenger rates the bondholders are not concerned with that question; (e) that plaintiffs have the burden of showing that the foreclosure sale will not realize enough to pay the consolidated mortgage bondholders in full; and (f) that it did not then sufficiently appear that, without putting into force the passenger fare provisions of the 1889 statute, the mortgaged property will not yield enough to pay those bonds in full. (The consolidated mortgage and all prior incumbrances, with interest, including receivers' certificates and notes, amount to less than $45,000,000.)

Complainant was given opportunity to amend its bill and supplement its showing, to meet, so far as it could, the views so announced. It is asserted in the amended and supplemental bill that the averments of the original bill respecting values of the railroad properties in Michigan and generally relate only to the values on which plaintiffs claim to be entitled to a fair return, and on which such return could be earned but for the alleged confiscatory passenger rates. A decree of foreclosure and sale under the consolidated mortgage has been made. It is alleged, however, in the amended and supplemental bill, that the existing passenger rate provision seriously affects the selling value of the railroad properties and seriously reduces the security of the consolidated mortgage, and, on information and belief, that unless such rate provision is enjoined the foreclosure sale will not bring enough in cash to pay the consolidated mortgage bonds in full, thus making it necessary that the bondholders thereunder, for their full protection, either bid in and reorganize the property or accept postponed securities, while, if permitted to receive a fair passenger rate, it is said, also on information and belief, that the foreclosure decree might be vacated and the consolidated mortgage continued as an investment, or the incumbrancers junior to the consolidated mortgage put in position to bid in the property and pay off the bonds secured by that mortgage.

Adhering, as we do, to our formerly expressed view that plaintiffs are in no event entitled to injunction unless it clearly appears that without it the foreclosure sale will not realize enough to pay the consolidated mortgage bonds after satisfying antecedent liens, the allegations in the amended and supplemental bill respecting the importance and value of an adequate passenger rate may be disregarded, except as they bear upon the ultimate question stated. It is also clear that

allegations merely by way of conclusion, or on information and belief, are not controlling of the facts.

Assuming, however (as seems likely), that a cash bid of $45,000,000 upon foreclosure sale is not to be expected, it does not follow that the consolidated mortgage bonds would not be paid in full through ability to market securities representing only a value upon which adequate returns are yielded. Indeed, it is unlikely that, with the old passenger rates restored, a cash bid of $45,000,000 could be obtained. A sale for cash is seldom made on railroad foreclosures. The necessity of protecting securities on such sales is not unusual.

[4, 5] Coming to the ultimate question: The rule is imperative that the operation of state statutes governing passenger rates should not be enjoined unless the confiscatory character of the rate is clear. This rule is specially applicable to injunctions before final hearing. Before granting injunction in this case we should be more sure that it is necessary to plaintiffs' protection, in view of the question (which we pass without decision) of plaintiffs' estoppel to complain of the rate, and considerations referred to in our former opinion (and not there or here passed upon) respecting the difficulties attendant upon an indefinite operation of the railroad without reincorporation under the existing law, of which the assailed rate is a part, and the segregation of the increased revenues for the benefit of plaintiffs, as well as the fact that the finding involved in the issue of injunction would naturally encourage reorganization investment, which might be disappointing if on final hearing injunction were denied. We need not now consider the efficacy of the provision in the foreclosure decree which attempts to give to the purchaser thereunder the right of action in this suit to attack the rate.

The receivers' report for the year ending June 30, 1915 (accessible since our former opinion), shows a net income of $1,006,012.17 after deducting operating expenses, taxes, hire of equipment ($609,074.00), rentals, and current interest on underlying bonds, receivers' certificates, receivers' notes, and bills payable; and after deducting the current year's interest ($99,365.80) on equipment obligations (whose principal now amounts to $2,515,132.27) a net income of $906,646.37 is shown, after paying interest accruing for the year on all incumbrances prior to the consolidated mortgage. This net income would thus pay in full the interest ($335,280) on the consolidated mortgage bonds (whose principal amounts to $8,382,000), and leave $571,366.37 available for interest on obligations *junior thereto* were it not for maturing principal on equipment obligations, principal of receivers' obligations, past-due bills payable, and arrears of interest on bonds, receivers' certificates and notes, and on bills payable, resulting from deficits in previous years' operations, including expenditures therein for new equipment, additions, and betterments.

By charging against this net income for the year 1915 $604,426.11 for maturing principal of equipment obligations, together with interest on matured and unpaid principal thereof, as well as interest on matured unpaid interest on prior bonds, plaintiffs' computation shows a deficiency on account of consolidated mortgage bond interest of

$223,412.56; that is to say, but $111,867.44 is left so available, instead of the required $335,280. But the record does not make it clear how much, for example, of the item of $604,426.11 paid as for maturing principal on equipment obligations is properly chargeable as an expense of the year 1915, for the purpose of determining net profits from operation or the income-yielding value of the railroad; and we are not prepared to say that on the basis of that year's operation the road did not earn a fair net income on an investment of $45,000,000. Unless, then, the operation for the year 1915 was abnormally profitable, a threatened confiscation of plaintiffs' property, or any part of it under existing passenger rates does not so clearly appear as to warrant injunction. We are not satisfied that the operation for that year was abnormally profitable, or, if more than normally profitable, was so much in excess of a normal return as to appreciably affect the value of plaintiffs' investment.

For the years 1907–1910, both inclusive, taking into account a comparatively small deficit for 1908, there was an average annual surplus of $137,229.99, after payment of operating expenses, taxes, rentals, hire of equipment, and interest accruals on all indebtedness; such surplus for 1910 being $469,713.69. True, there was for each of the years 1911–1913, both inclusive, an average balance of but $1,528,237.51 available for payment of interest, leaving an annual average deficit of $1,796,330.31, which deficit in 1914 was $7,152,894.75. But that the year 1914 was abnormally unprofitable, that the year 1915 makes a showing not substantially better than normal, and that the deficit for 1915 was due largely to the increased interest charges resulting from deficits created during the years immediately preceding, all seem to be fairly indicated by the facts that for the year 1915, while the gross revenues were only between 6 and 7 per cent. greater than in 1914 (and apparently not more than 6 per cent. greater than the average for 1910 to 1914, both inclusive), the balance before deduction for interest accruals was $2,888,279.78 (which was only 11 per cent. less than the entire of the average interest on funded debt accruing during the years 1910 to 1913, inclusive, and in fact a trifle more than the average interest accruing during the years 1907 to 1909, inclusive), this deficit for 1915 being only $1,419,264.53, although the interest accrual account ($4,307,544.31) was $982,976.49 greater than the average of that account from 1911 to 1913, and the funded debt had increased $5,000,000 since 1913. This deficit for 1915 seems to be less than the interest on the $40,000,000 excess of present funded indebtedness over the $45,000,000 required to include the consolidated mortgage bonds. The significant feature of the 1915 operation was the reduction (apparently due to careful management) of the operating expense ratio from more than 106 per cent. in 1914 [1] to less than 75 per cent. in 1915; such operating expense being less both in ratio and in the aggregate than for any year since 1910.

While the proof of the collectibility of the consolidated bonds, in the

[1] The 1914 operating expenses account included, however, items aggregating more than $2,200,000, accumulated in large part, at least, during previous years.

absence of the injunction asked for does not amount to a demonstration, in our opinion it does not clearly appear affirmatively that without the aid of the injunction asked for those bondholders are threatened with a confiscation of their investment in whole or in part. In other words, we are not clearly satisfied that the railroad is not now earning and will not continue to earn a fair return upon an investment represented by a funded debt of $45,000,000 (as against the present $85,000,000) when the necessity of using current income for principal of receivers' obligations and other maturing debts is removed.

We are therefore constrained to deny the preliminary injunction; and it will be so ordered.

BAILLIE v. BACKUS et al.

(District Court, D. Oregon. March 6, 1916.)

No. 7067.

1. REMOVAL OF CAUSES ⇐⇒49(1)—CITIZENSHIP OF PARTIES—SEPARABLE CONTROVERSIES.

Plaintiff, a citizen of Oregon, owned 5 per cent. of the stock of an Oregon mining company, and corporations controlled by B. owned the other 95 per cent. B., the corporations controlled by him, and their other officers had misappropriated surplus funds of the mining company and converted them to their own use and benefit, and plaintiff sued them for an accounting, also naming the mining company as a defendant. The complaint went into minute detail as to the misappropriations, showing that they were sometimes made through B.'s machinations, sometimes through the acts of one or other of his companies, and sometimes by other officers of such companies; but in several parts of the bill defendants were charged jointly with participating in the misappropriations, and from the whole bill it was apparently drawn on the theory that there was a joint participation by the defendants named in a common scheme to withdraw the surplus funds of the mining company, with a view to preventing plaintiff from obtaining his just share of the profits. The defendants other than the mining company were all nonresidents of Oregon. *Held*, that there was no separable controversy between plaintiff and B., and the suit was not removable, as there was no joinder of separate causes of action, but only a particularization of different items of misappropriation, all entering into and forming elements of the general accounting demanded.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95, 98, 99; Dec. Dig. ⇐⇒49(1).]

2. REMOVAL OF CAUSES ⇐⇒61—DETERMINATION OF RIGHT OF REMOVAL.

The right of removal depends upon the case disclosed by the pleadings when the petition for removal is filed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. ⇐⇒61.]

3. REMOVAL OF CAUSES ⇐⇒61—CITIZENSHIP OF PARTIES—SEPARABLE CONTROVERSIES.

Where a joint recovery against several defendants is claimed upon a cause of action which justifies a joint recovery, there is no separable controversy, though plaintiff might have elected to present a separable controversy with one of the defendants.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. ⇐⇒61.]

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4. REMOVAL OF CAUSES ⟸37—CITIZENSHIP OF PARTIES—REARRANGEMENT OF PARTIES.

In a suit by a minority stockholder in an Oregon corporation, who was a citizen of Oregon, for an accounting by nonresidents of Oregon respecting funds of the corporation misappropriated by them, the corporation could not be aligned on the side of plaintiff in determining the right of removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 80; Dec. Dig. ⟸37.]

In Equity. Suit by Frank S. Baillie against E. W. Backus and others. On motion to deny continuance of a temporary restraining order and to remand. Preliminary injunction dissolved, and cause remanded.

The E. W. Backus Lumber Company is a Minnesota corporation, with principal office at Minneapolis, of which Backus was president, A. E. Horr treasurer, and up to the time of his death, namely December, 1897, R. C. Leavitt vice president. A. E. Horr was the father and R. C. Leavitt the uncle of the wife of Backus, and said corporation was in all matters dominated and controlled by Backus. Backus-Brooks Company, a Minnesota corporation, having its principal place of business at Minneapolis, is the successor in interest of the E. W. Backus Lumber Company, and is under the same control and management as the E. W. Backus Lumber Company.

On August 17, 1896, R. C. Leavitt, acting on behalf of the E. W. Backus Lumber Company, entered into a contract with Henry Cable, Marion Cable, and Erwin Cable to lease and purchase from them what is known as the Columbia mine, later owned by the Columbia Gold Mining Company. By the terms of the contract Leavitt was to enter into the possession of the property by October 1, 1896, operate the same, and commence the construction of a mill for reducing ore, and was to pay for the property $80,000, as follows: $10,000 in cash, $10,000 by January 1, 1897, and $20,000, on the dates, respectively, of January 1, 1898, January 1, 1899, and January 1, 1900—the said $10,000 cash having been paid by E. W. Backus Lumber Company. E. W. Backus Lumber Company entered into possession of the property before October 1, 1896, constructed a mill, and, prior to the incorporation of the Columbia Gold Mining Company, paid the January 1, 1897, installment of $10,000.

In September, 1896, Backus, acting for the E. W. Backus Lumber Company, employed plaintiff to act as agent and representative of the company in disbursing moneys to be expended in its behalf. In discharge of his trust, plaintiff paid out, at the request of the company, $1,000, and about January 7, 1897, entered into a contract with the E. W. Backus Lumber Company whereby plaintiff became the active manager of the Columbia mine, and it was agreed that plaintiff should have the privilege of purchasing a 5 per cent. interest in the equity then owned by the E. W. Backus Lumber Company in the Columbia mine for $5,000; $1,000 thereof being acknowledged as paid, and the remaining $4,000 to bear interest at 8 per cent., and to be paid at the convenience of plaintiff within five years, either out of the profits of the operation of the mine or otherwise. It was further agreed that the Lumber Company should complete the purchase of the Columbia mine, and upon payment by plaintiff of the $5,000 that plaintiff should own an interest equivalent to 5 per cent. in the property, and that in case a corporation should be formed plaintiff should have 5 per cent. of the total authorized capital stock thereof fully paid up, with the privilege on the part of the Lumber Company of purchasing back the said 5 per cent. interest, or of the stock as the case might be, under certain conditions.

The Columbia Gold Mining Company was incorporated July 31, 1897, with an authorized capital stock of $150,000, divided into 1,500 shares, at $100 per share; its principal office being at Baker City, Or. On July 31, 1897, the Lumber Company had paid out, in connection with the Columbia mine, $33,538.39, and plaintiff, under his contract to purchase a 5 per cent. interest, $1,888.50, and there was owing to Cable Bros. $60,000, and some current obligations. The instructions of E. W. Backus, president of the E. W. Backus

Lumber Company, were followed in all things relating to the incorporation of the Columbia Gold Mining Company. R. C. Leavitt was elected president, A. E. Horr treasurer, R. L. Horr secretary, and plaintiff vice president and general manager.

Leavitt, also under instructions of Backus, assigned his contract with Cable Bros. to plaintiff, for the consideration as expressed in the assignment of $40,150.65, no part of which was paid by plaintiff, and plaintiff assigned said contract to the Mining Company in consideration of the issue by the Mining Company to him of 1,500 shares of its capital stock; and thereupon, by instructions of Backus, plaintiff caused 75 shares to be issued to himself, one share each to two other parties to qualify them to act as directors, and the balance of 1,423 shares to the E. W. Backus Lumber Company. About August 19, 1897, through negotiations of Backus and Cable Bros., the latter conveyed the mining property covered by the Leavitt contract to the Mining Company, and that company executed its mortgage to Cable Bros. to secure the payment of the postponed three installments of $20,000 each, which were subsequently paid at maturity by the Mining Company, and no part thereof was paid by the Lumber Company.

Up to about May, 1899, the mine was running at a loss, which then aggregated the sum of $65,517.18. Thereafter, during and following the month of May, in 1899, the mine produced, over and above current expenses, $130,981.06, which sum, under directions from Backus, was remitted to Horr, the treasurer at Minneapolis; and during the time Backus removed plaintiff as manager and secured the resignation of the directors holding one share of capital stock each, but subsequently reinstated plaintiff as manager. Of the moneys remitted to the treasurer, Backus, without the knowledge of plaintiff and without the corporate action of the Mining Company, fraudulently and wrongfully embezzled and took from the treasury, and converted to his own use, divers sums, charging them to divers accounts, which are set out, aggregating $103,174.50, and caused the entry thereof to be made in the books of the Mining Company during the year 1900. By withdrawing from the treasury the said sum of $65,517.18, the total investment made by the Lumber Company for the mine prior to 1898, and by misappropriating and withdrawing from the treasury the sums of money stated, the Mining Company was defrauded of the sum of $103,174.50, and plaintiff was defrauded of the sum of 5 per cent. interest therein, to wit, $5,158.73, and said moneys so wrongfully misappropriated, if properly applied, would have completely paid up and discharged the balance which plaintiff then owed on his stock note.

During the years 1900 and 1901 there was realized from the mine and remitted to Treasurer Horr at Minneapolis, over and above all sums used in paying off the Cable Bros.' mortgage and all sums paid for operating expenses, the aggregate sum of $190,572.28, of which sum plaintiff was entitled to have distributed to him 5 per cent. and the Lumber Company 95 per cent., and, if said sums of $103,174.50 and $190,572.28 had been so distributed, plaintiff's stock note would have been paid in full, and there would have remained about $8,000 which plaintiff would have been entitled to have distributed to him; and the defendants Backus, Backus-Brooks Company, and the Lumber Company, without the knowledge or consent of plaintiff, wrongfully misappropriated all said moneys, and pretended to loan the same to corporations of which they were the owners and in control, and in which the Mining Company had no interest, and expended them upon other concerns promoted by Backus. Defendants refused to apportion any of said sums of money until the year 1909, when Backus, without corporate action, but with the consent of plaintiff, distributed of the surplus funds of the Mining Company the sum of $230,000, of which there was paid to Backus the sum of $218,500, and the remainder, to wit, $11,500 to plaintiff.

After 1909 the earnings of the Mining Company to the extent of $100,000 were distributed, to plaintiff 5 per cent., and to Backus, president of the Lumber Company, 95 per cent., all without corporate action, and all by the acquiescence of the Lumber Company. Since about 1908 no meeting of the stockholders or of the board of directors of the Mining Company has ever been held within the knowledge of plaintiff, or, if any such has been held, it

has been without notice to plaintiff; but Backus assumes to act as president and Brooks as treasurer of the Mining Company. About April 26, 1915, Backus directed plaintiff to close down the mine on September 1, 1915, and at said time there was on deposit in the First National Bank of Baker City the sum of $15,000 over and above all sums necessary to pay all liabilities of the Mining Company up to September 1, 1915, and there were in transit ore and bullion shipments aggregating $7,000, making in all in cash assets a sum exceeding $22,000.

At said time there should have been in the treasury of the Mining Company, in addition to the cash assets of $22,000, a sum exceeding $300,000; but by report of Brooks, the treasurer, there was made to appear on hand but $143.59, and the balance of said money was covered by fictitious and fraudulent entries and loans to Backus-Brooks Company and other companies controlled by Backus and Brooks, and advances made and charged against other corporations of which Backus was the promoter. At said time plaintiff, for his own protection, drew out of the First National Bank as his own $14,756.83, and with said sum purchased two certificates of deposit, one for $5,829.55 and the other for $8,927.28, and placed the same in his own safety deposit vault in said bank, and notified defendants of what he had done, and that such certificate would be so held by plaintiff until an accounting was had for the misappropriation of the funds of the Mining Company by the defendants. Thereupon Backus' private attorney pretended to remove plaintiff as manager of the Mining Company, and to assume control thereof himself. The mine and all assets were surrendered to the attorney August 27, 1915.

The Mining Company has commenced an action at law against the bank to recover the money withdrawn by plaintiff, which sum was tendered into court by plaintiff on the commencement of this suit, to await the final determination thereof. Backus and his attorney are about to remove all the books and all vouchers, documents, and papers relating to the transactions of the Mining Company from the state, and will do so unless restrained. The entries in relation to the misappropriation of funds made by the defendants were made, in the Mining Company's books at the mine, long after such appropriations were made under the direction of Backus, and if such books and papers are permitted to be shipped away, it will leave plaintiff without available evidence to support his allegations for relief. On a proper accounting plaintiff would be found to be entitled, not only to the certificates of deposit, but to $20,000 additional, and defendants have refused an accounting.

All defendants are nonresidents of the state of Oregon except the Mining Company. Owing to the Mining Company being controlled by Backus, plaintiff is unable to secure relief from the company, on account of the defendants' owning and controlling 95 per cent. of the capital stock and refusing to act in this matter for the benefit and protection of the Mining Company and plaintiff, or either of them.

The foregoing is a brief summary of the complaint. An accounting is prayed in favor of plaintiff and the Mining Company, and against all the other defendants, except Richardson, and between plaintiff and the Mining Company and said defendants, and between the Mining Company and defendants other than said company, and that the sum to which plaintiff may be found to be entitled shall be decreed a lien upon the property of the Mining Company.

The suit was commenced in the state court. The defendants, except the Mining Company and Richardson, were served in Minneapolis, Minn., and after the time for answering had expired under such service, and default was entered, Backus petitioned the state court for a removal of the cause to this court. Upon hearing had, the state court refused to grant the prayer of the petition, but retained the cause. Backus, feeling aggrieved, brought the record here, and sued out an injunction against plaintiff's proceeding further in that court. A temporary restraining order was issued, and the cause now comes up for hearing on a motion to deny a continuance of the order and to remand the cause to the state court.

William Smith, Jas. H. Nichols, and John L. Rand, all of Baker, Or., for plaintiff.

Samuel White and John H. White, both of Portland, Or., and Harris Richardson, of St. Paul, Minn., for defendants.

WOLVERTON, District Judge (after stating the facts as above). Two questions are presented for decision, namely, whether the petition for removal from the state court was presented within the time the defendant Backus was required to answer, and, in connection therewith, whether Backus had been properly served with summons, and whether there is a separable controversy as to Backus.

[1] A brief analysis of the bill of complaint will suffice to determine whether a separable controversy exists as to Backus. The plaintiff and Backus are stockholders in the Columbia Gold Mining Company; plaintiff owning 5 per cent. of the capital stock, and Backus, or certain holding companies promoted by him and now under his complete control, owning and holding the other 95 per cent. Having control of the stock, Backus controls the affairs of the Mining Company, which it is asserted he controls to the detriment of both the plaintiff and the company.

According to the bill, the E. W. Backus Lumber Company and the Backus-Brooks Company were both promoted by Backus, and these companies and Backus and other officers thereof have misappropriated funds of the Mining Company, and converted the same to their own use and benefit, resulting in a failure to account to plaintiff for his proper proportion of the profits of the Mining Company. The complaint then goes on with minute detail to state how the misappropriations came about, sometimes through the machinations of Backus, sometimes through the acts of one or other of the defendant companies other than the Mining Company, and in some things the other officers of these companies having played a part. It is as though Backus and these two Minnesota corporations were charged as conspirators to loot the treasury of the Mining Company, and in carrying out the object of such conspiracy one conspirator would do one thing at one time, and another another thing at another time, but all working together for the common purpose. Thus it is alleged in one part of the bill that, of a surplus fund of $130,981.06 produced in the year 1899, the defendant Backus misappropriated $103,174.50 by charging the same to certain accounts, 16 in number, and in a following paragraph it is further alleged that at the same time Backus was fraudulently loaning to the corporation owned and controlled by him, and known as the Backus-Brooks Company, "the large sums of money above mentioned," referring in part to the moneys misappropriated by charging the same to the 16 accounts mentioned in the preceding paragraph. In harmony with this idea, the defendants are in several parts of the bill jointly charged with participating in the misappropriations. And, taken as a whole, looking through the entire bill, the theory upon which it was drawn becomes apparent, and that is there was a joint participation by the defendants named, except Richardson, in a common scheme to withdraw the surplus funds of the Mining Company, with a view to preventing plaintiff from

obtaining his just proportion of the profits rightly coming to him; the defendant Backus controlling at the same time the wrongful action of the Mining Company. Thus the several corporation defendants are all actors, though controlled by Backus, but all are separate entities, including Backus, working to a common unlawful purpose; and it does not lie in the mouth of Backus to say that he is acting independently of the corporations, when they are controlled by his initiative.

[2] The right of removal depends upon the case disclosed by the pleadings, when the petition therefor is filed. Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514.

[3] The principle governing the question of removal involved here is very clearly stated in Boyd v. Gill (C. C.) 19 Fed. 145, 148:

"It does not necessarily follow that a controversy is wholly between a plaintiff and each one of several defendants, and can be fully determined as between them, merely because such a controversy might have been presented if the plaintiff had elected to present it in that form. The controversy in a suit is the one which is actually presented, not the one that might have been. It is not wholly between the plaintiff and one of the defendants because it might have been if the plaintiff had so elected. Nor can a controversy be fully determined between a plaintiff and one of the defendants when in the form and substance which it has assumed the plaintiff insists, and has a right to insist, that so far as he is concerned it shall be determined as to both of the defendants. The controversy is the claim in form and substance as it is presented for determination; and if a joint recovery against several defendants is claimed upon a cause of action which justifies a joint recovery, the controversy is between the plaintiff and all the defendants against whom the claim is asserted."

It was determined in that case that there was a separable controversy, because directors of a corporation were joined against whom a separate action could have been maintained, and the prayer of the bill was against each defendant for a several accounting. What is meant by separate causes of action, not separable controversies, is very well illustrated in Barney v. Latham, supra, where there were joined in the same bill a cause about land and another about money. See, also, Hyde v. Ruble, 104 U. S. 407, 26 L. Ed. 823.

Now, the bill of complaint in the present case does not seek a separate accounting, but an accounting by all the parties alleged to have been engaged causing the misappropriations, and, as appears from the theory of the bill, the cause is one against all the parties involved in misappropriating the funds of the Mining Company. Such is the case brought by plaintiff, and by it he is entitled to have the suit proceed in the forum of his choice. Separate causes of action are not joined, but only a particularization of different items of misappropriation, all entering into and forming elements of the general accounting demanded.

[4] Another contention is that the Mining Company should be aligned on the side of the plaintiff, and when so aligned the right of removal would exist without question. But the contention is precluded by the holding of the Supreme Court of the United States, and of the Court of Appeals of this Circuit, in analogous cases. New Jersey Central Railroad Co. v. Mills, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949; East Tennessee, etc., Railroad v. Grayson, 119 U. S. 240, 7 Sup. Ct.

190, 30 L. Ed. 382; MacGinniss v. Boston, etc., Min. Co., 119 Fed. 96, 55 C. C. A. 648. Being satisfied that under the bill of complaint, there exists no separable controversy as to Backus, the questions respecting service and the time in which application was made for removal become wholly immaterial for a determination of plaintiff's right to have the cause remanded.

The preliminary injunction heretofore issued by this court will therefore be dissolved, and the cause remanded to the state court from whence it came.

THE KAISER WILHELM II.

(District Court, D. New Jersey. January 31, 1916.)

1. ADMIRALTY ⟸1—JURISDICTION—SUIT BETWEEN FOREIGN LITIGANTS.
A British libelant cannot maintain a suit in rem in an admiralty court of the United States against a German vessel to recover for repairs and supplies furnished in England, where the laws of both England and Germany are pleaded, and neither gives him a maritime lien, or right to proceed directly against the vessel, although in the absence of a showing of the foreign laws our own law would be applied.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1–17; Dec. Dig. ⟸1.]

2. MARITIME LIENS ⟸2—LAW GOVERNING—SUPPLIES FURNISHED TO FOREIGN VESSEL.
Whether a lien, independent of express contract, exists for supplies or necessaries furnished to a foreign vessel, depends on the law of the place where the supplies or necessaries are furnished.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 2; Dec. Dig. ⟸2.]

3. ADMIRALTY ⟸1—JURISDICTION—SUIT BASED ON FOREIGN STATUTE.
Under St. 3 & 4 Vict. c. 65, § 6, which confers on the English Court of Admiralty authority to arrest or proceed in rem against a foreign ship for necessaries supplied, a court of admiralty of the United States may entertain a suit in rem to enforce a claim for necessaries supplied to a foreign ship in England, even though the English statute does not confer a maritime lien, but merely a right to sue the ship.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1–17; Dec. Dig. ⟸1.]

4. WAR ⟸16—SUIT BETWEEN SUBJECTS OF BELLIGERENT NATIONS.
Since the commencement of war between England and Germany, and the promulgation by each government of laws or decrees prohibiting its subjects from making any payments to subjects of the other, and while such decrees remain in effect, a court of admiralty of the United States, in a case where its action is discretionary, will refuse to entertain jurisdiction of a suit between subjects of the two countries to enforce payment of a claim which arose in a foreign country.
[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80–84; Dec. Dig. ⟸16.]

In Admiralty. Suit by Harland & Wolff, Limited, against the steamship Kaiser Wilhelm II; North German Lloyd, claimant. On exceptions to answer of claimant. Exceptions overruled, and libel dismissed without prejudice.

Burlingham, Montgomery & Beecher, of New York City, for libelant.

Joseph D. Bedle, of Jersey City, N. J., and Walter C. Noyes, of New York City, for claimant.

HAIGHT, District Judge. The questions presented for decision arise on exceptions to the answer of the claimant. The libelant is a British corporation; the vessel libeled is German, and is owned by the claimant, a corporation of the German Empire. The libel alleges, in substance, that in the months of June and July, 1914, the Kaiser Wilhelm II, the vessel against which the libel was filed, was at Southampton, England, in need of certain repairs and supplies, and that upon the order of the owner of the vessel, or a duly authorized agent, the libelant performed certain necessary work and furnished labor, materials, and supplies for the vessel at Southampton, which were of a certain value, and for which it has not been paid. The answer admits the necessity of the repairs and supplies, and the fact that the libelant, on the order of a person duly authorized by the owner, performed the work and furnished the labor, materials, and supplies, as well as the nonpayment of libelant's claim, but it denies that the amount claimed in the libel is correct. It then proceeds to set up certain separate and distinct defenses, the legal sufficiency of which the exceptions challenge. These will be stated later in connection with the exceptions. It appears that after the work was performed and supplies furnished the vessel sailed from England to this country and arrived at the docks of the claimant at Hoboken, in this district. While she was moored there the European war broke out. The libelant thereupon, in order to enforce its claim, caused a libel in rem to be filed in this court.

[1] The third exception, which can be first most conveniently considered, attacks that part of the answer which alleges that neither the law of Great Britain, where the work was performed, and the labor, materials, and supplies furnished, nor the German law (the law of the ship's flag), gives for the claim in suit a maritime lien or other right enforceable in the courts of this country directly against the vessel; that under the facts alleged a maritime lien is not given under the general maritime law, as recognized in this country; and that consequently the libelant is not entitled to proceed directly against the vessel in this jurisdiction. A stipulation has been filed which provides that the laws, decisions, and proclamations of Great Britain and Germany may be referred to by the court and counsel upon the consideration of the exceptions. I shall assume, therefore, that I am to determine, if necessary, what the law of either country is, without regard to the allegations of the answer. The law of a foreign country being a fact, I would at this time, were it not for this stipulation, be bound to accept the allegations of the answer in respect thereto.

Of course, the libelant cannot maintain a proceeding in rem unless it has a lien upon the vessel, or some right to proceed directly against it. If, as stated in Re Insurance Co. (D. C.) 22 Fed. 109, affirmed (C. C.) 24 Fed. 559, it be considered as not free from doubt whether, in

a controversy wholly of foreign origin, and between citizens or subjects of foreign countries, the admiralty courts of this country will in any event entertain jurisdiction to enforce a maritime lien, given by the general maritime law as recognized in this country, in a case where the libelant would not be entitled to such a lien in the place where the contract was made or where the cause of action accrued, the question is of no practical importance, because the Supreme Court in The Maggie Hammond, 9 Wall. 435, 450, 19 L. Ed. 772, while apparently recognizing that the courts of this country may do so, stated that in general they will not. In Re Insurance Co., supra, it was held and argued with great force that our courts should never do so. There are no conceivable circumstances in this case which would justify a court of this country in conferring upon the libelant a right which it did not possess either by the law of the ship's flag or the lex loci. Of course, the situation would be different if it did not appear what the respective foreign laws are. Under such circumstances, in a case such as this, our own law would be applied. Liverpool Steam Co. v. Phenix Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Cuba R. R. Co. v. Crosby, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40.

[2] The laws of Great Britain and of Germany have both been pleaded, and, if no lien or right to proceed against the vessel is given under either of them, it is immaterial whether or not the libelant is entitled to proceed in rem, under the general maritime law as recognized in this country. In the first place, on behalf of the claimant, it is urged or suggested that in a case like the present it is the law of the ship's flag which should govern. The only authority cited is The Woodland, 14 Blatchf. 499, Fed. Cas. No. 17,977. The decision of the Circuit Court in that case was affirmed by the Supreme Court (The Woodland, 104 U. S. 180, 26 L. Ed. 705), but upon an entirely different ground; no reference being made to that upon which the decision in the court below was rested. The question was carefully examined, and the authorities collected and discussed, in a very elaborate opinion rendered by Judge Brown, in the same district a few years later, in The Scotia (D. C.) 35 Fed. 907. The conclusion was there reached that the question as to whether a lien, independent of express contract, exists for supplies or necessaries furnished to a foreign vessel, depends on the law of the place where the supplies or necessaries were furnished, and not on the law of the country to which the vessel belongs. The utter unsoundness of a rule such as the claimant suggests is there shown, and the case of The Woodland explained and distinguished.

It would be quite unnecessary for me to attempt to add anything to what Judge Brown so well and clearly stated. It would seem proper to observe, however, as pointed out by Judge Brown, that the question in the Woodland Case was whether the master of the vessel could expressly create a lien on the vessel in a foreign port, other than by a bottomry bond, when the law of the ship's flag did not permit him to do so, and not whether the ship would be subject to a lien for supplies, when the lien was created by the law of the place where the

supplies were furnished, independent of express contract. There is manifestly a broad distinction between these questions, for one depends upon the scope of the master's authority and the other solely on the law of the place of the transaction. It is also worthy of note that the case of Lloyd v. Guibert, 6 B. & S. 100 (s. c., L. R. 1 Q. B. 115), which is cited as the authority for the remarks in The Woodland, which are relied upon by the claimant in this case, was discussed by the Supreme Court in Liverpool Steam Co. v. Phenix Insurance Co., supra, and it was there shown that, under the peculiar circumstances of that case, it was held that the parties must have intended to look to the law of the ship's flag as governing the question of liability. The case is therefore not an authority for the broad statement contained in the opinion in The Woodland. Hence, as the law of Germany has no bearing on this case, it is immaterial whether or not it gives a lien upon or right to proceed against this vessel.

[3] But the claimant further contends that under the English law the libelant is not entitled to a maritime lien in a case such as this, but only to a right to arrest the vessel on the institution of an action. This position is undoubtedly correct (The Heinrich Bjorn, 11 App. Cas. 270, 24 Eng. Rul. Cas. 608; The John G. Stevens, 170 U. S. 117, 18 Sup. Ct. 544, 42 L. Ed. 969; see, also, the English authorities collected in The Scotia [D. C.] supra, 35 Fed. 908), and, in fact, is not disputed by the libelant. The right in England to arrest or proceed in rem against a foreign ship for necessaries supplied is settled by the courts of that country to have been conferred by section 6 of Act 3 & 4 Vict. c. 65. See The Heinrich Bjorn, supra. That statute, in terms, merely conferred upon the Admiralty Court of England jurisdiction to decide claims, among others, for necessaries supplied to any foreign ship, and to enforce the payment thereof. By section 6 of the subsequent Act 24 & 25 Vict. c. 10, there was conferred upon the English Court of Admiralty jurisdiction over certain other controversies. This latter statute was considered by the Supreme Court, in The Maggie Hammond, 9 Wall. 435, 456, 19 L. Ed. 772, to authorize the admiralty courts in this country, in administering the foreign law, to proceed in rem against the vessel, even if it did not confer a maritime lien, but merely a right to sue the ship. These statutes are in pari materia (The Heinrich Bjorn, supra), and if jurisdiction in rem can be maintained in this country under one, it certainly can be under the other.

Under the construction placed upon the word "necessaries," used in the first of the above-mentioned English statutes, by the English Court of Admiralty in The Riga, 3 Adm. & Eccl. 516 (where the English cases on this point are collected and discussed), the items, for the collection of which the libel in this case is filed, clearly come within the statute in question. No questions regarding the right of intervening lienors, or other persons who might have acquired rights, by purchase or otherwise, in the vessel between the time the cause of action arose and this proceeding was instituted, are presented in this case. It follows, therefore, that this court *may* entertain juris-

diction of this proceeding, although it is in rem. This leads to the sustaining of the third exception.

[4] There is then presented the important question, raised by the first and second exceptions, whether, in view of the additional facts alleged in the answer, a court in this country *should* now take jurisdiction.

The answer alleges, in substance, that the litigation is between foreigners, is wholly of foreign origin, and that for some time prior to the filing of the libel a state of war existed and still exists between the governments of the respective litigants, as to which controversy this country has declared its neutrality; that by a decree of the German government of September 30, 1914, its subjects are forbidden from making any payments to British subjects; and that the claimant had sufficient funds in Great Britain at the outbreak of the war to meet any claim which the libelant had on account of the matters alleged in the libel, which funds were confiscated by the British government after the outbreak of the war. In addition to the German decree it appears that the British government, on September 9, 1914, promulgated a similar decree, and Parliament shortly after passed a statute, known as the Trading with the Enemy Act (St. 4 & 5 Geo. V, c. 87).

It is urged that in view of these facts the courts of this country should decline to entertain jurisdiction at this time, and that consequently the libel should be dismissed. Whether our admiralty courts will take jurisdiction of controversies between foreigners which have not arisen in this country is unquestionably discretionary, and, when they do, it is, of course, upon principles of comity. The Maggie Hammond, supra; The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Taylor v. Carryl, 20 How. 583, 611, 15 L. Ed. 1028. However, the almost unbroken practice has been to entertain jurisdiction, except in those classes of cases which are mentioned in The Belgenland, 114 U. S. 363, 5 Sup. Ct. 860, 29 L. Ed. 152, and in those of a kindred nature, such as Goldman v. Furness (D. C.) 101 Fed. 467. This case does not fall within any of such classes. Although the status of commercial dealings and obligations between parties whose countries are at war is well defined in English and American jurisprudence, as respects the courts of the belligerent nations, strange as it may seem, their treatment in the courts of neutrals has not been the subject of any reported decisions, until very recently. The question has been considered, as far as I am aware, in but two cases—the first decided by Judge Veeder, of the Eastern district of New York, sitting in admiralty, in Watts, Watts & Co. v. Unione Austriaca di Navigazione, 224 Fed. 188; and the second by Vice Chancellor Stevens, of the Court of Chancery of New Jersey, in Compagnie U. de T., etc., v. United States Service Corporation et al., 95 Atl. 187. The judgment in the former has just been affirmed by the Circuit Court of Appeals of the Second Circuit. 229 Fed. 136, —— C. C. A. ——. In addition, some support for the conclusion reached by Judge Veeder may be found in certain of the remarks of Judge Van Ness in Juando v. Taylor, Fed. Cas. No. 7558.

Although the conclusions reached in the two cases first referred to can be distinguished on principle, because the New Jersey case dealt with a contract to convey land located in the state of New Jersey, although made abroad, and the federal case with a maritime contract made and to be performed in another country, yet the distinguished jurists who decided them expressed quite radically different views as to the propriety of our courts entertaining jurisdiction. Their respective views, as expressed in their opinions, fairly represent the contentions of the parties to this controversy. In the case decided by Judge Veeder the controversy was between a subject of Great Britain and a subject of Austria-Hungary. The latter country had promulgated a decree similar to that of Great Britain before mentioned. Judge Veeder, as I understand his opinion, while denying any extraterritorial efficacy to these decrees, held that they were merely declaratory of the common law of nations, as the same had been judicially declared in this country and England, and hence, such "being the law common to the belligerents and to the neutral forum," it should be recognized and applied in the latter, and that a failure to do so would not be consonant with the strict neutrality which this country has assumed in the present unhappy controversy. His summary of international law, as recognized and applied by the courts of England and this country, is abundantly supported by the authorities. On the other hand, Vice Chancellor Stevens was of the opinion that to refuse to take jurisdiction of a cause of action, arising out of a contract entered into before the beginning of hostilities, would be an unneutral act, because it would be, in effect, recognizing the legislation of one country, enacted as a means of crippling its enemy, to the detriment of a citizen of the other country. His view was, as I gather it, that neutrality requires us to impartially extend the right to sue in our courts to every belligerent alien who has a bona fide cause of action against another, which our courts are capable of redressing, and which we would have entertained, had not the state of war existed.

As to which is the correct view, opinions may justly differ. The difficulty with the latter view, I think, is that it fails to recognize that a refusal to entertain jurisdiction is not based upon the legislative enactments or decrees of the belligerent nations, but upon what we consider to be the common law of nations, of which the enactment and decrees are but declaratory. As it is the recognized right of a nation, while at war, to forbid performance, by its citizens, of contracts entered into before the beginning of hostilities with citizens of the country with which it is at war, when performance would aid the enemy, would it be compatible with neutrality to refuse to recognize and respect the existence of such a right, when both have invoked it? I think not. Additional force has been given to the view entertained by Judge Veeder through the affirmance of his decision by the Circuit Court of Appeals of the Second Circuit. While it is true that the latter court stated that it was a matter within discretion of the former as to whether to take or decline jurisdiction, and, as no abuse of discretion appeared, the decree would be affirmed, still it is in-

conceivable that in respect to a matter of so great importance, if the learned judges of the Court of Appeals had entertained any serious doubt regarding the correctness of Judge Veeder's judgment, they would not have reversed it.

The present case cannot be differentiated in principle from the Watts Case. It is true that that was a suit in personam, and this is a suit in rem. But, whatever distinction may in general exist between such suits, there can be no reasonable basis for distinction when the question is whether a neutral court shall take cognizance of a controversy which has arisen between citizens or subjects of belligerents. I therefore think that the facts alleged in the answer, to which the first and second exceptions were taken, would warrant this court in declining to entertain jurisdiction of this suit at this time. Nor can I see any good reason why the whole matter should not now be disposed of. International law is something of which courts will take notice, and the decrees and proclamations, which, as before stated, are declaratory of it, have, by the stipulation of counsel, in effect been made established facts. There is nothing left to try.

The first and second exceptions will therefore be overruled, and the libel dismissed without prejudice.

UNITED STATES v. BOPP et al.

(District Court, N. D. California, First Division. March 3, 1916.)

No. 5865.

1. CONSPIRACY ⊜43(1)—INDICTMENT.

Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201) makes it an offense to conspire to commit any offense against the United States. Section 13 (Comp. St. 1913, § 10177) makes it an offense for any person within the territory or jurisdiction of the United States to begin or set on foot or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince with whom the United States are at peace. An indictment charged that defendants conspired to begin and set on foot and provide and prepare the means for certain military enterprises to be carried on against the territory of the king of Great Britain, and alleged that such enterprises were to be carried on against the Dominion of Canada and certain British steamships, and that it was the intention of the defendants to blow up, damage, and destroy certain railroad tunnels, railroads, bridges, trains, and ships engaged in transporting munitions of war to England, France, Russia, and Japan. *Held*, that the indictment was insufficient, as the charge that defendants conspired to set on foot or provide means for a military enterprise was a mere conclusion, and it did not charge a conspiracy to do any acts which would constitute a setting on foot of a military enterprise or a providing of means therefore, nor was it aided by the allegations as to defendants' intention, since an attempt to destroy such tunnels, etc., was not necessarily a military enterprise, especially as it was not even alleged that the purpose of such destruction was to prevent the transportation of munitions of war.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 84, 99; Dec. Dig. ⊜43(1).]

2. INDICTMENT AND INFORMATION ⟸93, 110(3)—REQUISITES AND SUFFICIENCY —FOLLOWING LANGUAGE OF STATUTE.

Where the definition of an offense either by the common law or by statute includes generic terms, it is not sufficient for an indictment to charge the offense in such terms, and it must allege particulars.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 266, 291-294; Dec. Dig. ⟸93, 110(3).]

3. CONSPIRACY ⟸43(1)—CRIMINAL PROSECUTIONS—INDICTMENT.

While an indictment charging a conspiracy to commit an offense need not describe the offense which defendants conspired to commit with all the particularity required in an indictment charging its commission as a substantive offense, it does not follow that no particulars whatever need be given.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 84, 99; Dec. Dig. ⟸43(1).]

Franz Bopp and others were indicted for conspiracy. On demurrer to the indictment. Demurrer sustained.

J. P. O'Brien, of San Francisco, Cal., for defendants Cornell and Crowley.

George A. McGowan, of San Francisco, Cal., for defendant Von Brincken.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, Cal., for defendants Bopp and Von Schack.

DOOLING, District Judge. [1] The indictment herein charges that:

"Franz Bopp, E. H. Von Schack, Wilhelm Von Brincken, J. F. Van Koolbergen, Margaret W. Cornell, Charles C. Crowley, and Louis J. Smith, hereinafter called the defendants, heretofore, to wit, on or about the 1st day of May in the year of our Lord 1915, at San Francisco, in the state and Northern district of California then and there being, did willfully, knowingly, unlawfully, wickedly, corruptly, and feloniously conspire, combine, confederate, and agree together, and with divers other persons whose names are to the grand jurors aforesaid unknown, to commit certain offenses against the United States; that is to say:

"They, the said Franz Bopp, E. H. Von Schack, Wilhelm Von Brincken, J. F. Van Koolbergen, Margaret W. Cornell, Charles C. Crowley, and Louis J. Smith, did, at the time and place aforesaid, willfully, unlawfully, knowingly, wickedly, corruptly, and feloniously conspire, combine, confederate, and agree together, and with divers other persons whose names are to the grand jurors aforesaid unknown, to knowingly, willfully, unlawfully, and feloniously begin and set on foot, and provide and prepare the means for, certain military enterprises to be carried on from within the territory and jurisdiction of the United States against the territory and dominions of the king of the United Kingdom of Great Britain and Ireland, a foreign prince with whom the United States then were, ever since have been, and are now at peace, to wit:

"(1) Against the Dominion of Canada, the said Dominion of Canada being then and there territory and dominion of the said king of the United Kingdom of Great Britain and Ireland, the intention of the said defendants, and the design, the end, the aim, and the purpose of the said military enterprise being:

"(a) To blow up, injure, damage, obstruct, and destroy at the Canadian end thereof, and at a point within the said Dominion of Canada, by force and arms, a certain railway tunnel belonging to the St. Clair Tunnel Company, which tunnel extends under the Detroit river from Port Huron, in the state of Michigan, in the United States, to Sarnia, Ontario, in the Dominion of Canada, the said tunnel constituting the right of way of the Grand

Trunk Railway Company of Canada, which said railway company was, during all of the times herein mentioned, transporting and engaged in the transportation in foreign commerce, through the said tunnel, of mules, horses, other munitions of war, and other articles of commerce, which were being transported, and were in course of transportation, from the United States to England, France, Russia, and Japan, all of which the said defendants, and each of them, during the times herein mentioned, well knew."

It proceeds then to aver that the intention of defendants, and the end, the aim, and the purpose of the said military enterprise was further to destroy various tunnels belonging to the Canadian Pacific Railway Company, which company was transporting in domestic and foreign commerce munitions of war destined for and in course of transportation to England, France, Russia, and Japan; to destroy by force of arms all railroads in Canada so engaged in transporting such munitions of war so destined; to destroy by force of arms all railroad trains carrying such munitions of war so destined; to destroy all railroad bridges and tunnels upon or through which such trains were being operated; and to destroy and sink by force of arms all ships, with their cargoes and crews, engaged in transporting from any Canadian port such munitions of war so in course of transportation, or consigned to or intended for Great Britain, France, Russia, Belgium, or Japan.

The indictment further avers that such military enterprise was also to be carried on against the British steamship Talthybius, the said ship being the territory and dominion of the king of Great Britain and Ireland, the design being to destroy and sink the same, with her cargo and crew, and that said ship was engaged in transporting from ports in United States and British Columbia munitions of war consigned and intended for Russia, Great Britain, France, Belgium, and Japan; and also against the British steamship Hazel Dollar, averred to be the territory and dominion of the said king, and also so engaged; and finally against any and all ships of British registry, owned by subjects of the said king and engaged as hereinbefore set out. The indictment then sets out various overt acts averred to have been committed in furtherance of such conspiracy and to effect and accomplish the objects thereof.

I have set forth in the words of the indictment all that is charged in reference to the formation of the conspiracy itself; the matters not fully stated herein being only the averments as to the intention of the defendants, and the aim, design and purpose of the "military enterprise" mentioned. The indictment is for a conspiracy under section 37 of the Criminal Code of the United States, which provides:

"If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The offense which defendants are charged with having conspired to commit is that denounced by section 13 of the same Code, which is as follows:

"Whoever, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedi-

tion or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be fined not more than three thousand dollars and imprisoned not more than three years."

Neither this statute nor any other declares what is meant therein by the words "military enterprise," nor what would be required to constitute such an enterprise, so that in giving effect to the statute the court must determine from other sources what Congress meant when it used these words. So far as the conspiracy itself which is charged in this indictment is concerned, it is stated in the language of the statute without amplification; that is to say, there is no statement that defendants conspired to do certain things which, if accomplished, would in the judgment of the pleader constitute the beginning or setting on foot or the preparing or providing means for a military enterprise, and upon the sufficiency of which things to constitute such offense the judgment of the court might be exercised.

[2] It is a settled rule of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same terms as in the definition; but it must state the species, it must descend to particulars, or as stated in United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

The sole charge against the defendants here is that they conspired "to begin and set on foot, and prepare and provide the means for certain military enterprises." This is the bald language of the statute; the mere conclusion of the pleader. But the particular things which they conspired to do are not stated—the things which, if in fact accomplished, would constitute the setting on foot or providing means for a military enterprise. What does the pleader understand the words "military enterprise" to mean? What in his judgment constitutes a military enterprise? The indictment gives neither the defendants nor the court any information in this regard, and the things that the pleader might regard as sufficient to warrant him in asserting that defendants conspired to set on foot or provide means for a military enterprise might in the judgment of the court fall far short of being the things intended by the statute. The language of the Supreme Court in United States v. Hess, 124 U. S. 486, 8 Sup. Ct. 573, 31 L. Ed. 516, seems to me peculiarly applicable to the present case:

"The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment, in repeating its language, without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury."

The defendants are entitled to know the particular things which they are charged with having conspired to do, and the court, when the indictment is challenged, must also have this information, in order to be able definitely to say whether a conspiracy to do such particular

things is a conspiracy to set on foot or provide means for a military enterprise. The indictment here is not aided by the averments therein that the intention of defendants and the purpose of the enterprise was to destroy tunnels, railroads, bridges, trains, and ships which were engaged in the transportation of munitions of war. Such destruction is not necessarily aimed at the territory or dominions of the king of Great Britain, but might be directed only against the various companies owning such tunnels, railroads, bridges, trains and ships. And while such destruction might well be the aim of a military enterprise, it is not necessarily so, nor can it be said that every one who might undertake so to destroy or cripple railroads or ships was engaged in such an enterprise, even though munitions of war were transported by them. It is not even averred that the purpose of destroying the railroads and ships was to prevent the transportation of munitions of war, and the words "railroads or ships which were engaged in transporting munitions of war," without further averment, might well be mere words of description, having no relation to the motives of the defendants, and certainly not being sufficient to stamp every attempt to destroy such roads or ships as a military enterprise.

[3] I do not ignore the suggestion that in charging a conspiracy to commit an offense the offense so to be committed need not be set forth with all the particularity that might be required in an indictment charging its commission as a substantive offense; but this, if conceded, does not mean that no particulars whatever need be given. It would be an idle thing to go through a long trial upon this indictment, only to learn at the end of the trial that the facts established constituted no offense cognizable by this court.

The demurrer to the indictment will therefore be sustained.

SLOANE et al. v. KRAMER BROS. & CO. et al.

(District Court, E. D. North Carolina. March 9, 1916.)

1. COURTS ⟸328(2)—AMOUNT IN CONTROVERSY—REMOVING CLOUD FROM TITLE.
In a suit to remove a cloud from the title to land, the basis of equitable interference is that defendant is threatening to attack plaintiffs' title and holds some paper writing, invalid because of some defect not apparent upon its face; and hence it would seem that the amount in controversy is the value of the land, and that damages recoverable at law for cutting timber prior to the filing of the bill cannot be added to the value of the land to make the jurisdictional amount.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. ⟸328(2).]

2. COURTS ⟸256—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.
Judicial Code (Act Cong. March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1913, § 991), gives the District Courts jurisdiction of certain actions where the matter in controversy exceeds the sum or value of $3,000. Prior to the adoption of the Judicial Code, the jurisdictional amount was $2,000. Section 299 (section 1276) provides that the repeal of existing laws or the amendment thereof embraced therein shall not affect any act done or right accruing or accrued, or suit or proceeding pending at the taking

effect thereof, but that such suits and proceedings for causes arising or acts done prior to such date may be commenced and prosecuted within the same time and with the same effect as if such repeal or amendments had not been made. *Held* that, notwithstanding this section, the change in the jurisdictional amount or value applies to suits thereafter brought for acts done or causes arising prior to the taking effect of the Code.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 792; Dec. Dig. ⊂⊃256.]

3. COURTS ⊂⊃256—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Statutes changing, increasing, or decreasing the jurisdiction of federal courts, or the amount in controversy necessary to give jurisdiction, will, unless expressly restricted, apply to suits and actions instituted thereafter, without regard to the time the remedial right or cause of action accrued.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 792; Dec. Dig. ⊂⊃256.]

4. EQUITY ⊂⊃41—INCIDENTAL RELIEF—DISMISSAL OF BILL.

In a suit to remove a cloud from the title to land and to recover the value of timber cut therefrom, whatever jurisdiction a court of equity had regarding the timber was incidental to the jurisdiction to remove the cloud; and where defendant denied that he claimed any interest in, or right or title to, the land, equity had no jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 116-118; Dec. Dig. ⊂⊃41.]

In Equity. Suit by Mary E. Sloane and others against Kramer Bros. & Co. and another to remove a cloud from the title to land and for an accounting. Bill dismissed.

Winston & Biggs, of Raleigh, N. C., for plaintiffs.
Aydlett & Simpson, of Elizabeth City, N. C., for defendants.

CONNOR, District Judge. Plaintiffs deraign title to the land in controversy from the same source, and largely through the same chain, as did the plaintiff in Tilghman Johnston v. Kramer Bros. & Co. (D. C.) 203 Fed. 733, in which the title to a fractional interest ($^{11}/_{126}$) of the tract described in the bill herein was involved. It is unnecessary to do more than refer to the record and decree in that case, so far as plaintiffs' title is concerned. While defendants, in their answer, deny plaintiffs' title, they do not set up or claim that they own, or have any title to, the land. In that case, as in this, it appeared that defendant Leonard Vyne, on February 7, 1906, obtained from the state a grant for the tract containing 295 acres chiefly valuable for the timber standing upon it. For the reasons set out in the opinion in that case, it was held that the grant was void, conveying no title, and not being color of title. Pell's Rev. § 1699. No appeal was taken from the decree. This bill is filed by plaintiffs, who claim title to seven-eighths undivided interest in the same land, asking that, as to them and their title, the grant be declared void, and that they have an accounting for the timber cut therefrom by defendants Kramer Bros. & Co., who admit that they cut and removed 308,000 feet of timber under a contract with their codefendant Vyne. They never claimed or asserted any title to the land. The decree in the case referred to was filed March 10, 1913. This bill was filed May 5, 1914.

Defendants challenge the jurisdiction of the court by a denial of plaintiffs' allegations "that the said tract of land * * * was and is of a value in excess of $3,000." Evidence was introduced in regard to the value of the land, both at the date of filing the bill, after the timber had been cut and removed, and before that time. As usual, there is marked difference between the witnesses in their estimates of value. It is manifest that, without the timber, the land is of inconsiderable value; the lowest estimate being $1 and the highest $2 per acre. It is conceded that Kramer Bros. & Co. agreed to pay $2,000 for the timber, and they settled with Vyne by paying $950. While there are several estimates respecting the quantity of marketable timber now on the land, and its stumpage value, by witnesses more or less reliable, I am unable to find that the land, with the timber standing on it, at the date of filing the bill, was worth, or is now worth, so much as $2,000. I am of the opinion that, before the timber was cut and removed by defendants Kramer Bros. & Co., the land, with the timber, was worth more than $2,000, but that its value was reduced to less than that sum by the removal of the 308,000 feet of timber. If, however, the damage done by the trespass, for which plaintiffs demand judgment against both defendants Vyne and Kramer Bros. & Co., is, for the purpose of fixing the value, "of the matter in controversy," to be added to the value of the land, the two would exceed the sum of $2,000.

[1] Plaintiffs insist that the change in the jurisdictional value "of the matter in controversy" by Judicial Code 1912, § 24, from $2,000 to $3,000, does not apply to this case. This contention is based upon the language found in section 299 of the Code. Assuming pro hac vice that the jurisdiction in respect to the value "of the matter in controversy" is fixed by section 24 of the Judicial Code at $3,000, there is but one course to be pursued. The bill should be dismissed. If, however, by reason of the language of section 299, the jurisdictional amount is $2,000, it becomes material to ascertain the standard or test by which the value of "the matter in controversy" is to be fixed—whether the value of the land, the title to which is in controversy, at the date the bill is filed, fixes the jurisdiction, or whether to such value the amount claimed for the trespass is to be added.

Questions more or less analogous have been discussed and decided in cases wherein the jurisdiction of the Supreme Court to entertain writs of error or appeals was involved. In Vicksburg R. R. v. Smith, 135 U. S. 195, 10 Sup. Ct. 728, 34 L. Ed. 95, plaintiff claimed to be the owner of 186 acres, of the value of $10,000; but only 40 acres, of a value less than $2,000, was in possession of the defendant. Upon a motion to dismiss, the court said:

"The value of that part of land is shown clearly to be less than $2,000, and this is conclusive of our jurisdiction."

In Elgin v. Marshall, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249, it is said:

"Undoubtedly Congress, in establishing a rule for determining the appellate jurisdiction of this court, among other reasons of convenience that dictated the adoption of the money value of the matter in dispute, had in view that it was precise and definite. * * * The language of the rule limits, by its

own force, the required valuation to the matter in dispute in the particular action or suit in which the jurisdiction is invoked, and it plainly excludes, by a necessary implication, any estimate of value as to any matter not actually the subject of that litigation."

In response to the suggestion that certain elements of value should be included in fixing the jurisdiction, it is said that the rule is arbitrary, as it is based upon a fixed amount representing pecuniary value.

"But, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful constructions. * * * It is impossible to foresee into what mazes of speculation and conjecture we may be led by a departure from the simplicity of the statutory provision."

In Smith v. Adams, 130 U. S. 167, 175, 9 Sup. Ct. 566, 569, 32 L. Ed. 895, it is said:

"A suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected."

In Woodside v. Ciceroni, 93 Fed. 1, 35 C. C. A. 177 (C. C. A. 9th Cir.), Judge Gilbert says:

"In a suit to quiet title, or to remove a cloud therefrom, it is not the value of the defendant's claim which is the amount in controversy, but it is the whole of the real estate to which the claim extends. It would be impossible, for instance, to estimate the value of an interest claimed under a forged or fraudulent instrument. It is the property to which such an instrument relates that is the subject of the controversy."

In Hennesy v. Herrmann (C. C.) 89 Fed. 669, the subject-matter of the suit was a trade-mark. Judge Hawley said that it was the value of the trade-mark, and not the amount of damages sustained by its infringement, which fixed the jurisdiction. In Parker v. Morrill, 106 U. S. 1, 1 Sup. Ct. 14, 27 L. Ed. 72, a suit for partition and to remove cloud from title, it appeared that only one-twentieth of the entire tract was "in controversy" on the appeal, and this the court found to be of a value less than that which conferred jurisdiction. The appeal was for this reason dismissed. Mr. Foster says:

"In a suit to quiet title and remove a cloud therefrom, the test is the value of plaintiff's property, affected by the adverse claim." Fed. Prac. 52.

He cites, among other cases, Felch v. Travis (C. C. E. D. N. C.) 92 Fed. 210, decided by Judge Purnell. The question involved here was not presented. In view of the basis upon which courts of equity originally took jurisdiction of bills to remove cloud from title to land —that is, the necessity for granting relief because the plaintiff was in possession and could not resort to an action at law—it is doubtful whether a decree calling defendant to an accounting for a trespass was decreed. If defendant had committed a trespass, cut and removed timber, the plaintiff had an adequate remedy at law by an action for damages. If there had been an ouster, of course, plaintiff had his action of ejectment. The basis of equitable interference was that

defendant was threatening to attack plaintiffs' title; that he held some paper writing which was, in truth, invalid because of some defect, not apparent upon its face; that it had been procured by fraud, or was a forgery, etc. U. S. v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110. Mr. Pomeroy says:

"The relief being granted on the principle quia timet; that is, that the deed, or other instrument or proceeding, constituting the cloud, may be used to injuriously or vexatiously embarrass, or affect, plaintiff's title." Equity, § 1398.

The relief was usually awarded by a decree declaring the instrument, adjudged to be a cloud upon the plaintiff's title, void and directing it to be canceled, or enjoining the defendant from setting it up or using it in an action at law for the possession. The jurisdiction was exercised because of necessity; plaintiff, whose title was put in jeopardy, having no remedy at law. The court restricted it to relief against deeds or instruments which were not void on their face, but could be shown to be so only by extrinsic evidence; and while such is now the general rule, courts of equity have, in modern times, extended relief in cases where formerly it would have been denied. Pomeroy, Eq. § 1399; Fetter, Eq. 316.

In Johnston v. Kramer Bros., supra, the question of value, as affecting the jurisdiction, was not raised or considered. At the date the bill was filed, the jurisdictional value was fixed at $2,000. It would seem that such damage as the plaintiff has sustained by reason of the trespass by the defendants should be recovered in an action at law, unless there was some equitable element, which does not appear upon the record. Upon the reason of the thing, and in so far as they are analogous, the decisions cited would tend to show that the "matter in controversy" is the land, the title to which is affected by the instrument asked to be canceled, and this cannot be increased to bring it within the jurisdictional value by adding a demand for the value of the timber cut.

In this case the plaintiffs had, upon their own showing, a perfect legal remedy for the trespass committed by defendants Kramer Bros. & Co., under the contract with Vyne. If, for any reason, it was necessary to remove the cloud from their title, by a decree adjudging the grant from the state to be void, they were entitled to invoke the jurisdiction of this court in equity for that purpose. However this may be, the defendants insist that the plaintiffs have failed to make good their jurisdictional averment that the land, at the date of filing the bill, was of "a value in excess of $3,000," and this is true.

[2, 3] The resourceful counsel for plaintiffs insist that this allegation was unnecessary, and inadvertently made; that the jurisdictional value is $2,000, because of the provisions of section 299 of the Judicial Code; that—

"the repeal of existing laws, or the amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding * * * pending at the time of the taking effect of this act, but all such suits and proceedings, * * * for causes arising or acts done prior to such date, may be commenced and prosecuted within the same

time, and with the same effect, as if said repeal or amendments had not been made."

That Congress may change, increase, or decrease the jurisdiction of federal courts, or the value of "the matter in controversy," is not doubted; and that statutes enacted for that purpose will, unless expressly restricted, apply to suits and actions instituted thereafter, without regard to the time the remedial right or cause of action accrued, is equally clear. Such statutes apply to the remedies, which, with very few and limited exceptions, are within the control of the legislative department. There can be no doubt of the power of Congress to abolish the Circuit Courts and assign to the District Courts jurisdiction to hear and determine a suit in equity, wherein the right accrued prior to the act. The first part of the saving clause in the Code of 1912 is quite comprehensive, providing that the repeal of an amendment to "existing laws * * * embraced in this act" shall not affect any act done or right accruing or accrued." This language, if not restricted by the later clauses, would exclude such "acts" and "rights" from the operation or effect of the Code. They would, in all respects, be subject to the laws of procedure in force on January 1, 1912—be prosecuted in the same courts, etc.

That Congress did not so intend is manifested by the provision that "suits and proceedings for causes arising or acts done prior to such date may be commenced and prosecuted within the same time and with the same effect as if said repeal or amendment had not been made," thus removing suits and proceedings for such causes arising or acts done from the effect of statutes of limitations prescribed by the Code or changes in the method of procedure. If Congress had intended to make the change in the jurisdictional amount or value of the matter in controversy apply only to acts done or causes arising thereafter, it would have so provided in express terms. If the section is construed as plaintiffs contend it should be, the District Court would have no jurisdiction of this case. Prior to the enactment of the Code jurisdiction was vested in the Circuit Court, which is by the Code abolished, and jurisdiction conferred upon the District Court. I am of the opinion that the jurisdictional value was correctly alleged by the plaintiff at $3,000, but that, it being denied, the proof does not sustain the allegation, and the court is without jurisdiction.

[4] While the bill must be dismissed for want of jurisdiction, it would seem that in no event could a decree be made as prayed for. Defendant Leonard Vyne, in his answer, paragraph 12, denies that he is in possession of the land, and avers that he claims no interest therein, and no right or title thereto. Whatever interest he had he conveyed prior to the filing of the bill. On the hearing he introduces a deed executed by himself and wife, and duly registered, to the Mecklenburg Realty Company, bearing date January 31, 1908, and recorded in Perquimans county March 2, 1908. On his examination he says that, after the decision of the Tilghman Johnston Case, he claimed no title—thought his title good until the decree in that case. In this condition of the case there is nothing in controversy, except a claim against Kramer Bros. & Co. and Vyne for cutting and removing tim-

ber, and for this plaintiffs have an adequate remedy at law. Whatever jurisdiction the court may have had in regard to the timber was incidental to the jurisdiction to remove a cloud from the title; with the disappearance of this, the incident goes with it.

A decree may be drawn dismissing the bill at plaintiffs' cost.

In re COHEN.

(District Court, S. D. Georgia, Albany Division. February 23, 1916.)

1. INSURANCE ⟸116(2, 4)—LIFE INSURANCE—INSURABLE INTEREST.

A wife and children have an insurable interest in the life of the husband and father.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 159, 161; Dec. Dig. ⟸116(2, 4).]

2. BANKRUPTCY ⟸143—TRUSTEE—PROCEEDS OF LIFE POLICY—RIGHT TO.

Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1913, § 9654), declares that the trustee of a bankrupt shall be vested, save as to exempt property, with title to all property which prior to the petition the bankrupt could have transferred, or which might have been sold under judicial process against him, provided that, when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representative, he may, within 30 days after the cash surrender value has been ascertained, pay or secure to the trustee the sum so ascertained, and hold the policy free from the claims of the creditors; otherwise, the policy shall pass to the trustee as assets. To a bankrupt residing in Georgia three life policies had been issued, and in each case the wife of the bankrupt had been designated as beneficiary. The right to change the beneficiary was reserved to the insured, and as to one of the policies the insurer had consented to the designation, but as to the others no assent appeared. Park's Ann. Code Ga. § 2498, declares that the insured may direct the proceeds of a policy to be paid to his personal representatives or to his widow, and upon such direction, given and assented to by the insured, no other person can defeat the rights of the same, but the assignment is good without such assent. *Held*, that as the bankrupt's wife had an insurable interest in his life, and as assent by the insurers could in all cases have been compelled, the trustee was not entitled to the cash surrender value of the policy as against the wife, notwithstanding the insured might have changed the beneficiary, for he had not done so.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. ⟸143.]

3. BANKRUPTCY ⟸143—TRUSTEE—PROCEEDS OF LIFE POLICY—RIGHT TO—"CASH VALUE."

In such case, in view of the fact that the "cash value" of a policy represents the amount set aside each year by the company to provide a sinking fund, which will amount to the face of the policy and discharge it at the end of the period of insurance, and that Park's Ann. Code Ga. § 2993, declares that a wife shall not be liable for her husband's debts, the trustee in bankruptcy cannot, regardless of the Georgia statute relating to exemption of life policies, claim the proceeds as against the wife, particularly as a court of equity will consider the purpose of life insurance and aid a dependent wife.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. ⟸143.

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

In Bankruptcy. In the matter of the bankruptcy of A. S. Cohen, the trustee contended that he was entitled to the cash value of policies on the life of the bankrupt payable to the latter's wife. The referee found that, of three policies, the trustee was entitled to the cash value of only two, and both the bankrupt and the trustee filed petitions for review. Referee's order, in so far as it was in favor of trustee for two policies, reversed; otherwise, affirmed.

Pope & Bennet and Peacock & Gardner, all of Albany, Ga., for trustee.

Pottle & Hofmayer, J. W. Kieve, and W. W. Crews, all of Albany, Ga., for bankrupt.

SPEER, District Judge. The bankrupt in this case has three life insurance policies, two in the Penn Mutual, and one in the New York Life, Insurance Companies. These were issued about the year 1901. At the date of bankruptcy the beneficiary designated in each policy was the wife of the insured. This designation had been recorded some five years prior thereto. The right to change the beneficiary was reserved to the insured under all three policies. This appears from a designation in the wife's favor made by the insured, and assented to by the company, in the case of the New York Life policy. There were assignments to the wife of the other policies. In both the designation and the assignments the right to change the beneficiary was reserved. It has been ascertained that at the date of adjudication the New York policy had a cash value of $437, and that the Penn Mutual policies had cash values of $644.12 and $322.09, respectively.

The trustee, relying upon section 70a of the Bankruptcy Act, filed his petition to require the bankrupt to pay into court the cash value of these policies, to be administered as assets of the bankrupt. The petition was heard by the referee, and he held that the trustee was entitled to the cash values of the Penn Mutual policies, but was not entitled under the New York Life policy. He distinguishes substantially because, in the New York Life policy, the designation of the beneficiary was assented to by the company. This, he holds, under the Georgia law, exempts it from the claim of the trustee, The Penn Mutual policies, while showing a designation of the wife as beneficiary by the insured, did not show the assent of the insurance company. For this reason he holds that the cash values of the latter policies are not within the effect of the Georgia statute. Petitions for review were filed in behalf of the trustee, and in behalf of the bankrupt.

[1, 2] The essential facts are undisputed. The question turns upon the effect of the Georgia statute referred to, when construed in connection with the relating provision of the Bankruptcy Law. The Georgia Code section is as follows:

"The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or * * * assignees; and upon such direction given, and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent." Park's Annotated Code of Georgia, § 2498.

Now, the Bankruptcy Law (section 70a) applying to this question is as follows:

"(a) The trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt; * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

In the application of this language to the facts of the case it is essential to inquire, first, whether the bankrupt had title to the cash value of the policies; second, whether, construed in pari materia with the Georgia statute, Cohen had the power to transfer his interest to such cash values therein; again, whether they might have been levied upon and sold under judicial process; and, again, whether there was, in the language of the act, "a cash surrender value payable to himself, his estate, or personal representatives." We think that all these questions should be answered in the negative. The provision of the Bankruptcy Law above quoted must be held to relate to policies to which the bankrupt had title, or which he could have transferred, or which might have been levied upon and sold under judicial process. It can have no relation to a policy of which he has made his wife beneficiary, and where the state law protects her beneficial interest. Here the legal title was in the wife.

It is urged that he could have changed the beneficiary. If this be possible, in view of the Georgia statute, he had not done so on the date of adjudication; he had directed, years before bankruptcy, that the proceeds of the policies be paid to his widow, and while it does not appear that this direction had been assented to by the Penn Mutual Company, no reason appears why they should not have assented, and the assent might have been compelled. "Id certum est quod certum reddi potest." Besides, the explicit language of the Code is that the assignment is good without such assent. Can it be said, then, that the right to the cash value could have been transferred or levied upon, and sold under judicial process, and could, at the date of adjudication, have been made available for creditors? There are authorities which seem to answer this in the affirmative. See In re Herr (D. C.) 182 Fed. 716; In re Diack (D. C.) 100 Fed. 770; In re Boardman (D. C.) 103 Fed. 783; In re Coleman, 136 Fed. 818, 69 C. C. A. 496. But it will be found, we think, that these precedents relate to the proceeds of the policy, where the bankrupt or his legal representative was the beneficiary, or that the decisions were rendered in states where no such conclusive protection was thrown around the designation of the widow and children, as beneficiaries, as that afforded by the law of Georgia.

Where there is no fraud, and where the designation of the beneficiary is made several years before bankruptcy, indeed, if made in good faith more than four months before bankruptcy, in the language of

the Georgia law, "no other person can defeat the same." This language is imperative, and seems to throw an impregnable defense around the designated beneficiary. This, of course, where there is an insurable interest, as in the case of the wife and children. The language, "no other person can defeat the same," imports, we think, that no creditor can defeat the same, nor can the trustee do so.

Reliance is placed by the trustee upon the obiter of Chief Justice Lumpkin in Grenville v. Crawford, 13 Ga. 355. There a policy had been assigned to a creditor for debt, with the stipulation that, in event of the death of the insured, the proceeds of the policy should be first subjected to the debt of the assignee, and the balance to be turned over to the wife as beneficiary of the insured. There was, however, in that case, no contest as to the right of the creditor; but Chief Justice Lumpkin seemed to distinguish the rights of a creditor as superior to the right of the beneficiary of the policy. Section 2498 of the Code is clearly traceable to this case. Thomas R. R. Cobb, the famous codifier, was careful to incorporate the principle for the protection of the wife and children, but as carefully omitted to include the obiter of the great Chief Justice. The language of the section has remained unchanged in each of the numerous successive re-enactments of the Code; and we therefore conclude that in Georgia the language, "no other person can defeat," imports that the trustee in bankruptcy cannot defeat.

The question is without precedent, for the learned counsel for the trustee and the wife of the bankrupt have been unable to call attention to a case where this section of the Code has been construed in connection with 70a of the Bankruptcy Act, supra. In all the cases cited, where after death the proceeds of the policies were claimed by creditors and by the wife, when she was beneficiary, the wife has prevailed. In some states, statutes of exemption provide for the contingent intervention of bankruptcy; but section 2498 of the Code of Georgia, under consideration, makes no mention of bankruptcy.

[3] Aside from the Georgia statute, an important consideration depends upon the nature of the cash value of a policy of insurance, where a beneficiary with an insurable interest is other than the person insured. This represents the amount set aside each year by the company to the account of that particular policy. This is done to provide a sinking fund, which will amount to the face of the policy and discharge the same at the end of the period of insurance. That end is the probability of the death of the insured. This is calculated from the mortality tables, in view of the expectancy of life; that is to say, the period of his natural life, beginning with the inception of the insurance. The sums set aside from year to year for this purpose will ordinarily equal the amount for which the insurance policy is made. When the proceeds of the policy, by the designation of the insured, are to be paid to the wife upon death of the insured, in view of this system of the insurance company, the wife, who is beneficiary, has acquired a vested interest in this sinking fund, or reserve, as it is termed by the insurance companies. Its sum total constitutes the amount to be paid her in the event of her husband's death. If the

Georgia statute above cited does not forbid it, her interest might have been divested by another designation. This, however, he did not make.

The policy and all its values were hers at the time of bankruptcy. Her right is as strong as if the policy had been originally taken out in her name, with the reserved right to change the beneficiary, when no such change had been made. In such case it can scarcely be contended that against such right the creditors could have prevailed. The right is hers. Therefore, if the bankrupt in this case should be compelled by the court to withdraw this reserve, which has accumulated at this time, it will diminish the amount which will be paid to his widow at the date of his death. It therefore would make the widow pay the trustee for the benefit of the husband's creditors. In other words, it would make her responsible pro tanto for her husband's debts, which is contrary to the policy of the state. Georgia Code, § 2993. Again, the basic principle of life insurance is protection for those dependent upon the insured—primarily, his wife and children; and if his creditors, when his wife and children are designated as beneficiaries, because of bankruptcy, are to be permitted to deprive those who are otherwise helpless of this protection, the main purpose of insurance would be frustrated. Of course, this principle will not apply where the policy is payable to his legal representative.

While it is true that the law of Georgia is not as explicit as the law of some of the states for the protection of the widow, for the reasons above given, we think it is substantially effective to that end. And moreover, the bankruptcy court is a court of equity, and the fact that the widow to be has a vested interest in the cash value of the policy, that is to say, the reserve, appeals strongly to the court, particularly its duty as a court of chancery to protect the widow and the orphan. While the interest of the wife is, of course, contingent upon death as already stated, the withdrawal of the cash surrender value at the adjudication would subtract the amount from the total of that interest. It might, indeed, occasion the greatest hardship. The expectancy of the insured, for instance, might be 37 years. He might have carried a policy for 35 or 36 years. The cash value of such a policy, carried for so long, would practically amount nearly to its face value. Then, should bankruptcy intervene, and the cash value be withdrawn, the purpose of his life, extending over the period of a generation, to protect his wife and children by insurance, would be wholly defeated, for the remnant she would draw at his death would be of little value.

It follows that our conclusion is that in so far as the ruling of the referee is favorable to Mrs. Cohen it is sustained, and in so far as it is unfavorable to her it is reversed. Decree will be taken accordingly.

CLARK SPARKS & SONS MULE & HORSE CO. v. AMERICUS NAT. BANK et al.

(District Court, S. D. Georgia. March 13, 1916.)

1. BANKS AND BANKING ⟸116(1)—KNOWLEDGE OF CASHIER—NOTICE.
Where the assistant cashier of a bank knew of its insolvent condition, such knowledge is imputable to the bank and its board of directors.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 282; Dec. Dig. ⟸116(1).]

2. BANKS AND BANKING ⟸75—COLLECTIONS—INSOLVENT.
Where a bank had knowledge of its insolvency when it collected a draft sent it for collection, and withheld notice from the owner of the draft, such fraud precludes it from acquiring title to the draft.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 157; Dec. Dig. ⟸75.]

3. BANKS AND BANKING ⟸159—COLLECTIONS—TITLE.
Where a draft is sent a bank solely for the purpose of collection, title does not vest in the bank.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 547–553; Dec. Dig. ⟸159.]

4. TRUSTS ⟸372(1)—TRUSTEES—PAYMENTS OUT OF TRUST FUNDS.
Where money belonging to a cestui que trust is traced into a general mass in the hands of the trustee, and the trustee makes payments out of the mass, it is always presumed that he makes such payments out of his own funds, and the cestui que trust is entitled to trace his money into the residuum.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 600; Dec. Dig. ⟸372(1).]

5. BANKS AND BANKING ⟸80(8)—COLLECTION OF DRAFT—PROCEEDS—TRACING.
Complainant drew a draft for over $6,000 for payment for a shipment of live stock, which was forwarded to an insolvent bank for collection. The debtor agreed to take up the draft by giving his notes to the insolvent bank. Notes of the debtor to the amount of $6,000 were given, and the bank pledged such notes, with others, to a correspondent bank, which paid over the amount of the loan. At all times thereafter the defendant bank had on hand cash in excess of the amount of the draft. *Held* that, as the assets of the bank were increased in the sum of $6,000, complainant is entitled to priority in payment out of the cash on hand to the amount of $6,000; and as the debtor took up the remainder of the draft by a shifting of credits which did not increase the assets of the bank, complainant is not entitled to priority as to the amount of its claim in excess of $6,000.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 192; Dec. Dig. ⟸80(8).]

6. BANKS AND BANKING ⟸80(8)—PRIORITIES—INTEREST.
In such case complainant is not entitled to any interest on the amount of his draft.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 192; Dec. Dig. ⟸80(8).]

7. BANKS AND BANKING ⟸80(3)—PRIORITIES—STAY.
In such case, as there might be others entitled to priorities out of the cash turned over to the receiver, the receiver of the insolvent bank will be given a period of 30 days in which to call to the court's attention such priorities.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 192; Dec. Dig. ⟸80(3).]

In Equity. Bill by the Clark Sparks & Sons Mule & Horse Company against the Americus National Bank and N. M. Dudley, its receiver. Decree for complainant.

Bill in equity for recovery of collection made by national bank on eve of its failure. The evidence shows that complainant on January 7, 1914, drew a draft for $6,272.50 on one J. J. Hanesley, of Americus, Ga., for a shipment of live stock, and deposited same for collection in his bank, the National Stockyards National Bank, in Illinois, and that said bank forwarded same for collection to the Americus National Bank, of Americus, Ga., and that said bank presented said draft to the drawee for payment on January 9, 1914. Said drawee was engaged in the live stock business, and, in expectation of this shipment of stock and the drawing of this draft, had applied to the Americus National Bank three or four weeks before this time to ascertain the condition of his account, and on finding that same was apparently overdrawn he made arrangement to pay the expected draft by a check on his account in the bank, and was then to give his notes to protect his check. On January 9th, therefore, he took up the draft of complainant by giving his check to the Americus National Bank for the sum of $6,272.50, with exchange added, same being drawn on said bank, and this check was charged against him by said bank, and resulted in an overdraft against him. A week afterwards Mr. Hanesley, in pursuance of the arrangement which he had previously made, as above stated, in order to cover his overdraft with the bank and protect his check, gave to said bank his two notes, dated January 9th and due in October, 1914, with interest included in the notes to maturity; the then cash value of the notes, however, being $6,000. On January 25, 1914, these notes, with others belonging to the Americus National Bank (the total amount of these notes being $24,562.60), were by that bank hypothecated with the National Park Bank of New York as collateral security for a loan of $20,000, which was then made with said bank and placed to the credit of the Americus National Bank. Between that time and the time when the doors of the Americus National Bank were closed, on February 2, 1914, nearly all of said funds in the National Park Bank were withdrawn by the Americus National Bank by the sale of New York exchange made by the Americus National Bank; said bank receiving cash for such exchange. In this way nearly all of said loan of $20,000, for which said Hanesley notes and other notes were deposited as collateral, was withdrawn from the New York bank, and placed in the Americus bank. The amount left in the New York bank at the time of the failure of the Americus bank was less than $2,000, which amount was credited by the New York bank on the above-stated loan and a previous loan which it had made to the Americus bank. When the Americus National Bank failed, on February 2, 1914, it had in its safe in cash the sum of $7,082.46, which was turned over to its receiver. From January 9, 1914 (when Mr. Hanesley paid his draft), and also from January 25, 1914 (when the loan of $20,000 was secured from the New York bank), up to the time when the Americus bank closed its doors, there was constantly on hand in said bank cash, as shown by the evidence, each day, of at least $7,000. At the hearing of the case the evidence showed that the Hanesley notes were good, and that more than $4,000 had been paid on same after the receivership.

The Hanesley draft was handled and collected by one Wheatley, who was assistant cashier of the Americus bank, and on January 9th this assistant cashier wrote to the National Stockyards National Bank, advising that he was on that day remitting "your collection J. J. Hanesley $6,272.50 sent us in yours of the 7th"; and on that day said Wheatley drew New York exchange for the amount of said collection, but, instead of forwarding same, he put it in an envelope and in the vault of the Americus National Bank, where it remained until the receiver took charge. On January 23d the National Stockyards National Bank wired the Americus bank that it had not received the remittance, and asked for a duplicate remittance to be forwarded at once, and thereupon, on January 27th, the Americus bank wired the other bank that it had located the remittance and had forwarded same by special delivery, with interest, which, however, was not done. The National Stockyards National Bank, on January 31st, again wired the Americus bank that it had not received the remittance, whereupon, on January 31st, Mr. Lowrey, the cashier of the Amer-

icus bank, made out new New York exchange, and forwarded same to the National Stockyards National Bank, which received same on February 2d and immediately forwarded it to the National Park Bank of New York, where it was presented on the 4th, when payment was refused, because the Americus bank had already been placed in the hands of a receiver. At the time that the Hanesley draft was collected by the Americus National Bank, it was hopelessly insolvent, and from the conduct of Mr. Wheatley, the assistant cashier at the time, and from the other evidence in the case, the court is of the opinion that Mr. Wheatley was fully aware of the insolvency of the Americus bank when he collected the draft. Mr. Lowrey, the cashier, denied that he knew of this insolvency until some three weeks afterwards, just before the bank closed its doors. Neither the complainant nor the National Stockyards National Bank knew of the insolvency of the Americus National Bank, and neither had any account with this bank, but the draft in question was sent merely for collection and remittance of proceeds.

Harris, Harris & Witman, of Macon, Ga., for complainant.
W. A. Dodson, of Americus, Ga., for receiver.

LAMBDIN, District Judge (after stating the facts as above). The question here presented is whether the complainant, who forwarded the draft in question for $6,272.50 for collection to the Americus National Bank, which collected same in the manner stated above, but failed to remit the proceeds before its failure, is entitled to priority of payment over the general creditors of that bank.

[1] 1. The assistant cashier, Wheatley, who handled the draft in question, was fully aware of the insolvency of the Americus bank when he made the collection, and the court is of the opinion that this knowledge should be imputed to the bank itself. At any rate, it was the duty of the directors of the bank to know of its insolvency, and it is presumed that they had knowledge of same. Lowry Banking Co. v. Empire Co., 91 Ga. 624, 17 S. E. 968; State v. Quackenbush, 98 Minn. 515, 108 N. W. 953; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; Manhattan Bank v. Walker, 130 U. S. 627, 9 Sup. Ct. 519, 32 L. Ed. 959; Tate v. Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

[2] (a) The bank being thus hopelessly insolvent at the time that it received and collected the draft, and the officers of the bank having knowledge of this insolvency, or being presumed to have knowledge of such insolvency, the Americus bank, on account of this fraud, did not acquire title to the draft, or to the proceeds of the collection of same. Wasson v. Hawkins (C. C.) 59 Fed. 233; Richardson v. Olivier, 105 Fed. 277, 40 C. C. A. 468, 53 L. R. A. 113; 5 Cyc. 493, and cases cited in notes.

[3] (b) Furthermore, from the facts above stated, and from other facts shown by the evidence, including the fact that this Hanesley draft was sent to the Americus bank solely for collection and remittance of proceeds, the court is of the opinion that on this ground also the title to this draft and its proceeds never left the complainant, as the Americus bank was a mere agent for the collection of the draft. 5 Cyc. 493, and cases cited in notes; Fifth Nat. Bank v. Armstrong (C. C.) 40 Fed. 46.

[4-6] 2. For both these reasons complainant is entitled to recover the proceeds of this draft from the receiver of the Americus bank,

provided it is able to trace and identify the proceeds derived from the collection of same. This brings the court to the consideration of the next question in the case, which is whether the complainant has been able to trace and identify the proceeds of the collection of this draft. It appears that the draft was paid by a check drawn by Mr. Hanesley on his deposit with the Americus National Bank for $6,272.50 and exchange, and that by previous arrangement with the Americus bank, Mr. Hanesley paid $6,000 of this amount with his two notes, which were dated January 9, 1914, the day the draft was paid, and which fell due October following. The court is of the opinion that, since these two notes were used by agreement for the payment of this draft to the amount of $6,000, they can be considered as a part of the proceeds of the collection of this draft, and a substitution for same. The amount of the draft above $6,000 was paid by a mere shifting of credits in the Americus bank, and did not add to or increase its assets, and consequently the court is of the opinion, under the ruling in the case of Anheuser Busch Brewing Association v. Clayton, 56 Fed. 759, 6 C. C. A. 108 (C. C. A. 5th Cir.), that complainant cannot recover the excess over $6,000, which was the cash value at the time of the notes Mr. Hanesley gave the bank, so as to pay the draft in question.

These notes, as stated above, along with other notes, amounting to $24,562.60, were taken by the cashier of the Americus National Bank to New York and hypothecated with the National Park Bank as security for a loan of $20,000, which was then made by the National Park Bank to the Americus bank, and nearly all of this loan, by the sale of New York exchange, was transferred from the New York bank to the Americus bank. The Hanesley notes, which were good, were transformed into a part of this loan, and thus became a part of the funds so transferred to the vault of the Americus bank. At no time between the payment of the draft in question, or the making of said loan in New York, and the date when the Americus bank closed its doors, was the cash on hand in said bank less than $7,000. The court is therefore of the opinion that the proceeds from the collection of said Hanesley draft to the amount of $6,000, which was represented by the Hanesley notes so deposited with the New York bank, increased the assets of the Americus National Bank to the extent of said sum of $6,000, and that this sum has been traced and identified in the residuum of over $7,000 which was turned over to the receiver when the Americus bank closed its doors. Since the modern doctrine of equity in such matters was enunciated in the leading English case of Knatchbull v. Hallett (In re Hallett's Estate) 13 Ch. Div. 696, which has been quoted approvingly many times by the Supreme Court of the United States, it is no longer necessary to trace the identical money by any earmarks which it may have; but, if the money in question can be traced into a general mass of money, equity will follow the money by taking out the same quantity. National Bank v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693.

Where money belonging to a cestui que trust is traced into a general mass in the hands of a trustee, and the trustee makes payments out of this mass, it is always presumed that he makes such payments out of his own funds, and not out of the money of the cestui que trust, which has gone into this mass, and the cestui que trust is therefore entitled to trace his money into the residuum. Boone County Nat. Bank v. Latimer (C. C.) 67 Fed. 27; 39 Cyc. 539 and 540, and cases cited in notes; Piano Manufacturing Co. v. Auld, 14 S. D. 512, 86 N. W. 21, 86 Am. St. Rep. 769; In re Berry, 147 Fed. 208, 77 C. C. A. 434. The court is therefore of the opinion that, under the facts in this case, the complainant is entitled to a decree against the receiver for the sum of $6,000, represented by the cash value of the Hanesley notes at the time they were given. Commercial Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; Western German Bank v. Norvell, 134 Fed. 724, 69 C. C. A. 330; Butler v. Western German Bank, 159 Fed. 116, 86 C. C. A. 306; Richardson v. New Orleans, etc., Co., 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67; Richardson v. New Orleans Coffee Co., 102 Fed. 785, 43 C. C. A. 583; Richardson v. Continental Nat. Bank, 94 Fed. 450, 36 C. C. A. 315; Goshorn v. Murray (D. C.) 197 Fed. 409; E. B. Macy v. Roedenbeck (C. C. A. 8th Cir.) 36 Am. Bankr. Rep. 31, 227 Fed. 346, —— C. C. A. ——, and cases cited in same; St. Louis Ry. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683.

(a) However, under the ruling in the case of Richardson v. Louisville Banking Co., 94 Fed. 442, 36 C. C. A. 307, complainant is not entitled to any interest.

[7] 3. A suggestion is made that there are possibly other persons who claim priority in the same fund that was turned over by the bank to the receiver when it closed its doors. The receiver in this case will be allowed 30 days in which to call the attention of the court to any other claim which is entitled to such priority.

A decree may therefore be entered in this case finding in favor of the complainant against the defendants, the Americus National Bank and its receiver, for the said sum of $6,000 as a preferred claim entitled to priority in payment out of the funds in the hands of the receiver in said cause ahead of the general creditors, and the complainant is also entitled to a decree for the remainder of its claim amounting to $272.50, but without priority, to rank along with the claims of the other unsecured creditors of the bank, giving the privilege, however, to the receiver, at any time within 30 days from this date, to call the attention of the court to any other claims which may be entitled to priority of payment, so that the court may take such further action in the matter as may be equitable and proper, in view of such other claims.

FITCH v. YOUNG et al.

(District Court, S. D. New York. March 15, 1916.)

1. COPYRIGHTS ⊂=36—EXTENT OF RIGHTS ACQUIRED—"PLAY RIGHT."
"Play right" and "copyright" are distinct under the old copyright statute, though printed publication will forfeit both, and though one statutory copyright will protect both; and an author of a play, in assigning it to a publisher, was therefore justified in reserving his common-law play right, and the necessary formalities respecting the printed play created a statutory play right, which the publishers held in trust for him, and a statutory copyright, which they held beneficially.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 37; Dec. Dig. ⊂=36.

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

2. COPYRIGHTS ⊂=47—ASSIGNMENTS—RIGHTS ASSIGNED—"PUBLISH."
Where the publisher of a play, after copyrighting it, assigned the copyright thereof, with other copyrights, to the author by an assignment which provided that it should not affect the right of the publisher to publish such works, and that it should continue to have the sole and exclusive right to publish them as though the assignment had not been made, it conveyed to the author only the statutory play right, and reserved the copyright, since, while the statute, in defining copyright, uses other words than "publish," they were all covered by the word "publish," as used in the assignment.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 45; Dec. Dig. ⊂=47.

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

3. COPYRIGHTS ⊂=76—SUITS FOR INFRINGEMENT—PARTIES ENTITLED TO SUE.
Rev. St. § 4952, provided prior to the present copyright statute that the author of any dramatic composition should upon complying therewith have the sole liberty of printing, publishing, copying, and vending it, and of publicly performing or representing it, or causing it to be performed or represented by others. The author of a play prior to the present statute assigned it to the M. Co., who procured a copyright and assigned the copyright to the author, reserving the right to publish the work. *Held*, that the author could not sue for an infringement, consisting of the publication of a story, since section 4952 did not give the exclusive right to novelize a copyrighted play, and a novelization was not an infringement, unless it amounted to a copy, in which case it was an infringement of the rights of the M. Co., which had the exclusive right of copying.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 68; Dec. Dig. ⊂=76.]

In Equity. Suit by Alice M. Fitch, as sole executrix of William C. Fitch, against Courtland H. Young and another. Bill dismissed.

Suit upon a copyright injunction and incidental remedies. The plaintiff is executor of one William G. Fitch, who was residuary legatee and executor of the playwright, Clyde Fitch, and the case may be regarded as though Clyde Fitch were living and were the plaintiff. He wrote a play called "Truth," which he assigned to the MacMillan Company, which took out a copyright on June 5, 1907, and published the same in book form. In the notice of copyright the MacMillan Company declared that all acting rights both professional and amateur were reserved to Clyde Fitch, but that licenses must be

procured from the MacMillan Company. On January 20, 1908, the MacMillan Company assigned the copyright to Clyde Fitch of "Truth" and four other plays with the following clause: "This assignment shall not affect in any way the right of the MacMillan Company to publish the above-described works. The company shall continue to have the sole and exclusive right to publish said works as though this assignment had not been made." "Truth" was presented for some time both in the United States and in England and had some dramatic success. It was revived some time later and was again successful.

The defendant Young is the publisher of a monthly magazine of short stories and received from the defendant Sallie Underhill a story called the "Liar," which he published in the issue of October, 1913, and which is the supposed infringement. Young knew nothing of the sources from which Sallie Underhill obtained the story, and has not yet been able to learn, because she has not been served, nor has she been examined. The defendant raises three points: That Clyde Fitch never assigned the copyright to the MacMillan Company since he reserved his dramatic rights and hence the copyright is invalid; that the assignment by the MacMillan Company to Clyde Fitch was likewise invalid being for a part of the copyright only; that the story is not an infringement of the play.

Bernard M. L. Ernst, of New York City, for plaintiff.
Charles A. Taussig, of New York City, for defendant Young.

LEARNED HAND, District Judge (after stating the facts as above). [1] The second point raised by the defendant seems to me determinative of the case. I think that play right and copyright are quite distinct under the statute, in spite of the fact that printed publication will forfeit both, and that one statutory copyright will protect both. If so, Clyde Fitch was justified in reserving his common-law play right from the original assignment to the MacMillan Company, and they could, by the necessary formalities on the printed play, create a statutory play right, which they held in trust for him, and a statutory copyright which they held beneficially. This is the effect of Judge Holt's decision as to the right to dramatize, a similar right, in Ford v. Charles E. Blaney Co. (C. C.) 148 Fed. 842. Judge Noyes in Dam v. Kirk La Shelle, 175 Fed. 902, 99 C. C. A. 392, 41 L. R. A. (N. S.) 1002, 20 Ann. Cas. 1173, in citing Ford v. Charles E. Blaney Co., supra, speaks of this as "probably" the law, and Judge Hazel had so held in the court below. 166 Fed. 589.

[2] The assignment by the MacMillan Company to Clyde Fitch was, however, clearly intended, I think, to convey only the play right and to reserve the copyright. This follows from the fact that the exclusive right to publish was reserved to them, and that that exclusive right included all that they had, except the statutory play right held in trust for Clyde Fitch. It is true that the statute uses more words than "publish" to define copyright, including the words "copy, publish, print, complete, vend," and others; but they are all clearly intended to be covered by the word "publish," as used in the assignment, and would have prevented Clyde Fitch from himself publishing the play, had he wished. The analogy of patents is apt, in which the form of an assignment does not count, and in which even a license for the term of the patent to use, make, and vend will, if exclusive, operate as an assignment.

Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923.

[3] The plaintiff seems to suppose that the composer of a play gains under the statute not only copyright and play right, but also the right to novelize it, analogous to the right to dramatize given by R. S. § 4952. It is true that the right to novelize is created by section 1 (b) of Copyright Act of 1909 (Act March 4, 1909, c. 320, 35 Stat. 1075 [Comp. St. 1913, § 9517]), and it is quite possible that an assignment like that at bar would to-day convey that right to Clyde Fitch. The right to novelize did not, however, exist before the Copyright Act of 1909, and the only basis for suit against a story as piracy which could arise under this copyright would be by virtue of the exclusive right to "copy" granted by section 4952 of the Revised Statutes, a right which the MacMillan Company, the owner of the copyright, alone has the right to invoke. Any right to novelize the play in such form as does not result in a "copy" is a right in the public domain, and would inhere in the first novelizer, whether he were Clyde Fitch or another; any right so to change the play that a court would still consider it a "copy" of the play is within the exclusive control of the MacMillan Company. This conclusion is in no sense contrary to the decision in New Fiction Publishing Co. v. Star Co., 220 Fed. 994, because the plaintiff there did not have copyright at all, but only a license to publish the story serially, a quite limited part of the copyright, and one not vesting in the licensee any right to sue an infringer, any more than an exclusive right to vend a patented invention would have enabled the licensee to sue. Judge Sprague, indeed, in Roberts v. Myers, 20 Fed. Cas. No. 11906, held that an assignment of the right to perform a play for a limited period would give the assignee the right to sue; but that was certainly an extension of the rules applicable to patents, and a step further than it is necessary to go in the case at bar.

If, on the other hand, the play right and copyright be deemed to be indivisible, in such sense that one may not be assigned without the other, while it is true that the MacMillan Company would become only a licensee under the assignment to Clyde Fitch, yet there would be a fatal defect in the copyright itself. For in that case the MacMillan Company could hardly be regarded as the "proprietor" of the indivisible common-law literary property out of which alone the statutory play right and copyright could be created. It can hardly be possible to treat this as an indivisible right for the purpose of one kind of assignment and as divisible for another.

I conclude, therefore, that the plaintiff has brought this suit upon the mistaken theory that the right of novelization existed under the earlier act, when in fact the statute created only play right and copyright. It is, indeed, a very troublesome question whether the MacMillan Company could succeed as owner of the copyright in holding the defendant for publishing a copy of the play. I have not the least doubt that the story was a cheap and vulgar plagiarism. The parallelism is so complete and minute as to admit of not the slightest doubt that it was slavishly pirated in plot and characters; but it has never been very satisfactorily established, and probably never can be, at what

point a plagiarism ceases to copy the expression of an author's ideas and steals only the ideas themselves. No one can test that question but the MacMillan Company.

The bill will be dismissed for failure of title, with costs.

Ex parte LEE DUNG MOO.

(District Court, N. D. California, First Division. February 14, 1916.)

No. 15947.

ALIENS ⟸32(9)—EXCLUSION OF IMMIGRANTS—UNFAIR HEARING.

Under Rev. St. § 1993 (Comp. St. 1913, § 3947), providing that children born out of the United States, whose fathers are citizens, are thereby declared to be citizens, where a native of China seeks admission to the country as the son of a native-born citizen, the question of relationship should be fairly investigated, with a view to ascertaining the truth, and with a perfect willingness to admit him as a citizen, and where his right to admission is examined in a spirit hostile to the law he is denied a fair hearing.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⟸32(9).]

Petition by Lee Dung Moo for a writ of habeas corpus. On demurrer to the petition. Demurrer overruled, and writ issued.

George A. McGowan, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. Applicant, a native of China, seeks admission to this country as the son of a native-born citizen and resident thereof. Although it is apparent from the record that his proofs would be regarded as sufficient in an ordinary case his application to enter was denied, and such denial was affirmed on appeal. The Acting Commissioner General in passing upon his appeal uses the following language:

"After careful consideration the Bureau is clearly of the opinion that this applicant has not shown his right to admission on the status claimed in the positive and satisfactory manner required by the Department in cases of this kind, where, as it was decided in the case of Leong Mow, the applicant's right to admission is at best only technical. He is, as above pointed out, a Chinese in every respect save his claim to American citizenship by virtue of the alleged birth in this country of his alleged father, who, as pointed out in the first paragraph hereof, has not become Americanized to any apparent degree. It is accordingly recommended that the excluding decision be affirmed and deportation ordered."

And the Assistant Secretary of Labor, in his opinion dismissing the appeal, says:

"To admit this applicant is to recognize naturalization of a man of 25, with a family of his own, who has never lived in the United States, who does not speak English, nor understand it, and who has in no way indicated any sense of American allegiance, but whose sense of allegiance has been and is

distinctly alien. It cannot be that Congress intended to confer citizenship under these circumstances, especially of races whom they have excluded from naturalization by careful judicial process and after renunciation of foreign allegiance."

The right which is called "at best only technical" in the decision of the Acting Commissioner General, and the "naturalization" and "conferring of citizenship" spoken of by the Assistant Secretary, are those founded upon the following provision of section 1993 of the Revised Statutes (Comp. St. 1913, § 3947):

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States."

It is manifest from the foregoing quotations, and indeed has also appeared from records submitted here in other cases, that the Immigration Bureau looks upon this statute, in so far as it may be applicable to persons of the Chinese race, with an unfriendly eye. The absolute citizenship therein provided for, and the rights pertaining to such citizenship, are regarded as "at best only technical," while to the plain language of the statute is added by construction the provision that it does not apply, unless the foreign-born child of the American citizen shall learn the English language and come to the United States before he is 25 years of age. I conceive it to be the duty of executive as well as of judicial officers fairly and freely to administer the laws of Congress as they find them, whether they agree with the policy or purpose of such laws or not. In the instant case the very law which would entitle the applicant to admission into this country is regarded with such hostility as to be cast into the balance against him. If applicant is the son of a resident American citizen, he, too, is a citizen, and entitled to every right as such. The question of relationship should therefore be fairly investigated, with a view to ascertain the truth, and with a perfect willingness to admit him as a citizen under this law, instead of being investigated in a spirit hostile to the law, which, lacking the power to repeal, accomplishes the same result by denying to it effect. When one's right as a citizen is examined in that spirit, the hearing given him appears to me to be anything but fair.

The demurrer will therefore be overruled, and the writ prayed for will issue, returnable February 19, 1916, at 10 o'clock a. m.

Ex parte TOM TOY TIN.

(District Court, N. D. California, First Division. February 15, 1916.)

No. 15942.

1. ALIENS ⟸32(9)—EXCLUSION OF IMMIGRANTS—UNFAIR HEARING.

While immigration officers, in passing upon an immigrant's right of admission to the country, have the sole power to pass upon the facts after a fair hearing, the hearing is not fair, where the examination is had and the evidence weighed in a spirit hostile to the statute providing that children born out of the United States, whose fathers at the time of their

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

birth are citizens thereof, are declared to be citizens of the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⟸32(9).]

2. ALIENS ⟸32(9)—EXCLUSION OF IMMIGRANTS—UNFAIR HEARING.

If the right of a person of Chinese descent to enter the country as the son of a native-born citizen can be made dependent on the father's failure to take more advantage of his right as an American citizen than to live in the country, his delinquency in this respect must be shown, and it was manifestly unfair to exclude such person on the ground that his father had not taken advantage of his rights as an American citizen until after a residence in the United States of approximately 27 years, without any evidence that he had not exercised every right of an American citizen.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⟸32(9).]

Petition by Tom Toy Tin for a writ of habeas corpus. On demurrer to the petition. Demurrer overruled, and writ issued.

Catlin, Catlin & Friedman, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. Applicant, a native of China, seeks admission to this country as the son of a native-born citizen and resident thereof. His application to enter was denied, and such denial was affirmed on appeal. In the memorandum for the Commissioner, prepared by the inspector in charge of the law section, is found the following statements:

"The conditions in this case are comprehensively set forth by the examining inspector in his supplemental report of September 29, 1915. I shall only add that the alleged father has never taken advantage of his rights as an American citizen, until now, after a residence in the United States of approximately 27 years, when he exerts them for the purpose of having an alleged son admitted, whom he has never seen, and evidently taken but little interest in, if any, since he has never seen fit to visit his alleged family during the period of 27 years. He has permitted his alleged son to remain in China until he is many years past his majority, and has a family of his own, consisting of three boys and one daughter; this despite the fact that applicant has evidently been unable to support himself and family, his alleged father having testified that he was sending about $200 yearly to his family, and when it would have been greatly to his (applicant's) advantage to have availed himself of the rights he now lays claim to at a much earlier date."

Among the "conditions comprehensively set forth by the examining inspector," as stated above, is the following:

"Aside from the evidence mentioned as to familiarity with the locality in question, the only favorable feature in the case is the decidedly strong resemblance between the applicant and the alleged father. Considering the proximity in age, however, this might easily be due to the fact that the two persons are brothers, instead of father and son. While I am somewhat in doubt as to the merits of the case, I am of the opinion that in a case of this sort, where the applicant has resided for so many years in China before making any claim to admission to this country, and where the circumstances as outlined are such as to restrict the scope of the examination, there is not sufficient affirmative evidence to warrant the conclusion that the applicant is

entitled to take advantage of the technical wording of the law entitling foreign-born children of American parents to admission to this country."

[1] The view that the citizenship of a person of the Chinese race, who, though born in China, is the son of a native-born American citizen, is a "technical" instead of a real one, seems to have originated in the Bureau at Washington, and to have drifted downwards through the service until it has inoculated the examining inspectors, so that the apparent purpose of their examinations is, not to ascertain the truth, but to exclude all Chinese who, claiming to be citizens by virtue of the citizenship of their fathers, have failed to come to this country during their minority. That the immigration officers have the sole power to pass upon the facts after a fair hearing is not disputed, and has never been disputed, by this court. But the court has several times held in recent cases that a fair hearing is not accorded when the examination, as to relationship, is had in a spirit hostile to that law which provides that:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens thereof, are declared to be citizens of the United States."

And where the record itself discloses the fact that the evidence is weighed in that spirit of hostility to the plain provisions of the statute the court is driven to the conclusion that the hearing was unfair. In a case just decided this court (In re Lee Dung Moo, 230 Fed. 746) stated its views as follows:

"I conceive it to be the duty of executive as well as of judicial officers fairly and freely to administer the laws of Congress as they find them, whether they agree with the policy or purpose of such laws or not. In the instant case the very law which would entitle the applicant to admission into this country is regarded with such hostility as to be cast into the balance against him. If applicant is the son of a resident American citizen, he, too, is a citizen, and entitled to every right as such. The question of relationship should therefore be fairly investigated, with a view to ascertain the truth, and with a perfect willingness to admit him as a citizen under this law, instead of being investigated in a spirit hostile to the law, which, lacking the power to repeal, accomplishes the same result by denying to it effect. When one's right as a citizen is examined in that spirit, the hearing given him appears to me to be anything but fair."

[2] Here it is urged that the alleged father, whose citizenship is not questioned, "has never taken advantage of his rights as an American citizen." It is in the record that he has so far taken advantage of his rights as to live in this country all his life, save for one trip to China, at which time he claims to have been married and to have begotten the applicant. What other rights he should have exercised is not stated, but there is absolutely no evidence to show that he has not exercised every right of an American citizen. If the right of applicant to land is to be made dependent upon the opinion of some officer that the father should have taken more advantage of his rights as an American citizen than to live in this country, then the record should clearly show wherein the father was delinquent in this regard. This record does not so show, and the statements quoted are manifestly unfair reasons employed in weighing the evidence to applicant's detriment. Upon the

whole record the court is of the opinion that applicant's right to enter was not inquired into in that spirit described by Judge Morton in the following terms:

"The essential thing is that there shall have been an honest effort to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law." Chin Loy You (D. C.) 223 Fed. 833.

The demurrer will therefore be overruled, and the writ will issue as prayed for, returnable on February 19, 1916, at 10 o'clock a. m.

UNITED STATES v. DALE et al.

(District Court, N. D. California, First Division. May 17, 1915.)

No. 5676.

POST OFFICE ⊂=48(4)—USE OF MAILS TO DEFRAUD—INDICTMENT.

An indictment for using the mails to defraud *held* insufficient, in the absence of any averment showing the use of the mails by defendants prior to the consummation of the alleged fraud.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⊂=48(4).]

Criminal prosecution by the United States against J. A. Dale and H. P. Tracy. On demurrer to indictment. Demurrer sustained.

John W. Preston, U. S. Atty., and Annette Abbott Adams, Asst. U. S. Atty., both of San Francisco, Cal.

P. L. Benjamin, of San Francisco, Cal., for defendants.

DOOLING, District Judge. Defendants have been indicted for using the mails in furtherance of a scheme to defraud. The scheme averred was that defendants should, under the name of the Universal Company, pretend and represent to one Daniel N. Schneider that his father, lately deceased, had ordered from them, C. O. D., a pair of spectacles which were worth $10, to be delivered to him by Wells Fargo & Co., and would represent to said Schneider that these spectacles were to be paid for upon delivery, and that his deceased father had become obligated to pay therefor the sum of $10 and would thus procure the said spectacles to be delivered to said Schneider, as a true consignment made by agreement with and to be sent to his said deceased father, and thus induce him to pay to said Wells Fargo & Co. the sum of $10, which said sum should be by said Wells Fargo & Co. *delivered to defendants;* that said representations were all false, and the said spectacles were worth not more than $1; that in furtherance of said scheme defendants placed and caused to be placed in the post office, to be sent and delivered, and caused to be delivered according to the directions thereon, an envelope addressed to "The Universal Company, Care Wells Fargo & Co., San Francisco, Cal.," which envelope contained a Wells Fargo & Co.'s check for $10 payable to the order of the Universal Co., San Francisco, "account of C. O. D. shipped 3–16–1915, to J. J. Schneider."

It is evident from the scheme as alleged that its culmination would consist in inducing Schneider "to pay to Wells Fargo & Co. the sum

of $10, which said sum should be by said Wells Fargo & Co. delivered to defendants." It is not averred that it was intended that said sum should be sent to defendants by mail, so that from the indictment we may gather that Schneider paid to Wells Fargo & Co. the sum of $10, that Wells Fargo & Co. delivered this sum to defendants, and that they procured a check for that amount and mailed it to themselves at San Francisco, under the name of the Universal Company. If this be the meaning of the indictment, the mailing was in no way in furtherance of a scheme to defraud, although so averred, as the scheme had already been consummated. If this is not the meaning, but it is meant that Wells Fargo & Co., instead of "delivering the said sum of $10 to defendants," as it is averred they intended the express company to do, the company, going beyond their intention, mailed the money to them, they cannot be held criminally responsible for such use of the mails by the company, and the mailing of the letter would not be in furtherance of the scheme, which according to the averments of the indictment went no further than the "payment of the money to Wells Fargo & Co., and its delivery by said company to them."

The fraud averred is a petty one and should be punished; but, if the defendants were not responsible for the use of the mails "in furtherance thereof," they cannot be punished in this court. In the absence of any averment that it was part of their scheme that the money paid to Wells Fargo & Co. should be sent to them by mail, I do not think they can be properly held.

The demurrer is therefore sustained.

Ex parte NG DOO WONG.

(District Court, N. D. California, First Division. December 16, 1915.)

No. 15887.

ALIENS ⊜23(1)—EXCLUSION OF IMMIGRANTS—FOREIGN-BORN "CITIZEN."

Under Rev. St. § 1993 (Comp. St. 1913, § 3947), providing that children born outside the United States, whose fathers were, at the time of their birth, citizens thereof, are declared to be citizens of the United States, but that the rights of citizenship shall not descend to children whose fathers never resided in the United States, a foreign-born son of a native-born citizen of Chinese descent cannot be excluded from the country merely because he did not apply for admission during his minority or shortly thereafter, and is entitled to admission, though he remained abroad until 27 years of age.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⊜23(1).

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

Petition by Ng Doo Wong for a writ of habeas corpus. On demurrer to the petition. Demurrer overruled, and writ issued.

Joseph P. Fallon, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Caspar A. Ornbaum, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. Petitioner applied to enter the United States as the son of a citizen. He was born in China and is now 27 years of age. The immigration inspectors examining him and his alleged father report favorably upon the testimony given by each and recommend his admission. The commissioner at San Francisco, however, denied admission, on the ground, as stated:

"The existence of the relationship claimed to his alleged father is not established to my satisfaction."

There are no discrepancies in the testimony offered by petitioner, but in the memorandum for the Acting Secretary, upon appeal, the fact is pointed out that according to the testimony petitioner's father married and became such father when he was only 15 years of age, with the statement that this is possible, but not probable, even in China. The real reason, however, for the excluding decision, in my opinion, is found in the next paragraph:

"Applicant is a man 27 years of age, and has a wife and three children in China. He is to all intents and purposes a Chinese citizen. There is hardly any doubt that the law under which he claims citizenship was never intended to confer this valuable privilege upon a person in his circumstances. The Department has so held in the case of Chin Do Fung (53817/51). Following the departmental decision above referred to, the Bureau recommends that the excluding decision of the San Francisco office be affirmed, and deportation directed."

If this means anything, it means that, no matter what the proof, a foreign-born son of a Chinese native will not be admitted to this country, notwithstanding his citizenship, unless he applies for admission during his minority or shortly thereafter. But the statute (section 1993, R. S. [Comp. St. 1913, § 3947]) is as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

To this statute the Department is adding by construction this proviso:

"Provided such children shall come to the United States during their minority."

Doubtless Congress might have attached such a proviso, but I do not think the Department has such power. If petitioner is the son of a citizen of the United States, he himself is such citizen, though born abroad and remaining abroad until 27 years of age. Such citizenship is of little value to him, if he may be excluded from this country by the arbitrary rejection of the testimony offered by him solely because he did not, in the opinion of the Department, apply for entry in time. The findings of the Department are conclusive, when supported by evidence, but not when based upon an erroneous construction of the law.

The demurrer to the petition will therefore be overruled, and the writ will issue, returnable December 22d at 10 a. m.

THE CELTIC CHIEF.

(Circuit Court of Appeals, Ninth Circuit. January 10, 1916.)

No. 2426.

1. SALVAGE ⊂=21—RIGHT TO COMPENSATION—FORFEITURE.
A tug went to the assistance of a steamship stranded on a reef outside the harbor of Honolulu, and for more than 50 hours, most of the time with other vessels, pulled constantly, rendering valuable service in preventing the swell from driving the stranded ship further on the reef. At the end of that time she refused the request of the master of the ship to give her place to a larger vessel, and her hawser was cut and she was discharged from further service, but continued to stand by. *Held* that while she was properly discharged for refusing to give up her place, she did not, because of such refusal, forfeit her right to compensation for the service rendered.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 48–51; Dec. Dig. ⊂=21.]

2. SALVAGE ⊂=27—AMOUNT OF COMPENSATION—RELEASING STRANDED STEAMSHIP.
Another vessel owner, which employed in all four vessels in assisting the steamship, three of the aggregate value of $240,000, with crews of 97 men, being used at the same time in pulling and in lightering 365 tons of cargo, *held* entitled to a salvage award of $12,500, in addition to extra expenses; the value of the ship and cargo salved being about $135,000, and the service extending over the greater part of three days and nights, but not, owing to fine weather, being attended with any great danger. Another company, which employed in all five smaller vessels, of the aggregate value, with their equipment, of about $20,000, *held* entitled to an award of $6,500; the total amount of salvage awarded, in addition to expenses, being $19,500.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 65, 66; Dec. Dig. ⊂=27.]

3. SALVAGE ⊂=21—RIGHT TO COMPENSATION—FORFEITURE BY MISCONDUCT.
The fact that the manager of the company which owned the latter vessels, who was also the principal stockholder and in charge of their work, knew that the ship was moving some two hours before she came clear, but did not tell her captain, who, with others, was in the cabin, for the reason that he wished his vessels, which were the only ones then pulling, to have the credit, and the fact that he expressed the hope that, when the ship came clear, she would bump a foreign naval cruiser which had reluctantly come to her assistance and was directly astern, it appearing that no injury resulted therefrom, *held* not sufficient to deprive his company of the right to a salvage award for the services of its vessels, which were distinctly meritorious and effective.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 48–51; Dec. Dig. ⊂=21.]

Ross, Circuit Judge, dissenting in part.

Appeals from the District Court of the United States for the Territory of Hawaii; Chas. F. Clemons, Judge.

Suits in admiralty for salvage by the Inter-Island Steam Navigation Company, Limited, owner of the steamers Helene, Mikahala, Likelike, and Mauna Kea, for itself, the officers and crews of said steamers, and other servants of said owner, by the Miller Salvage Company, Limited, owner of other vessels, and by the Matson Navigation Company, owner of the tug Intrepid, for itself and the officers and crew

of said tug, against the British steamship Celtic Chief, John Henry, master and claimant. Decrees for libelants, and claimant appeals. Modified and affirmed.

Holmes, Stanley & Olson, of Honolulu, T. H., and E. B. McClanahan and S. H. Derby, both of San Francisco, Cal., for appellants.

W. O. Smith and L. J. Warren, both of Honolulu, T. H., and Charles P. Eells and W. H. Orrick, both of San Francisco, Cal., for appellees Inter-Island Steam Nav. Co. and Matson Nav. Co.

Philip L. Weaver and J. Alfred Magoon, both of Honolulu, T. H., for appellee Miller Salvage Co., Limited.

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

ROSS, Circuit Judge (concurring in part and dissenting in part). These are salvage causes, consolidated and tried together in the court below, and so submitted here. All of the libels were filed against the British ship Celtic Chief, her cargo and freight—the original libel of the Inter-Island Steam Navigation Company, Limited, claiming $35,000, that of the Miller Salvage Company claiming $20,000, and that of the Matson Navigation Company claiming $15,000 for the salvage services alleged. Subsequently the Inter-Island Company reduced its claim to $25,000, and the Matson Company reduced its claim to $10,000. Each of the libelants conceded that, in addition to its own efforts in the alleged salvage operations, "some very slight assistance" was rendered the distressed ship by the German cruiser Arcona, in whose behalf no claim for compensation was made.

The evidence and the findings of the trial court show these, among other, facts:

That about 2:30 o'clock in the morning of December 6, 1909, which was Sunday, the Celtic Chief, bound from Hamburg, Germany, to Honolulu, with a cargo mainly of fertilizer, and a small quantity of general merchandise, ran aground on a shore reef about half a mile to the westward of the channel entrance to the harbor of Honolulu. Her master, Capt. Henry, knew nothing of the Hawaiian waters, and in approaching the harbor the previous evening was warned by the harbor pilot, Capt. Macaulay, that he was too close to a reef, which advice being unheeded, the pilot at once boarded the ship and offered the captain further advice in respect to his entry, which was also disregarded, resulting in the ship running lightly aground on the reef about 9 o'clock that night, where she remained until 2 o'clock the following morning, when an off-shore breeze arose, in which the captain endeavored to make the open sea, but the breeze dying down left the ship in about the same position as before. The reef there runs east and west in ledges of coral rock, the outer ledge arising abruptly out of deep water and extending back in a northerly direction on a plane of very slight grade for about 1,000 feet to another ledge from 2 to 4 feet higher, the surface of the outer ledge presenting patches of sand interspersed with hummocks of outcropping coral, some of them of boulder size. The sea bottom at the place mentioned shows superficially more sand than coral; the dominant character of the reef

being coral rock, somewhat sharp and of some degree of hardness, but at its surface not hard enough to withstand grinding under the moving weight of such a vessel as the Celtic Chief.

The air continued calm until about daybreak of Monday, when a light southeasterly breeze prevailed, instead of the northeast trade winds which blow most of the year; but there were indications of a "kona," which is a period of southerly winds likely to blow strong and steady for several days, not uncommonly developing into a protracted gale. A considerable, but by no means extraordinary, swell was striking the ship on her starboard quarter, and a current of from 1 to 3 knots per hour was running more directly against her starboard; that is to say, the current running more from east to west and the swell more from south to north, the former more parallel with the reef, the latter more at a right angle with the reef. The southerly swell continued throughout the stranding of the ship, varying in height to an average maximum of about 8 feet. The swell broke on the reef somewhat further in than the ship.

Signal lights of distress were burned, but brought no relief. After daylight, however, and about 6:30 Monday morning, a launch called the Huki-Huki appeared, and with a new 4-inch manila hawser pulled on the stern of the ship for about an hour and then withdrew. For that service no claim has been made. About a half an hour afterwards the Matson Navigation Company's tug Intrepid appeared and offered her services to the ship for $20,000, which demand was then reduced to $10,000, and subsequently she commenced the rendering of her services without any agreement as to compensation. She gave the ship a 12-inch manila hawser about 100 feet long, with a 1⅛ inch steel wire about 300 feet long attached to it, making a line of about 400 feet in length, by means of which the tug, from her position almost astern of the ship, pulled more or less continuously until noon of the following Wednesday. The gross tonnage of the tug was 123, net 55, and her engines were of 350 horse power. She carried 12 men, including her master, and her line was attached to the ship's starboard quarter.

When the first assistance came, the ship lay heading in a northeasterly direction, making an angle of about 45 degrees with the reef, with her stern on its outer edge and her bow free, her starboard anchor down. As the current and swell inclined to move the ship further on the reef and into a broadside position, and as her starboard anchor had comparatively little holding power, from the small amount of chain which was out and which could be put out with safety as she lay, it was decided by the master and by Capt. Macaulay, the pilot, who remained on board throughout and was the master's chief counselor during the stranding, to be of great advantage to get the ship at right angles to the reef, so as to receive the sea as much as possible right astern. Accordingly, the starboard anchor was taken up, and with the tug and the launch holding her stern the ship swung around to the desired position, her head pointing northerly, which position was maintained until she came off the reef at 12:20 o'clock Thursday morning.

From the moment of touching the reef until the arrival of the Intrepid the ship was gradually altering her position, being carried for-

ward by the swell; her tendency being toward a position broadside to the reef. After taking the tug's line her position on the reef was easier, but in spite of the efforts of the tug and of the vessels of the Inter-Island Steam Navigation Company, Limited, which shortly afterwards arrived, she kept gradually going in during Monday, until on that night she was aground for her whole length, and moved about 6 feet further in on Tuesday. By Wednesday morning her forward movement had ceased. In this forward movement she had been carried fully 70 feet. Around her, the water forward was 16 feet, amidships 18 feet, and aft 19 feet; her draft laden to the water line, as she was on her voyage, being 20 feet 10 inches forward and 21 feet aft.

The first of the Inter-Island Company's vessels that came to the rescue was the Mauna Kea, which arrived about 10:30 Monday morning; its steamer Mikahala coming about a half hour later. Both passed lines to the ship on their arrival—the Mauna Kea a new 12-inch manila hawser of about 600 feet in length through the ship's port quarter wharfing chock and made fast around the mizzenmast, and the Mikahala a new 8-inch manila hawser through the ship's starboard quarter chock to strong iron bitts on the main deck of the ship. The Mikahala's line was attached to a bridle (or double line) running in through the steamer's midship chocks, port and starboard. On Wednesday the Mikahala ran a second line of the same kind and size from her port chock amidship to the same point of attachment on the Celtic Chief as her first line, and the Mikahala pulled by use of her propellers almost continuously thereafter until the Celtic Chief was floated, having out about 400 feet of towing line and her port anchor down about two points east of the ship's stern, with about 30 fathoms of chain in about 5 fathoms of water, the purpose of her anchor being principally to maintain her in position. Her bearing from the ship was southeast by east. The gross tonnage of the Mikahala was 444, net 354, and her engines were 404 horse power. She carried a crew of 35 men, besides her master, and the effective thrust of her propeller was about 297 tons, both tied up and running free.

On her arrival the Mauna Kea dropped anchor off her port quarter, put a heavy and steady strain on her line, and, after several hours' pulling, parted it at the ship's quarter chock. The line was again made fast, and the steamer, going full speed ahead in a quick jump, broke it a second time, pulling so hard as to make a 1¾-inch dent in the steel mast to which the line was fast. Again she ran her line to the ship, and pulled until 7 o'clock Tuesday morning, when she left to make her regular scheduled run to Hilo with mail, passengers, and freight, and her place and towing line were taken at about the same time Tuesday morning by the Inter-Island vessel Helene. The Mauna Kea's tonnage was gross 1,566, net 940, and her horse power 2,400. The effective thrust of her propellers was over 12 tons, both tied up and running free, and her crew consisted of 60 men, besides her master. During the time of her pulling her position was southward and a little to the westward of the stranded ship, and during all of such time there was a good strain upon her line.

The Helene took position 635 feet from the Celtic Chief, placed her 2,000-pound anchors for the special purpose of effective heaving on her anchor chains, in addition to pulling by her propellers, having 90 fathoms of chain out from her starboard anchor, and 60 fathoms from her port anchor, these anchors being two or three points apart. Her 12-inch line was not only itself fast to the vessel, but was also attached thereto by a bridle. Her gross tonnage was 618, net 392, and her horse power 470. The useful or effective thrust of her propeller was 3.11 tons tied up and 3.26 running free; her crew consisting of 31 men, besides her master.

At noon on Wednesday the Inter-Island Company's steamer Likelike laid out her anchor ahead about two points off the ship's stern, and passed to the ship an 8-inch manila hawser, which was made fast through the port quarter hawse pipe to bitts on the main deck. The Likelike's tonnage was gross 374, net 214, and her engines were of 340 horse power. The useful or effective thrust of her propeller was about 2.5 tons, both tied up and running free, and her crew consisted of 28 men, besides her master.

Monday morning, at about 7:30 or 8 o'clock, the libelant Miller Salvage Company, Limited, through its principal owner, Capt. Miller, offered its services, without agreement as to compensation, and about 10 o'clock of that day its schooner Concord, its gasoline motorboat Mokolii, and its steamship James Makee arrived, were moored alongside the Celtic Chief, and the lightering of her cargo began; stevedores passing out by hand bags of fertilizer directly into those vessels. After noon of Monday the Miller lighter Kaimiloa was also brought out and similarly employed. The Miller Company's men continued such lightering until 2:30 a. m. of Tuesday, by which time they had taken out 239 tons of fertilizer, which was carried to the wharf and discharged. Tuesday afternoon Capt. Miller brought a 5-ton anchor, which he first placed in a position from which it could not be used, but finally laid it astern of the Celtic Chief, and connected it with the ship through the starboard after chock by powerful lines and a system of triple purchase tackles rigged on the deck of the ship, and worked most of the time from the ship's duplex capstan with 16 men at the bars, and occasionally by the ship's winch. These lines consisted of a new 2¼-inch steel wire cable attached to the anchor and a new 12-inch manila hawser shackled to this wire at about 30 feet from the ship's stern; the manila line being reinforced by a double piece of 1½-inch steel wire. The large manila line was attached to the system of three tackles, through the first, second, and third triple blocks of which ran, respectively, 7-inch, 5-inch, and 3¼-inch falls of new manila rope. The Miller anchor lay about 900 or more feet almost directly astern of the Celtic Chief and a little to the starboard. The Miller Company employed under Capt. Miller from 45 to 60 men, most of them working overtime from 5 to 11 hours, in addition to a full day on Tuesday and Wednesday, and in addition to a three-quarter day on Monday. Besides the vessels named a small gasoline launch, the Elizabeth, was used in that company's operations.

At the request of the master of the Celtic Chief the Inter-Island Company's superintendent, Capt. Haglund, began lightering the ship at about 11 o'clock Tuesday morning, working at the main hatch until noon, and after 1 o'clock at both the main hatch and the after hatch with an increase of men, continuing all that afternoon and evening, and until 2 o'clock Wednesday morning. Men from the crews of the Mikahala and Helene, and extra stevedores, about 100 in all, were thus employed. About 6 a. m. lightering was resumed, and continued until about 11:30 p. m., or shortly before the ship was free. At about noon of Wednesday a floating donkey hoist was moored by an anchor and lay opposite the main hatch of the port side, as a complement to the ship's winch, which was used throughout, but which was inadequate for all the work required. The Inter-Island Company took out about 365 tons of cargo, carrying it in surf boats to the Inter-Island Company's steamers, whence it was discharged at the wharf. At noon of Wednesday the cruiser Arcona, of 2,800 tonnage and 8,200 horse power, and with a full equipment of anchors and lines, came out to assist the ship, at the request of her agent and of the British consul. Monday evening, and again on Tuesday, she had been called upon for aid, but her commander "did not relish the job," and wanted to wait a day to see if the salving agencies at work were not successful unaided. The master of the Celtic Chief, desiring that the Arcona, bebecause of her great power, should have the most favorable position (which was occupied by the Intrepid), requested the master of that tug to cease towing, so that his line could be cast off, but he refused to yield. The ship's master then sent a note in writing to the same effect, stating as his reason for this action the desire "to make a good berth for the man of war," also offering to take the tug's line "from some other part of the ship"; but, as the tug still stood firm, her line was cut by order of the ship's master. The Intrepid then made room for the Arcona, and continued to lie within hailing distance in case of need, though informed that her assistance would not be required further. It was a condition imposed by the commander of the Arcona that his vessel should have the Intrepid's position astern before giving any aid.

The Arcona dropped her port anchor dead astern of the Celtic Chief and a little outside of the position of the Helene. After having parted her first line of manila, which appears to have been merely a messenger for another line, she passed a small wire line of her own to the ship and started ahead at increasing speed. The wire broke almost immediately. This was at about high tide, between 12 and 1 o'clock. She swung around to her anchor and drifted with the swell and current down rather close to the Helene. She hove anchor, and, moving further eastward and seaward, dropped her port anchor again, this time directly ahead of the Mikahala's bow and some 300 or 400 feet distant therefrom. Her stern was then on a line directly ahead of the Mikahala's bow. She paid out more chain and swung westward toward the Helene until she was half way between the Helene and the Mikahala and seaward of them a little. She then ran a wire of her own and took one from the ship, started her engine ahead, and after

pulling for from five minutes to a half hour, broke the ship's wire at about 3 o'clock. She then attempted for several hours to get a long wire aboard the Celtic Chief, but failed, and again ran two wires, using the ship's broken wire, which had been spliced and reinforced. Between 6 and 7 o'clock she had finally made fast and proceeded to "equalize" the wires and to then heave in on her anchor chain, not using her propellers at all. She kept somewhat of a strain on her anchor chain thereafter until the ship floated. About 8 o'clock she turned on her two large searchlights, which afforded a favorable condition for the salvage operations during the rest of the evening.

The trial court said in the course of its opinion:

"The element of danger was clearly present—not the danger of rough weather, though that was actually imminent, but particularly the danger of the ship's being rapidly pounded to pieces on the coral sea bottom, or thrown broadside on the reef, as the testimony shows to have been the case with other ships in this vicinity. She bumped considerably, and was violently shaken when lifted by the swells early in her stranding. These dangers were relieved more and more as the salving agencies came to her assistance. It does not take long for a vessel so heavily weighted to open her seams when lifted and dropped upon a resistant sea bottom, the time of destruction being dependent upon the stress of wind and wave, and that the weather and sea conditions were so favorable was a lucky circumstance. The cargo was practically all of a character perishable on exposure to sea water. The fact that no leak resulted in these three days on the reef shows how effectively her early bumping was checked. It will be said here once for all that the ship was saved without material injury. There was danger to the men who lightered cargo into surf boats—especially the Inter-Island men. The case was a different one from that of lightering from a large vessel riding at anchor, and rising and falling with the swell, but to some of the men presented the peril of working in a small boat close to a solid body against which the sea was pounding, and under an overhanging sling carrying several hundred pounds' weight. The danger to the other men engaged was nothing more than is commonly involved in a seaman's or stevedore's work, except, of course, the increase of danger inherent in working under pressure and with engines and appliances strained to their limit of safety. The success of the lightering is demonstrated by the small amount of loss in the lightered cargo—only $1,441."

The court below also made findings respecting the value of the salved property and the damage thereto, and the value of the salving agencies of the respective libelants and their length of service, substantially as follows:

Value of the Celtic Chief, $25,000; conceded value of the cargo, including the freight thereon, $111,000, less $1,441, the damage to the lightered cargo, leaving as the aggregate value of the property salved, $134,559.

The findings regarding the values of the Inter-Island and the Miller vessels are as follows:

"The value of the Inter-Island vessels, with their equipment, and the length of service of these vessels, according to their own witnesses, are as follows:

"Mauna Kea, $325,000, engaged about 20 hours.

"Helene, $100,000, engaged about 42 hours.

"Mikahala, $40,000, engaged about 62 hours.

"Likelike, $100,000, engaged about 12 hours.

"The expenses of the Inter-Island operations, exclusive of regular salaries and wages, were $3,561.77, including overtime of men, extra stevedores, launch hire, use of barge and donkey hoist, extra fuel, loss and depreciation of ropes, lines, and anchor chain and anchor. Overtime cost, $456; and extra stevedores, $1,059.

"The highest value of the Inter-Island ships engaged at any one time was $465,000; the lowest, $240,000.

"The values of the Miller vessels engaged were, according to Captain Miller, as follows:

"Concord, $3,000.

"Mokolii, $8,000.

"James Makee, $15,000.

"Kaimiloa, $2,000.

"Elizabeth, $4,000.

"The value of the Miller anchor and tackle was $12,000. The aggregate of these values is $44,000. The values were shown, by comparison with tax returns and purchase prices and other data, to be so exaggerated that they can be safely discounted to one-half and still be very liberal."

The court below made no finding in regard to the value of the Intrepid, which was, however, admitted to be $30,000.

By its judgment the court fixed the aggregate value of the services of the salvage agents to be $30,000, and deducted therefrom $500 for the services of the Arcona, leaving $29,500, which by the judgment was apportioned as follows: $4,000 to the Intrepid and her officers and men, apportioned in a certain prescribed way; $8,000 to the Miller Salvage Company, Limited, its officers and men, apportioned in a certain prescribed way; $17,500 to the Inter-Island Steam Navigation Company, Limited, apportioned in a certain prescribed way, together with an allowance to the last-named company in the sum of $2,046.77 for expenses, and apportioning the taxable costs of the proceeding as stated in the judgment.

It is contended on the part of the appellees that the services of the Arcona amounted to nothing; that after her first lines parted, without any effect upon the stranded ship, her propellers were not used at all until the ship was floated, and that the lines used by the cruiser after the breaking of her other lines were never taut, but, on the contrary, had no strain upon them, and that she did not move at all until after the Celtic Chief was floated and had approached very close to the cruiser, which latter then got out of the way by means of her propellers, and towed the ship out to sea, where she turned her over to the Mikahala, which towed her to an anchorage; that the fact that the ship, in coming off the reef, moved towards the Arcona, does not warrant the claim that the latter had any part in pulling the ship off, for the reason that she would naturally have moved that way, because the Inter-Island steamers were pulling from both sides of the stern of the ship and balanced each other.

That might possibly be true, had the effective power of the latter boats been the same; but in view of their difference in that respect it is not at all probable. On the contrary, the fact that the stern of the stranded ship, in coming off the reef, was drawn towards the Arcona, gives some confirmation at least to the testimony on behalf of the cruiser that her towing lines were at the time and for hours theretofore had been taut, and is in support of the finding of the trial court that she thus rendered some effective service in floating the ship. The court fixed $500 as the value of that service. Accepting that as correct, we are to inquire what as to the services of the other salvors.

[1] With the exception of the launch, in behalf of which no compensation was claimed, the Intrepid was the first vessel to offer or render any assistance to the stranded ship. It was, according to the evidence and findings, the Intrepid, with such aid as the launch rendered, that relieved the threatened danger of the ship swinging broadside on the reef, from which position it would have been far more difficult to have removed her, if, indeed, it could have been done at all. And that the danger was a real, present one appears, not only from the statement of the master of the ship, but from the testimony of the pilot, Capt. Macaulay, whose conduct throughout the trouble very justly received the commendation of the court below. And that the subsequent hard pulling, at times at least, by the Intrepid on the stern of the ship, was effective in preventing her from going further on the reef than she actually did go, is, we think, very likely. We do not, therefore, consider the award of $4,000 made by the trial court for the services of that vessel unreasonable in amount.

It is contended, however, on the part of the appellant, that the Intrepid was discharged for cause, and that her claim for salvage was forfeited, because she refused to agree to give her place to the cruiser Arcona. She undoubtedly was discharged by the master of the ship because of such refusal. That was about 12:20 p. m. of Wednesday, at which time the tug had been pulling from about 7 a. m. of Monday, and she thereafter continued to stand by, offering her services, although notified that they would not be needed. It is urged in behalf of the latter that she did make room for the Arcona by moving over towards one of the vessels of the Inter-Island Company, and thereby left sufficient room for the cruiser. We think, however, from the record, that it was the duty of the tug to have given place to the Arcona as directed by the master of the stranded ship, and that the latter was entirely justified in cutting the line of the tug and discharging her. Nevertheless, in view of all of the facts and circumstances, we do not think that the award made by the court below for the services of the Intrepid actually rendered should for that reason be here adjudged forfeited.

[2] The services of the Inter-Island Company's vessels appear from the evidence and from the findings of the trial court to have been rendered promptly and with skill under the direction of the superintendent of the company, Capt. Haglund. It is contended on the part of the appellant that compensation for the services rendered by the Mauna Kea was forfeited by reason of the fact that prior to their being effective she was sent upon her regular run between the islands by the superintendent of the company, and the Helene substituted in her stead. Before leaving she had been, as has been seen, engaged in pulling on the stranded ship about 20 hours, at times with a jerk, in the endeavor to move her, but without success. It must be remembered that throughout the salvage operations the weather was good, and that while there was a considerable swell, with the likelihood of strong and steady southeasterly winds, and the possibility of a protracted gale, yet nothing of the sort occurred, and in view of the further fact that there were numerous other vessels immediately

available to render the necessary aid to the distressed ship, one of which was almost immediately put in the place of the Mauna Kea by the superintendent of the Inter-Island Company, we do not think that the latter company should be deprived of a reasonable compensation for the services rendered by the Mauna Kea.

The claim of that company is for the aggregate value of the services of all of its vessels engaged in the undertaking, and in considering what is a just sum to be allowed it for such services the value of the vessels engaged, the number of men employed, the length of time consumed, the situation and value of the salved property, and the danger attending the salvors and their property are all to be considered. While in almost all salvage operations there is more or less danger attending the salvors and the salving vessels, there appears in this case to have been no imminent, nor indeed any great, risk of any kind to any of them. Indeed, in so far as the vessels are concerned, the risk seems to have been very slight, and to have been confined to a possible collision or the possible fouling of propellers, growing out of the breaking or possible breaking of a line or lines. The weather was good and the sea calm, with but a moderate swell. In such circumstances the risk to the vessels could not have been much. And in respect to the danger attending the boats and men engaged in lightering the ship it is manifest from the evidence in the case and from the findings of the court that the danger to them was not great. The master of the Helene, which did a part of the lightering, in answer to the question:

"Referring to the operations of the boats from the Mikahala and the Helene in lightering, would those boats, in your judgment, and were they, in any position of danger in those operations, in your judgment?"

—said:

"Not in extreme danger. They were in more or less danger by being alongside of the vessel by reason of the cargo that was being suspended over the sides on the burthen arms. If the swells happened to come in when the sling of fertilizer was just on the gunwale of the boat, if it got in the right position it would capsize the boat. Except for that, I do not think there was any danger."

The measure of compensation in salvage cases depends wholly on the circumstances attending the services, and one of the principal ingredients is the degree of peril to which the salvor exposes himself and his property. In the present case, the property of the salvors not having been in much danger, too much effect should not be given to its value. The aggregate value of that of the Inter-Island Company "engaged at any one time" was fixed by the court below at $465,000; but in that respect the court was in error, for the Mauna Kea, whose value was fixed by it at $325,000, ceased its 20 hours' work and departed upon or just prior to the arrival of the Helene Tuesday morning. The aggregate value of the three remaining vessels of the Inter-Island Company, namely, the Helene, Mikahala, and Likelike, was $240,000.

The court below, as has been seen from the statement of the case, allowed the Inter-Island Company $2,046.77 for expenses incurred in

its operations, and $17,500 for the services rendered by its vessels and their officers and men. In The Flottbek, 118 Fed. 954, 964, 55 C. C. A. 448, 458, this court, after quoting from its previous decision in the case of Simpson v. Dollar, 48 C. C. A. 663, 109 Fed. 814, 816, the following:

"No exact criterion can be found for estimating the amount of salvage in any case. The judgments of courts must necessarily differ as to the precise amount to be allowed under given circumstances. Where there has been no mistake in fact, or application of an unwarranted rule of compensation in arriving at the award, and the amount allowed cannot be clearly seen to be inappropriate, the courts on appeal have been reluctant to disturb the decision of the trial court"

—added:

"But the appellate courts are the final arbiters, and it is their duty to decide the question fearlessly and impartially, with an eye single to reach the ends of justice"—citing The Sirius, 6 C. C. A. 614, 57 Fed. 851; The Elmbank, 16 C. C. A. 164, 69 Fed. 104, 109; The Haxby, 28 C. C. A. 33, 83 Fed. 715; The Brandywine, 31 C. C. A. 187, 87 Fed. 652; Ulster S. S. Co. v. Cape Fear Towing & Transportation Co., 36 C. C. A. 201, 94 Fed. 214, 219; The New Camelia, 44 C. C. A. 642, 105 Fed. 637.

In view of all of the facts and circumstances of the present case, we are of the opinion that the award of $17,500 made to the Inter-Island Company was excessive, and should be reduced to $12,500.

There remains for consideration the award of $8,000 to the Miller Salvage Company, Limited, which was, in our opinion, not only more excessive in amount, but the writer is of opinion, in view of the conduct of Capt. Miller, as disclosed by his own testimony, that the principles governing courts of admiralty preclude the making of any allowance to that company. He had charge of its operations, and was manager of the company, and the owner of a majority of its stock—members of his family owning almost all of the remainder. The actual value of the property used by his company in the salving operations appears from his own testimony to have been grossly exaggerated in making and seeking to maintain its salvage claim—so much so, indeed, that the trial court said in its opinion that "said values can be safely discounted to one-half and still be very liberal." That the court was quite moderate in this statement, so far as the boats are concerned, is abundantly shown by the evidence, from which it appears that the Mokolii was 30 years old and cost Miller $350, the Kaimiloa was *70* years old, the Elizabeth was a small launch, the Concord was more than 30 years old and cost Miller $850, and the James Makee was over 30 years old and cost him $4,500, although he testified that she was worth $15,000 because of improvements that he had made thereon, consisting mainly of a new windlass, which he testified he bought at auction from one Morgan for $500, and for which Morgan's books showed he paid $105 only.

By the anchor of the Miller Company as finally placed, the value of which anchor was fixed by the court at $12,000, that company undoubtedly rendered to the stranded ship valuable and meritorious service. Lightering done by it (contrary to Miller's own judgment and advice, but at the request of the master of the ship), while at first work-

ing harm, in that the direct tendency of it was to enable the current and swell to carry the ship further on the reef, ultimately was of benefit, for the reason, as is manifest from the evidence as well as from the findings, that the lightering, which, as has been seen, was also partly done by the Inter-Island Company, was an important element in the work of freeing the ship. I should, therefore, have no difficulty in holding that the Miller Company was entitled to a reasonable allowance for the services it rendered, but for the conduct of Capt. Miller now to be mentioned.

That the ship began to move about 8 o'clock in the evening of Wednesday, and made at least two "jumps" within a couple of hours, appears from the evidence without conflict; and that Capt. Miller was told at 10 o'clock that evening by the captain of his boat Concord that the ship was coming off also appears without conflict. Richard Clarke, one of Miller's men, testified that he noticed the first jump between 8 and 10 p. m., and that he told Capt. Miller that the ship was coming off, to which he responded, "Shut up." It appears that about that time Miller was in the cabin of the ship with the ship's master, the pilot, Capt. Macaulay, and Capt. Haglund of the Inter-Island Company, taking lunch. Capt. Miller testified, among other things, that about 8 o'clock Wednesday evening he instructed his men to keep a strain on the ship, and by invitation of her master went to his cabin to take some lunch, where were also the pilot, Capt. Macaulay, and Capt. Haglund of the Inter-Island Company. We extract from his testimony as follows:

"I went out on the deck every once in a while to see those men; then I'd go back in the cabin there with the pilot and the captain. Stayed there and ate lunch and telling stories. Finally, when I got out on deck one time I met one of the men. He said: 'The ship is starting. We're coming.' 'Slack on our lines,' I said, 'little, very little.' He said: 'You come here and look at the range.' I went there to see the range, and thought she was moved a little. So I told the boys to keep on heaving away, and I'd show them a trick or two before morning. We went back into the room. The pilot was telling us a good story, and she felt a jump, and the captain jumped up, and he said, 'Pilot, she's moving;' and he says: 'How the h—— can she move? They are not pulling. They won't start to pull until they get the signal.' * * * Capt. Henry said to him, 'Why, this man's men is pulling,' pointing to me. Macaulay said: 'Sit still, sit still. He's only tightening his tackles. He can't get her off.' So the captain sat down again. He jumped out of the chair, of the seat. About, I should say, anywhere from 10 to 20 minutes later on, I cannot say exactly the time, she made another jump. You could feel it then strong, and that time the pilot jumped, and Henry jumped up and started to run to the companionway. When they got up on deck, Macaulay went and looked over the stern, and he said, 'Bill, your anchor is dragged;' and he looked over the stern, and he said, 'The anchor isn't dragging; the ship's coming off; look at the Arcona. See where she is!' and we'd shortened up the distance at least one-half, the probability is more. Then I said to him again, 'Look on your range lights;' and he looked at the range lights, and the order was given, 'Fire your fireworks, and up your second signal light.' And everybody was flying around there pretty busy, chopping lines and letting go hawsers. Before this, the man —I think it was Dick Clarke; I'm not sure—Dick Clarke, I saw him out on deck, and then the Kanakas were shouting, 'She's coming! she's coming! and I didn't want the captain or Pilot Macaulay to know that the ship was coming off. * * * Just before she had fetched the second bump, I'd run out in the meantime. I knew the ship was moving. I could hear the Kanakas plain. I was afraid that they would hear it. Q. How long before this time you rushed out did you tell these men to shut up? A. Oh, I had gone out between the two

bumps, after the first bump, when I got Macaulay and the captain quiet again, seated down telling stories again, and I had gone out in the meantime; then I come back; I'm frank to tell you I wanted them to stay down in the cabin. I wanted that ship to come off without their knowledge. * * * Q. Why did you want to keep the fact that you were pulling the Celtic Chief quiet from Capt. Henry and Pilot Macaulay? A. I'll tell you why. We'd started to work on that job in the morning, contrary to my own good judgment. In the first place, we had considerable difficulty in getting Capt. Henry to adopt the plan of putting an anchor down and the Helene. They had made an arrangement without—practically ignoring—me, and if the Celtic Chief came off or they had known that the Celtic Chief was being pulled off by the Miller Salvage Company's equipment, they would have given those signals to the German cruiser to begin pulling, and they would have shared in whatever glory and so far expense. We'd have to share in the credit of pulling her off. I wish your honor would permit me to say by way of interpolation that the German cruiser had absolutely no more to do with the actual pulling of that Celtic Chief than you."

At page 1385 of the transcript Miller testified that he knew of his own knowledge that the ship was coming off because he—

"saw the slack coming in a very little. I stayed there for a few minutes to assure myself to a dead certainty, and then went back to the cabin for fear them fellows would come out."

Further on in his testimony, in answer to the question, "Had you been out of the cabin during that time?" the witness answered:

"I came out between the two. I came out of that cabin at least a half a dozen times. I came out distinctly after the first bump. I came out to shut our men up. Q. You came up to shut up the first time? A. I had to come out and tell them between the bumps. I couldn't talk native, and I had to tell one of my men that spoke native to keep them fellows quiet."

Further on in his testimony Capt. Miller was questioned and answered as follows:

"Q. Now, you satisfied yourself that the Celtic Chief had come seaward several feet at that time, did you? A. Well, I satisfied myself she'd moved three or four feet. Q. At what time? A. At that time. Q. Did you go back and inform Capt. Henry and Capt. Macaulay and Capt. Haglund about that? A. Capt. Haglund was not there. Q. Did you inform Capt. Henry and Capt. Macaulay? A. No; I did not. Q. You didn't intend to? A. No; I didn't intend to. Q. You didn't want them to know anything about it? A. I did not. Q. And you went back down there and regaled yourself with lunch? A. I did. Q. And told stories back and forth? A. Yes. Q. In other words, it was your purpose to keep them in the dark about it? A. I didn't tell them that the ship was coming off. Q. You were trying to keep *that* from knowing? A. I wasn't holding them. Q. I am merely referring to the question to which you answered you did not tell them that the ship was coming off. A. If I stated that— I had no power to keep them quiet. I would'nt have told them, however. Q. Preferred not to have them know? A. I preferred not to have them know, because I told our men two or three times to shut up their noise. Q. Did you make that the first time? A. The first time I didn't tell the men at all of the fact that she was moving. Before the first bump those Kanakas knew as well as I knew it. Q. Now, didn't Dick Clarke come over to the cabin and call you out? A. He came out to the cabin door, and called me once. Q. Wasn't it just after that first bump that he came aft with ——— ———? A. Possibly, it may have been. Q. And he told you that she was coming? A. Dick called me and told me she was coming."

On cross-examination Capt. Miller was further questioned and answered as follows:

"Q. Now, you said that you didn't go directly up on the deck when you heard this first bump because you wanted to wait until Capt. Henry and Capt.

Macaulay had allayed their suspicions somewhat, had been quieted down? A. Practically so. Q. That is to say, you mean by that that you didn't want them to get onto the fact that the Celtic Chief was actually afloat? A. That's right. Q. And you stayed there and helped to make them quiet? A. I stayed about 10 or 15 minutes. Q. Even though you realized the Celtic Chief was coming off? A. I knew she was coming off."

On cross-examination Capt. Miller was also questioned and answered as follows:

"Q. You had been down in the cabin for some little time with Capt. Henry and Capt. Macaulay? A. Yes. Q. Probably 10 or 15 minutes? A. Yes; possibly. Q. After having been up on the deck, on the main deck? A. I think so. Q. And then you felt this bump, and Capt. Macaulay made the remark— No, it was Capt. Henry made the remark— A. No; Capt. Henry. Capt. Macaulay was telling the story. 'Q. And Capt. Henry made the remark that the ship must be coming off? A. He said, 'The ship's coming off.' Q. What did Capt. Macaulay say? A. He said: 'Sit down! Why, how can it come off? They're not towing.' Capt. Henry said, 'This man's got his anchor out.' Capt. Macaulay said: 'Oh, sit down! Let me finish my story; she isn't coming off.' Q. Did you say anything at all? A. I think I said to him then— He had said before, if Haglund had had any sense he would have sent him a bottle of beer to eat with that lunch. Capt. Haglund had sent over a dish of sandwiches and pies. I said to him, 'If you wait 10 or 15 minutes I'll put you alongside the Arcona and get some beer from them,' and Macaulay thought that was a good joke. Q. Henry thought it was a good joke? A. No; Henry was uneasy—he was rather uneasy, because he jumped out of his chair quick. Q. Did you agree with Capt. Macaulay, or did you agree with Capt. Henry? A. Oh, I agreed with Macaulay. Q. What did you do that for? A. Well, I didn't want them to know that she was coming off. Q. So you were sure that she was coming off? A. I didn't tell Henry that the ship was coming off. I said, 'I'll put you alongside that German cruiser in 20 minutes.' Q. In other words, you turned it into a sort of joke in telling them what you thought was the truth? A. Exactly. Q. In a jocular way? A. Sure, I did. Q. You did intend that they shouldn't know? A. As far as I could. Q. As far as you could, you gave that impression; you wanted to create that impression? A. I did. * * * Q. Well, then, isn't it the fact, Capt. Miller, that you were only out on deck once between the two bumps—that is, between the time you went out and told the men to shut up? A. The best of my recollection is that between the two bumps I only recollect of going out on deck once. Q. And that was the time you went out and told the men to shut up? A. Yes; I told them to shut up then, but I may have told them before the first bump. Q. What were you doing down there in that cabin during that period of time; that is, between the first and second bumps after you had come back into the cabin again? What were you doing at the time? A. Telling stories and exchanging experiences. Q. Didn't you feel pretty sure that there would probably be another movement of the Celtic Chief in a short time? A. I did. I expected to feel our side, our stern, bump right into the German cruiser. Q. At any time? A. That's what I did. Q. Why weren't you out on the deck? A. I didn't want to see it. I wanted to feel it. Q. I want to know why it was that you stayed down there in the cabin? A. Because it suited me to do it. Q. That was a pretty critical moment of the salvage of the Celtic Chief? A. Sure it was. Q. Still you deliberately stayed down in the cabin, feeling that that ship was going to come off at any time? A. I did. Q. What was your reason? A. I didn't want them fellows on deck setting up any signal rockets. Q. And you stayed down there in order to keep them from sending up the signals? A. I don't know that my presence with them kept them, but it— Q. That was your intention, at any rate? A. That was my intention. Q. Why didn't you want them— A. For this reason, if those rockets and signals had gone up, the German cruiser would have started pulling right away, and she would then claim the credit for pulling that ship off."

The witness Miller was further questioned on cross-examination and answered as follows:

"Mr. Olson: I want to ask a question. You said that you hoped that the Celtic Chief would bump the Arcona? A. Yes. Q. One of the witnesses who has already testified on behalf of the Miller Salvage Company testified to a similar wish expressed by you? A. Yes. Q. Was that—did you—why was that spoken? A. I wasn't here in the court when he testified. I'm taking your word that he did. Q. But I say, on the ship, was that wish expressed on the Celtic Chief while she was coming off? A. It was expressed this way: I told those men: 'We'll show them a trick or two before we get through with them to-night.' I think I told the men myself that we'd bump her right in the stern. Q. And you hoped you would? A. I don't know that I said I hoped we would. I intended to do it. Q. You intended to? A. I did. Q. You wanted to bring her up near enough to bump? A. I wanted her to bump. Q. And in heaving on her then that was part of your intention? A. That was not part of my intention. Q. You knew that she was directly at stern, and you were so directing your appliances that she would bump her? A. That she would have bumped the Arcona, so there would have been no question about who pulled her off. That was my intention. That was in my mind. * * *

"Mr. Olson: I'll withdraw my question. At the time, Capt. Miller, did you stop to think that if the Celtic Chief did as you hoped she would, and intended that she would, namely, that the Arcona—that the Celtic Chief should bump the Arcona, that she would be damaged? A. I knew that she wouldn't suffer any material damage. Q. Did you stop to think that the Celtic Chief would probably suffer more damage than the Arcona? A. Sure, she would have suffered some damage. Q. I asked you a definite question. Would she have suffered more damage than the Arcona? A. I think she would. Q. Did you stop to think of that at the time? A. I didn't stop to consider that. Q. Now, then, the reason why—will you state the reason why you think she would have suffered the greater damage? A. Yes; because she was a lighter ship. Q. The Arcona was a steel vessel also? A. The Arcona was a steel vessel."

To reward a salvor who willfully suppresses facts that might be of benefit to a distressed vessel, and who willfully so conducts his operations as to endanger it for his own glorification or pecuniary benefit, would be contrary to the very first principles governing courts of admiralty. Such courts take pleasure in rewarding liberally those who gallantly rush into dangers to preserve the lives and property of others when exposed to the dangers of shipwreck, without considering the pecuniary or other benefit that may come to them, but will turn a deaf ear to all those whose misconduct was so gross as that of the Miller Salvage Company, Limited, in the present case. See The Boston, 3 Fed. Cas. 932; The D. M. Hall, 7 Fed. Cas. 770, 772; The Howard, 12 Fed. Cas. 630, 633; Pacific Mail S. S. Co. v. Commercial Pacific Cable Co., 173 Fed. 28, 97 C. C. A. 346; Abbott on Shipping (14th Ed.) p. 967; Jones, Salv. 124; Hughes, Admiralty, p. 139; Desty's Shipping and Admiralty, § 326; Carver's Carriage by Sea, § 346.

To the ratio of apportionment of the respective awards made by the court below between the libelants and their respective officers and men we see no objection. I think the cases should be remanded, with directions to the court below to modify the decree in accordance with the views above expressed, and, as so modified, should stand affirmed —the costs in this court to be apportioned two-thirds against the appellees, because of the large amount of unnecessary matter put into the record, and one-third against the appellant.

GILBERT, Circuit Judge, and WOLVERTON, District Judge (concurring). [3] We are unable to concur in the view that a salvage

award to the Miller Salvage Company should be denied for the reason that Miller withheld from the master of the Celtic Chief the information that the vessel was about to be rescued, or for the reason that Miller expressed the wish or purpose so to haul off the vessel as to cause her to bump the Arcona. It is not shown that Miller's suppression of facts in any way endangered the distressed vessel. Although on the Monday preceding there had been a hazy condition which indicated the approach of a kona, the weather on Tuesday and Wednesday was fine, with a light southerly wind. The other vessels were standing by awaiting the time of high tide, which was 1 a. m., when they expected to make a combined effort to pull the stranded vessel off. The sum and substance of the evidence is that Miller knew, perhaps two hours before the vessel came clear, that she had begun to move in response to the strain which his line was exerting, and that he said nothing about it. It does not appear that the vessel's movement could have been very materially hastened if others had known of it, and, if it be said that it was Miller's duty to relieve the anxiety of the master of the Celtic Chief, the answer is that the master might very readily have relieved his own anxiety by coming on deck and looking, instead of remaining as he did in the cabin, lunching and listening to the pilot's stories. Miller's conduct was evidently inspired by that feeling of rivalry which is often manifested, and is generally commendable, in the efforts of those who are striving together to accomplish a salvage service, and it was of the nature of that rivalry which the court refused to condemn in The Birdie, 7 Blatchf. 238, Fed. Cas. No. 1,432. In The D. M. Hall v. John Land, Fed. Cas. No. 3,939, Judge Hoffman held that slight misconduct of sailors, not resulting in any loss to claimants, should not reduce the amount of salvage.

As to Miller's wish to bump the Arcona, nothing was done in pursuance of it, and it resulted in nothing. It was a very human wish, for which Capt. Miller might perhaps have been pardoned, in view of the "half-heartedness" of the efforts of the Arcona's men, and their "gingerly" action in the fear of damage to their own vessel, which is observed in the opinion of the court below. Miller's attitude of mind toward the Arcona has been sufficiently penalized, we think, by the reduction which on that account the District Court made in the award to Miller's company.

We agree that the award to the Inter-Island Company should be reduced to $12,500, and we are of the opinion that the award to the Miller Salvage Company should be likewise reduced to the sum of $6,500. It is ordered that the decree of the court below be modified accordingly.

SCHMIDTMAN v. ATLANTIC PHOSPHATE & OIL CORP. et al.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

Nos. 197, 198.

1. CORPORATIONS ⟸566—RECEIVERS—PRIORITIES—CLAIMS OF EMPLOYÉS.
Labor Law N. Y. (Consol. Law, c. 31) § 9, providing that, upon the appointment of a receiver of a domestic corporation other than a moneyed corporation, the wages of the employés shall be preferred to every other debt or claim, does not give an employé's claim for wages priority over the lien of a mortgage on property of a corporation, as statutes which disturb vested rights are not given such construction, unless their language clearly indicates an intention to change the existing law, and the statute is open to the construction that it gives a preference only in unincumbered assets.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283–2286; Dec. Dig. ⟸566.]

2. CORPORATIONS ⟸559—RECEIVERS—TITLE OF RECEIVER.
A receiver of an insolvent corporation takes the property subject to existing liens; the fact of insolvency and the appointment of the receiver not impairing a valid contract lien.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241–2252, 2259; Dec. Dig. ⟸559.]

3. CORPORATIONS ⟸566—RECEIVERS—PRIORITIES—CLAIMS OF EMPLOYÉS.
Labor Law N. Y. § 9, providing that, upon the appointment of a receiver of a corporation organized under the laws of that state and doing business therein, the wages of employés shall be preferred to every other debt or claim, refers to the appointment of a receiver of the whole property of the corporation, and not to a receivership in a suit to foreclose a mortgage on a single parcel of real estate owned by the corporation, and the fact that general receivers were first appointed, and that when foreclosure proceedings were instituted the same persons were appointed receivers therein, made no difference.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283–2286; Dec. Dig. ⟸566.]

4. LIENS ⟸12—RIGHT TO PRIORITY OF PAYMENT.
A person who has a specific lien on property is entitled to pay himself out of that property, and if it be insufficient to prove his claim for the deficiency and share with unsecured creditors of his debtor in property not covered by the lien, and no other creditor is entitled to any part of the proceeds of property covered by the lien until the lienor is first paid.
[Ed. Note.—For other cases, see Liens, Cent. Dig. § 18; Dec. Dig. ⟸12.]

Appeals from the District Court of the United States for the Eastern District of New York.

Bill by Waldemar Schmidtman against the Atlantic Phosphate & Oil Corporation. From a decree, George Haefer, Jr., and others, appeal. Reversed.

The Phosphate Corporation, above named, was organized under the laws of New York in 1913, and on July 1, 1913, it executed to the Astor Trust Company, as trustee, a mortgage upon its real estate, vessels, and certain other property to secure $1,438,000 face amount of interest-bearing bonds. On October 19, 1914, Schmidtman, a general creditor, filed a bill in the District Court, Eastern District of New York, alleging insolvency of the corporation and praying for the appointment of a receiver. Thereupon the court appointed Messrs. Oeland and Coxe temporary receivers. Claims of creditors were advertised

for, filed, and proved, and receivers filed a report thereon. On December 12, 1914, the mortgage trustee brought suit for foreclosure and sale because of default under the terms of the mortgage. The creditors' bill and foreclosure suit were consolidated, and receivership in the former suit was duly extended to all properties and franchises, covered by the mortgage. On March 4, 1915, decree of foreclosure and sale was entered, and the mortgaged property was thereafter sold for a gross price of $433,800. Many of the claims which had been filed were so-called laborer's claims. The question arose whether, in the case of an insolvent New York corporation, debts of the corporation due to its laborers should be paid out of proceeds arising upon foreclosure sale of real estate, vessels, and other property, before distribution of such proceeds upon the bonds and coupons secured by the mortgage? The question, coming duly on before the court, was answered by it in the affirmative, and decree was entered to that effect. From such decree this appeal is taken by the mortgage trustee and by representatives of the bondholders. This question of priority of labor claims is the only one here presented. Certain other questions as to various maritime liens on some of the vessels are not here involved.

White & Case and Sullivan & Cromwell, all of New York City (Royall Victor and Ralph L. Collett, both of New York City, of counsel), for appellants Astor Trust Co. and others.

George R. Cooper, of New York City, for appellant Wadman.

F. Healy, of Providence, R. I., for wage claimants.

Alexander & Ash, of New York City (Mark Ash and E. Ash, both of New York City, of counsel), for appellant Haefer.

F. M. Silvia and Louis Shabshelowitz, both of Fall River, Mass., and Frank Healy, of Providence, R. I., for employés.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] The basis of the claim to priority is found in section 9 of New York Labor Law (chapter 415, § 8, Laws of 1897), which reads as follows:

"Sec. 9. Upon the appointment of a receiver of a partnership or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employés of such partnership or corporation shall be preferred to every other debt or claim."

[2] Manifestly the statute involved is in derogation of the common law and of common rights. It is a well-established principle that a receiver of an insolvent corporation takes the property subject to existing liens. The fact of insolvency and the fact of the appointment of a receiver does not impair a valid contract lien. In this case the insolvent is not a public service corporation, such as a railroad, and therefore the principles enunciated in a well-known group of cases do not apply. Impairment of existing contract liens must be found in a statute, or they will not be found at all. Statutes which disturb vested rights are to be closely scrutinized, and are not to be given such construction, unless their language clearly indicates an intention on the part of the Legislature to change the existing law.

The original act was passed in 1885 (chapter 376 of the Laws of that year). The only changes effected by the later act are these: (1) To include partnerships; (2) to strike insurance companies out of the exception; (3) to describe the beneficiaries generally as "employés," receiving wages, instead of "employés, operatives and laborers," receiving wages; and (4) to strike out the concluding words of the act

of 1885, "and shall be paid by the receiver from the moneys of such corporation which shall first come to his hands." Why these last-quoted words were struck out we do not know. There seems to be no special sigificance in their deletion, since the words "shall be preferred to every other debt or claim" are found in both acts.

Since this act has been on the statute book for 30 years, it might be expected that opinions of the state courts would be found definitely construing it. Strange to say such is not the fact. The briefs cite the following cases: People v. Remington, 45 Hun (N. Y.) 329; Franklin Trust Company v. N. A. R. R. Company, 11 App. Div. 249, 42 N. Y. Supp. 211; Matter of Muller, 21 App. Div. 629, 47 N. Y. Supp. 277; Matter of Stryker, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; People v. Remington, 109 N. Y. 631, 16 N. E. 680; Palmer v. Van Santvoord, 153 N. Y. 612, 47 N. E. 915, 38 L. R. A. 402. These deal with other questions arising under the statute, e. g., who is and who is not an "employé," but, with the exception of an expression of opinion by a dissenting judge, there is nothing in them to indicate that the courts of this state construe the statute as displacing existing contract liens.

[3] Since there is not satisfactory state court construction, we are forced to construe the act ourselves. The words "upon the appointment of a receiver of a corporation" must mean the appointment of a receiver of the whole property of the corporation. Certainly the section was not intended to apply where the foreclosure of a mortgage on a single parcel of real estate, owned by corporation, brought about the appointment of a receiver in mortgage foreclosure.

In the case at bar general receivers were first appointed. The mere circumstance that when foreclosure proceedings were instituted the same persons were appointed receivers therein makes no difference. The question is this: Does the section displace a lien given to the holder of a debt by mortgage made subsequent to the statute and properly recorded, etc.?

[4] The security afforded by a lien well recognized in law and equity has always been held entitled to consideration. The person who has a specific lien on property is entitled to pay himself out of that property, and, if it be insufficient, then to prove his claim for deficiency and share with unsecured creditors in the proceeds of property not covered by his lien. No other creditor is entitled to any part of the proceeds of property covered by lien until the lienor is first paid. These principles have been so well-settled for so long that it might fairly be supposed that a Legislature seeking to exclude their application in certain cases would declare its intention in unmistakable language. Certainly the language of this statute is not "unmistakable"; it may be construed to subordinate all specific liens to claims for wages of employés; it may also be construed to give the latter preference only in unincumbered assets.

An excellent illustration, showing how similar legislation has impressed other courts, will be found in two Indiana statutes. Section 7058, Burns' Ann. Stat. Ind. 1901, provides that all debts due any person for manual labor shall be a preferred claim in all cases against

a corporation, when its property shall pass into the hands of a receiver; and such receiver shall first pay in full all debts due for such labor before paying any other except legitimate costs and expenses. But the Indiana Supreme Court in McDaniel v. Osborn (1905) 166 Ind. 1, 75 N. E. 647, 2 L. R. A. (N. S.) 615, 117 Am. St. Rep. 354, held that:

"There is no intent manifest in the title, or from any language employed in the body of the statute under consideration, that an employé should have or could acquire a lien upon all the property of his employer on account of general manual or mechanical labor. * * * There is a very clear and marked distinction between a preferred debt and a debt secured by a specific lien. A general debt cannot become superior to another secured by a lien, unless expressly made so by a valid law; and, if a statutory lien is to be created, the language employed should be specific in declaring the fact, as well as the nature, character, and extent of such lien. * * * The obvious purpose of the Legislature in this enactment was to give laborers of the class named in the statute preference in the payment of their claims from the estate of the insolvent employer, in the same sense and to the same extent that preference is given in the payment of funeral expenses under the statute for the administration of decedents' estates."

The same state, however, passed another statute specifically dealing with coal miners. Section 5471, R. S. 1881; section 8596, Burns' Ann. Stat. Ind. 1908. It gave the miners a lien on the mine and machinery, and provided that "such liens shall be paramount to all other liens except the lien of the state for taxes." As might be supposed, the Indiana Supreme Court in Warren v. Sohn, 112 Ind. 213, 13 N. E. 863, held that a mortgage lien was subordinate to a miner's lien.

The claimants refer to the following authorities: To Graham v. Magann Fawke Company, 118 Ky. 192, 80 S. W. 799, 4 Ann. Cas. 1026; but in that cause the statute provided that the "lien of such employés shall be superior to the lien of any mortgage or other incumbrance." To Wimberly v. Mayberry, 94 Ala. 240, 10 South. 157, 14 L. R. A. 305; but in that cause the statute provided that the employé's lien "shall have priority over all other liens, mortgages, or incumbrances." To Sitton v. Dubois, 14 Wash. 624, 45 Pac. 303; but in that cause the statute provided that "the lien created by the provisions of this section shall be prior to all other liens." These three opinions are not conclusive in the construction of the language of the New York statute. They indicate, however, that Legislatures of other states, which intended to have employé's wages' claims displace liens, evidently thought it important to say so in express terms.

In three other states the language of the statute is substantially as it is in the New York act. In New Jersey the statute provides that the laborers shall "have a lien upon the amount due to them respectively, which shall be paid prior to any other debt or debts of the corporation." But the New Jersey courts have held that this secured to laborers priority only after the liens existing on the property at the adjudication of insolvency shall have been discharged. Hinkle v. Camden Safe D. Company, 47 N. J. Eq. 333, 21 Atl. 861; Wright v. Wynockie Iron Company, 48 N. J. Eq. 29, 21 Atl. 862. In Missouri the statute provides that "such laborers or employés shall be preferred creditors, and shall be first paid in full." But the Court of

Appeals of Missouri, in Fitzgerald v. Meyer, 65 Mo. App. 665, held that there was "nothing in the statute to show that the lawmakers meant to disturb the prior vested rights of those holding mortgage security." A similar statute in Utah was similarly construed. Salt Lake L. Company v. Ibex M. & S. Company, 15 Utah, 445, 49 Pac. 832.

In construing a statute like this it is a safe rule for federal courts to follow, by analogy, the construction given by the United States Supreme Court to section 6372, U. S. Compiled Statutes (Rev. St. U. S. 3466), originally passed in 1799 (Act March 2, 1799, c. 22, § 65). That section gives to the United States, on the death of an insolvent debtor whose estate is not sufficient to pay "all debts due from him," a priority of payment, declaring that the "debts due to the United States shall be first satisfied." Interpreting this statute literally and upon the theory that a sum due under a mortgage is a debt under the statute, then the courts should have held that the government's debt is to be satisfied before the debt secured by a mortgage. But the Supreme Court has held otherwise consistently from the beginning, having laid down the rule in Conard v. Atlantic Insurance Co., 1 Pet. 386, 7 L. Ed. 189, in an opinion written by Justice Story, that the statute gives a mere right of prior payment out of the general funds of the debtor and that it does not take precedence over a mortgage debt. It is just as true now as it was then that the Supreme Court has never yet decided that the priority the statute gives divests a specific lien.

The rule thus laid down is that by which we should be guided. The decree of the District Court should be reversed. This disposition of the cause will make it unnecessary to determine whether or not there was error in refusing to classify some of these claimants as coming within the terms of the statute.

Decree reversed.

POST PUB. CO. v. MURRAY.

(Circuit Court of Appeals, First Circuit. March 7, 1916.)

No. 1145.

1. POST OFFICE ⇐14—UNMAILABLE MATTER—"LOTTERY SCHEME"—"GIFT ENTERPRISE."

Penal Code (Act March 4, 1909, c. 321) § 213, 35 Stat. 1129 (Comp. St. 1913, § 10383), provides that no newspaper or publication of any kind containing any advertisements of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, shall be deposited in or carried by the mails. A newspaper advertised that its photographers would take pictures of women shoppers and publish the pictures with the heads cut off, and that $5 would be paid to each lady photographed who identified her photo. *Held*, that this was not within the statute, as the particular kind of chance involved in the advertisement did not require a parting with anything by members of the public for the prize offered, and it did not amount to a "lottery scheme," as a lottery involves a scheme for raising money by selling chances to share in a distribution of prizes, or a scheme for the distribu-

tion of prizes by chance among persons purchasing tickets, while a "gift enterprise" contemplates a scheme in which presents are given as an inducement to members of the public to part with their money.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 21; Dec. Dig. ⊂⊃14.

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

2. POST OFFICE ⊂⊃14—MAILABLE MATTER—STATUTORY PROVISIONS.
As Penal Code, § 213, excluding from the mails newspapers containing advertisements of lotteries, etc., and prescribing as punishment for violations a fine or imprisonment, is a highly penal statute, it is not susceptible of a liberal construction, bringing within its prohibitions press publications not clearly within its terms.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 21; Dec. Dig. ⊂⊃14.]

3. POST OFFICE ⊂⊃14—MAILABLE MATTER—STATUTORY PROVISIONS.
The exclusion of newspapers and other publications from the mails in the exercise of executive power is highly arbitrary in its character, and can only be justified where the statute is clearly applicable to the supposed objectionable publication.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 21; Dec. Dig. ⊂⊃14.]

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

Suit by the Post Publishing Company against William F. Murray, as Postmaster. From a decree for defendant, plaintiff appeals. Reversed, with directions.

Edmund A. Whitman, of Boston, Mass. (Elder, Whitman & Barnum, of Boston, Mass., on the brief), for appellant.

Louis Goldberg, Asst. U. S. Atty., of Boston, Mass. (George W. Anderson, U. S. Atty., of Boston, Mass., Horace J. Donnelly, of Washington, D. C., and Leo A. Rogers, Sp. Asst. U. S. Atty., of Boston, Mass., on the brief), for appellee.

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

ALDRICH, District Judge. This is an equity proceeding in the District Court, in which the Post Publishing Company asked to be relieved from an order of the Boston postmaster, made under direction of the Department at Washington, whereby certain issues of the Boston Post were excluded from the Boston post office and from the mails. The Boston Post is a newspaper published in Boston.

On May 1, and May 2, 1915, it published a certain advertisement in which were represented pictures of headless women shoppers. The advertisement was in part as follows:

"Attention, Ladies!

"During this week Post Photographers will take snapshots in the Busy Boston Shopping District of Fifty Women Shoppers.

"These pictures will be developed and illustrations made in the usual way, and then their Heads will be Cut off!

"The Headless Pictures will be published—twenty-five in next Saturday's Post and twenty-five in next Sunday's Post—numbered but without names. The names will not be known to the Post Photographers.

"The Ladies Photographed are invited to identify the Headless Photos.

"A Five Dollar Gold Piece for Each Identification.

"Ladies who recognize themselves are invited to call at Room 305, third floor, 257 Washington Street, Boston, between 2 p. m. and 5 p. m. on the following Monday, May 3, Tuesday, May 4, or Wednesday, May 5, wearing the same hat and costume as when photographed. A woman representative of the Sunday Post will be present. As she will have at hand the missing heads duly numbered, she will be able to readily confirm the identifications. Five Dollars in Gold will be presented to each photographed shopper who is thus identified, but payment will be made only to the originals of the photographs. A list of identifications will be published.

"$250 for 50 Ladies Who Recognize Themselves."

Under departmental interpretation of the act of Congress in respect to lotteries, games of chance, and gift enterprises, the Post was excluded from the Boston post office and from the mails. Section 213 of the Penal Code of the United States in question is as follows, and the material provisions thereof are italicized:

"No letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme; *and no newspaper, circular, pamphlet, or publication of any kind containing any advertisements of any lottery, gift enterprise or scheme of any kind offering prizes dependent in whole or in part upon lot or chance,* or containing any list of the prizes drawn or awarded by means of * * * such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, *shall be deposited in or carried by the mails of the United States,* or be delivered by any postmaster or letter carrier. Whoever shall knowingly deposit or cause to be deposited, or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of the provisions of this section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years."

The District Court denied relief, and construed the advertisement as one presenting a scheme prohibited by the statute, and the petitioner appealed.

[1] It seems to us quite impossible, under the rule of strict and literal construction of the statute, to accept the advertisement in question as one containing the elements of wrong involved in the schemes against which the statute was directed. The advertisement, or scheme, in question does not seem to be like any of the kinds or types of wrong against which the act of Congress was directed. It did not present a lottery scheme, because a lottery involves a scheme for raising money by selling chances to share in a distribution of prizes—a scheme for the distribution of prizes by chance among persons purchasing tickets. It was not a gift enterprise, because a gift enterprise contemplates a scheme in which publishers or sellers give

presents as an inducement to members of the public to part with their money. Nor did it present the kind of lot or chance which the act of Congress was striking against, because the particular kind of chance involved in the advertisement in question did not require a parting with anything by members of the public for the prize offered.

[2] Congress and the courts are cautious about placing restrictions upon the liberty of press publications, and, as the statute in question is a highly penal one, it is not susceptible of a liberal construction to the end that press publications not clearly within its terms shall be brought within its prohibitions.

[3] The exercise of executive power, like that of excluding newspapers and other publications from the mails, is highly arbitrary in its character, and can only be justified where the statute is clearly applicable to the supposed objectionable publication.

The advertisement in question, while ingenious, and rather gruesome in some of its phases, after all involved only harmless novelty, promoted probably by the radical change in women's street costume, and carried forward with the purpose of attracting attention to the newspaper and of increasing its circulation, rather than as a scheme involving direct and specific intent to induce members of the public to part with money, which seems to be a necessary element of the statute against lotteries, gift enterprises and games of chance.

Under this curious advertisement, which involved pictures of headless women in street costume, there was nothing for the woman who was curious enough to be in the shopping district at the appointed time to pay, to buy, or to lose by failure of identity, and while losing nothing in the event of failure, her gain was to depend, not upon chance, in the ordinary acceptation of that term as used in the statute, but upon the fact of identity. If she established her identity through the instrumentality of the headless picture, she was to get the $5 gold piece, and if she failed to establish her identity she lost nothing, and her comforting compensation would happily result through the satisfaction of feminine curiosity; and in the given individual instances the publisher was not to gain anything by the fact of identity or failure of identity, but was to lose if the fact of identity was established. Thus the conclusion must be that there was no special intent to cheat or induce members of the public into buying something, or paying something for a chance. Instead of being that, it was a situation in which there was a general intent and general purpose to present something which the publisher thought would be attractive, and which would catch the eye and increase the circulation of the paper. We view this curious conception more as a playful one, though slightly sportive, and as one possibly involving the idea of burlesquing a little the street costume of women, thereby attracting public attention, with the view of increasing the circulation of the publication, rather than as a deliberate scheme to wrong members of the public.

Such being the idea of the publisher, and there being little, if any, element of chance in the scheme, and whatever chance there was being one which would make the publisher the loser rather than the

gainer, and the woman the gainer rather than the loser, it would not seem to be within the class of wrongs covered by the statute. It is impossible to find in the advertisement the necessary specific intent to cheat members of the public through advertising a chance enterprise.

This advertising enterprise is so far sui generis that we get little aid from the authorities cited with respect to the statute in question. It is enough to say that they all apparently proceed upon the idea that the statute was directed against schemes which involved specific intent to induce members of the public to part with money, and schemes under which they were to get something of a value which they knew not of, and under which, as a rule, the originator of the scheme intended to chance off things at a value less than their real value.

We only refer to the interesting discussion by Chief Justice Perley, with reference to gift enterprises. State v. Clarke, 33 N. H. 329, 66 Am. Dec. 723. The federal statute, generally speaking, is in conformity with substantially similar statutory enactments in the various states, and the opinion of Chief Justice Perley is interesting, because it points out, in a very clear way, the idea that these statutes are effective against enterprises and schemes which induce or cheat members of the public into parting with their money on the idea that they are to get something through lot, chance, or expectancy, with the result, in the end, of being cheated.

We cannot view the advertisement in question as one involving the specific wrongful intent necessary to bring it within the purview of the penal statute under consideration.

The decree of the District Court is reversed, with directions for further proceedings not inconsistent with this opinion and for proceedings to the end that the relief sought shall be granted.

THE MACHIGONNE.

(Circuit Court of Appeals, First Circuit. February 15, 1916.)

No. 1144.

COLLISION ⊂=56—OVERTAKING STEAM VESSELS—FAULT.

Evidence *held* not to sustain the claim of a steamer which, on a slightly crossing but nearly overtaking course, had come into collision with and sunk a smaller and slower motor-propelled schooner, that the latter changed her course just before the collision and was chargeable with contributory fault.

[Ed. Note.—For other cases, see Collision, Dec. Dig. ⊂=56.]

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

Suit in admiralty for collision by Jacob F. Brown, owner of the fishing schooner Priscilla, and others, against the steamer Machigonne; Boston, Nahant & Pines Steamboat Company, claimant. Decree for libelants, and claimant appeals. Affirmed.

Edward E. Blodgett and Albert T. Gould, both of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on the brief), for appellant.

G. Philip Wardner, of Boston, Mass., for appellees.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The owner of the fishing schooner Priscilla, of Boston, together with her master on the trip below mentioned, filed this libel, on behalf of themselves and of her crew on the same trip, against the steamer Machigonne, of Boston, to recover damages for the sinking of the schooner, caused by a collision between the two vessels in the upper harbor of Boston on June 24, 1913.

In the District Court the Machigonne was held solely in fault. Her owner and claimant, the Boston, Nahant & Pines Steamboat Company, appeals from the decree; not contending that she should have been held free from fault, but contending that the schooner should have been held also in fault.

The Priscilla, though ordinarily a schooner, had a gasoline motor engine, by whose power alone she was being propelled. Her sails were furled. For the purposes of the applicable Inland Rules, therefore, the collision was between two "steam vessels," not between a "steam vessel" and a "sailing vessel." See the "preliminary" paragraph of the Rules, 30 Stat. 96 (Comp. St. 1913, § 7873).

The collision happened a little before one o'clock in the afternoon, the weather being clear, the water smooth, and the wind light. Having left T Wharf shortly after noon, the Priscilla was proceeding down the harbor, bound outward on a sword-fishing trip, but intending to stop on the way at a station near Commonwealth Dock, in South Boston, to take on board a supply of gasoline. The Machigonne, a passenger boat making regular trips between Boston and Nahant, had left her dock at Otis Wharf at about 25 minutes before 1 o'clock, also bound down the harbor, on her way to Nahant. The collision was at a point near Channel Buoy No. 7, a black buoy on the southerly edge of the deep-water channel, and somewhat above Commonwealth Dock. This buoy is just about half a mile from a point off T Wharf; and a very little less than half a mile from a point off Otis Wharf. From the first-mentioned point it bears about southeast by south; from the second, about east southeast. The above facts are not disputed, and it is admitted by the pleadings that the Machigonne's bow collided with the Priscilla's stern near the last stanchion aft, on the starboard side, cutting into her so that she filled and sank shortly afterward.

Both vessels had the tide, which was flood, against them. Up to a time when collision was imminent, the Machigonne's speed had been from 10 to 12 knots; the Priscilla's from 3 to 4.

The Priscilla was being steered by her master; four of her crew were on deck, one of them being on lookout forward. All of these testified as witnesses at the trial. In the Machigonne's pilot house were her captain, pilot and quartermaster, all of whom testified at the trial, as did also her engineer, who was below. She had no lookout

stationed forward of her pilot house, which was 40 feet aft from her stern. There were no other witnesses from on board her.

While on their way toward the place of collision, both vessels had had in view ahead of them a large coal-laden steamer, the Malden, which had been anchored on the southerly side of the deep-water channel, about off the Commonwealth Dock, and not far below Buoy 7. The Malden was seen to be getting up her anchor and getting under way as they approached her. With both the Machigonne and Priscilla, it had been a question on which side of the Malden to head.

The schooner had covered a good part of the distance between T Wharf and Buoy 7, before the steamer started, and was the first of the two vessels required to shape her course with reference to the Malden. Her master, according to his own testimony, having steered southeast by south from off T Wharf, changed this course to about southeast by east under a port helm, which would have carried him outside the Malden, had that vessel not gathered a speed exceeding the schooner's and gone down channel at a faster rate, before the schooner came up with her. Finding that she would not have to pass the Malden, he brought the schooner back to her original course of southeast by south, which he then maintained until the collision without further change. At the time this last change of helm was made, he saw the Machigonne coming after him at a considerable distance behind the schooner, further from her than the schooner was from the Malden, and bearing over the schooner's starboard quarter.

We find no reason to doubt that this testimony truly states the relative positions of the two vessels at the time; and if there was no further change of course on the schooner's part, the Machigonne was solely to blame for striking the schooner. The respective courses and speeds of the two vessels involved risk of collision; she was the overtaking vessel, she had time and room enough in which to keep clear, and might easily have done so if due care on her part had been used. To escape this result, the steamer is obliged to rely upon a claim that the schooner, instead of maintaining her course down channel, suddenly changed it so as to head toward the South Boston shore, directly across the steamer's course, when the vessels were so close to each other as to leave the steamer no opportunity of avoiding collision.

We find nothing in the evidence from the schooner as a whole, whatever the discrepancies it contains, sufficient to establish or materially assist this claim, and the witnesses from the steamer are not in a position to establish it, for the reason that, on their own statements, they were not watching the schooner or her movements, and first became aware that she was dangerously near them when they found themselves in imminent danger of collision with her. The only lookout being kept on board her was from her pilot house, and of the three persons there, only two were concerning themselves with the steamer's navigation or with any other vessel in sight. These were the pilot, who was steering, and the captain, standing on the starboard side of the wheel. The quartermaster, on the other side of the wheel, was busy with a book wherein he was setting down the number of passengers.

According to the pilot's testimony, the steamer's course was east southeast from off Otis Wharf, with the Malden very nearly ahead, a trifle, if anything, on the starboard bow. Intending at first to leave the Malden on his port side and pass between her and Commonwealth Dock, the steamer's helm was ported a little, but while answering this change of helm, the Malden was found to be also directing her course to starboard. Fearing that there might not be room enough to pass her on that side, there being other vessels at anchor in that direction further down, the helm was changed to starboard sufficiently to put the steamer on a course carrying her outside the Malden, and then steadied. It was after this had been done that he first saw anything of the schooner. She was then, according to him, not over 300 feet away, crossing the steamer's course almost at right angles and swinging to starboard. Although the engines were at once reversed and the wheel put hard to starboard, collision followed, the vessels being nearly at right angles when the steamer's bow hit the schooner as above.

According to the captain's testimony, he had noticed the schooner going down stream while backing his steamer out from Otis Wharf. How far down she then was, he does not say. He appears to have taken little notice of her then, and no further notice of her until he discovered her, a few seconds after the pilot had headed the steamer so as to go outside the Malden, on the steamer's port bow, crossing her course, heading as if to pass under the Malden's stern, and so near as to cause him to signal instantly for full speed astern and order the steamer's wheel hard to starboard. The vessels struck, according to him, almost at a right angle. The quartermaster saw the schooner "just when it happened." A diagram drawn by him would indicate the angle of the collision to have been considerably more than a right angle.

Testimony coming from witnesses who, like the captain and pilot, charged with the navigation of a steamer running at high speed, strike a vessel they are bound to avoid, in broad daylight, without having taken any notice of her until they are on the point of striking her, is not testimony such as can be expected to convince the court that they would not have struck her at all but for an unexpected change of her course such as to bring her directly across their own. We think it evident, as did the District Court, that their attention had been directed solely to the Malden, and none of it given to the schooner until too late.

Their evidence fails to convince us that the steamer in fact struck the schooner at a right angle. With the exception of a diagram made by one witness, who was not taking any part in her navigation at the time, the evidence of all the witnesses from the schooner is to the contrary; nor do we think the argument from the nature of the injury to the schooner's hull, as ascertained after she was raised, strong enough to establish the fact. Going, as she was, nearly at full speed, the steamer could hardly strike a vessel so much smaller on the quarter without instantly swinging her around; and in view of this fact, neither the estimates of witnesses who had not observed the entire approach of the vessels as to the angle of collision, nor opinions form-

ed from examination of the injuries to the hull as to the "angle of the break," can have much weight.

The master of the schooner called at the Steamboat Company's office directly after the collision, on the same afternoon, and the appellant relies on admissions he is said to have then and there made regarding the manner in which the collision happened. The evidence is contradictory as to what was said and done at the time. We are not satisfied that any admissions were then made which materially conflicted with the master's testimony as summarized above. Neither the diagram which he admits having made, nor that made by Mr. Sherman and claimed to have been approved by him seem to us necessarily inconsistent with that testimony.

The alleged sudden change of course on the schooner's part is obviously one which she could have had no motive to make, but, on the contrary, every motive to avoid making. We do not think the evidence sufficient to prove that she ever made it. We therefore agree with the conclusions of the District Court. It is unnecessary to deal separately with each of the assignments of error.

The decree of the District Court is affirmed, with interest, and the appellees recover their costs of appeal.

SCHNEPFE v. SCHNEPFE et al.

(Circuit Court of Appeals, Fourth Circuit. February 24, 1916.)

No. 1407.

1. JUDGMENT ⇐688—CONCLUSIVENESS—PARTIES CONCLUDED.

A testator's widow brought suit in a state court to require his executor to pay her $12,000, under an antenuptial contract whereby the testator promised to pay her that sum in lieu of any dower interest in his estate, and obtained a decree requiring the executor to pay such sum. Thereafter a son brought an action to recover from her his share of the amount paid and the share of another son, on allegations similar to those made by the executor in the former suit. He contended that the amount named in the antenuptial agreement was a charge upon real estate, and not collectible out of personal property, and that as the testator's will disposed of personal property only, and gave the executor no interest in real estate, the executor did not represent the testator's heirs in the former suit, and that he was not bound by the decree. *Held*, that the executor represented all parties having any interest in the personal property as to any claim or liability payable out of his personal property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1211; Dec. Dig. ⇐688.]

2. JUDGMENT ⇐688—CONCLUSIVENESS—MATTERS CONCLUDED.

It was the right and duty of the executor to set up any valid defense when sued by the widow, including the defense that she had no right of action, because the $12,000 was only a charge upon real estate and not an enforceable demand against personal property, and plaintiff was therefore bound by the decree against the executor, whether such defense was set up or not, as a judgment is conclusive as to defenses which might have been presented, though they were not presented.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1211; Dec. Dig. ⇐688.]

3. COURTS ⊜365—LOCAL LAW—FOLLOWING STATE DECISION.

The questions whether the widow could maintain an equitable action, and whether there was a failure of consideration because of her abandonment of the testator, were purely questions of local law, and the decision of the state court of last resort was conclusive, and not open to review in a federal court.

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

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by John Frederick Schnepfe against Caroline M. Schnepfe and another. From a decree dismissing the bill, plaintiff appeals. Affirmed.

George G. Schnepfe, of Baltimore, Md., for appellant.

William Colton and Frederick N. Tannar, both of Baltimore, Md., for appellees.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. In June, 1904, Caroline Mahle, a widow, and John Henry Schnepfe, entered into an antenuptial contract, which begins with the following recital:

"Whereas, a marriage is intended to be solemnized between the said Caroline Mahle and John Henry Schnepfe, and in view of which they desire to provide that certain real and personal property shall, after the said intended marriage has taken place, be possessed, enjoyed and disposed of as though they were unmarried. * * *"

The first paragraph of this contract provided that Caroline Mahle, "in consideration of the said intended marriage and certain other good and valuable considerations," should continue to possess the real and personal property which she then owned, with power to dispose of it, absolutely or conditionally, by deed or will, notwithstanding her coverture; and a similar provision was made as to property acquired by her during coverture, Mr. Schnepfe agreeing to unite with her in the execution of such deeds and conveyances as might be required.

The second paragraph provided as follows:

"In consideration of the said Caroline Mahle uniting in marriage with the said John Henry Schnepfe, the said John Henry Schnepfe doth agree to pay, in lieu of any dower interest which she, the said Caroline Mahle, would acquire in his, the said John Henry Schnepfe's, estate, the sum of $12,000.00; the said $12,000.00 to be paid to the said Caroline Mahle upon the death of the said John Henry Schnepfe out of whatever estate the said John Henry Schnepfe may die seised of, said payment to be made prior to the distribution of said estate."

It was also agreed that in the event of the death of Caroline Mahle during Schnepfe's lifetime he was to pay the $12,000 to her children by her former husband, and he further agreed to relinquish all right, title and interest which he might acquire by way of curtesy in her estate.

The marriage followed soon afterwards, and Schnepfe died in No-

vember, 1913. In January, 1914, the $12,000 not having been paid, Mrs. Schnepfe brought an equity suit in circuit court No. 2 of Baltimore city against the executor of the last will and testament of her deceased husband. The trial of the case resulted in a decree which required the executor to pay complainant the sum of $12,000 and costs of the proceedings. The executor appealed to the Court of Appeals of Maryland, and that court in December, 1914, affirmed the decree. Schnepfe v. Schnepfe, 124 Md. 330, 92 Atl. 891. The opinion of Boyd, C. J., contains a full and careful discussion of the questions involved.

In April, 1915, this action was brought by the appellant, a son of John Henry Schnepfe, and a citizen of the state of Alabama, against the executor and Mrs. Schnepfe, to recover from her his share as heir at law, and also the share of a brother assigned to him, of the $12,000 which had been paid to her, on the ground that such payment was illegal and operated to deprive him of property to which he was justly entitled. The voluminous bill of complaint sets up, among other things, the same facts alleged in the answer of the executor to Mrs. Schnepfe's suit in the state court, and the exhibits include all the proceedings in that suit. The executor by way of answer admitted all the allegations of the bill. Mrs. Schnepfe filed a motion to dismiss on various grounds, the substance of which is that the facts alleged in the bill do not state a cause of action or entitle the complainant to equitable relief. The learned District Judge, after hearing the parties, dismissed the bill, for the declared reason, as asserted in appellant's brief:

"This is in effect an attempt to set aside a decree of the Court of Appeals of Maryland."

The appellant contends, if we understand his argument, that the $12,000 named in the antenuptial agreement was a charge upon real estate and not collectible out of the personal property left by Schnepfe; that his will disposed of personal property only and gave the executor no right or interest in real estate; that therefore the executor did not represent in the state court the heirs of the testator, meaning the persons to whom any real estate owned by him descended; and consequently that appellant is not bound by the decree of that court, and has not had his day in court as to the controversy here presented.

[1, 2] But the obvious answer to this contention is that the executor did represent all parties having any interest in the personal property of the deceased, and also represented them as to any claim or liability payable out of his personal property. 18 Cyc. 955; Cowen v. Adams, 78 Fed. 536, 24 C. C. A. 198. When Mrs. Schnepfe sued in the state court to compel payment of the $12,000 out of the personal estate in the hands of the executor, it was his right and duty to set up any valid ground of defense including the defense that the antenuptial agreement gave no right of action against him, because the $12,000 was not an enforceable demand against personal property, but only a charge upon real estate, with which the executor had nothing to do. And for the purposes of this case it is unimportant whether or not that defense was set up in the answer and urged at the trial; it

is sufficient if there was opportunity to make it, and this seems to us to be beyond question. The appellant was therefore represented by the executor in that suit, because it was a suit to enforce payment of the $12,000 out of the personal property, and it follows that he has had his day in court as to that question and is bound by the decree. As the Supreme Court said in the leading case of Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195:

"Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy."

[3] It is argued that appellant is not bound by the Maryland decree, because any claim of Mrs. Schnepfe for payment of the $12,000 out of the personal property was not cognizable by a court of equity, but could be enforced only, if at all, in an action at law, and that therefore the court was without jurisdiction to render the decree. But manifestly the question whether she could maintain an equitable action was purely one of local law, and the decision of the state court of last resort is conclusive upon that question. If we are right in what has already been said, the appellant was represented in that suit by the executor, and the ruling against him upon the issue of jurisdiction is not open to review in a federal court.

The same principle applies to the claim that there was failure of consideration for the $12,000 because Mrs. Schnepfe is alleged to have abandoned her husband for such length of time and under such circumstances as entitled him to a divorce, which would have annulled the antenuptial agreement. This question is discussed at length by the learned Chief Justice, who sums up the conclusion of the court as follows:

"It is not a meritorious defense for the executor to now set up, when the testator can no longer speak for himself—to seek to avoid the obligation solemnly made by the testator, and so far as appears from the record, intended by him to be provided for out of part of his estate set apart for that purpose, by alleging a ground, the real facts as to which no one knew better than the testator himself, and yet he did not in his lifetime seek to obtain a divorce. Inasmuch as the appellee would in the absence of the agreement have been entitled to dower and her share of the personal estate left by the husband, even if it be true that she abandoned him, as there was no divorce we are of the opinion that the abandonment (if conceded) does not nullify the antenuptial contract, or make it inequitable in this case to enforce it."

We find no merit in the appeal, and the decree dismissing the bill of complaint will be affirmed.

Affirmed.

In re NATIONAL TELEPHONE MFG. CO.

(Circuit Court of Appeals, First Circuit. February 10, 1916.)

No. 1161.

1. JUDGES ⟸16—SUBSTITUTE JUDGES—APPOINTMENT—VALIDITY.

Rev. St. § 591, provided that, when any District Judge was prevented by disability from holding court in the absence of the other judges, as appears by the certificate of the clerk to the Circuit Judge or Circuit Justice, such Circuit Judge or Justice might appoint the judge of any other district in the same circuit to hold such courts. Section 592 provided that when the urgency of business in any District Court required such appointment, as appeared by the certificate of the clerk to the Circuit Judge or Justice, such Circuit Judge or Justice might appoint the judge of any other district to exercise within the district the powers vested in the judge thereof. Section 596 provided that it should be the duty of every Circuit Judge, whenever the public interest so required, to appoint the District Judge of any judicial district within his circuit to hold a District or Circuit Court in the place or in aid of any other District Judge within such circuit. *Held*, that a District Judge, appointed by a Circuit Judge under section 596 to hold the Circuit Court for a district other than his own district, was authorized to determine a case tried at such term of the Circuit Court, though it did not appear that the appointment was made in response to a certificate of the clerk, as section 596 does not require the clerk's certificate as a condition to the exercise of the power of appointment thereunder, as is required by sections 591 and 592.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 46, 53–59; Dec. Dig. ⟸16.]

2. JUDGMENT ⟸407—VACATING OR SETTING ASIDE—JURISDICTION.

A District Judge did not err in declining to entertain a motion and petition to vacate a judgment on the ground that the moving party had taken a writ of error from the Supreme Court, which was dismissed for want of jurisdiction, and that the time had elapsed within which a writ of error could be taken from the Circuit Court of Appeals, where the judgment was the one the court intended to enter and there were no clerical mistakes, and, treating the petition as a bill in equity, it was not alleged or contended that the petitioner had any equitable defense of which it could not avail itself at law, or a good defense at law of which it was prevented from availing itself by fraud, or accident unmixed with negligence of itself or its agents, as, after the term ended at which it was entered, the judgment passed beyond the control of the court, and errors therein could only be corrected by writ of error or appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 768–771, 773, 774; Dec. Dig. ⟸407.]

Original petition by the National Telephone Manufacturing Company for a writ of mandamus, directed to Clarence Hale, District Judge for the District of Maine, holding District Court in the District of Massachusetts. Petition dismissed.

Henry T. Richardson, of Boston, Mass., for petitioner.

Charles H. Swan, of Boston, Mass., for respondent.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. This is a petition for a writ of mandamus directing the Honorable Clarence Hale, District Judge of the Dis-

trict of Maine, holding the District Court in the District of Massachusetts, to permit certain motions and a petition to be filed, and to consider and determine the same and enter thereon some final order, so that the petitioner, if so advised, may, by appeal or other appropriate remedy, bring the questions involved before this court for final determination.

It seems that in January, 1904, the petitioner brought a suit in the Circuit Court for the District of Massachusetts against the American Bell Telephone Company, which was heard before Judge Hale and a jury at the February term, 1910; that a verdict was directed for the defendant at that term, and judgment entered thereon February 27, 1911, during the October term, 1910; that May 4, 1911, a writ of error was sued out from the Supreme Court (226 U. S. 600, 33 Sup. Ct. 114, 57 L. Ed. 376); and that on November 11, 1912, that court dismissed the writ for want of jurisdiction. In September and December, 1913, a motion and a petition were handed to the clerk of the District Court of Massachusetts, in each of which it was sought to have the judgment entered February 27, 1911, vacated; and in December, 1913, two motions were handed to the clerk, seeking to have the record corrected by striking from the docket of the court all entries in the cause made subsequent to February 21 and October 26, 1910.

As a writ of mandamus is never granted in a case where, if issued, it would prove unavailing, it becomes necessary for us to inquire whether the petition states grounds which would warrant the relief prayed for.

[1] The first ground relied on by the petitioner is that Judge Hale was not duly authorized to hold the terms at which the case was tried and the judgment was entered.

It appears that on February 23, 1910, the Honorable Francis C. Lowell, then a United States Circuit Judge for this Circuit, designated Judge Hale to hold the February term of the Circuit Court, and that the records of the court contain the following entry:

"Circuit Court of the United States.

"District of Massachusetts.

"Whereas, in my judgment the public interest so requires, I do hereby designate and appoint the Honorable Clarence Hale, District Judge for the District of Maine, to hold the February term, 1910, of the Circuit Court of the United States, for the District of Massachusetts.

"Witness my hand, at Boston, in the District of Massachusetts, this twenty-third day of February, in the year of our Lord one thousand nine hundred and ten. Francis C. Lowell, U. S. Circuit Judge."

And that on October 18, 1910, the Honorable Le Baron B. Colt, then a Circuit Judge for this Circuit, issued a like order designating Judge Hale to hold the October term, 1910, of the Circuit Court, as shown by the records of said court.

In support of the petitioner's contention, it is pointed out that the records of the court fail to disclose that either appointment was made in response to a certificate of the clerk, under seal of the court, as required by sections 591 and 592 of the Revised Statutes of the United States, and that under these sections of the statutes such a certificate

is made a condition precedent to the power of the Circuit Judge to make the appointment.

It is true that, under sections 591 and 592, the conditions there provided for, namely, disability of the local District Judge (section 591), or an accumulation of business (section 592), are required to be set out in a certificate of the clerk under seal of the court as the occasion for an appointment under the respective sections. But the appointments in question were not made under either of these sections of the statutes, but under section 596, which provides:

"It shall be the duty of every Circuit Judge, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section five hundred and ninety-one, the District Judge of any judicial district within his circuit to hold a District or Circuit Court in the place or in aid of any other District Judge within the same circuit; and it shall be the duty of the District Judge, so designated and appointed, to hold the District or Circuit [Court] as aforesaid, without any other compensation than his regular salary as established by law, except in the case provided in the next section."

This section does not require the certificate of the clerk as a condition to the exercise of the power of appointment. In McDowell v. United States, 159 U. S. 596, 600, 16 Sup. Ct. 111, 112 (40 L. Ed. 271), Mr. Justice Brewer, in discussing this provision of the statutes, said:

"This gives full power to the Circuit Judge to act without reference to any certificate from the clerk, whenever in his judgment the public interests require."

And Chief Justice Fuller, in Ball v. United States, 140 U. S. 118, 128, 11 Sup. Ct. 761, 765 (35 L. Ed. 377), in explaining the provisions of this section, and particularly the clause, "in the manner and with the powers provided in section five hundred and ninety-one," said:

"This section contemplates that the appointment made under it should state what court the appointee was to hold, and that it was in place of the judge of the District Court, or in aid of him, and that the appointment should be filed and entered on the minutes, as provided in section 591."

We are of the opinion, therefore, that Judge Hale was duly authorized to hear and determine the cause.

[2] In support of its motion and petition to vacate the judgment upon which Judge Hale refused to take any action for the reason, as stated by him, that the case had passed beyond his control, the petitioner offers no suggestion other than that it would be equitable, in view of the fact that it had taken a writ of error from the wrong court and more than six months had elapsed within which a writ of error could be taken from this court (Act March 3, 1891, c. 517, § 11, 26 Stat. 829; Rev. Stat. Supp. vol. 1, p. 904), to require the District Judge to vacate the judgment and enter a new judgment from which a writ of error might be had and the exceptions taken and saved at the trial passed upon by this court.

It is not contended that the judgment entered is not the one the court intended to enter or that the record contains any clerical mistakes.

"The case, therefore, does not come within the rule, that a court, after the expiration of the term, may, by an order nunc pro tunc, amend the record by inserting what had been omitted by the act of the clerk or of the court. In re Wight, Petitioner, 134 U. S. 136, 144, 10 Sup. Ct. 487, 33 L. Ed. 865; Fowler v. Equitable Trust Co. (1) 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; Galloway v. McKeithen, 27 N. C. 12, 42 Am. Dec. 153; Hyde v. Curling, 10 Mo., 359. Nor is this a suit in equity to set aside or vacate the judgment upon any of the grounds on which courts of equity interfere to prevent the enforcement of judgments at law." Hickman v. Ft. Scott, 141 U. S. 415, 418, 12 Sup. Ct. 9, 10 (35 L. Ed. 775).

"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, because it did not amount to a legal defense, 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." Phillips v. Negley, 117 U. S. 665, 675, 6 Sup. Ct. 901, 905 (29 L. Ed. 1013).

If the petition presented to the District Court could be treated as a bill in equity, it does not allege, and it is not contended, that the petitioner had an equitable defense to the action of which it could not avail itself at law, or that it had a good defense at law of which it was prevented from availing itself by fraud or accident, unmixed with negligence of itself or its agents. And as the judgment, after the term ended at which it was entered, passed beyond the control of the court, and, if errors existed, they could "only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision" (Bronson v. Schulten, 104 U. S. 410, 415 [26 L. Ed. 797]), we are of the opinion that Judge Hale did not err in declining to entertain the motion and petition.

The petition is dismissed, with costs.

CHRISTOPOULO v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1916.)

No. 1391.

1. GRAND JURY ⊂=5—QUALIFICATION OF JURORS—CONVICTION OF CRIME.

Under Judicial Code (Act March 3, 1911, c. 231) § 275, 36 Stat. 1164 (Comp. St. 1913, § 1252), requiring jurors in United States courts to have the same qualifications as jurors in the highest court of the state, Const. S. C. art. 5, § 22, requiring each juror to be a qualified elector of good moral character, and article 2, § 6, disqualifying persons convicted of certain named offenses, one who had been convicted on plea of guilty of a violation of the act to regulate commerce by making false reports of the weight of certain articles shipped was not thereby disqualified to serve as a grand juror.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 8–13, 15; Dec. Dig. ⊂=5.]

2. GRAND JURY ⊂=5—QUALIFICATIONS—GOOD CHARACTER.

The commission of that offense does not show that the juror was not a man of good moral character, since such character is presumed, unless the want of it is shown by conviction of a disqualifying crime, or is made to appear by evidence outside the record.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 8–13, 15; Dec. Dig. ⊂=5.]

3. GRAND JURY ⇐5—QUALIFICATIONS—GOOD CHARACTER—STATUTE.
Civ. Code S. C. 1912, § 4036, providing that, if any person whose name is placed in the jury box is convicted of any scandalous crime or is guilty of any gross immorality, the board of jury commissioners shall withdraw his name from the box, does not modify the standard of qualification fixed by the state Constitution, but is merely a direction to the board; and the presence of one whose character was questioned, but who was retained on the list by the board, does not invalidate an indictment.
[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 8–13, 15; Dec. Dig. ⇐5.]

4. WITNESSES ⇐337(6)—CREDIBILITY—COMMISSION OF OTHER OFFENSES.
In a prosecution for falsely representing himself to be a citizen of the United States, defendant, who took the stand in his own behalf, may be required to answer whether he ran a blind tiger, when the court charges that his answer can be considered, not as evidence of guilt, but only as affecting, in so far as it involved moral delinquency, his credibility as a witness.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1132, 1140–1142, 1146–1148; Dec. Dig. ⇐337(6).]

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

Constan H. Christopoulo was convicted of falsely representing himself to be a citizen of the United States, and he brings error. Affirmed.

John I. Cosgrove, of Charleston, S. C. (W. Turner Logan, of Charleston, S. C., on the brief), for plaintiff in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. Plaintiff in error, hereinafter called defendant, was convicted, under section 79 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1103 [Comp. St. 1913, § 10247]), of falsely representing himself to be a citizen of the United States. The record shows these facts:

In March, 1915, there was an enrollment of voters for a municipal primary in the city of Charleston, S. C. This enrollment was conducted by the city Democratic executive committee under rules and regulations which were authorized or prescribed by the statute laws of the state. Among these rules was one "that if a naturalized citizen he must show his papers before being permitted to enroll." Defendant is a native of Greece, but at the time in question was not a naturalized citizen of the United States, although he had declared his intention to become a citizen more than two years before. He appeared at the proper place of enrollment and inquired of those in charge of the books as to his right to enroll. In compliance with the rule just quoted he produced his intention papers, which were examined by one of the officers in charge, and thereupon, after making oath that he was duly qualified to vote, he was allowed to enroll. The person who made the examination stated at the trial that he himself did not know the differ-

ence between citizenship papers and intention papers; but defendant admitted on cross-examination that he knew he was not a citizen of the United States, that he had only declared his intention to apply for citizenship, and that an additional application was necessary before he could become a citizen. He also admitted that he had not voted in previous years because he was not a citizen. Shortly after enrolling defendant was arrested and bound over for trial by the United States commissioner. The next grand jury was organized on the morning of the 1st of June, and was discharged, after returning a number of indictments, in the afternoon of the following day. The defendant's case was called for trial the next morning, the 3d of June, at which time, and before pleading, he moved to quash the indictment on the ground that the foreman of the grand jury, one John Cart, had theretofore been convicted, upon a plea of guilty, of a disqualifying crime; and the denial of that motion is the principal ground relied upon for a reversal of the judgment. It seems that Cart had been indicted in March, 1910, for a violation of the act to regulate commerce, in that he had made false reports of the weights of certain articles shipped for transportation in the years 1908 and 1909. He pleaded guilty to this offense and was punished with a fine of $750.

For the purposes of this case we shall assume that the motion to quash was seasonably made (Crowley v. United States, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. Ed. 1075), although defendant was arrested and bound over more than two months before, and apparently might have ascertained at a much earlier date the alleged disqualification of Cart. We also lay aside the suggestion that the indictment is valid, even if Cart was disqualified, because 20 grand jurors were present when the indictment was found and no claim is made that any of the others were not qualified. The question then remains whether Cart was disqualified by reason of the offense which he had previously committed.

[1] The Judicial Code of the United States (section 275) provides that jurors in courts of the United States shall have the same qualifications as jurors in the highest court of the state. Under the Constitution of South Carolina (section 22 of article 5) each juror must be a qualified elector of good moral character and between the ages of 21 and 65 years. By section 6 of article 12, the following persons are disqualified as electors, namely:

"Persons convicted of burglary, arson, obtaining goods or money under false pretences, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny, or a crime against the election laws."

It will be observed that the list does not include convictions for felony or misdemeanor, and the enumeration of specific crimes is necessarily exclusive, because the evident purpose is to declare who shall have the right to vote in the state of South Carolina. The offense of which Cart was convicted, which at the time of its commission was only a misdemeanor, is plainly not within or covered by any of the named crimes which disqualify an elector. It must, therefore, be held that

Cart had not been convicted of a disqualifying crime under the laws of South Carolina. If he had the right to vote in that state, which seems to us not doubtful, he was qualified to act as a grand juror, notwithstanding the fact that he had been previously convicted of a statutory misdemeanor.

[2, 3] It is argued that the commission of this offense shows that Cart was not a man of good moral character, and therefore not qualified to serve as a grand juror. But every elector must be presumed to be of good moral character, unless the want of it is manifested by conviction of a disqualifying crime or is made to appear by evidence dehors the record. True, it is provided in section 4036 of the Civil Code of South Carolina that:

"If any person whose name is placed in the jury box is convicted of any scandalous crime, or is guilty of any gross immorality, his name shall be withdrawn therefrom by the board of jury commissioners, and he shall not be returned as a juror."

But this does not modify the standard of qualification fixed by the state Constitution; it is merely a direction to the board that makes up the list of jurymen. If the board retains on the list the name of a person whose moral character is called in question, but who is otherwise a qualified elector, the presence of that person on the grand jury would not invalidate an indictment. We think it obvious that this must be so, since a contrary conclusion would seriously impede the administration of justice.

Without further comment we deem it sufficient to express the opinion that the court below did not err in refusing to quash the indictment.

[4] The only remaining assignment that needs to be noticed relates to a question of evidence. The defendant was a witness in his own behalf and was asked on cross-examination if he ran a "blind tiger," which implied that he sold liquor unlawfully. The question was allowed over his objection and he was required to answer. In charging the jury the trial court made it plain that this evidence was admitted, not as tending in any wise to prove the offense for which defendant was on trial, but solely, in so far as it involved moral delinquency, as affecting his credibility. For this purpose, to which it was explicitly limited, the evidence was admissible, as this court has recently held in Fields v. United States, 221 Fed. 242, 137 C. C. A. 98.

The question of defendant's intent was fairly submitted to the jury and upon that issue the verdict was warranted by the testimony.

Affirmed.

LEHIGH VALLEY COAL CO. v. LUKASZUNAS.

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 85.

1. MASTER AND SERVANT ⟸153(1)—INJURIES TO SERVANT—DUTY OF MASTER —WARNING.

A master is negligent who sets a servant, regularly employed at work involving no special risk, to perform work involving special risk, without instruction and warning as to the manner of doing the work and the dangers to be anticipated, unless the master knows or has good reason to believe that the servant has sufficient information as to the dangers and how to avoid them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 314; Dec. Dig. ⟸153(1).]

2. APPEAL AND ERROR ⟸930(4)—REVIEW—EFFECT OF VERDICT.

Where the verdict was for plaintiff, each controverted issue on which the testimony was conflicting must be taken as decided in plaintiff's favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3760, 3761; Dec. Dig. ⟸930(4).]

3. MASTER AND SERVANT ⟸149(2)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—BLASTING.

It was negligent for the labor boss of a mine to direct a coal loader, who was not known to be a qualified blaster, to fire a blast to loosen coal jammed in the chutes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 295; Dec. Dig. ⟸149(2).]

4. MASTER AND SERVANT ⟸151—INJURIES EO SERVANT—DELEGATION OF DUTY —WARNING.

The master's obligation to warn an inexperienced servant of special risks cannot be delegated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 298; Dec. Dig. ⟸151.]

5. MASTER AND SERVANT ⟸95½—INJURIES TO SERVANT—LIABILITY OF MASTER—ACTS OF ANOTHER.

Where it was a custom in the mine to send a laborer to get the blasting materials from the assistant mine foreman, who was a state officer, in order to take them to an experienced miner, the fact that the assistant foreman gave them to a laborer, who had been ordered to do the blasting himself, but was not qualified, did not exonerate the employer from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 358; Dec. Dig. ⟸95½.]

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

Action by Antanas Lukaszunas against the Lehigh Valley Coal Company for damages for personal injuries. 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, in favor of defendant in error who was plaintiff below. The action was brought to recover damages for personal injuries sustained by plaintiff while working in the coal mines of defendant near Mahoney City, Pa. Plaintiff was employed as a laborer, his work was the loading of coal on cars in the mine, shoveling coal into cars from platforms

erected in the gangway at the bottom of various chambers or breasts. He had been so employed for some four years. In its progress down the chute to a platform the mined coal passes one or more barriers, called "batteries," at which it sometimes becomes clogged. When so clogged, the accumulation is broken out with a pick, or, if that will not suffice, with a stick of dynamite. Plaintiff was under the orders of one Wilson, known as the "loader boss," who on the day in question set him to work shoveling coal on one of the platforms. There was a stoppage of coal up near the main battery, and plaintiff went there, carrying the materials for a blast. According to his narrative, no one else was near the battery, he drilled a hole in the dynamite stick, inserted a cap (about an inch long) in the hole, inserted a squib or fuse in the outer, open end of the cap, and was pressing the cap to hold the squib in place, when both cap and dynamite exploded, causing the injuries which he sustained.

Allan McCulloh, of New York City (Clifton P. Williamson and Edward W. Walker, both of New York City, of counsel), for plaintiff in error.

Baltrus S. Yankaus, of New York City (John Vernou Bouvier, Jr., and Wm. Montague Geer, Jr., both of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The action is brought at common law and under the Mining Act of Pennsylvania. Act No. 177 of the Session of 1891. That statute, among other things, provides that no person shall be allowed to blast coal unless the mine foreman (a state officer) is satisfied that such person is qualified by experience and judgment to do such work. Article 12, rules 35 and 36. The theory of the plaintiff is that plaintiff was not qualified by experience and judgment to fire a blast; that he had never even received any instructions as to how such work should be done; that the defendant directed him to fire this blast, a dangerous operation, and was negligent in wholly failing to properly and sufficiently instruct him in the preparation and use of dynamite and in failing to acquaint and appraise him of the nature and character of the explosive and to warn him of the dangers to be apprehended from the use thereof. This was the common-law side of the case. Negligence under the statute was charged in violating the rule above referred to by directing plaintiff to charge and fire a blast, knowing that he had no miner's certificate and had not satisfied the mine foreman that he was qualified to do the work. The common law side of the case only need be considered.

[1] It is elementary law that a master is negligent, who sets his servant whose regular work involves in itself no special risk, to perform other work involving special risk, without instruction and warning as to how the work may be safely done and what dangers are to be anticipated—unless the master knows, or has good reason to believe, that the servant has sufficient information as to the dangers to be encountered and how, in practice, to avoid them. This is the law in Pennsylvania. Bogdanovicz v. Susquehanna Coal Company, 240 Pa. 124, 87 Atl. 295.

[2] There was sharp conflict in the testimony as to several propo-

sitions; since the verdict was for the plaintiff each of these controversies must be taken here as decided in his favor. There was testimony which would warrant the jury, if they believed it (much of it came only from the plaintiff himself) in finding the following facts:

(1) The explosion occurred either because plaintiff did not break off the hard end of the squib and in pushing the squib down this hard end scratched the fulminate in the bottom of the cap, or because when pressing the cap in to hold the squib in place he squeezed it too close to the fulminate, thereby causing a disturbance of the same, with friction which induced explosion.

(2) Plaintiff had never been instructed by any one how to put these three things, dynamite, cap and squib, together; he had only such information as an ignorant man would have, who had seen others doing it and might in his observation have overlooked some of the details of their methods.

(3) He was not a man qualified by experience to be put to blast; he was an ordinary loader working with a shovel.

(4) He was under the immediate direction of the loader boss, and was to obey his instructions.

(5) There was in that part of the mine, a man, Boyle, the starter, a certified miner, whose duty it was to blast out the coal when it clogged in the chutes. Sometimes word would be sent to him by a boss loader (or some one else) that blasting of clogged coal would be needed at a particular place. If he had the necessary explosives with him (he was furnished usually with several charges) he would go direct to the place and act. If he needed explosives he would go first to the box kept under lock by the boss loader and get some.

(6) Sometimes the boss loader would send a man to Boyle to tell him to go to a battery and blast, and would give that man the explosives to take to Boyle.

(7) This practice the assistant mine foreman knew of and tolerated. It is not apparent why he should have stopped it; if the unqualified man was merely carrying to Boyle the separate articles, which were harmless thus separated, there seems to be nothing dangerous about it.

(8) The labor boss Wilson did not know that plaintiff was a man qualified to blast. Nevertheless on the day in question the labor boss gave plaintiff these explosives and told him to go and blast at the battery.

[3, 4] We are satisfied that it was negligent in the labor boss to give these explosives to a man, whom he did not know to be a qualified blaster, and to instruct him to use them to fire a blast. Also that for negligence of this sort by the labor boss affecting a man under his orders the owner would be responsible since the master's obligation to warn is not one which he can delegate.

[5] We do not think responsibility for the accident can be shifted off upon the assistant mine foreman (a state officer) on the ground that he saw Wilson give plaintiff this dynamite. He might have supposed that this was done for the not unusual purpose merely of carrying it to Boyle with information as to the place which was clogged.

The question whether any negligence of the plaintiff contributed to the accident was clearly one for the jury upon the proof.

It is unnecessary to consider the few exceptions to the admission of testimony; the evidence introduced under exception was unimportant.

Judgment affirmed.

IRVIN et al. v. KOEHLER.

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 155.

1. CORPORATIONS ⟸117—SALE OF STOCK—FRAUD—RIGHT OF ACTION—DELAY.
Where plaintiff bought preferred stock on misrepresentation that the dividend to accrue the following month had already been declared, but that dividend was paid him by the seller, so that he did not learn that the misrepresentation was false, and the corporation passed the next semiannual dividend, but declared one a year after the purchase, plaintiff's failure to institute an action to rescind for the fraud until 16 months after the last dividend was paid was not, as a matter of law, failure to act with reasonable promptness.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. ⟸117.]

2. CORPORATIONS ⟸117—SALE OF STOCK—FRAUD—RESCISSION—DELAY—"PROMPTLY."
One who has made an investment in stock cannot, after he knows he was deceived, or has matters brought to his knowledge that would put a reasonable man on inquiry which would disclose that he had been deceived, wait and see whether the investment turns out unfavorably, but, if he desires to recover the price paid on rescission, he must act promptly; "promptly" having no precise definition as a particular period of time, but depending largely on the facts in each case.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. ⟸117.

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

3. TRIAL ⟸412—ADMISSION OF EVIDENCE—WAIVER OF OBJECTIONS.
In an action for misrepresentation in the sale of corporate stock, where the complaint alleged that defendants fraudulently told plaintiff they knew the stock to be a good purchase, and plaintiff offered in evidence a prospectus showing the estimates of the earnings of the company, given him by defendants with the statement that the earnings had been even better than the estimates, without proving that the statements were false, and defendants, instead of moving to strike the prospectus, offered evidence that the statements were true, and one of them was cross-examined to show that they were not true, the prospectus was properly in the record.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 974-977; Dec. Dig. ⟸412.]

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

Action by Henry Koehler against Richard Irvin and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Lord, Day & Lord, of New York City (Henry De Forest Baldwin and Allen Evarts Foster, both of New York City, of counsel), for plaintiffs in error.

Robert C. Birkhahn, of New York City (Henry S. Dottenheim, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The action was brought to recover the sum paid by plaintiff to defendants for shares of stock of the Harper Transportation Company, it being averred that the purchase was made because of representations made by defendants as to its value, which representations were false and known by defendants to be false when they made them. The stock was cumulative preferred seven per cent. stock. The purchases were made in two separate lots on December 14, and December 29, 1911.

The only representation, other than such as were mere expressions of opinion, which is here relied on is the statement alleged to have been made, on or about December 14, 1911, by one of the defendants and by his agent in his presence that the semiannual dividend which according to the terms of the stock certificate was to be expected on January 1, 1912, "had been declared." It is not necessary to enter into any discussion of the evidence bearing upon this issue, because it is conflicting, the plaintiff testifying that the statement was made and defendant that it was not made. By their verdict the jury has settled that question adversely to defendants. There is no dispute upon the testimony that such dividend had not been declared at the time the representation was made, nor that the first and only dividend was not declared until January 10, 1913.

[1] This suit was instituted in May, 1914, and the proposition principally contended for on this appeal is that plaintiff is estopped from recovery because of his delay in asserting that he had been defrauded.

At the time plaintiff bought the stock defendant paid him the amount of the dividend which was expected January 1, 1912, apparently on the theory that the dividend check would go to the holder of the stock prior to transfer. Therefore nonpayment of that dividend by the company would not come to the knowledge of plaintiff.

In July, 1912, no dividend was declared, and plaintiff became suspicious; he was ignorant of business affairs and of the methods of stock corporations. In January, 1913, dividend was declared and paid. In July, 1913, it was not declared.

Whatever suspicions as to the falsity of the statements touching the declaration of the January dividend of 1912, may have been aroused by the failure to pay dividend in July, 1912, may not unreasonably have been dissipated by the payment of dividend in January, 1913. The case is not sufficiently clear to warrant holding as matter of law that plaintiff was estopped because of failure to act with reasonable promptness.

[2] There was conflicting testimony as to when it was that plaintiff ascertained that he had been deceived by a false representation as to the dividend of January 1, 1913. The court submitted that branch

of the case to the jury with instructions which correctly set forth the law and adequately advised them what was the point to be decided. We quote from the charge:

"There is a principle with relation to rescinding a contract which it is proper to state to you. A man cannot lie by, generally speaking, after he has made an investment and wait until it turns out unfavorably, still going ahead, having known of any falsity connected with the investment whereupon he invested, and not proceed. In plain English, if he finds out that he has been defrauded, and he wants to recover damages and rescind, he must act promptly.

"*Promptly* does not have any exact definition that can be regulated with respect to a period of time. It depends, of course, in its definition largely on the circumstances surrounding the facts which are adduced in each case, but the principle which is applied is that a man must act promptly after he knows that a fraud or misrepresentation—and misrepresentation and deceit are the very same thing—has been perpetrated upon him. The mere suspicion that it has been, of course, is not enough for him to act upon, but if things are brought to his knowledge, which in the exercise of ordinary prudence should put him on inquiry, he ought to make an inquiry and when he is satisfied that he has been deceived he ought to act without delay. Now in this case, when did Mr. Koehler, assuming that there was misrepresentation, if you find that that phase of the case is reached by you, first know of any such misrepresentation. If he knew at the time that the defendant argues he did, he had knowledge back, I think in 1913, and I think he did not commence his action until 1914 about May—but whether he knew in 1913 or whether or not there were facts which ought to have put him upon his inquiry, is a matter, gentlemen, for you to work out after a fair consideration of what these witnesses have said."

Defendants did not except to this part of the charge nor did they ask specifically to have the case disposed of on the defense of estoppel. Their motion at the close of the case was to direct verdict for defendant "on the ground that plaintiff has failed to produce facts sufficient to constitute a cause of action."

[3] It is assigned as error that:

"The trial court admitted in evidence the prospectus of the Harper Transportation Company and permitted the plaintiff to attempt to prove that the satements therein contained were untrue."

One feature of the charge in the complaint was that the defendants fraudulently told the plaintiff that they knew the stock to be a good purchase. Plaintiff offered in evidence a prospectus of the company showing the estimated earnings which the defendant from whom he bought the stock gave him with the further assurance by that defendant that the actual earnings had been better than the estimated. The plaintiff might have proved that they were not and that the defendants knew they were not, but he did not do so. Under these circumstances it would have been proper for the defendant to move to strike the testimony out and the motion should have been granted. But before they made the motion they asked the defendant Irvin whether the statements in the prospectus were true and he said they were. This justified the plaintiff on cross-examination in showing that they were not, which leaves the prospectus properly in the case.

The judgment is affirmed.

CANADIAN PAC. RY. CO. v. BLACK.

(Circuit Court of Appeals, Second Circuit. January 11, 1916.)

No. 84.

1. APPEAL AND ERROR ⟸1062(1)—HARMLESS ERROR—SUBMISSION OF QUESTIONS TO JURY.

Where, in an action for false arrest and malicious prosecution, the undisputed facts conclusively showed as a matter of law that there was no probable cause, defendant was not harmed by the submission of this question to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4212; Dec. Dig. ⟸1062(1).]

2. APPEAL AND ERROR ⟸1053(2)—ERROR—CURE.

Plaintiff, who had formerly been a station agent in defendant's employ in British Columbia, was arrested in Buffalo on a charge based on an alleged shortage in his accounts and held for extradition. Upon promises by defendant's special agent, he waived extradition and voluntarily crossed the border into Canada, when, contrary to such promises, he was placed under close arrest and transported 2,400 miles in a public railroad coach, and subjected during such transportation to humiliation and unnecessary brutality. On a trial for false arrest and malicious prosecution, the undisputed facts showed that there was no probable cause. A witness testified that defendant's auditor, who instigated the prosecution, said that he was not sure that the alleged shortage was anything more than an error in bookkeeping, but that plaintiff had been snippy to him, and that he was going to make it as hard for him as he could. The court subsequently struck out this testimony and told the jury to disregard it. *Held* that, as this testimony could have left no possible impression on the jury's mind, except on the questions of probable cause and the amount of damages, its subsequent withdrawal cured the effect of its admission, since it was of no importance on the question of damages, in view of the more important matters bearing on that question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4179; Dec. Dig. ⟸1053(2).]

3. MALICIOUS PROSECUTION ⟸67—FALSE IMPRISONMENT—DAMAGES—EVIDENCE.

In view of the evidence as to plaintiff's treatment, there was sufficient proof of loss to authorize an award of damages for injury to his reputation.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 155, 156; Dec. Dig. ⟸67.]

4. MALICIOUS PROSECUTION ⟸62—FALSE IMPRISONMENT—DAMAGES—EVIDENCE.

Where the complaint in such action alleged that plaintiff's nervous system was shocked by what took place, evidence tending to show that he was a changed man after his sad experience was properly admitted, as the inference that the change was due to the experience was a perfectly legitimate one for the jury to draw.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 148, 150; Dec. Dig. ⟸62.]

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

Action by David J. Black against the Canadian Pacific Railway Company. Judgment on a verdict for plaintiff, which the trial court

refused, on motion, to set aside (218 Fed. 239), and defendant brings error. Affirmed.

This cause comes here upon writ of error to review a judgment of the District Court, Western District of New York, in favor of defendant in error, who was plaintiff below. The action was brought to recover damages for false arrest and malicious prosecution. Plaintiff was a station agent in the employ of defendant at Wycliff, British Columbia. There was no one else at the station; plaintiff having full charge thereof, including the billing out and receiving of freight, the sale of tickets, the handling of baggage, etc. An auditor of the defendant, one Phillips, reported a shortage in his accounts. Thereupon a warrant was obtained for his arrest from a court of British Columbia, and a special officer of the defendant had plaintiff arrested in Buffalo and held for extradition. Upon promises made by Cadieux, the special agent, plaintiff waived all opposition to extradition and voluntarily crossed the border into Canada, when he was at once, contrary to the promises, placed under close arrest and taken to the court in British Columbia, to be tried for grand larceny. When the case came on for trial, the judge dismissed it on the showing of the crown, and there was not even any necessity of calling Black to the stand. The traveling auditor admitted in substance to the judge that a mistake had been made and that there was no case.

Clinton, Clinton & Striker, of Buffalo, N. Y. (G. Clinton, Jr., of Buffalo, N. Y., of counsel), for plaintiff in error.

Sullivan, Bagley & Wechter, of Buffalo, N. Y. (J. A. Wechter, of Buffalo, N. Y., of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The trial judge instructed the jury that actual malice had not been shown and the sole issues submitted to the jury were: Did plaintiff establish lack of probable cause? If so, does the jury find malice in law? What, if any, actual damages did plaintiff sustain?

We have rarely had before us a case where the testimony adduced to show probable cause was so flimsy and unpersuasive, or where the circumstances attending the prosecution of the unfortunate plaintiff were characterized by such gross breach of faith and such humiliating and unnecessary brutality.

Fortunately we are spared the trouble of incorporating any digest of the testimony in our opinion. Upon the denial of a motion to set aside the verdict Judge Mayer reviewed the whole testimony exhaustively. His opinion will be found in 218 Fed. 239. No one reading it will be surprised that the jury assessed $25,000 as compensatory damages. All we have to do is to pass upon the points presented on this writ of error. They are three in number:

[1] 1. That the court erred in leaving to the jury the question whether or not plaintiff had shown absence of probable cause. It is argued that there is no substantial controversy on the facts relevant to "probable cause," and therefore, according to the authorities cited, the court should have determined that question itself. It is a sufficient answer to this assignment of error to say that the undisputed facts conclusively establish the proposition as a matter of law that there was no probable cause. Indeed, the trial judge himself so held when motion to dismiss was made at the end of plaintiff's case, although subsequently he sent the question to the jury. Certainly no harm re-

sulted to defendant in giving it a chance to persuade the jury that there was "probable cause," when the testimony plainly showed that there was none.

[2] 2. That a witness, Carter, testified to a conversation with Phillipps, the auditor—the real instigator of the prosecution—in which the latter stated that he was not then sure that defendant's errors were more than errors in bookkeeping, and that Black had been snippy to him, and he was going to make it as hard for him as he could. This testimony was subsequently struck out by the court, and the jury were told to disregard it. Defendant's counsel objected to this, and insisted on his exception reserved to its admission. He did not, however, when it was thus stricken out, ask to have a juror withdrawn. The point need not be disposed of on any such technicality. There are cases where "such strong impression has been made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objections may avail on appeal or writ of error." Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663. See, also, Turner v. American Security & Trust Co., 213 U. S. 257, 29 Sup. Ct. 420, 53 L. Ed. 788; Furst v. Second Avenue R. R. Co., 72 N. Y. 542.

But this is no such case. The only possible impression left on the jury's mind could be as to two propositions only: First, absence of probable cause; second, amount of damages. But, without this evidence, the testimony was such that the court should have instructed the jury that on the undisputed facts there was no probable cause. On the question of damages the evidence struck out was of no importance. With the disgraceful narrative fresh in their minds of the special agent's disregard of the promises, in reliance on which plaintiff had voluntarily crossed from the United States into Canada—a breach of faith induced by instruction from defendant's headquarters —and the account of the incidents of the journey from Toronto to Winipeg, the jurors' minds were too full of more important matters to give any attention to Phillipps' statement that plaintiff had been snippy to him.

[3, 4] 3. As to alleged errors in the charge as to measure of damages:

A. The proposition that there could be no damages found for injury to reputation without specific proof of loss is without merit, when one reads the narrative of the treatment to which plaintiff was subjected for 2,400 miles of travel in a public railroad coach.

B. That plaintiff's nervous system was shocked by what took place was alleged in the complaint. The evidence objected to tended to show that he was a changed man after his sad experience. The inference that the change was due to the experience was a perfectly legitimate one for the jury to draw. He certainly would have possessed a tougher hide and blunter susceptibilities than the average man, if he had gone through that seven times heated furnace without being singed.

The judgment is affirmed.

TEXAS & P. RY. CO. v. HARTFORD FIRE INS. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 13, 1916. Rehearing Denied April 19, 1916.)

No. 2678.

APPEAL AND ERROR ⊜1050(1)—RAILROADS ⊜481(2)—DAMAGES FROM FIRE—ACTIONS—EVIDENCE.

In an action against a railroad company to recover the value of cotton destroyed by fire while on a platform adjoining defendant's track, where direct evidence was introduced tending to prove that the cotton was discovered to be on fire shortly after three locomotives had passed, one or more of which was emitting large cinders in unusual quantities, and that there was no means for the fire being set other than by such locomotives, it was error to admit evidence that a few days afterwards an entirely different locomotive, in no way responsible for the injury complained of, emitted large cinders as it was passing such platform, which fell on cotton and scorched it; and the admission of such evidence was prejudicial, as further inquiry should have been limited to the construction, condition, and operation of the locomotives shown to be the only ones by which the fire might have been caused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157, 4166; Dec. Dig. ⊜1050(1); Railroads, Cent. Dig. § 1719; Dec. Dig. ⊜481(2).]

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

On rehearing. Former judgment overruled, and judgment of the trial court reversed.

For former opinion, see 218 Fed. 990, 133 C. C. A. 673.

F. H. Prendergast, of Marshall, Tex., for plaintiff in error.

S. P. Jones, of Marshall, Tex. (Wm. Thompson, of Dallas, Tex., on the brief), for defendant in error.

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

WALKER, Circuit Judge. This was an action to recover damages for the destruction, on a date stated, of cotton by fire, which was attributed to sparks from a locomotive or locomotives of the defendant, which were alleged not to have been properly provided with appliances for preventing the escape of sparks or fire; it being also alleged that the defendant did not exercise proper care to keep said locomotives in good and proper condition and repair as regards the escape of fire therefrom, and that its employés in charge of said locomotives negligently and improperly operated them, so as to cause large quantities of sparks and cinders to escape. After the plaintiffs had introduced direct evidence tending to prove that, on the date mentioned, the cotton, which was on a platform adjoining the defendant's track, was discovered to be on fire very shortly after three locomotives of the defendant had passed, one or more of which was seen emitting large cinders in unusual quantities, and that there was no means for the fire being set other than the passing locomotives, they were per-

mitted, over objections duly made by the defendant, to introduce testimony to the effect that two or three days after the fire a locomotive of the defendant, which was admitted not to be either one of the three which passed the platform shortly before the fire was discovered, was seen emitting large cinders, which, as it was passing the platform, fell on cotton and scorched it.

In the case of Grand Trunk Railroad Company v. Richardson, 91 U. S. 454, 23 L. Ed. 356, in which, so far as the report of the case indicates, there was an absence of any direct evidence as to the emission of sparks by either of the two locomotives which passed the scene of the fire shortly before it started, and those locomotives not being identified, it was held that error was not committed in admitting evidence that some locomotives of the same defendant, at other times during the same season, prior to the time of the fire in question, had scattered fire while passing the same place. It seems that there was a necessity in that case to resort to circumstantial evidence to prove that sparks were scattered by either of the two engines which could have started the fire, and it was not made to appear that the scattering of sparks testified to was by a locomotive or locomotives which had no part in causing the fire in question. In the instant case there was direct evidence to support a finding that one or more of the locomotives which, shortly before the fire was discovered, passed the platform upon which the cotton was, then emitted sparks which might have started the fire, and it was admitted that the locomotive which, several days after the fire, was seen emitting large sparks was in no way responsible for the injury complained of.

We are not of opinion that the ruling in the case cited furnishes support for the proposition that evidence is admissible as to the construction, condition or operation, at a date subsequent to the fire complained of, of a locomotive which confessedly did not contribute to the starting of that fire. Where, as in the instant case, the facts of the starting of the fire complained of are so far disclosed by direct evidence introduced by the plaintiffs as to make it apparent that, if it was started by sparks from a passing locomotive, it was so started by one or more of three locomotives which passed shortly before the fire was discovered, further inquiry to support the charge made should be limited to the construction, condition, and operation of those locomotives, so shown to be the only ones by which the fire might have been caused. In such a situation it is apparent that evidence as to the emission of sparks several days later by a locomotive which was admitted not to be either of three which might have started the fire has reference to a matter which is entirely foreign to the issue to be passed on, namely, the negligence vel non of the defendant with reference to the construction, maintenance, or operation of the locomotive or locomotives which might have caused the fire. That evidence could have no logical or rational tendency to prove how those locomotives were constructed, in what state of repair they were, or how they were operated. It could shed no light on the inquiry as to what caused the fire. That evidence as to the excessive emission, several days after the fire in question, of sparks by a locomotive of the defendant which is identified

as one that had no part in causing that fire, is inadmissible to support a charge that the fire was negligently caused by some other locomotive or locomotives of the defendant is supported by reason and by abundant authority. Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133, 52 C. C. A. 95; Henderson, Hull & Co. v. Philadelphia & Reading R. Co., 144 Pa. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652; Alabama G. S. R. Co. v. Johnston, 128 Ala. 283, 29 South. 771; Gibbons v. Wisconsin Valley Railroad Co., 58 Wis. 335, 17 N. W. 132; San Antonio & A. P. Ry. Co. v. Home Insurance Co. of New York (Tex. Civ. App.) 70 S. W. 999; W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas, 50 Tex. Civ. App. 420, 110 S. W. 978; Moose v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 179 S. W. 75; 4 Chamberlayne on Evidence, § 3191.

In another case which grew out of the same fire it has been held that error was not committed in admitting evidence which was substantially the same as that above considered. Texas & Pacific Ry. v. Rosborough, 235 U. S. 429, 35 Sup. Ct. 117, 59 L. Ed. 299; Texas & P. Ry. Co. v. Rosborough, 209 Fed. 205, 126 C. C. A. 299. In that case that evidence was introduced by the plaintiff in rebuttal after the defendant had introduced evidence tending to show that its locomotives were all equipped with a standard spark arrester, and were kept in order and well handled, and it was held to be admissible as rebutting evidence. The ground upon which the admission of the evidence in that case was sustained does not exist in the instant case. Here the testimony complained of was introduced as a part of the evidence by which the plaintiffs undertook to sustain the averments of their petition. The conclusion is that it was not competent for the purpose for which it was offered and admitted, and that the admission of it was prejudicial error.

The judgment is reversed.

SMITH v. CURRIE et al.

(Circuit Court of Appeals, Fourth Circuit. February 24, 1916.)

No. 1412.

APPEAL AND ERROR ⊂⊃4—CIRCUIT COURT OF APPEALS—REVIEW OF DECISIONS OF STATE COURTS—FORM OF PROCEEDING.

In an action at law, known as claim and delivery, under the Code of North Carolina (Revisal 1905, §§ 790-802), judgment having gone against defendant, the Circuit Court of Appeals is without jurisdiction of an appeal, notwithstanding Rev. St. § 914 (Comp. St. 1913, § 1537), declaring that the pleadings and proceedings, other than in equity and admiralty cases, shall conform to the state practice, of an appeal by defendant, though bond was given and citation issued to plaintiff, for, the action being one at law, the judgment can be reviewed in the federal courts only on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. ⊂⊃4.]

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Newbern; Henry G. Connor, Judge.

Action by Benjamin C. Currie and others against Grover D. Smith. From a judgment for plaintiffs, defendant appeals. Appeal dismissed.

Larry I. Moore, of Newbern, N. C. (Moore & Dunn, of Newbern, N. C., on the brief), for appellant.

A. D. Ward, of Newbern, N. C. (T. D. Warren, of Newbern, N. C., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and BOYD, District Judge.

PER CURIAM. In this case the court is constrained of its own motion to raise the question of jurisdiction. The suit is brought to recover possession, alleged to be wrongfully withheld by the defendant below, of certain specified articles of personal property. It is plainly an action at law, known as "claim and delivery" under the Code of North Carolina. Revisal 1905, §§ 790–802. It was tried to a jury and judgment entered on a verdict for the plaintiff. The defendant thereupon prayed an appeal to the Circuit Court of Appeals, which was granted by the trial judge. A bond was given and citation issued to the plaintiffs; but there was no petition for a writ of error, and no writ of error has been filed or allowed. Such a case can be brought up for review only by writ of error, and a mere appeal is insufficient to give the appellate court jurisdiction. In every aspect the case is practically identical with Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379, decided by the Circuit Court of Appeals of the Seventh Circuit in March, 1894, and repeatedly followed. The opinion in that case contains a full and clear exposition of the law, and its complete application to the case at bar will appear from the following quotations:

"The action was one at law, to recover damages upon a contract for the delivery of ice. The case was tried before a jury in January, 1893, and a verdict rendered for the plaintiff on January 13, 1893, for $4,397.97. On February 20, 1893, a motion for a new trial was overruled, and judgment entered for the plaintiff upon the verdict. On April 19th an appeal was prayed for and allowed. The case was argued upon the merits on October 5, 1893, without any objection being raised as to the jurisdiction of this court to hear the case. It was afterwards discovered by the court that no writ of error had ever been prayed for or issued, and, the attention of counsel being called to the fact, argument was had and briefs were filed on the question whether or not this court could take jurisdiction of the case by consent, without a writ of error ever having been issued. If it could, then the objection on this ground must be considered as waived by the parties having argued and submitted the case upon the merits without objection.

"We are of opinion that this court has not obtained jurisdiction of the case, and that the appeal must be dismissed. The appropriate and only mode of bringing cases of law for review before this court is a writ of error. An appeal is applicable only in chancery cases. This distinction is obvious, and has been steadily observed and maintained by the United States Supreme Court for a century. Equity cases must be brought up by appeal, which brings up the entire record upon the facts as well as the law. Cases at law can only be brought up by writ of error, which simply brings up the record for the correction of errors of law; that is to say, a writ of error carries up nothing but questions of law, and these questions are to be determined according to the facts found in the record. * * *

"The Supreme Court has uniformly held that it can obtain appellate jurisdiction in a case at law only by the issuing by the proper authority of a

writ of error, and by filing the same in the court which rendered the judgment. Brooks v. Norris, 11 How. 204 [13 L. Ed. 665]. Consent will not give jurisdiction; and if, at any time, the record does not show the necessary facts to give the court jurisdiction, the court will dismiss the case. The jurisdiction of all the United States Courts is special. The Supreme Court and the Circuit Court of Appeals possess no appellate power in any case unless conferred upon them by act of Congress; nor can such jurisdiction, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes. Barry v. Mercein, 5 How. 103 [12 L. Ed. 70]; U. S. v. Curry, 6 How. 106 [12 L. Ed. 363]. * * *

"Some stress was laid in the argument of this question upon the waiver of the writ of error by the appellee, by arguing and submitting the case upon the merits, without objection or making a motion to dismiss; and, if consent of parties, without the formality of a writ, could give jurisdiction, after the time had expired for issuing the writ, there can be no doubt that the submitting of the case on the merits would be a waiver. The law gives six months after the entry of the judgment in which to issue the writ of error or take an appeal. This provision as to time is absolute. The right is strictly statutory. The time for suing out the writ or praying an appeal cannot be enlarged by stipulation of the parties, nor by the order of the court. * * *

"The true line of distinction running through the cases is between facts which are jurisdictional and those which are not. The issuance of the writ and filing it with the court below within the time prescribed by law are jurisdictional, and cannot be waived. They are the only means known to the law for bringing up for review cases at law; but any mere irregularity in setting up the record may be waived."

The same ruling was made in the Sixth Circuit Court of Appeals in February, 1895; Judge Taft writing the opinion:

"In this case the record shows that the defendants below prayed an appeal, and that the same was allowed by the court, and that a citation issued to the plaintiffs below to appear at a session of this court, pursuant to such appeal, and to show cause, if any there be, why the decree rendered, in the said appeal mentioned, should not be corrected. It is true that the supersedeas bond which was given recites that the defendants below have presented a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment rendered in the suit, and the condition of the bond is that the defendants shall prosecute their said writ of error to effect, and answer all damages and costs; but the wording of the bond cannot supply the absence of a writ of error, which, under the law, issues out of this court either by the clerk of this court or by the clerk of the Circuit Court. All the proceedings taken were expressly for an appeal, and give this court no jurisdiction to consider the cause, for the reasons above stated." Muhlenberg County v. Dyer et al., 65 Fed. 634, 13 C. C. A. 64.

Other decisions of like import are Old Nick Williams Company v. United States, 215 U. S. 541, 30 Sup. Ct. 221, 54 L. Ed. 318; Mackinaw City v. United States, 120 Fed. 252, 56 C. C. A. 88; Roberts v. Great Northern Ry. Co., 138 Fed. 711, 71 C. C. A. 127; United States ex rel. Schauffler v. Fidelity & Deposit Co., 147 Fed. 228, 77 C. C. A. 370; Kerr v. United States, 159 Fed. 428, 86 C. C. A. 408; United States v. Northwestern Development Co., 203 Fed. 960, 122 C. C. A. 262.

As to the effect of the Conformity Act (Rev. St. § 914 [Comp. St. 1913, § 1537]) in states where writs of error have been abolished by statute, and actions at law as well as suits in equity are brought up for review by appeal, the Circuit Court of Appeals of the Eighth Circuit has held:

"The acts of Congress give to defeated litigants in the national courts the right to a review of final judgments at law against them by writs of error, and a right to a review of final decrees in equity by appeal. These acts grant the power and fix the jurisdiction of the federal appellate courts. They are not matters of form or practice, but matters of power and jurisdiction. They are not affected by the act of conformity, * * * nor by the legislation or practice of the states." Hooven v. John Featherstone's Sons, 111 Fed. 81, 49 C. C. A. 229.

The appeal must be dismissed for want of jurisdiction.
Dismissed.

KIRKLAND et al. v. KNOX et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1916.)

No. 1401.

1. COURTS ⟸294—UNITED STATES COURTS—JURISDICTION—ANCILLARY JURISDICTION.

A suit by receivers appointed by a federal court to recover the possession of standing timber claimed by them as part of their trust estate, which they were prevented from cutting by the owner of the land, and to recover damages, was within the jurisdiction of the court appointing them, irrespective of the citizenship of the parties or the amount involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 836; Dec. Dig. ⟸294.]

2. LOGS AND LOGGING ⟸3(15)—SALES OF STANDING TIMBER—TIME FOR CUTTING—EVIDENCE AS TO DATE OF CONTRACT.

A contract of sale of standing timber required its removal within 10 years from the date thereof, but bore no date. It was probated on June 26, 1905, and recorded about 10 days later, and it was shown that on or near the date of probate the grantor deposited an amount equal to the recited consideration in a bank, and that this was his only deposit of that amount and the only deposit made about that time. One of the subscribing witnesses testified that he was absent from the county during the year 1905 until the latter part of May or the first part of June. *Held* that, in the absence of any evidence to the contrary, the court properly held as a presumption of law that the contract was executed about the time of its probate, and that the 10 years had not expired in March, 1915.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 12; Dec. Dig. ⟸3(15).]

3. LOGS AND LOGGING ⟸3(15)—SALES OF STANDING TIMBER—PREVENTING CUTTING—DAMAGES.

Receivers of a lumber company owning standing timber employed D. to cut and remove it, and he hired E., who had the necessary machinery and force of men to do the work. The owner of the land prevented the cutting of the timber. A sawmill and other machinery had been transported at considerable cost, and other outlays incurred in assembling a force of men and teams and providing for their maintenance. *Held* that, where the circumstances under which E. was employed and the authority of the receivers' agent to make the arrangement with him showed that the receivers were liable for his expenses, they could recover such expenses as damages for preventing the cutting, though the receivers made no direct contract with E.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 12; Dec. Dig. ⟸3(15).]

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

Action by Robert H. Knox and another, as receivers of the Hilton-Dodge Lumber Company, against Ela F. Kirkland and husband. Judgment for plaintiffs, and defendants bring error. Affirmed.

James A. Willis, of Barnwell, S. C. (James E. Davis, of Barnwell, S. C., on the brief), for plaintiffs in error.

Arthur R. Young, of Charleston, S. C. (B. A. Hagood and Hagood, Rivers & Young, all of Charleston, S. C., on the brief), for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. In February, 1915, the receivers of the Hilton-Dodge Lumber Company, claiming to own the timber on a tract of land in Barnwell county, S. C., employed one Durden to cut and remove the same. Durden hired a man by the name of Edenfield, who had the needful machinery and force of men, to do the work. In the latter part of March these agents of the receivers attempted to commence operations, but were prevented from going upon the premises by George D. Kirkland, acting for his wife, Ela F. Kirkland, the then owner of the land. The receivers thereupon brought suit for possession of the property and for expenses incurred in preparing to cut the timber. They had judgment in the court below, entered upon the verdict of a jury, and the case comes here on writ of error.

[1] It is contended that the District Court was without jurisdiction, because the requisite amount was not involved; but the contention is without merit. The receivers were appointed by the federal court in which the suit was brought, and pursuant to its order. It was brought to recover property claimed by the receivers as part of their trust estate, the possession of which was refused by defendants, and was therefore auxiliary to the main action in which they had been appointed. Under these circumstances the court had jurisdiction irrespective of the citizenship of the parties or the amount involved, as the Supreme Court expressly held in White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67. The opinion in that case says:

"Any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties, or of the amount in controversy."

[2] The contract under which the receivers claim limited the time for cutting and removing the timber to "the space and term of ten years from the date of this lease and sale." This contract, however, bore no date of month or year, the spaces for the insertion of the dates having been left blank, and from this omission it is argued that there was failure to prove that the 10 years had not expired when the receivers attempted the cutting operations which defendants interdicted. But the instrument was probated on the 26th of June, 1905, and

recorded some 10 days later; the consideration named therein, and recited to have been paid before execution, was $500; and it was shown that one of the grantors deposited that sum in bank on or near the date of probate, that this was his only deposit of that amount, and that he made no other deposits about that time. Moreover, one of the subscribing witnesses to the contract testified that he was absent from Screven county, the county in which the instrument was probated, all of the year 1905 until the latter part of May or first part of June, and therefore could not have witnessed the paper at an earlier date. On this showing, nothing whatever appearing of contrary import, the court below held as a presumption of law that the contract was executed about the time of its probate, and therefore the 10 years had not expired when the receivers made preparations for cutting the timber as above stated. The correctness of this ruling is so evident that it cannot need the support of argument or citation.

The right of the receivers to the possession of the timber on this tract was virtually conceded on the trial, and that question disappeared from the case. At the conclusion of the testimony, and before charging the jury, the court, addressing defendants' counsel, said:

"As to the right to the timber you yourselves admit upon the papers that these people are entitled to that."

The record shows that no objection was made to this statement, and the ruling, repeated in the subsequent charge, is not made the subject of exception.

[3] The only remaining issue was the amount of recoverable damage, and that issue was submitted to the jury for determination. The court held that the receivers, having the right to cut the timber covered by the contract, and having been prevented from exercising that right by defendants' refusal to allow them to go upon the premises, could recover the expenses to which they were actually put in preparing for cutting operations. A sawmill and other machinery had been transported at considerable cost, and other outlays incurred in assembling a force of men and teams and providing for their maintenance. The amount of the verdict was somewhat less than the aggregate items of expenditure, and it cannot be said that the damages awarded are not fully sustained by the testimony. Something is sought to be made of the fact that the receivers had made no direct contract with Edenfield, the man whom Durden hired to do the work; but the circumstances under which he was employed, and the proven authority of the agents of the receivers to make the arrangement with him, leave no room for doubt that the receivers were liable for his expenses, and that was sufficient to establish their right of action.

The other assignments of error are covered by what has already been said or relate to rulings upon immaterial questions. The record discloses no reversible error, and the judgment is therefore affirmed.

NORD DEUTSCHE INS. CO. OF HAMBURG, GERMANY, v. HART.

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 81.

1. INSURANCE ⊂=651(1)—ACTIONS ON CONTRACTS—ADMISSIBILITY OF EVIDENCE.
In an action on a memorandum contract of insurance or binder covering a building described as a frame dwelling house, where, though defendant claimed that the building was not a dwelling house, but a "builder's risk," the evidence showed that repairs which would bring it within the definition of a "builder's risk" had been completed and that it was a dwelling house, all testimony to show the rates charged for builders' risks absolutely or relatively was immaterial, and evidence as to the technical meaning of the expressions "dwelling house risk" and "builder's risk," and the bearing this classification had upon the rates charged for insurance, was properly excluded.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1673; Dec. Dig. ⊂=651(1).]

2. INSURANCE ⊂=132—CONTRACTS—BINDERS.
A memorandum insurance contract, or binder, was not void on the ground that it did not express any consideration, where thereunder insured had agreed to pay the regular premium of the policy to be issued.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 210; Dec. Dig. ⊂=132.]

3. INSURANCE ⊂=132—CONSIDERATION FOR BINDER—CHANGE OF CONDITION.
Where insured relied upon a binder or memorandum insurance contract, and did not protect herself by getting insurance elsewhere, this change in her condition constituted a good consideration.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 210; Dec. Dig. ⊂=132.]

4. INSURANCE ⊂=132—CONTRACTS—PARTIES BY WHOM MADE.
In an action on an insurance contract, plaintiff claimed that he applied for insurance to defendant's authorized agent, who suggested that they should see an officer of the defendant, defendant's offices being in the same building as those of the agent, and that they saw an officer who authorized the signing of a binder. The officer denied that any such interview took place. *Held* that, if plaintiff's story was true, the contract was entered into directly by defendant, and, if not, the contract was made by a regular authorized agent of defendant, and bound it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 210; Dec. Dig. ⊂=132.]

5. INSURANCE ⊂=648(1)—ACTIONS ON CONTRACTS—ADMISSIBILITY OF EVIDENCE.
In an action on an insurance binder covering a building described as a dwelling house, but claimed by defendant to constitute a hotel risk, or a "builder's risk," the court excluded a map offered by defendant on which it entered its risks. *Held*, that the map was irrelevant, since, if it did not include the risk for which defendant's agent had signed a binder, this circumstance would not affect plaintiff, while, if it did include the risk, describing it as a dwelling house, it merely corroborated plaintiff's contention, and if it described it as a hotel risk, or builder's risk, there was no defense left to the action, only a somewhat larger sum would be deducted from the recovery for the premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1669, 1676; Dec. Dig. ⊂=648(1).]

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

Action by Louis G. Hart against the Nord Deutsche Insurance Company of Hamburg, Germany. Judgment for plaintiff, and defendant brings error. Affirmed.

This cause comes here upon appeal to review a judgment in favor of defendant in error, who was plaintiff below. The action is based upon a memorandum contract for fire insurance, ordinarily known as a "binder." Upon the close of the testimony both sides moved for a direction; the court denied defendant's motion, and instructed the jury to find for the plaintiff; defendant did not ask to go to the jury on any specific question.

Cabell & Gilpin, of New York City (H. Cabell, of New York City, of counsel), for plaintiff in error.

Cardozo & Nathan, of New York City (Edgar J. Nathan and Brison Howie, both of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The risk described in the binder is a "frame dwelling house." Defendant contended that the risk was in fact a "hotel," or a "builder's risk." At one time the premises had formed part of a group of buildings which together constituted a hotel. That condition of affairs had ceased to exist before the binder was signed. Repairs had been undertaken, which would bring the premises within the definition of a "builder's risk"; but these had been completed before the binder was signed. It is not necessary to rehearse the undisputed testimony; that the building, on the date the binder was signed, was a "frame dwelling house" was abundantly proved; it was inhabited on the day of the fire.

[1] Defendant further contends that the court erred in refusing to permit defendant to show the technical meaning of the expressions "dwelling house risk" and "builder's risk" and the bearing this classification has upon the rates charged for insurance. The court did allow defendant's witness to testify fully as to what a "builder's risk" was. Since this building was not within the terms of such definition all testimony offered to show the rates charged for builder's risks, absolutely or relatively, was immaterial.

[2, 3] It is further contended that the contract sued upon (the binder) is void because it does not express any consideration. We find no merit in this point; under the binder the insured had agreed to pay the regular premium of the policy to be issued. At all events, as the insured relied upon the binder and did not protect herself by getting insurance elsewhere, this change in her condition would constitute a good consideration.

[4] There was a conflict of testimony upon one point in the case. Plaintiff's story is that he applied for insurance to the authorized agent of the company, and that the agent suggested they should see an officer of the underwriter; defendant's offices being in the same building as those of the agent. That they saw the officer of defendant, who, on being told the risk was a "frame dwelling house" authorized

the signing of a binder. If this be so, the contract was entered into, directly, by defendant. The officer of the underwriter testified that no such interview with him took place. If that be so the contract was made by the regular authorized agent of defendant, and, of course, bound it.

[5] We find no error in the exclusion of a map offered by defendant on which it entered its risks. Without expressing any opinion as to the competency of such evidence, we can see nothing in the record which would make it relevant. If it did not include the risk which its agent had signed a binder for, that circumstance would not affect the plaintiff. If it did include the risk, described as a "frame dwelling house," it merely corroborated plaintiff's contention. Presumably it did not include the building classified as a hotel risk, or a builder's risk, because defendant insisted that, as such, it would not have underwritten the building at all. If, however, it did contain the building thus classified, there was no defense left to the action, only a somewhat larger sum would be deducted from the recovery for premium.

The judgment is affirmed.

In re FITZHUGH HALL AMUSEMENT CO.

In re RUDOLPH WURLITZER CO.

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 147.

1. SALES ⟸467—CONDITIONAL SALE—EFFECT.
   A contract for the sale of a chattel, which provides that the title shall remain in the seller until the balance due on the purchase price is paid, does not give the seller a lien, but gives him the title.

   [Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1354, 1358–1364; Dec. Dig. ⟸467.]

2. BANKRUPTCY ⟸140(1)—PROPERTY PASSING TO TRUSTEE—CONDITIONAL SALE—ELECTION.
   Where the seller of a chattel, who had reserved title until the balance of the purchase price was paid, permitted the sheriff to levy execution issued on his judgment for the balance on the chattel, and later made an agreement for payment, and instructed the sheriff to hold the execution, he waived his reserved title, and can rely only on his execution lien, which, under Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564, as amended by Act June 25, 1910, c. 412, § 12, 36 Stat. 842 (Comp. St. 1913, § 9651), was invalid against a trustee, where the petition was filed within four months after the levy.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⟸140(1).]

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

In the matter of the Fitzhugh Hall Amusement Company, bankrupt. From an order of the District Court, authorizing the trustee

to sell an organ claimed by the Rudolph Wurlitzer Company, free from liens (228 Fed. 169), the claimant appeals. Affirmed.

This cause comes here upon appeal from an order authorizing the trustee herein to sell an organ alleged to belong to the Rudolph Wurlitzer Company free from all liens of said company and to place the proceeds in a separate account to the credit of the trustee subject to further order of the court to await the outcome of an appropriate action to determine the validity of the Rudolph Wurlitzer Company's lien. The opinion below of Judge Thomas will be found in 228 Fed. 169.

Kirby & Millener, of Rochester, N. Y. (Isaac Adler, of Rochester, N. Y., of counsel), for appellant.

Albert H. Stearns, of Rochester, N. Y., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. More than a year before bankruptcy the Amusement Company entered into a contract with one Kelley for the purchase of an organ. Kelley's rights under the contract were duly assigned to the Wurlitzer Company, which will be hereinafter treated as if it were the original party to the contract. The sale was a conditional one; the consideration was $10,000, payable $500 upon delivery and the balance in equal monthly payments, notes being given for each future installment. The contract provided that in case of default on any note, all should become due; also that in case of default the vendor might take possession and remove the instrument without legal process. It contained the provision:

"The title to said instrument will not pass until the purchase price or any judgment for the same is paid in full and shall remain your [vendor's] property until that time."

The purchaser being in default, the Wurlitzer Company brought suit on January 26, 1914, for the balance due, and judgment was entered therein against the bankrupt for $9,454.70 on February 18, 1914. Execution therefor was issued to the sheriff on the same day. The sheriff went at once to the premises of the Amusement Company and made a levy on everything there, "piano, organ, chairs, carpets, pictures, desk and safe." Bankrupt's manager then entered into negotiations with the company's attorneys and as a result one Arnold, who was interested in the bankrupt, paid $2,000 and it was agreed that the sheriff should not close the place up for 10 days; the attorneys who had issued the execution instructed him to hold the levy. The Amusement Company was adjudged a bankrupt in May, less than four months after the judgment, execution and levy. The Wurlitzer Company filed a claim for the balance due on the contract as a secured claim on the theory that the security was the title to the organ reserved under the conditional sale.

The order of the District Court now here for review merely authorized the trustee to sell the organ, which came into his possession because it was in the bankrupt's possession, free of lien. The proceeds were ordered to be held for further adjudication as to their disposi-

tion. Inasmuch as the only lien of which there is any suggestion in the case is that created against the bankrupt's property by judgment, levy, and execution, which lien was void under section 67f, because it originated within four months of bankruptcy, there seems to be no error in holding that the organ was free of lien. The District Judge, in his opinion (the idea is not found in the order), refers to this lien as valid, but as losing its preferential character in favor of the attaching creditor. What in the case at bar would be accomplished by such a holding we do not understand.

[1, 2] The case is greatly confused by the circumstance that every one, counsel, referee, and District Judge, treated the case as if the original contract created a lien. This is a mistake; the contract was not a chattel mortgage, but a conditional sale. We have no question of lien, but only a question of title. At the time the order was made was the title to the organ in the Wurlitzer Company or in the trustee as representative and successor in title of the bankrupt to whom the conditional sale was made? The amendment of 1910 which gives a trustee the rights of a creditor holding a lien cuts no figure, if the title to the organ was in the Wurlitzer Company. Undoubtedly the title remained in the vendor at the time the organ was delivered, although at any time thereafter the company could waive its rights to repossession and allow the title to become absolute. It did not exercise such election by taking notes for installments to come due; nor by suing and taking judgment for such installments when they came due under the terms of the contract, because the contract provided expressly that the title should not pass until such judgment was paid in full. Nor do we think the situation would be changed by the issue of a general execution; non constat but what the judgment might have been collected out of the vendor's property aside from the organ. If, however, the vendor instructed the sheriff to levy on the organ, or stood by and saw him levy on the organ as part of the vendee's property without advising him that the organ belonged to the vendor, we think such conduct would amount to an election to rely on the judgment and execution and to give up the right to retake the organ under claim of title in itself. There would be nothing surprising in making such an election, because had the vendor decided to retake the organ it would have been subject to the onerous provisions of article 4 of the Personal Property Act (Consol. Laws, c. 41).

The evidence fails to show that the sheriff was expressly instructed to levy on the organ; but it does appear that he levied on it, that the attorney for the vendor knew that he had done so and did not inform him that the organ did not belong to the vendee. On the contrary, when the $2,000 was paid by a ten-day note of Arnold and extension given to continue the exhibition in the Amusement Hall the sheriff was told by the vendor's attorney to hold the levy, which he knew included the organ. Of course the vendor could neither direct nor hold levy of an execution on its own property. On that day the title passed and in place of title the vendor had a lien under the execution, but that lien, arising within four months, was wiped out by bankruptcy.

The order is affirmed.

PHILADELPHIA & READING RY. CO. v. SHERMAN.

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 181.

1. REMOVAL OF CAUSES ⟸112—OBJECTION TO JURISDICTION OF STATE COURT.
Objections as to the jurisdiction of a state court over the subject-matter may be taken advantage of at any time in a federal court after removal thereto.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 238; Dec. Dig. ⟸112.]

2. REMOVAL OF CAUSES ⟸119—RESIDENCE OF PLAINTIFF IN STATE—QUESTION FOR JURY.
In a suit by a purported resident of New York against a Pennsylvania railroad for injuries, removed to the federal court on the ground of diversity of citizenship, whether plaintiff was a bona fide resident of New York, entitling him to sue in the courts thereof, so that the state court originally had jurisdiction of the suit, was for the jury; the question depending on the fact of his intention in taking up residence in New York and the surrounding circumstances.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 252; Dec. Dig. ⟸119.]

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

Suit by William Sherman against the Philadelphia & Reading Railway Company. To review a judgment for plaintiff, defendant brings error. Judgment reversed, and new trial ordered.

Armstrong, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for plaintiff in error.

J. C. Robinson, of New York City, for the defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The plaintiff was struck and injured by one of defendant's trains at a street crossing in the city of Shamokin, Pa., and he brought suit to recover damages in the Supreme Court of the State of New York for Richmond County. The defendant appeared specially to remove the cause to the District Court of the United States for the Eastern District of New York and in its petition alleged that it was a corporation of the state of Pennsylvania and a resident and citizen of that state and that the plaintiff "claims to have been at the time of the commencement of this action and since a resident, citizen and inhabitant of the state of New York." There was no such allegation in the complaint and so far as the plaintiff's citizenship is concerned it was untrue. However, the cause was removed upon the strength of the defendant's allegation. In direct contradiction thereof the answer set up as an independent defense:

"Fourth. That neither at the time of said accident nor at the time of the commencement of this action was the plaintiff a resident, citizen and inhabitant of the state of New York, but at all such times said plaintiff was and now is a resident and inhabitant of the state of Pennsylvania. That the defendant is a foreign corporation, transacts no business in this state and has no property in this state, and this court has not and should not entertain jurisdiction of said action."

Though this defense might well have been more explicit, it seems to proceed upon the ground that the state court had no jurisdiction of the subject-matter of the action under section 1780, Code of Civil Procedure, which reads:

"Sec. 1780. (Am'd. 1913) *When Foreign Corporation may be Sued.* An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a nonresident, in one of the following cases only:

"1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

"2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.

"3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

"4. Where a foreign corporation is doing business within this state."

It appeared at the very outset of the trial on the plaintiff's examination that he was an alien, a citizen of Russia and lived in Staten Island when the action was begun. On cross-examination he said that he left Pennsylvania because he could no longer work as a miner on account of his injury; that he came to Staten Island to get light work; that he had lived between there and Brooklyn about two months before he brought his action and would have stayed there if he could have got work, but four or five days thereafter he went to Jersey City where he did find employment and had lived ever since. Thereupon the defendant moved to dismiss:

"Upon the ground that upon the plaintiff's own showing that he is not such a resident of New York as justifies him in bringing this suit here."

At the close of the plaintiff's case the defendant again raised the question of jurisdiction in a quite unintelligible form:

"Defendant moves to dismiss: 1st. Court has no jurisdiction over subject action of defendant."

Upon the close of the whole case the defendant moved:

"Mr. Brown: I will now make a motion to dismiss the complaint and for the direction of a verdict for the defendant, upon the ground that it is now apparent that the plaintiff was not at the time of the commencement of the action and is not now such a bona fide resident of the state of New York as entitles him to sue in the courts of New York."

This did present definitely the objection as to jurisdiction over the subject-matter because the plaintiff was not such a bona fide resident of the state of New York as to be entitled to sue a foreign corporation in the courts of that state on a cause of action arising without the state. But the court evidently and not unnaturally, as we think from the way the subject had been presented throughout the case, still thought of the objection as being to the jurisdiction of the person of the defendant within the federal statutes:

"Mr. Brown: Now, about this question of residence, the reason that I have in a great many of these cases asked that that question be submitted—and it has always been granted—is that that would be the first question that the

jury would determine. If they determine that he just came for the purpose of suing, that would end the case.

"The Court: No. A man being an alien, has a right to bring suit in any state, if the defendant comes into court. He simply brings his action and you remove it into this court for hearing. If he has made misstatements about it, that goes to his credibility and nothing else. I will deny the motions so as to leave the question to the jury.

"Mr. Brown: I except, and I except also to the ruling of the court that the question of residence is only one for the purpose of attacking the credibility of the plaintiff."

[1] Objections as to the jurisdiction of the state court over the subject-matter may be taken advantage of at any time, De Lima v. Bidwell, 182 U. S. 174, 21 Sup. Ct. 744, 45 L. Ed. 1041, in which Mr. Justice Brown said:

"Did the question of jurisdiction raised by the demurrer involve only the jurisdiction of the Circuit Court as a federal court, we should be obliged to say that the defendant was not in a position to make this claim, since the case was removed to the federal court upon his own petition. It is no infringement upon the ancient maxim of the law that consent cannot confer jurisdiction, to hold that, where a party has procured the removal of a cause from a state court upon the ground that he is lawfully entitled to a trial in a federal court, he is estopped to deny that such removal was lawful, if the federal court could take jurisdiction of the case or that the federal court did not have the same right to pass upon the questions at issue that the state court would have had, if the cause had remained there. Defendant neither gains nor loses by the removal, and the case proceeds as if no such removal had taken place. Cowley v. Northern Pacific Railroad Co., 159 U. S. 569, 583 [16 Sup. Ct. 127, 40 L. Ed. 263]; Mansfield Railway Co. v. Swan, 111 U. S. 379 [4 Sup. Ct. 510, 28 L. Ed. 462]; Mexican Nat. Railroad v. Davidson, 157 U. S. 201 [15 Sup. Ct. 563, 39 L. Ed. 672]. This, however, is more a matter of words than of substance, as the defendant unquestionably has the right to show that the state court had no jurisdiction, or that the complaint did not set forth facts sufficient to constitute a cause of action. This we understand to be the substance of the defense in this connection."

The Court of Appeals of New York has held that the objection that the plaintiff is not a resident of the state in such a suit does go to the subject-matter, Robinson v. Oceanic Steam Navigation Co., 112 N. Y. 315, 324, 19 N. E. 625, 627 [2 L. R. A. 636], Earl, J., saying:

"It is not sufficient that a nonresident plaintiff should, by any service of process or in any other way, obtain jurisdiction of a foreign corporation; but before the action can be maintained, in any court of this state, there must also be jurisdiction of the subject-matter of the action. Jurisdiction of the action cannot be conferred upon the court by any consent or stipulation of the parties. The objection to the jurisdiction in such case may be taken at any stage of the action, and the court may, ex mero motu, at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action. Cooley's Const. Lim. 398; Davidsburgh v. Knickerbocker L. Ins. Co., 90 N. Y. 526. In the case cited Danforth, J., said: 'There are no doubt many cases where the court having jurisdiction over the subject-matter may proceed against a defendant who voluntarily submits to its decision; but where the state prescribes conditions under which a court may act, those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact.'"

[2] The question of the plaintiff's residence was one of intention to be drawn not only from his testimony as to intention but from the surrounding circumstances. It was for the jury, not being a pure

question of law but depending upon facts. The jury might find residence on less evidence in the case of an unmarried and disabled laboring man looking for light work than they would in the case of a man with a family, well to do and accustomed to a permanent domicile.

The objection made by the defendant is a substantial one and although it should have been pleaded more specially and brought more clearly to the attention of the trial judge than it was, we feel obliged to reverse the judgment and order a new trial.

FIRST NAT. BANK OF BAYONNE et al. v. ANGLO-SOUTH AMERICAN BANK, Limited.

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 130.

1. APPEAL AND ERROR ⟸1008(2)—REVIEW—QUESTIONS OF FACT.
Where a jury was waived by stipulation, the court's finding on the issues of fact had the effect and force of a verdict by a jury.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3957, 3964; Dec. Dig. ⟸1008(2).]

2. BILLS AND NOTES ⟸237, 496(3)—BONA FIDE HOLDERS—PRESUMPTIONS.
The indorsement of commercial paper by a bank does not, in the absence of proof, indicate an accommodation indorsement; and, in an action involving the good faith of a subsequent purchaser, no presumption based upon the indorsement alone can be indulged in.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 564, 1665½; Dec. Dig. ⟸237, 496(3).]

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

Action by the Anglo-South American Bank, Limited, against the First National Bank of Bayonne and another. To review a judgment entered upon the direction of the court, a jury having been waived, in favor of the plaintiff for the sum of $26,553.84, defendants bring error. Affirmed.

Barber, Watson & Gibboney, of New York City (Archibald R. Watson and Stuart G. Gibboney, both of New York City, of counsel), for plaintiffs in error.

Whitridge, Butler & Rice, of New York City (Edwin T. Rice, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. [1] This action was tried before Judge Grubb, a jury being waived. The Anglo-South American Bank sued the Bayonne Bank to recover upon five protested bills of exchange which were purchased by the Anglo Bank in the city of New York, in the ordinary course of business, in August and October, 1913. The purchase was made of Bierling & Son, brokers in foreign exchange, who were paid the full amount due thereon. At the time the drafts were purchased by the Anglo Bank they were indorsed by the

"First National Bank of Bayonne—George Carragan, President." The Anglo Bank thereupon stamped above the indorsement which was in blank the words, "Pay to the order of the Anglo-South American Bank, Ltd." The court found the issues of fact for the plaintiff, which has the effect and force of a verdict by a jury. In other words if a jury had been present and had found for the plaintiff on all the issues of fact, it would have had no different effect than the finding by the court after a stipulation waiving the jury. Judge Grubb says in his opinion:

"It seems to me that the Anglo-American Bank was a taker, in due course, and for value and without actual knowledge that the paper was accommodation paper, and without knowledge of any facts that would make the taking of it an act of bad faith under the New York Negotiable Instrument Act. * * * It does not seem to me that there is evidence of knowledge of facts that would make it bad faith on the part of the Anglo-American Bank to have taken the paper."

In Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373, the court said:

"If there be no special findings, there can be no inquiry as to whether the judgment is thus supported. We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury."

See U. S. v. U. S. Fidelity & Guaranty Co., 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696; Schmid v. Dohan, 167 Fed. 804, 93 C. C. A. 194.

Although we might rest our opinion upon the rule thus enunciated we think it proper to say that the evidence warranted a finding that the Anglo-American Bank had no actual knowledge that it was dealing with accommodation paper or of any fact of which bad faith can be predicated.

[2] The indorsement of commercial paper by a bank does not, in the absence of proof, indicate an accommodation indorsement. No presumption can be indulged in based upon the indorsement alone. The bills of exchange on their face showed nothing to indicate that the Bayonne Bank did not own them and that its indorsement was not made in due course and intended to create a liability. It would produce endless confusion in the financial world if an indorsement so made cannot be taken for its full face value.

The judgment is affirmed with costs.

SCHMID v. ROSENTHAL.

(Circuit Court of Appeals, Third Circuit. March 24, 1916.)

No. 2057.

1. BANKRUPTCY ⊜467—REVIEW—QUESTIONS OF FACT.

Nothing except a plain mistake will justify an appellate court in disregarding the findings of the referee in bankruptcy, approved by the District Court, upon disputed questions of fact.

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

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2. BANKRUPTCY ⇐136(2)—CONCEALMENT OF ASSETS—PROCEEDINGS—FINDINGS.
A proceeding for an order requiring a bankrupt to turn over to the trustee assets which it is claimed he is concealing is not a proceeding to punish for contempt, and in that stage of the controversy the finding as to the bankrupt's possession of the concealed assets should be restricted to the date of the bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235; Dec. Dig. ⇐136(2).]

Appeal and Petition to Revise from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

In the matter of S. A. Schmid, bankrupt. An order of the referee directing the bankrupt to pay concealed assets to David Rosenthal, the trustee, was affirmed by the District Judge, and the bankrupt appeals and files a petition to revise. Modified and affirmed.

Andrew Hourigan and David Oppenheimer, both of Wilkes-Barre, Pa., for appellant.

David Rosenthal and W. N. Reynolds, Jr., both of Wilkes-Barre, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. [1] On May 22, 1915, S. A. Schmid was adjudged an involuntary bankrupt, after carrying on business for about a year in the city of Wilkes-Barre. In July, the trustee filed a petition with the referee, averring that the bankrupt was concealing assets in the sum of $10,000, and asking for an order requiring the money to be turned over. Testimony was taken and a hearing had, the result being a finding by the referee that the bankrupt "had and now has in his possession" $5,102.20, and an order to pay over that amount forthwith. Upon a petition to review, the District Judge affirmed the order, directing the bankrupt to pay within 30 days from September 14. The present proceeding asserts the order to be erroneous, and assigns several errors, mainly to the effect that the referee's finding was not justified by the competent evidence. We agree that the record is not as satisfactory as we might desire, but we shall not discuss the facts, because we are satisfied nevertheless with the referee's conclusion. We see no sufficient reason to depart from the well-settled rule that nothing except a plain mistake will justify an appellate court in disregarding the concurrent findings of two subordinate tribunals upon disputed questions of fact. Epstein v. Steinfeld (C. C. A. 3d) 210 Fed. 236, 127 C. C. A. 54.

[2] Some confusion seems to exist in the minds of counsel concerning the effect of the order below, and we may say a few further words to make the situation clear. This is not a proceeding to punish for contempt; the controversy has not yet reached that stage. Nothing has been done thus far except to ascertain what sum of money the bankrupt should have accounted for at the time of the adjudication, and should have turned over to his trustee afterward. The prac-

tice in this circuit was definitely settled by the decision in Epstein v. Steinfeld, supra (followed in Re Pennell [C. C. A. 3d] 214 Fed. 341, 130 C. C. A. 645), and with a slight modification the referee's finding will conform to that decision. The finding should have been restricted to the date of bankruptcy, and should therefore be modified by striking out the words "and now has in his possession," and by substituting therefor the words "at the time the petition in bankruptcy was filed." The District Judge will of course fix another date for payment of the money.

Thus modified, the order appealed from is affirmed.

LEE LEW YOU v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 132.

1. ALIENS ⟸32(5)—CHINESE PERSONS—PRESUMPTION.
   The presumption that a person of the Mongolian race is not a citizen is strengthened when he attempts to enter the country in a clandestine manner.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(5).]

2. ALIENS ⟸32(12)—DEPORTATION—REVIEW—FINDINGS.
   A finding of the commissioner, approved by the District Court, will not be disturbed on appeal, where there is evidence in support of it.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⟸32(12).]

Appeal from the District Court of the Southern District of New York.

Proceeding by the United States of America against Lee Lew You. From an order of the District Court, affirming the judgment of the commissioner, ordering deportation of defendant, he appeals. Affirmed.

Robert M. Moore, of New York City, for appellant.

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.

COXE, Circuit Judge. This is an appeal from an order of the District Court for the Southern District of New York affirming a judgment of the commissioner ordering the deportation of the appellant to China.

His contention before the commissioner was that he was born in San Francisco 38 years ago. If he were a native-born citizen of the United States, it seems incredible that he should have paid a white man $150 to smuggle him across the Canadian border in a freight car, there being two other Chinese persons in the car.

[1] The presumption that a person of the Mongolian race is not a citizen is materially strengthened when he seeks to enter the country in so clandestine a manner. The commissioner who heard the testimony and the judge who reviewed it did not believe that the appellant was born in the United States. The assignment of errors brings up the single question that the judgment is against the weight of evidence.

[2] In such circumstances, the commissioner and the judge agreeing, we think the decision on the facts should not be disturbed by an appellate court. Chin Bak Kan v. U. S., 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121; Lee Sim v. U. S., 218 Fed. 432, 134 C. C. A. 232. As was said by Chief Justice Fuller in the former case (186 U. S. at page 201, 22 Sup. Ct. at page 895, 46 L. Ed. 1121):

"We are of the opinion that we cannot properly re-examine the facts already determined by two judgments below."

The judgment and order of the District Court are affirmed.

NATIONAL MALLEABLE CASTINGS CO. et al. v. T. H. SYMINGTON CO.

(Circuit Court of Appeals, First Circuit. February 3, 1916.)

No. 1147.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—DRAFT-RIGGING FOR RAILWAY CARS.

The Byers patent, No. 673,419, for a draft-rigging for railway cars, the special feature of which is the ready removability of the shock-absorbing parts in case of breakage, claims 3, 5, and 6, *held* not anticipated, valid, and infringed; claims 1, 2, and 10 *held* not anticipated and valid, but not infringed; and claim 8 *held* void for anticipation, and also such claim and claim 7 not infringed.

2. PATENTS ⟸259—CONTRIBUTORY INFRINGEMENT.

A defendant is not chargeable with contributory infringement because it manufactures and furnishes to another parts used in an infringing structure, where none of such parts are elements of the patented combination.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 400–402; Dec. Dig. ⟸259.]

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit in equity by the National Malleable Castings Company and another against the T. H. Symington Company. Decree for defendant, and complainants appeal. Reversed.

For opinion below, see 222 Fed. 517.

Clarence D. Kerr, of New York City (Charles Neave, of New York City, on the brief), for appellants.

Gilbert P. Ritter, of Washington, D. C. (W. Stuart Symington, Jr., of Baltimore, Md., of counsel), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. The plaintiffs, the National Malleable Castings Company and Jacob J. Byers, are the exclusive owners of

United States letters patent No. 673,419, issued to them May 7, 1901, on the application of said Byers filed April 21, 1900, and complain of its infringement by the defendant, the T. H. Symington Company.

The patent is for a draft-rigging for railway cars, and relates to structures used for coupling cars and intended to prevent the shock or jar, due to pushing and pulling the train, from being transmitted from car to car. To do away with this it has been customary to provide a cushioning or yielding device between each coupler and the car to which it is attached. This mechanism is called a draft-rigging and includes the drawbar carrying the coupler at its outer end, and at its inner end shock-absorbing mechanism interposed between the drawbar and the parts which are rigidly connected with the car.

The shock-absorbing mechanism of the patent in suit consists of a single spring or a pair of springs arranged one above the other, the ends of which are engaged by followers, the springs and followers being inclosed by a yoke, the arms of which are connected to the rear end of the drawbar by rivets or a removable key. This mechanism is held in place by parts rigidly connected to the car, and the relation between the spring mechanism and the parts rigidly connected to the car is such that, whether the car is pulled or pushed, the springs will be compressed between the drawbar and the car and the shock thus greatly reduced.

On freight cars where great weights are drawn, it is necessary to make the parts very strong and heavy. The weight of those provided under the patent in suit are as follows: Coupler, 300 pounds; yoke, 112 pounds; springs, 55 pounds each; followers, 60 pounds each; key, 40 pounds; spacer-block, 15 pounds; making a total of over 700 pounds. Notwithstanding the great strength of the parts, they frequently break and have to be replaced. The capacity of ready removal and replacement of the parts is, therefore, an important factor, and, in view of their weight and location in a limited space under the car, the arrangement of the mechanism so that the desired result may be accomplished presents a difficult problem.

[1] The special feature relied upon by the plaintiffs in connection with their device is that the shock-absorbing mechanism may be placed in position after the other parts have been affixed to the car, and, in case of breakage, may be removed without disturbing the yoke and drawbar; and they contend that Byers was the first to invent a mechanism presenting the combination of elements disclosed in his patent that would answer these requirements.

In the specification, after referring to certain drawings which represent the shank of the drawbar and the pocket, which is set between the draft timbers to which it is affixed by bolts, the patentee says:

"The pocket may be cast in a single piece and is provided with horizontal lugs *5 5*, which extend across the pocket, above and below, and constitute abutments for the followers *6 6'*, which are set in the pocket. The pocket and lugs are suitably braced by metal ribs or flanges, as shown. *7 7'* are springs, placed, preferably, one above the other between the followers, and to hold them in place, as well as to limit the approach of the followers, I may provide the latter with projecting stops *8*, which extend from such followers between the springs. The drawbar shank *2* is connected with the rear follower *6'* by a yoke *2'*, which is fixed to the drawbar by riveting or otherwise, and extends

within the pocket, between the lugs and around the rear follower, as shown. The pocket is open at the bottom, so that the follower-plates and springs may be removed freely from within the yoke in a vertical direction without the necessity of disengaging the yoke from the drawbar, since the follower-plates are not connected with the drawbar otherwise than by being placed between the sides of the yoke. This removal is made possible by taking off a cap-plate *9*, which closes the opening at the bottom of the pocket and is secured by bolts *9a*, and the follower-plates can then be pried out by means of a tool applied to toothed recesses *10*, formed in the edges of the follower-plates."

He also provides for:

"A stop-piece *12*, made separate from the follower-plates and interposed between the springs, performing the same function as is performed by the projections from the follower-plates shown in Figs. 1 and 4."

He also provides for:

"In addition to the stops *12* * * * as an alternate construction stops *18*, either hollow or solid; which may be set axially within the springs between the follower-plates."

He refers to Fig. 4 as presenting a front elevation of the follower, which discloses that it is rectangular in shape, but in the figure has the horizontal stop *8*.

The claims said to be infringed by the defendant are 1, 2, 3, 5, 6, 7, 8 and 10. They read as follows:

"1. A draft-rigging, having a combination, with the drawbar, a yoke, the arms of which are connected to the sides of the drawbar, springs arranged one above the other within the yoke, and followers also arranged between the arms of the yoke, said springs and followers being removable from below, independently of the drawbar, substantially as described.

"2. A draft-rigging having a yoke, the arms of which are adapted to be connected to the sides of the drawbar, springs arranged one above the other between the arms of the yoke, and followers adapted to fit against the ends of both springs, and also contained between the ends of the yoke, said springs and followers being removable from below, independently of the drawbar, substantially as described.

"3. A draft-rigging having a pocket, lugs, extending horizontally across the pocket, at the upper and lower portions thereof, respectively, followers within the pocket which bear against the lugs, and a yoke which extends within the pocket between the lugs and around the rear follower, substantially as described."

"5. A draft-rigging having a yoke open at the bottom and having a spring and followers arranged between the arms of the yoke, and a pocket within which the yoke extends and which is also open at the bottom to permit removal of the spring and followers independently of the drawbar, substantially as described.

"6. A draft-rigging having a yoke open at the bottom, and having a spring and followers arranged between the arms of the yoke, a pocket which contains the yoke, and is also open at the bottom to permit removal of the spring and followers, and a detachable closure for the opening in the pocket, substantially as described.

"7. A draft-rigging having, in combination with the drawbar and spring mechanism, a yoke, the arms of which are connected to the sides of the drawbar, a pocket within which the yoke extends, and a key which extends horizontally through the drawbar and yoke, and through slots in the walls of the pocket, substantially as described.

"8. A draft-rigging having springs set one above the other, and a follower engaging the ends of both springs and having at the middle a stop projection which separates the springs, substantially as described."

"10. A draft-rigging having springs arranged vertically, one above the other, followers, a yoke between the sides of which the springs and follow-

ers are set, said springs and followers being removable vertically from below, independently of the drawbar, substantially as described."

Claim 8 relates to a draft-rigging having springs, one above the other, and a follower engaging the ends of the springs with a stop projection at the middle and separating the springs. It does not call for a yoke, but would require a horizontal one if a yoke were used.

Claims 1, 2, and 10 are more general. They disclose a draft-rigging having in combination a drawbar, a yoke, springs and followers. The construction called for in these claims is such as to require the yoke to be placed in a horizontal position, with its arms connected, or adapted to be connected, to the sides of the drawbar. The springs are arranged vertically, one above the other, within the yoke, and the followers are "arranged," "set" or "contained" between the arms, sides or ends of the yoke, both springs and followers being removable from below, independently of the drawbar.

In claims 3, 5, 6 and 7 a pocket is introduced as an additional element; and in claim 3 the element of "lugs extending horizontally across the pocket at the upper and lower portions thereof, respectively," is specified, which element does not expressly appear in the rest of these claims. In this claim, the followers bear against the lugs, necessitating their being placed in a vertical position within the pocket, and the yoke, which extends around the rear follower and between the lugs of the pocket, is of necessity placed horizontally. This claim does not enumerate springs as an element in the combination, but, as a draft-rigging embodies a shock-absorbing mechanism and springs are disclosed in the specification as a part of such mechanism, they may be understood as forming a part of the device, not for the purpose of establishing novelty, but for making it workable.

Claims 5, 6 and 7, do not enumerate lugs as an element, either as extending horizontally across the pocket or as extending horizontally into the plane of the vertical lines of the interior faces of the yoke, but, as the followers disclosed in the specification are rectangular in shape, and, according to the claims, are arranged between the sides of a horizontal yoke, the device of the claims calls for horizontal lugs in order to be operative, and the specification discloses such lugs. The language of all these claims shows that the yoke is positioned horizontally.

Claim 5 provides for the removal of the springs and followers independently of the drawbar, but claims 6 and 7 do not, except as the construction called for is such as will permit it. The distinctive feature of claim 6 is that a detachable cover is provided for closing the pocket; and of claim 7, is a key extending horizontally through the drawbar, yoke and slots in the walls of the pocket.

In August, 1913, the defendant entered into an agreement with the Pressed Steel Car Company to furnish cheek-plates and spacer-blocks of a special design for installation by the car company on Boston & Maine cars, and, subsequently, furnished such parts with the intention that they should be assembled with other parts in such a way as would, according to the plaintiffs' contention, make up the combination of the patent in suit.

The construction of the alleged infringing device is disclosed in the answers of the defendant to certain interrogatories, and is spoken of as the machine of the interrogatories; and the question is whether the device thus disclosed infringes the patent in suit.

In the District Court it was held, with regard to claims 1, 2, 8 and 10, that every element in the claims was old and that the combination was anticipated; that claims 3, 5, 6 and 7 related to an integral box or pocket open at the bottom and were limited to that structure; that all the other elements enumerated in these claims were old, the integral pocket being the only new thing and the sole advance which Byers made in the art; and that the invention thus limited was not infringed by the device of the interrogatories, as it did not have the integral pocket of claims 3, 5, 6 and 7, but employed cheek-plates.

Was the District Court right in holding that claims 1, 2 and 10 were anticipated? The defendant says that he was; that the language of the claims—"followers * * * arranged between the arms of the yoke," "followers * * * contained between the ends of the yoke," and "a yoke between the sides of which * * * followers are set"—cannot properly be construed to mean "followers being wholly contained within the space bounded by the inner vertical faces of said yoke."

As heretofore pointed out, the follower-plates of the plaintiffs' device are described in the specification as rectangular in shape, as placed between the sides of the yoke, and as being removable from below by being "pried out by means of a tool applied to toothed recesses 10, formed in the edges of the follower-plates." The claims do not specifically state the shape of the followers; they do, however, state that they possess the quality of being "removable from below, independently of the drawbar, substantially as described," which, according to the specification, means that they may be removed "in a vertical direction without the necessity of disengaging the yoke from the drawbar" and be pried down by means of a tool applied to toothed recesses in the edges of the follower-plates. To be capable of being thus removed, the vertical edges of the followers must be straight throughout their length, and, as the claims disclose that the followers are "contained between," "arranged between," or "set between" the ends, arms or sides of the yoke, the fair inference is that the followers called for by these claims, as well as by the specification, are rectangular in shape.

The question then is, whether these claims for a draft-rigging having in combination with the drawbar a horizontal yoke, springs vertically arranged within the yoke, and followers rectangular in shape set or contained between the sides or arms of the yoke, the springs and followers being removable from below, independently of the drawbar, are anticipated, and, if not, are infringed by the device of the interrogatories.

The devices of the prior art which have been called to our attention fail to disclose such a combination, and we regard the combination as novel and the prima facie evidence of invention, due to the issuing of the patent, as not overcome.

In the patent granted to Frost (No. 232,272, January 8, 1895), the device contemplates the use of a single spring, and the followers, instead of being rectangular in shape, have arms extending horizontally above and below the yoke. They could not be removed by prying them directly down, without first removing the spring or springs, as in Byers'. It would be necessary to first remove the spring, then turn the followers to a position in which their arms would be lengthwise of the yoke before they could be removed. This surely is not the solution of the problem of free removability presented by Byers, especially when the weight of the parts and pressure of the springs are considered.

In the patent granted to Simons (No. 627,540, June 27, 1899), the yoke is arranged vertically, not horizontally, and the springs and followers are set horizontally and are removable from the side and not the bottom.

In Pilcher (No. 616,965, January 3, 1899), the yoke is horizontal, and the arms of the yoke extend through holes in the followers, thereby preventing their removal without disconnecting the yoke from the drawbar.

In Reagan (No. 491,785, February 14, 1893), and Miner (No. 570,038, October 27, 1896), the yoke is placed vertically, and to remove the springs and followers the yoke has to be disconnected from the drawbar or taken apart.

[2] While we regard these claims as valid, we are of the opinion that the defendant does not infringe any of them, as it does not furnish any element that enters into them. Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107; Leeds & Catlin Co. v. Victor, 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816.

Claim 8 is limited to followers with stop projections used in connection with two springs, and the followers and springs are to be used in connection with a horizontal yoke or some other drawbar attachment. A follower device with a stop projection was old as shown in the patent granted to Hinson (No. 635,322, October 24, 1899). This claim is not only anticipated by the prior art, but is not infringed, as the defendant does not provide followers with projecting stops.

It does not seem to us, however, that the District Court was right in holding that claims 3, 5, 6 and 7 were limited to an integral pocket. Nothing is said in these claims about the pocket being integral or a distinct entity, while in claim 9, which is not in issue, such an intention is plainly manifested. Moreover, the specification shows that the patentee's conception was not limited to an integral pocket, for he there states that "the pocket *may be* cast in a single piece." When the housing is not integral, the parts, on being assembled upon the car, form a pocket. The parts are nothing more than the cheek-castings of the prior art, with the single exception that the lugs or bearings for the followers, instead of being arranged vertically, as in the old cheek-plates, are projected horizontally across or into the vertical lines of the plane of the yoke.

In the earlier devices of the draft-rigging art, the followers were arranged horizontally rather than vertically and the ends of the fol-

lowers engaged the vertical lugs of the old cheek-plates. During the period covered by the Frost and Pilcher patents, when the method was introduced of placing the followers vertically, it became necessary, in order to avail themselves of the vertical lugs of the old cheek-plates, to so construct the followers that their sides would extend horizontally and engage the vertical lugs, but Byers conceived the idea of projecting the lugs horizontally to engage the followers, thus doing away with the horizontally-projecting arms of the followers of the Frost device. By so doing, he was enabled to make his construction stronger and render the removability of the springs and followers from below easier. While the followers in the Frost patent are removable from below without disengaging the yoke from the drawbar, they are not as readily or easily removed as in Byers, and the extended arms on the followers of Frost were more likely to become broken as they could not be reinforced and strengthened as could the lugs in Byers' device. Cheek-plates cast integrally and forming a pocket were old in the art, as shown in the patent granted to Perry, June 1, 1880, but the lugs in it, as in the old cheek-plates, were arranged vertically, not horizontally, and a guideway was formed for the ends of the followers in the cheeks of the pocket or casting by lowering or sinking the face in a limited area of each cheek, thus forming the lugs and guideway.

The defendant concedes that claims 3, 5, 6 and 7 are valid if limited to an integral pocket. It denies, however, that they are valid if not so limited; but we have held that the term "pocket" as used in these claims is not limited to an integral pocket or housing, and have shown that the housing, when not cast integrally, makes two cheek-plates which, when put in position on a car, form a pocket; and that the cheek-plates, when put in position and forming a pocket contain an element, namely, lugs which extend horizontally across or into the vertical lines of the plane of the yoke, and constitute stops for the followers, and that this element is not disclosed in the prior art.

The defendant claims that this element is old, and is shown in letters patent No. 693,643, granted to Emerick, February 18, 1902, the application having been made May 24, 1901. It will be seen that the application for this patent was not made until after the patent to Byers was issued. But the defendant contends that Emerick conceived and disclosed his invention in the spring or summer of 1899. The evidence, however, adduced in support of the proposition does not answer the requirements called for in cases of this character. The proof lies wholly in parole, is equivocal, and the time that has elapsed between the alleged conception and the filing of the application is of such length that it does not establish the clear conviction necessary to prove anticipation. Emerson & Norris Co. v. Simpson, 202 Fed. 747, 121 C. C. A. 113.

In the device of the interrogatories the cheek-plates furnished by the defendant contain lugs which extend horizontally into the plane of the vertical lines of the yoke, and constitute stops or bearings for the followers in the upper and lower portions of the pocket when the parts are assembled. The guideways for the yoke, which are disclosed

in the Byers' patent, are present in the cheek-plates of this device. They are made, not merely by cutting away the central portions of the vertical lugs of the old cheek-plates, but by cutting below the face of the plates, thereby converting the remaining portions of what were previously vertical lugs into horizontal lugs projecting across or into the plane of the vertical lines of the yoke, when the parts are assembled, and manifest a clear intention to adopt the construction of the Byers' device. We are, therefore, of the opinion that in so doing, the defendant infringes claim 3, and this is so, notwithstanding the horizontal lugs of the infringing device do not extend entirely across the pocket. The idea of horizontally projecting lugs was new with Byers. In his commercial device he does not construct the lugs so that they extend entirely across the pocket, and being the first to conceive a device of this character, we think that he is entitled, as a reasonable equivalent, to the exclusive use of such a lug, although it does not extend entirely across the pocket.

Claims 5 and 6 do not include lugs as a part of the combinations. They do, however, specify a pocket and followers arranged between the arms of a horizontal yoke within the pocket and provide for free removability from below. As these claims contemplate followers rectangular in shape included entirely within the vertical lines of the yoke, with free removability from below, the same as claims 1, 2 and 10 do, the combination presented is novel for the reasons stated with reference to those claims. And, as the parts forming the pocket when it is not cast integrally are nothing but cheek-plates, and the defendant furnishes cheek-plates for the device of the interrogatories, it infringes the combination of these claims.

In claim 7, the only distinctive feature is the key extending horizontally through corresponding slots in the pocket, yoke and drawbar. Whether this is a novel feature in plaintiffs' device, it is unnecessary to determine, as the cheek-plates furnished by the defendant in the device of the interrogatories do not infringe the claim, the slot in the cheek-plates being of an entirely different character, and in no way adapted to serve the purpose of holding the drawbar in position in case the yoke should break.

We regard claims 3, 5 and 6 as valid and infringed.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to enjoin the defendant from further constructing or selling the stop-pieces and cheek-plates referred to in the interrogatories made a part of the record in this case, for an accounting, and for costs in the District Court and on this appeal.

KINTNER et al. v. ATLANTIC COMMUNICATION CO. et al.

(District Court, S. D. New York. January 7, 1916.)

1. PATENTS ⟸157(1)—CONSTRUCTION—SCOPE OF INVENTION.

In a new and rapidly developing art, when the date of an invention and the clarity of disclosure are in serious controversy, the courts must be vigilant to prevent a result by which after-acquired knowledge gives to a patentee that valuable control which would not have been his but for a later, or, if not later, a newly expressed, thought which he seeks to antedate.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229, 230; Dec. Dig. ⟸157(1).]

2. PATENTS ⟸157(1)—CONSTRUCTION—GENERAL PRINCIPLES.

In patent cases, where advances in respect of health, safety, and comfort of living are concerned, the public has a real as well as a theoretical interest. On the one hand, it is essential to the welfare of the country that inventors shall not be discouraged by narrow interpretations when they have made a worth-while contribution; but, on the other, the public are not to be deprived of the full enjoyment of what becomes rightly theirs because the advance is a mere improvement, or, if more than that, because the inventor has not made a full and clear disclosure, or has failed to obtain a contract with the government which defines what he may later claim.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229, 230; Dec. Dig. ⟸157(1).]

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—METHOD AND APPARATUS FOR WIRELESS SIGNALING—"STATIC."

The Fessenden patents, No. 918,306, for a method of wireless signaling, and No. 918,307, for an apparatus for wireless signaling, the principal purpose of which was to overcome the effect of atmospheric disturbances or "static" by a combination of high spark frequency and definite or regular spark frequency, with a receiving apparatus consisting of an indicator resonantly unresponsive, or an ordinary telephone, were not the first to disclose either high or regular frequency, both of which were known and practiced in the prior art and the patents, as to claims 1 and 3 of the former and claims 1, 2, 3 and 4 of the latter, are void for lack of invention; such claims also *held* not infringed, if conceded validity.

In Equity. Suit by Samuel M. Kintner and Halsey M. Barrett, receivers of the National Electric Signaling Company, against the Atlantic Communication Company and others. On final hearing. Decree for defendants.

Suit for infringement of claims 1 and 3 of United States letters patent No. 918,306 (method), and claims 1, 2, 3, and 4 of No. 918,307 (apparatus), each granted to Reginald A. Fessenden on April 13, 1909.

Frederick W. Winter, of Pittsburgh, Pa., and J. Edgar Bull and Herbert G. Ogden, both of New York City, for plaintiffs.

Harry E. Knight, of New York City, Frederick P. Fish, of Boston, Mass., Hector T. Fenton, of Philadelphia, Pa., and Philip Farnsworth and W. H. Pumphrey, both of New York City, for defendants.

MAYER, District Judge. This voluminous record is not so formidable as it looks, and while the questions under consideration are highly interesting, yet many important facts are either uncontroverted or not seriously in dispute. The extensive record is due partly

to the introduction of testimony as to prior use, either not presented at all or only passingly and inconclusively in a previous litigation, and partly to the desire of the court and counsel that this record shall contain all there is—in the hope that the final determination in this suit may end the controversy.

Before undertaking the technical discussion here involved, it is desirable to outline the mental attitude with which the subject must be approached, even though such outline suggests observations, more or less trite, to those familiar with the law of patents. The radio art (as wireless telegraphy is now called) is, at the outset, so mysterious to the layman that even its fundamentals still seem wonderful, and what to the scientist may appear to be but natural progress may carry an exaggerated importance to an unskilled mind. It is therefore vital to have a clear understanding of the state of the art, and at least to endeavor to perform that difficult feat of mental gymnastics whereby a lay mind presumes to understand, first what was known to that much referred to person "the man skilled in the art," and next whether what was done went beyond the ken of that same person.

Fortunately, in this case, we have an extraordinary array of men of super-scientific attainments, some of whom have spoken through their writings and others in the flesh, and, with the court transformed into a university classroom, it has been a liberal education to listen to the noted scientists who have appeared, either as experts or as fact witnesses, as well as to the many fine upstanding men whom the government and the wireless telegraph companies are fortunate enough to have in their service from officers to operators. From hearing what these men have said and reading what they and others have written, the case must be approached with the realization that "the man skilled in the art" possessed a high order of knowledge and attainment and that something profoundly abstruse to men less qualified may have been the noninventive, although useful, step forward.

[1] It is also important to remember that in the early stages of an art of this kind discoveries are being made rapidly and constantly, and therefore the file wrapper assumes an importance which is often absent in many cases; for when the date of an invention and the clarity of disclosure are in serious controversy the courts must be vigilant to prevent a result by which after-acquired knowledge, in a swiftly developing art, gives to a patentee that valuable control which would not have been his but for a later, or, if not later, a newly expressed, thought which he seeks to antedate.

[2] Finally, although at times, in some patent cases, much concern is expressed in argument about the rights of the public in regard to some alleged invention, without which, up to that time, the public had lived with philosophic complacency, yet in cases where advances in respect of health, safety, and comfort of living are concerned, the public has a real as well as a theoretical interest. On the one hand, it is essential to the welfare of the country that inventors shall not be discouraged by narrow attitudes and interpretations when they have made a worth-while contribution; but, on the other, the public is not to be deprived of the full enjoyment of what be-

comes rightly theirs because the advance is a mere improvement, or, if more than that, because, through no fault of theirs, the inventor has not made full and clear disclosure, or has failed to obtain a contract with the government which defines what he may later claim.

[3] With these views in mind, I take up the discussion of the patents in suit. In the early history of the art, signaling by wireless was much embarrassed by atmospheric disturbances, or "static," as it is called. To the overcoming of this difficulty the two patents in suit, one for a "method of wireless signaling" and the other "for apparatus for wireless signaling," are directed.

The method patent was applied for on July 1, 1907, and was issued April 13, 1909. The apparatus patent (divisional) was applied for August 25, 1908, and was issued also on April 13, 1909.

"Great difficulty," said Fessenden, "has been experienced in wireless signaling on account of electric disturbances, more particularly atmospheric disturbances. In the tropics, for example, stations equipped with the usual type of apparatus as a rule are unable to work at all for months at a time, except at brief intervals, and even in the more northern climates the same difficulties occur during the summer months. By my apparatus and method herein described I succeed in annulling the effects of disturbances, and more particularly such atmospheric disturbances."

In the method patent there were four claims, two of which are here in issue as follows:

"1. In the art of wireless signaling, the method of eliminating disturbing impulses which comprises generating waves having a definite frequency, in groups having a definite group frequency above 250 per second, but within the limits of audibility, and receiving the same with an indicator resonantly unresponsive to said group frequency."

"3. In the art of wireless signaling, the method of eliminating disturbing impulses which comprises generating waves having a definite frequency, in groups having a definite group frequency of approximately 1,000 per second, and receiving the same with an indicator which is unresponsive, resonantly, to said group frequency."

In the art, there must be a transmitting instrumentality and a receiving apparatus; for wireless telegraphy consists in sending through the ether the electro-magnetic wave known as the Hertzian wave, which is heard at the receiving end. Translated into plain English, "an indicator resonantly unresponsive" to the group frequency transmitted means an ordinary telephone. "Group [or spark] frequency" means the number of times per second that the ether is agitated, such as by means of recurrent sparks, and is not to be confused with "wave frequency." A "wave train" means the electric waves radiated during one set of oscillations. If more than one, the wave trains radiated during one-half cycle of the charging current are called a group of wave trains. What Fessenden claimed, according to plaintiffs, may therefore be colloquially stated thus:

"If you watch my method, you will learn that the electric spark recurs at regularly spaced or definite intervals, that I produce over 250 sparks per second in this definite or regular manner, and that at the other end the sound reaches a human being who has a telephone receiver held to his ear. I never generate so many sparks per second as to produce a sound beyond the limits of audibility, and I further inform you, among other things, that when I produce approximately 1,000 sparks per second, regularly spaced, I am simply

particularizing in respect of one of the group frequencies which I use, and which you will find effective in overcoming static."

An elaborate description of the details of the transmitting and receiving apparatus need not be here given. The uninitiated will find very interesting statements of the underlying principles of the radio art in Marconi Wireless Telegraph of America v. National Electric Signaling Co. (D. C.) 213 Fed. 815, Marconi Wireless Telegraph Co. of America v. De Forest Wireless Telegraph Co. (C. C.) 138 Fed. 657, and National Electric Signaling Co. v. United Wireless Telegraph Co. (C. C.) 189 Fed. 727, and in the Navy Manuals.

In addition to these will be found the opinion of Judge Buffington in National Electrical Signaling Co. et al. v. Telefunken Wireless Telegraph Co. of United States, 208 Fed. 679, 125 C. C. A. 647, discussing the same patents as are here in issue. That opinion is of great value as an introduction to this case, and I should have no hesitation in concurring with its conclusion, had the court in that case had before it certain material testimony, there omitted and here included, which vitally changes the whole aspect of the controversy, both in regard to validity and infringement.

It is plain that the court there was led to believe that Fessenden was the first to realize the value of high frequency in combination with a resonantly unresponsive receiver, and, indeed, the court said:

"For as we have seen, and *in the then state of aural knowledge*, it would have been regarded as destructive to have coupled such high spark frequency with nonresonant receiving."

In the case at bar, it is and must be conceded that the combination of high frequency and a telephone receiver was well known and had been used extensively in practice, and this fact is now uncontroverted because of overwhelming evidence which was not presented in the suit in the Third circuit.

I fully agree with Judge Buffington that that combination involved invention; but the difficulty is that Fessenden was not the inventor of this notable contribution to the art, and therefore this case turns on the meaning and value of Fessenden's "definite" group frequency. It is now said that Fessenden was the first to realize and disclose that the group or spark frequency must not only be high, but regular; that this regularity of high frequency sparks produces a musical note, which enables the operator to concentrate his attention on that note, so that he can distinguish the signals from the queer, irregular noises of static.

A reading of the opinion of Judge Buffington clearly shows that either the court did not attach any importance to the regularity of spark frequency or took it for granted, and this is readily understood when, on an examination of the briefs of counsel in that case, it will be seen that while references are made to that subject they were either (a) to "definite," as meaning "predetermined," or (b) as if the element were old and well known, or (c) as incidental and wholly subordinate to the major proposition that the discovery consisted in using high frequency sparks with a telephone receiver.[1]

[1] Space will not permit extended analysis of this summary. Defendants' briefs set this forth elaborately.

What lends a touch of dramatics to the case is the experience on the night of December 11, 1905, of Iredell, a De Forest operator at San Juan, Porto Rico. At this time the Marconi and the De Forest Companies had various stations throughout the country, and a considerable number of vessels, navy and merchant, had been equipped with wireless apparatus. Iredell at one time had been a telegraph operator, and was employed at San Juan by the De Forest Company from about October, 1905, until April, 1906. While he was unable to produce his log of December 11, 1905, there cannot be any question that his report describing what he heard is accurately set forth in the following letter of Admiral Dunlop, dated January 6, 1906, and in Iredell's answer, of January 7, 1906:

"U. S. Naval Station,
"San Juan, Puerto Rico, January 6, 1906.

"Mr. W. G. Iredell, New Long Distance Wireless Station, San Juan, P. R.—Dear Sir: The Bureau of Equipment, Navy Department, has asked me to report on the receipt of a signal which was received at this station, from overhauling a report made from the wireless station on December 11th at 10:15 p. m., in which the following was reported:

" 'Heard a new spark. Never heard it before. Was making signals Boz in the Continental code. Caught the words "spark—do you get— How does our spark sound."

" 'At 10:30 there were several sparks sending, one sending Boz in the Continental code, and another Slaby-Arco spark sending in Continental, and a third low frequency spark, which sounded like a De Forest long-distance station.

" 'At 10:44 heard Boz repeated frequently, also two others, one making D's—probably S. L. (Colon De Forest station).

" 'At 10:51 heard the same.

" 'At 10:52 Boz came in better and repeated the following message several times, "Metallasi. Wire receipt of these messages," then repeated Boz.

" 'At 10:58 said Boz again until 11 p. m. He then made several other signal letters and stopped at 11:08.

" 'At 11:19 heard the same spark making D's a few times. Came louder than before and stopped at 11:20. Between 11:20 and 11:25 heard a spark which sounded like R K (Pensacola).

" 'Listened until 11:35.'

"2. The Bureau wishes to learn what the strength of the signal was and any particular characteristics of the same as received at San Juan.

"Very respectfully, [Signed] A. A. Dunlop,
Rear Admiral U. S. N., Commandant."

"San Juan, P. R., Jan. 7, 1906.

"To Admiral Dunlop, Commandant, U. S. Naval Station, San Juan, Puerto Rico—Dear Sir: Replying to your favor of January 6th regarding the 'Boz' signals, permit me to state that these are the same as are referred to in subsequent reports as being made by 'JN.' These signals are still being heard, but the sender seems careful to conceal his identity.

"The signals vary a great deal in strength, some periods coming in faintly, or not heard at all, and at other times coming stronger. He changes his tune every fifteen minutes. The spark is of high frequency and regular periodicity.

"Very respectfully, [Signed] G. S. Iredell." [2]

That the Brant Rock note heard at San Juan was musical there can be no doubt; that it produced a marked impression on Iredell must

[2] Tune means wave tuning. I am satisfied, in view of the context, that "periodicity" means schedule.

likewise be unquestioned; that it was not the note disclosed by the patent was abundantly demonstrated by the experiments during the trial, the file wrapper, and by the testimony as to the motor generator then used and the consequent cyclage and spark frequency.

In the prosaic surroundings of an equity courtroom we sit in wonderment as we hear tales of accomplishment which make Jules Verne commonplace and suggest that H. G. Wells is a conservative prophet, and it is not surprising that in the silent watches of the night, as Iredell sat in the wierd environment of a radio station, this Brant Rock note made a profound impression. He was an intelligent man, with some knowledge of music and a fair, but not extensive, experience in radio, and in those days operators were watching for every new sound, and, indeed, for every new development, and, accustomed as Iredell was to low frequency sparks, the Brant Rock note would naturally have challenged his attention; for, while Iredell heard many sparks, he had never listened to the signal of the U. S. S. Kentucky or of the Galilee station of the De Forest Company near the Highlands in New Jersey. But what had so markedly and naturally impressed this man, who was an operator, but not a scientist, either did not impress the scientist, Fessenden, or failed as yet to suggest to him that he had solved the problem, as now claimed, or that he knew what he had accomplished sufficiently well to instruct the art.

Let us see what Fessenden said and did at this time. Under date of December 19, 1905, the Navy Department, referring to the "new spark" of December 11th, wrote to the National Electric Signaling Company at Brant Rock, inquiring "if any of your stations were sending the above at the time given, and what station it was." To this Fessenden answered:

"Brant Rock, Mass., Dec. 22, 1905.

"Bureau of Equipment, Navy Department, Washington, D. C.—Sir: 1. Replying to your letter of Dec. 19th, I would say that the messages received at San Juan were sent out from our station at Brant Rock. I inclose report of messages sent out Dec. 11th.

"2. The reason for the operator stating that he heard a new spark is because on that night we sent for the first time on a new selector, which gives a spark of a different sound from the old selector. We inclose report. I would say that the amount of radiation sent out with the new and old selectors is practically the same, but the new selector gives a clearer pitched note.

"3. This company would be pleased to learn what the strength of the signals was as received at San Juan."

The "new selector" was a synchronous rotary gap, which undoubtedly gave a regular spark frequency; but not a word was said by Fessenden as to the frequency used, and not a word as to a "musical" spark. The emphasis was on a "clearer pitched note," and the inquiry was as to "the strength of the signals." At that time, therefore, taking the most favorable construction to plaintiffs, Fessenden either did not know the true reason for the Brant Rock note, or, if he knew, then he withheld his full information from the world. Of course, he had a perfect right to withhold his information until he could secure himself by a patent; but, to establish the true date of an invention, the fact must be proved, and guesses are not permissible.

The conclusion, however, is irresistible that then and as time went

on he believed the solution was in ascertaining what high frequencies could be attained and used so as to cause the listener to concentrate on these "higher notes to such an extent that the low noises made by atmospheric disturbances ceased to affect the consciousness," and, if he thought that a musical note created because of regular spark frequency was essential to that ideal, he certainly failed to say so until long after. The truth of the matter is that Fessenden at that time either attached no importance to definite spark frequency or regarded it as so well known as not to constitute an element in a new combination.

Now, the Brant Rock note, although the subject of inquiry and comment, did not contain the invention; for it must not be forgotten that the claims call for a spark frequency higher than 250. Brant Rock, Mass., was an experimental station established by the National Electric Signaling Company under the professional charge of Fessenden. A station for long-distance work had been established at Machrihanish, Scotland.

According to Fessenden, the first set of apparatus installed at Brant Rock was a 7 k. w. or a 7 k. w. to 10 k. w. at 60 cycles. This set he testified was later (about January, 1906) speeded up to 120 cycles, and with that gave about 25 k. w. That set was used for years, until the company got 500 cycle sets early in 1909. (Testimony of Edwards, pp. 2229, 2230.) The evidence is overwhelming that the Brant Rock spark frequency in December, 1905, was 240 or at best 250, although to be accurate I should say 246. Claubitz, who left Brant Rock in July, 1905, for Machrihanish, where he remained about two years, seemed to be an impartial witness, and from his testimony it would appear that the cyclage at Brant Rock and Machrihanish was not to exceed 123 or 246 spark frequency.

The testimony of Iredell that the signal of December 11, 1905, corresponded to D on the violin string (equivalent to a frequency of 288), is truthful, but not reliable, for the ear in such matters is a shaky guide to accuracy. The single test card out of a number made by Bennet (the assistant of Fessenden), before the machine was purchased, and showing 253, is too isolated an instance to negative the proposition that a machine of 120 cycles will normally produce a spark frequency of 240, or at best, in practice, not to exceed 250. The result is that what Iredell heard was a note of a frequency under 250, but of a musical character, because reed or saxophone like; but that is not the note of the specification and the claims, which call for a higher frequency.

More than that, Fessenden's work was still highly experimental, as is made clear by many witnesses, and especially in Iredell's report that "the signals vary a great deal in strength, some periods coming in *faintly* or *not heard at all,* * * *;" and this statement, we will find, was later confirmed by Fessenden in his application for letters patent. (Page 2, line 30.) But at this time, while Fessenden was experimenting, much was already known. Whether Fessenden knew what De Forest and the Navy were doing is, of course, immaterial; but they had accomplished much. De Forest had been a liberal con-

tributor to scientific magazines and discussions, beginning at least as early as 1901. These need not be reviewed in respect of the subject of high frequency, for he sums up his observations and experience of years, concisely and relevantly, in remarkably simple language, in his now famous book of instructions to his operators.

It is established that these instructions were drafted by De Forest in the summer or fall of 1905; that 100 books were printed by September 26, 1905, and widely circulated; that Humphrey, a printer, received the order to print a second edition on November 3, 1905; and that the books were delivered by Humphrey on November 20, 1905. It cannot be questioned that the instruction book was public property before December 11, 1905. So also with the Shoemaker book, and about the same time a compilation made up at the Brooklyn Navy Yard. (Defendants' Exhibit 245.) De Forest said:

"The length of spark gap determines the amount of energy, to a large extent, employed and radiated, and thus the distance which can be covered.

"With ordinary installations having antennæ 150 feet or more in height, one-inch spark gap should be sufficient for 100 miles. For relatively short distances it may be desirable to cut down spark gap to one-quarter inch or so. Under no circumstances widen spark gap above 1¾ inches, to avoid puncture of condenser. These extremely wide gaps should seldom be used with 1 k. w. sets.

"It is well to know that the length of spark determines very largely the sound frequency of the spark or the number of sparks per second, and that a high frequency spark is much more readily distinguished through atmospheric and other interferences. It may be well, therefore, under one condition, to shorten spark gap until the frequency of the spark is quite high, even if this shortening decreases distances over which signals can be heard.

"It may thus be possible to read a weaker signal of high frequency through static disturbances, when a low frequency spark, even though much louder in sound, could not be read through the same disturbances.

"Operators using good judgment in such matters can maintain communication over distances and under conditions which render other operators entirely helpless.

"The spark gap should never be so wide that spark is draggy and irregular, but should always respond instantly to the touch of the Morse key. On the other hand, spark gap should always be kept clear of flame and never become an arc. An arc is of little use for wireless telegraphic signals.

"If the spark arcs, it indicates either that same is too short or that there is insufficient impedance in the primary of the transformer."

Shoemaker, also an inventor, said in his "General Description of the Shoemaker Wireless Telegraph Apparatus" and "Directions for Connecting and Operating," November 15, 1905 (Defendants' Exhibit 83):

"The spark gap should be adjusted so that a clear and uniform sound is given out. If the gap is too wide the spark gives a ragged sound, and if too short it gives a buzzing sound, accompanied by a considerable arc, which should be avoided at all times. When properly adjusted it gives a sharp, clear note, and an intense, bright light, without any signs of an arc.

"After some practice the operator will be able to get this adjustment with great accuracy by the sound alone.

"The spark gap should never be more than one-half inch, as it strains and heats the condensers, and does not increase the working distance to any great extent.

"Another method of adjusting the spark gap is by increasing or decreasing the potential of the secondary of the transformer, or better still by adjusting both the spark gap and the potential of the secondary of the transformer. This may be done by regulating the potential of the primary circuit, by means of the

field rheostat of the A. C. generator. Where the reactance regulator is used in series with the primary of the transformer, the current flow may be increased or decreased to obtain the above results.

"When an arc is present in the spark gap, the current should be decreased in the primary of the transformer, until the arc disappears."

At this time, telephones (resonantly unresponsive) at the receiving end were so thoroughly accepted as the practice of the art that reference in detail to that use is unnecessary. The instructions of De Forest were the result of actual practice, and at this time De Forest was using 133 cycles at certain stations—notably Galilee, Beaumont, Tex., and Boulder, Colo., thus getting more than 250 sparks per second; but the sparks often were not regular, and the spark gaps were generally shortened so as to obtain more than one spark discharge per half cycle.

The Galilee spark was well known along the coast, and was quite successful in getting through static, although, of course, not to be compared with the modern 1,000 spark frequency. The frequency of the Galilee spark was undoubtedly higher than that of the Brant Rock spark of December, 1905. It may have been less musical, or even if it be concluded that it was not musical, it nevertheless had a much more pleasing and certainly a more effective sound, than the sound produced by the low-frequency nonsynchronous gap installations, and it was one of the best stations at the time for getting through static. By common agreement it was the best De Forest practice, although De Forest thought Key West the best. That difference of opinion is not important, for Galilee amply illustrates the state of the art.

De Forest used a plain gap, and it was well known that, when the gap is kept free from arcing by an air blast, the spark will be regular. While Fessenden was experimenting in his way, and De Forest was actually operating commercial stations in his, the Navy was active in practicing still another method. It will suffice to refer to the battleship Kentucky "whose spark note," according to Gunner Bean, "was especially high and was known so throughout the fleet." The Kentucky used a Slaby-Arco mercury interrupter set. These Slaby-Arco interrupters usually had two segments, and undoubtedly could give regular interruptions and regular sparks—one spark per interruption.

The ambitious Navy operators, anxious to attain good results and in commendable rivalry to outdo each other, often increased the number of segments. Guthrie's entry of August 12, 1905, shows that the Kentucky was using 4 and 6 segment interrupters (and Bean said "it had as high as eight segments"), and that the Kentucky spark was as notable as Bean said is proved by many witnesses from Scanlin, who on June 7, 1905, entered in his Navy log at the Highland station that he "could read Kentucky fine through static," and who described the note as a "very high, shrill note" to Guthrie, who graphically and onomatopœtically said:

"It struck me to be a dandy spark for piercing through static, because there was a sting and a ping in it."

In analyzing the testimony of many witnesses who have attempted

the difficult task of describing in words the characteristics of a sound, nothing is more striking than Guthrie's "sting and ping," for one needs but to say these words, and he will at once realize that they express a high pitch with some musical attribute. Of course, although the r. p. m. was increased by speeding up, it is impossible to determine the precise frequency in the absence of accurate records; but the fact is established beyond peradventure that the Kentucky note was a then relatively high frequency note, and, like the notes of other Navy ships, sometimes regular and sometimes irregular.

Whatever may have been the observations and conclusions of Lieutenant Hudgins, now deceased, the practical Navy operators knew that this high note "got through" static; and, a little later, Captain Robison set forth his observations of and conclusion from the Navy practice in the Navy Manual of 1906. But the contemporaneous comparison is admirably stated by Cram, a radio engineer of the War Department, and a man of education and wide experience, who had heard the signals during 1905 and 1906; for he thought that the Brant Rock and Kentucky notes were each characteristic, and he said:

"The Kentucky spark was certainly a higher pitch, but not as pure a note as Brant Rock. The Brant Rock station was noted for the smoothness, clearness, and purity of note. The Kentucky spark was certainly higher in pitch and was more certainly identified and read through interference of any kind. * * * The spark from the modern 500 cycle station that is properly adjusted is a purer note than the Kentucky, but not a very different pitch."

Thus, on December 11, 1905: (1) A spark frequency above 120 was high, and the commercial art had gone up to, but not beyond, generators of 133 cycles; (2) De Forest had in practice a spark frequency over 250, but a plain gap usually shortened, so that multiple instead of regular sparks were discharged; (3) the Navy had means for producing regular spark discharges with a frequency which cannot be stated with certainty, but high enough to produce a note, higher in pitch, than Brant Rock, but not as musical; (4) Brant Rock used a synchronous rotary gap, had a musical note, but a frequency not to exceed 250; and (5) in all three systems the telephone was the receiver.

The art stood thus:

De Forest (Practice)	Navy (Practice)
(1) Frequency above 250;	(1) Frequency often but not consistently above 250;
(2) a telephone receiver;	(2) a telephone receiver;
(3) usually multiple sparks;	(3) means for regular sparks; and sometimes regular, sometimes not.

Fessenden (Experimental)
(1) Frequency under 250;
(2) a telephone receiver;
(3) regular sparks.

Thus nobody had consistently in practice all the elements of either claim 1 or claim 3, if "definite," as applied to spark frequency, means "regular."

Now, it must not be forgotten that overcoming static was not the only problem with which all these men were contending. They were

seeking greater distance all the time—the most important problem of all. That, of course, was the reason for the Machrihanish station and the Marconi station at Poldhu, and undoubtedly the reason for Fessenden's inquiry of December 22, 1905, supra, as to "what the *strength* of the signals was as received at San Juan."

A musical or any other note might overcome static in a laboratory experiment, but these men were looking for commercial results, and what they wanted to find out was how to produce a sound strong enough to be heard at substantial distances, which at the same time would be of a character to dominate static. Many considerations entered into that problem: The k. w. capacity; the wave length, with the corresponding higher or lower decrement; the detectors; and, in brief, a wealth of important detail, both of principle and apparatus.

Contemporaneous conduct shows that neither the frequency nor the regularity of the Brant Rock spark of December, 1905, impressed Fessenden. Neither the question of spark frequency or regularity ever came up for discussion between Fessenden and his assistants, although, of course, the speed of the engine was kept high, just as De Forest was doing at Galilee and elsewhere.

The rotary gap was old, having been contributed to the art by Tesla in 1896 (United States letters patent No. 568,179), and that regularity of sparks would produce a musical note was well known, as will later appear. But we need not stop with contemporaneous conduct; for sebsequent acts confirm the conclusion that Fessenden had not as yet believed or claimed that regularity was an essential element of his invention. In correspondence with the Westinghouse Company (February 26, 1906), with Howe, of the General Electric Company (March 29, 1906), the Marconi Company (August 27, 1906), the General Electric (April 26, 1907, June 7, 1907, June 11, 1908, June 26, July 2), not a word is said or intimation given as to the desirability of a musical note or regular spark frequency.[3]

This correspondence shows a gradual progression towards higher frequencies and makes certain references to the sensitiveness of the telephone; but meanwhile others were going along the path which De Forest had blazed in a practical way, as is best illustrated by the Navy Manual of 1906. This valuable contribution was prepared by Captain Robison, and was based on previous knowledge gained from the Navy experience, and "was intended to indicate the general opinion existing among radio or wireless men at that time," and, as he says, "thev were the results of all my work with the subject."

The book was written in the spring of 1906, having been begun in March and finished in June, and, presumably was distributed in the summer of 1906. (Guthrie's testimony p. 781.) The following full extract is well worth while:

Page 62—"It is evident that, if the spark gap in the circuit under consideration is adjusted to 30,000 volts, but one discharge of the condenser per alternation will take place, and but one train of waves will be sent out. Short-

[3] This important correspondence is discussed in detail in defendants' brief. For future use and in the interest of brevity, defendants are authorized to state that I agree fully with defendants' view of that correspondence.

ening the gap will increase the number of discharges per alternation. The exact number for any spark gap length will depend on the time of an alternation—i. e., the frequency, and on the length of time it takes the available power to charge the condenser to the voltage required to break down the gap. Less energy per wave train will be radiated on a short gap than on a long one, because the work done varies as the square of the voltage (see paragraph 86); but the total work done may be equal, on account of the greater number of discharges."

Page 69—"The spark must be kept white and crackling—if too long, it will be stringy; if too short, an arc will be formed. There is no doubt that much of the irregularity noticed in sending is due to irregular action in the spark gap."

Page 81—"It should also be noted that the energy in a wave train depends on the amplitude and number of its oscillations. The effect on the detector being cumulative, there is probably some number of oscillations per train, which is most efficient. Therefore, in considering the action of electric wave detectors, we should look upon it as being produced by electric wave trains of a certain number of oscillations or waves per train, and a certain number of trains per second, or per dot, and the most efficient use of any given power will be made when the energy is best distributed, both in any train and in the number of trains per second."

Page 82—"By distributing the available energy over a greater number of wave trains per second, a weaker sound, but a higher note, is produced. *The human ear is not equally affected by sounds of equal loudness, regardless of their pitch.* The note of a 60-cycle alternator is an octave above that of a mercury turbine interrupter, making 1,800 revolutions per minute, and having a two-segment ring—that is, two breaks per revolution and sparking only on the break. *The higher frequency produces a more piercing spark, one that can be distinguished farther than the one of lower frequency, though probably of greater intensity. In order to get the very best results, the frequency used should be that to which the operator's ear and the telephone diaphragm are most sensitive. Telephone diaphragms which will respond best to sounds of a particular frequency can be made.* Resonance is thus seen to be a highly important quality in wireless telegraph circuits: * * * (5) *Resonance of human ear with telephone diaphragm.* All these are changeable at will, except the last, which cannot be changed, and is different for different people. Experimental data on this subject are exceedingly limited, but such as we have indicate that the average human ear is most sensitive to notes of higher frequencies than those thus far generally used in wireless telegraphy."

Page 109—"The discharges are usually intermittent and vary in strength; sometimes they are almost continuous, and are described as a continuous roar, through which it is impossible to read signals. In this respect *the note of the spark* (the frequency of the wave trains) affects reception, *a high, clear note being easier to read than any other.* Less sensitive detectors can sometimes be successfully used when static disturbances render the more sensitive ones useless. Whatever tends to selectivity or inertia in receiving circuits, such as large inductances, also tends to decrease static interference. It is found that closed receiving circuits not directly connected to the open circuit are less affected by static. The static charges, having a direct path to ground, do not accumulate on the aerial, and the aerial, being only inductively connected to the closed circuit, impulses out of tune are much weakened in the transfer. When the signals it is desired to read are strong, static can be largely eliminated by disconnecting the ground without destroying the signal."

Page 110—"As previously stated, 60 cycles, normal frequency, are used *because this is a commercial type of motor generator. It appears probable that a higher frequency will give better results.*" (While I have italicized only part, every word is worth reading.)

From the foregoing outline of the state of the art, I have omitted many references to scientific books and discussions, because the De Forest, Shoemaker, and Navy books used language so simple and clear that they summarized the art in a manner which could be under-

stood by the operator of modest attainments, who might be lost in the more technical and intricate discussions addressed to men of science.

But at this point it becomes necessary to appreciate something of the literature and apparatus directed to the subject of regular sparks and musical notes. That regular sparks would produce musical notes was common knowledge and belief (the reason why I say belief to appear infra) long before July 1, 1907, or December 11, 1905. Thus, in Maxwell's Theory and Wireless Telegraphy by Poincare and Vreeland 1904 (page 190), in describing the action when an electrolytic detector is used with an ordinary telephone, the author says:

"The slightest irregularity in the sending spark has its effect in altering the note in the telephone—indeed, a variation in the temperature or quality of the sending spark is often observed by the receiver when the sending operator himself cannot detect it—and even when a Wehnelt interrupter is used at the transmitting end, producing sparks at the rate of a thousand or more per second, each impulse is separately detected by the receiver, and the resulting *musical note* is clear and strong."

Eichhorn (Leipzig, 1904), Murgas, the Electrical Review of October 25, 1902, and of December 2, 1905, Pupin (United States letters patent No. 768,301 of August 23, 1904), Captain Robison's report (Defendants' Exhibit 208), late in 1905, and Captain Robison's testimony as to the test of the Murgas system at Wilkesbarre on November 23, 1905—not to speak of Blondel—all go to the same information; and if any more is desired on this subject, it will be found in extenso in Stone's exposition (particularly at pages 2622–2698).

The Tesla rotary spark gap, already referred to, was as old as 1894 or 1895 (Tesla letters patent Nos. 541,168, 568,179, 609,245, and 725,605); while Fessenden's patent No. 730,753, of June 9, 1903, showed means for getting exact regularity of spark frequency, and Elihu Thomson, in his No. 645,675, Shoemaker, in his No. 749,584, of January 12, 1904, and Blondel, in his No. 783,923, of February 28, 1905, also disclosed means adapted to produce regularity of spark frequency.

That the ear was not only more sensitive to high pitch than to sounds of a low pitch, but that it was also more discriminating as to pitch, had long been recognized by such men as Helmholtz, Preyer, and Lord Rayleigh (see Zahm's "Sound and Music," 1909); but again we need go no further than De Forest and Robison. All the elaborate experiments and treatises teach no more on the practical side of the art than did these men to their operators, and, while Fessenden was still trying to satisfy himself and supposing that he had made a great physiological discovery, everyday operators knew or were told the fact that they could hear a high frequency spark better than a low one, and that it was more effective for getting through static.

This, then, was the state of the art when Fessenden went to the Patent Office. High frequency was old, regular sparking was old, and the telephone receiver in radio was old. True, the Navy had abandoned the Slaby-Arco mercury turbine interrupter for the 60-cycle generator, furnished, however, by Fessenden's company during

the latter part of 1906 and early in 1907, because, as Robison said, "this is a commercial type of generator."

The Slaby-Arco had not been abandoned because the Navy desired to go back to low frequency, but, obviously, because of difficulty in keeping the apparatus clean and in good order. De Forest could go no further, because he and his company were in straitened financial condition. He says so, and there is no reason to doubt his statement; for, as Fessenden put it in his letter to Edwards of the General Electric, as late as June 11, 1908:

"I note that the prices are very high, and if it were not for the fact that the 500-cycle machine does the work of a low frequency machine of much greater output, we would not consider using them," et seq.

Whether in Fessenden's correspondence with the General Electric Company in February, March, and April, 1906, in regard to a 240-cycle generator, he had in mind 240 or 480 sparks, makes no difference, for, in view of the state of the art and, to be repetitious, the explicit teaching of De Forest, 480 sparks would not be invention over 266 sparks, especially as the principles affecting high frequency had been clearly stated; and so also as to the letter of February 28, 1906, to the Westinghouse Company and the conversation with Mr. Young of that company, said to have taken place in February, 1906.

The truth is that the evidence of things done, the correspondence throughout culminating in the letters of May 8, 1907, and June 7, 1907, to the General Electric Company, and the fair inferences from Fessenden's specification, indicate beyond peradventure that what he thought was his invention was made about April or May, 1907; and, in any event, plaintiffs have failed to carry the burden resting upon them when they seek to establish an earlier date of invention.

As I look back upon what I have written, it might be pertinent to ask why a consideration of the patent and the file wrapper have been so long delayed. The answer is that this history must be lived in chronologically; for in no other way can a true appreciation be had of the state of the art, paper and commercial, on July 1, 1907. On that date there were just two possibilities: (1) To annul, exclude, eliminate static; or (2) to improve the wireless note by method or apparatus, or both, so far beyond the art as to constitute invention. The first has not been done. He who shall accomplish that need have no fear of the fate of his invention.

Fessenden undertook the second. As filed, the word "definite" does not appear either in the specification or claims. The specification, from line 62, page 2, to the end of the claims, was omitted, and in place of it there was the following paragraph:

"Any suitable means of obtaining the desired spark frequency may be used. *The receiver is preferably mechanically tuned*, as well as electrically; but this is not shown or claimed herein, as it is shown and claimed in other applications."

And the following claim:

"1. In a system of wireless signaling, the production of signals by groups of impulses having a group frequency higher than commercially used alternating current frequencies and within the limits of audition."

By an amendment of November 16, 1908, the patentee inserted the matter on page 1, line 51:

"The rate of vibration being altered at will by shifting the weight *19a* on the reed."

The claims were changed, four new claims being presented, of which the first included:

"Using a group frequency for the impulses higher than 125 per second, but within the limits of audibility."

The second was the same as the fourth claim of the patent, the third had similar language to the first in the above respect, and the fourth included:

"A group frequency above the ordinary disturbing commercial frequencies, but within the limits of sensibility of an aural receiver."

The case had been rejected on reference to Blondel's patent, No. 824,682, of June 26, 1906, and Fessenden, in support of the above-mentioned claims, argued that:

"The methods given by Blondel * * * are impracticable and inoperative for giving group frequencies. The inductance of a Reuhmkorff coil is too great to be used with a circuit breaker of the kind described, and an electric circuit breaker does not give any *definite and constant frequency.* Nor can any *definite number of discharges* be obtained from an alternating current dynamo in the manner stated, for even if a number of discharges may be obtained for every half wave, they are irregular in the interval between discharges being closer together at the top of the wave than at the beginning or end of the wave. It is therefore plain that Blondel never used any such frequency as that to which he refers, and since the methods described are incapable of producing them, this reference is no anticipation. * * *"

In an affidavit dated November 23, 1908, Fessenden stated that he had discovered:

"That the sensitiveness of the ear increased to a very great extent for frequencies above those heretofore used in wireless signaling, and reached a maximum at about 920 impulses per second, and thereafter began to decrease"

—and then described the results from using a spark frequency of 960 per second, as contrasted with 120 per second. He also believed that Lord Rayleigh was wrong in concluding (as he construed) that the ear was equally sensitive to all frequencies—an error which he pointed out was later corrected by that distinguished scientist, when he independently discovered what Fessenden asserted he himself already knew.

On January 12, 1909, the office examiner rejected three out of the four claims, and on March 13, 1909, a further amendment and argument was filed. Up to March 13, 1909, the situation of the file wrapper was:

(1) The word "definite" did not appear once, either in specification or claims.

(2) The word "musical" did not appear anywhere.

(3) Fessenden had used the isolated parenthetical expression (page 2, line 34) referring to a frequency of 250 as "being generated by dynamo of *approximately* 125 cycles per second"—an expression

which, read with the context, does not convey the meaning of absolute definiteness insisted upon.

(4) Fessenden said:

"I discovered * * * that when higher frequencies were being used for signaling the attention of the hearer was concentrated on the higher notes to such an extent that the lower noises made by atmospheric disturbances ceased to affect the consciousness."

It is now contended that "note" is used in its strict technical sense, meaning a musical note produced by "definite" frequency; but it is plain that "note" was the language of the art, paper and practical, for a wireless signal, and "noise" was the common description of the sounds of static. Besides, it will not do to drag out one sentence from a specification, and give to cloudy inference the dignity of that clearness which the statute requires, when nowhere else, in drawing, specification, or claim, can the meaning urged be found.

(5) Fessenden preferred mechanical tuning.

(6) Fessenden, referring to the spark gap, simply said "*37* is a spark gap," and *37* in Fig. 3 of the drawings showed an ordinary plain gap—concededly not an instrumentality for automatic regularity, but a gap which must be kept clear of arcing by air blast, or otherwise regulated, in order to assure regular sparks.

(7) Fessenden showed a close regulation of the dynamo speed, the contention here being that this was of value in enabling proper spark gap and condenser adjustments to be made; but the simple and known means for insuring regularity, such as the rotary gap, was not shown nor described.

(8) Fessenden was wrong in characterizing Blondel's methods as inoperative.

(9) Fessenden was wrong about Lord Rayleigh. Vide Lord Rayleigh's articles in the Philosophical Magazine for 1894 and his "Theory of Sound," 2 volumes.

The result is that prior to March 13, 1909, "definite," in the sense of regular, had not been disclosed.

Responding to the examiner's letter of January 12, 1909, citing Stone, No. 767,892, Shoemaker, No. 749,584, and Ehret, No. 785,803, Fessenden, obviously still worrying about Blondel, amended by adding from the word "heretofore," on page 2, line 62, to the word "note," on page 2, line 119, and then abandoned the preference for mechanical tuning, and substituted and added down to the word "used," on page 3, line 6. Thus, what theretofore read:

"Any suitable means of obtaining the desired spark frequency may be used. The receiver is preferably mechanically tuned, as well as electrically, as shown in my United States patent No. 727,526"

—now became:

"Any suitable means of obtaining the desired spark frequency may be used, as, for example, an alternating current dynamo having a frequency of 500 cycles, as above referred to. While the receiver may also be mechanically tuned to the group frequency, this is not always advantageous, and moreover it is not part of the present invention, having been already shown and claimed in my prior patent, No. 727,325, of May 5, 1903. In describing the indicator as 'resonantly unresponsive' to the group frequency, such phrase is intended to

mean an indicator which, on being affected by aperiodic impulses, does not emit a note of the group frequency being used."

In the foregoing the word "definite" appears just once (page 3, line 118), and then in the sense of predetermined or selected. But now, as if dropping unheralded from the sky, the word "definite" appears in claims 1, 2, and 3 for the first time. Now, at this time, "definite" might have meant "predetermined," as defendants contend, or "regular," as plaintiffs contend.

There is a good deal in the prior art and in the history of Fessenden's prior patents and experiments to support defendants' contention; but I prefer to take the broader view, and assume that now Fessenden meant "definite" in the sense of regular, and that those skilled in the art, when confronted by the ambiguity, would have concluded that "regularity" was meant, especially in view of the fact that the use of a resonantly unresponsive receiver and the abandonment of preference for a tuned receiver would negative the idea that Fessenden meant predetermined.

But now the patent is impaled on the horns of a real dilemma: Either "definite" in combination was new matter not supported by oath, or by virtue of the prior art and the file wrapper history it was old, or obvious, or both, and the only theory upon which the changes of March 13, 1909, can be supported is that they were additions of well-known matter to complete an imperfect showing. The importance of watching closely vital changes in the progress of an application through the Patent Office is strikingly illustrated here, because, when Fessenden added "definite," in March, 1909, Cabot's application for his patent No. 937,281, dated October 19, 1909, had been filed as far back as December 31, 1906; and the Telefunken Company, as appears from the paper read by Count Arco at the seventeenth annual convention of the Federation of German Electrical Engineers, claimed to have introduced the high frequency spark on new installations in this country and elsewhere, since the spring of 1907—the point, among other things, being that the high frequency generator of Fessenden was probably not novel in 1909, even in practice.

But I will go further. In view of the then known and now understood prior art, the Blondel patent, No. 824,682, now looms up larger than ever; for Blondel had high and definite frequency, and everybody knew that high frequency was effective with ordinary as well as tuned receivers. Fessenden, in his argument supporting the amendment of March 13, 1909, speaks of a "musical note" as a matter of course, when he refers to the musical notes of static and of a transmitting station; and Blondel, whose application was filed as early as December 3, 1900, had expressed his views in a sealed communication in 1898 to the Academy of Sciences at Paris, which he quoted as early as 1900 in "Comptes Rendus des Séances de l'Acadamie des Sciences."

If, therefore, we return to July 1, 1907, we have, in addition to everything else, Blondel's frequencies as high as 900 and definite; and throughout it must not be forgotten that to sustain the patent it must be assumed that the skilled man, who read Fessenden's *original*

application and drawings, would have substituted a rotary gap for the plain gap there shown, and from that assumption it follows logically that that feature must have been obvious. From what has been outlined, and much more which could be added if space permitted, I am fully satisfied that, even assuming July 1, 1907, as Fessenden's date, his patent does not show invention. So holding, a discussion of questions of anticipation becomes unnecessary.

To resolve a doubt, if such existed, plaintiffs point to commercial utility. Of course, the 1,000 spark frequency produces an excellent note and is extensively used; but it is not exclusively used. More than that, I think there is no escape from the conclusion that the commercial art had been moving up rapidly because of disasters at sea and greater requirements set by governments and international conventions. Wireless was being transformed from a dream to a reality, with capital to back it, and hence expense was not the deterrent which it had been in the earlier days.

But, finally, I am not by any means convinced that "definite" spark frequency is sine qua non above certain lower limits of frequency. Of course, the fact must be acknowledged that the method and apparatus show how to produce a musical note of high pitch, which is of great service in dominating static; but, as aptly put in the Telefunken Zeitung, supra:

"Corresponding to the manifold demands of the practice, many methods may exist side by side."

The experiments of Waterman and Weagant raised a serious doubt as to the necessity for absolute definiteness in connection with high frequency; but the tests at Sayville, at which I was present, have in my opinion demonstrated that a note musical in quality, of high pitch, and effective may be produced without that regularity required by the patent.

Some suspicion was suggested as to the surreptitious nature of certain adjustments; but, fortunately, the arrangements made by me were such as to negative this suggestion. No one for a moment would think that the counsel for defendants would be parties to any deception, and I cannot permit myself to believe that the engineers and employés at the Sayville station, who were present at these tests, would willfully deceive the court by trick and device.

To the eye it seemed that the sparks were not regular, and this visual impression was confirmed by the photographs contemporaneously taken and later received in evidence. Kintner made a brave and ingenious effort to show that the sparks were in fact regular; but there were so many exceptions to regularity, even if Kintner's theory were adopted, that it is plain that in the method in use at Sayville exact regularity is not sought nor attained. The sparks at Sayville were of the order of 640 and irregularly spaced. The resultant note of musical quality is accounted for by an interesting, and to the layman unusual, law explained in

"The Elements of Physics, A College Text-Book, by Edward L. Nichols and William S. Franklin, in three volumes, vol. III, Light and Sound, New Edition, Revised and Rewritten. New York, The Macmillan Company: London, Macmillan Company. 1909."

For convenience, and because of its importance, section 202 of Nichols and Franklin is quoted in full:

"202. *Consonance and Dissonance.*—An intermittent or fluctuating tone produces an unpleasant sensation which is called discord or dissonance. A steady tone, or one which fluctuates so rapidly as to give a steady sensation, produces a pleasing effect which is called concord or consonance. These terms discord or dissonance and concord or consonance are used to express the effects produced by two or more simultaneous tones, that is, they are used to express the relations of tones. Nevertheless, the above definitions are physically correct, as will appear in the following discussion.

"Consider a tone which is intermittently shut off from the ear, the intermittence beginning at low frequency and increasing to greater and greater frequency. The dissonance at first increases with increasing frequency of intermittence, reaches a maximum, then falls off, and disappears entirely when the frequency of intermittence becomes so great that the sensation of the tone becomes smooth and continuous. The frequency of intermittence for which the dissonance is a maximum, and the frequency of intermittence for which the sensation becomes smooth and continuous depend upon the vibration frequency of the tone which is used, as is shown in the table on page 210.

"Vibration.	Frequency of Intermittence.	
Frequency Of Intermittent Tone.	When Tone Becomes Smooth.	When Discord is a maximum.
64	16	6.4
128	26	10.4
256	47	18.8
384	60	24.0
512	78	31.2
640	90	36.0
768	109	43.6
1,024	135	54.0

"The fluctuations of tone which produce dissonance in music are due to beats. When two tones are in unison they give a smooth sensation. If the vibration frequency of one tone is slowly increased beats occur with greater and greater frequency, the intermittent sound sensation becomes more disagreeable or discordant, and soon reaches a point of maximum discord, after which the discord decreases again. When the beats become sufficiently frequent, the sensation becomes smooth because of the persistence of the sound sensations."

To the foregoing should be added the answer of Stone to Q. 92: "Would the tone produced by the telephone be smooth or harsh?" as follows:

"It would depend upon the frequency of recurrence of the impulses, as determined in the tables given in the book on physics by Professors Nichols and Franklin, to which I have referred to-day. If the natural periodicity of the diaphragm of the telephone be 1,024 vibrations per second, then the frequency of the impulses necessary to produce a smooth or consonant tone in the telephone would be 135 per second, while, if the frequency of recurrence of the impulses acting on the telephone diaphragm be 54 per second, the notes produced would be extremely harsh. Again, if the natural frequency of vibration of the diaphragm be 768 per second, the frequency of recurrence of the impulses required to produce a smooth tone would be 109 per second, while a frequency of recurrence of impulses of 43.6 per second would produce an extremely harsh tone in the telephone."

Thus what was seen and heard at Sayville is amply confirmed in theory. Irrespective of the conclusion as to the validity of the patent,

it is apparent (and indeed conceded) that the defendants do not at Sayville infringe claim 3; and because, among other reasons, the spark frequency is not definite, they do not infringe claim 1. There is really no proof of infringement at West Street; but, in any event, neither claim is infringed for the reasons, supra. Of course, it is urged that in any event, both Sayville and West Street did at one time infringe; but, in view of my opinion as to the patent, that question becomes academic.

Finally, although Stone at the moment stands alone, I think that scientists in course of time (if they have not done so already) may find that he is right in his theory as to the relation between persistent wave trains and musical radio notes; but we need not speculate, when it is clear that regularity, in the sense of the patent, is not needed in high frequencies.

In this opinion, of necessity, I have omitted many references to testimony, patents, and scientific writings which confirm the conclusion, for the reasons, here outlined, that the method patent is invalid, and, in any event, is not infringed.

In the apparatus patent, the sentence, "The receiver is preferably mechanically tuned as well as electrically," was permitted to remain; and this is an additional defect which, in view of the prior art, and the controversy as to the word "definite," is destructive of validity.

As, in my opinion, the suit in the Third circuit does not operate as an estoppel, the complaint must be dismissed, and a decree may pass accordingly.

SAFETY CAR HEATING & LIGHTING CO. v. GOULD COUPLER CO.

(District Court, N. D. New York. March 6, 1916.)

1. PATENTS ⟸167(1)—CONSTRUCTION OF CLAIMS.
   The claims of a patent are limited by the language used, and, while they may be construed in the light of the drawings and specification, they cannot be broadened to include all matter contained or stated therein.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. ⟸167(1).]

2. PATENTS ⟸303, 328—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
   A preliminary injunction against infringement of the Creveling patent, No. 747,686, for a system of electrical regulation for use in car lighting, denied on the ground that the question of infringement could not be determined on affidavits.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 496–498, 502, 503; Dec. Dig. ⟸303.]

3. PATENTS ⟸226—"INFRINGEMENT."
   To constitute "infringement" of a patent claim, it is essential that there be present in the infringing device or combination every element of such claim or its equivalent, so combined as to produce substantially the same result operating in substantially the same way.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 357; Dec. Dig. ⟸226.]

In Equity. Suit by the Safety Car Heating & Lighting Company against the Gould Coupler Company. On motion for preliminary injunction. Denied.

Duell, Warfield & Duell, of New York City, for complainant.

Kenyon & Kenyon, Wm. H. Kenyon, Richard Eyre, and Gorham Crosby, all of New York City, for defendant.

RAY, District Judge. Claims 1 to 8, inclusive, of the Creveling patent, No. 747,686, dated December 2, 1903, and issued on application filed February 12, 1902, are alleged to be infringed by the defendant. The patent relates to and embodies a "system of electrical regulation." These claims have been the subject of litigation and adjudication in the federal courts in this, the Second circuit, by Judge Hazel (Safety Car Heating & Lighting Co. v. U. S. Light & Heating Co. [D. C.] 222 Fed. 310), and by the Circuit Court of Appeals (223 Fed. 1023, 138 C. C. A. 651), affirming Judge Hazel. The adjudication in that case is binding and conclusive on this court on this motion, but this is a different defendant, and it contends that the "Simplex" system of this defendant "is so very different from either of the systems of the complainant company that an entirely new question of infringement is presented, which would not merely call for a broader construction of the patent in suit than that previously given it, but one that would be inconsistent with that previously given" should infringement be found in the use by defendant of such system.

The defendant alleges as defenses (1) estoppel and laches, (2) noninfringement, and (3) invalidity, claiming that new prior art not considered in the prior litigation anticipates each and every of the claims sued upon. The defendant claims that it does not infringe, inasmuch as it does not employ "a regulator adapted to maintain a constant current from a generator driven at variable speed and an interdependent regulator for determining the current which the regulator shall hold constant." This is a quotation from the patent wherein is stated what the patent "broadly considered" embodies.

The eight claims in issue read as follows:

"1. In a system of electrical distribution, the combination with a generator adapted to be driven at variable speeds and a storage battery charged thereby of a regulator adapted to maintain given charging currents throughout changes in speed of the generator and means operated by changes in the difference of potential of the battery determining the said charging currents.

"2. In a system of electrical distribution, the combination of a generator and accumulator and automatic means including a device operated by difference of potential determining the charging rate with means maintaining the said charging rate throughout changes in speed of the generator until a change of voltage of the battery causes a change in the charging rate.

"3. In a system of electrical distribution, the combination of a generator, automatic means for maintaining the output of the generator practically constant throughout changes in speed and electromagnetic means determining the said output to be maintained.

"4. In a system of electrical distribution, the combination of a generator, an accumulator, automatic means for maintaining the current output of the generator practically constant and automatic means determining the said current to be maintained.

"5. In a system of electrical distribution, the combination of a generator, an accumulator charged thereby, means for maintaining the current output of the

generator practically constant throughout changes in speed and automatic means controlled by voltage of the accumulator for altering the current upon changes in voltage of said accumulator.

"6. In a system of electrical distribution, the combination of a generator, an accumulator, means for maintaining a desired current output of the generator and automatic means, dependent upon the voltage of the accumulator, determining the said output.

"7. In a system of electrical distribution, the combination of a generator, an accumulator charged thereby, a regulating device in circuit with the generator for controlling the current output of the generator, and automatic means governed by the voltage for determining the said current output.

"8. In a system of electrical distribution, the combination of a generator, an accumulator, a regulating device for regulating the output of the generator and supplemental means controlling the regulating device, to determine the said output."

[1] In construing the claims of a patent, we are confined to the language of the claims made, enlightened as to their scope and meaning by the drawings and specifications. It is not infrequent that the drawings show things not claimed, or that the specifications describe matters not within the claims made. Claims may be construed in the light of the drawings and specifications, but cannot be broadened to include all matters contained or stated therein. This would be substituting the specifications for the claims as made. The defendant contends that each claim in issue calls for the two elements specified in the language quoted, and that this combination of these two elements is not found in either form of defendant's system and structure, etc., alleged to infringe. The defendant claims that it has a current regulator which sometimes acts and a voltage regulator which sometimes acts, but that neither ever determines the standard of current or voltage that the other shall maintain; that each when active effects the entire regulation. The defendant also contends that, as to one form of defendant's "Simplex System" (called by Hammer "Defendant's System No. 1"), it does not infringe for the reason that it has no regulator adapted at any time "to maintain a constant current from a generator driven at variable speed"; that its only current regulator is one that maintains constancy of battery current and permits the generator current to vary with every change of lamp load.

The elements of claim 1 are, in a system of electrical distribution, the combination of (1) a generator adapted to be driven at variable speeds (as a generator attached to the axle of a car) with (2) a storage battery charged by the said generator, (3) a regulator adapted to maintain given charging currents throughout changes in speed of the said generator, and (4) means operated by changes in the difference of potential of the battery determining the said charging currents.

The elements of claim 3 are, in a system of electrical distribution, the combination of (1) a generator, (2) automatic means for maintaining the output of the generator practically constant throughout changes in speed, and (3) electromagnetic means determining the said output to be maintained.

The elements of claim 8 are, in a system of electrical distribution, the combination of (1) a generator, (2) an accumulator, (3) a regulating device for regulating the output of the generator, and (4) supple-

mental means controlling the regulating device to determine the said output.

In claim 8 I fail to find any reference to a regulator or regulating device adapted to maintain a constant current from the generator driven at variable speed, or to an interdependent regulator for determining the current which the regulator shall hold constant. In claim 8 we have "a regulating device for regulating the output of the generator," and also supplemental means for controlling this regulating device and thereby determining the output of the generator. Nothing is said about "maintaining a constant current" from the generator or any interdependent regulator which is to determine the current which the regulator "shall hold constant."

Claim 5 demands, in a system of electrical distribution, the combination of (1) a generator and (2) an accumulator charged thereby, (3) means for maintaining the current output of the generator practically constant throughout changes in speed, and (4) automatic means, controlled by voltage of the accumulator, for altering the current upon changes in voltage of said accumulator. Of claim 5, Judge Hazel says it is "typical of the other claims."

[3] To "infringe" a claim of a patent, it is essential that there be present in the infringing device or combination every element of such claim, or its equivalent, so combined as to produce substantially the same result operating in substantially the same way. The defendant insists that the invention that Creveling discloses, and that each claim of the patent in one form of language or another demands, is one which embodies the combination of two instrumentalities, (1) a regulator operated by the current output of the generator to maintain the generator output constant at all times in spite of variation of speed, and (2) a voltage device influenced by the state of charge of the battery and acting upon said current regulator to adjust it so as to determine the generator current that the regulator shall maintain during the changes of speed. The contention is that thereby Creveling at all times, whatever the condition of the battery, maintained in use a current regulator and always obtained the various well-recognized advantages of such current regulator, at the same time avoiding the danger of overcharging the battery, and that he was also enabled to use a generator of relatively small capacity and to operate that generator always at its point of greatest efficiency.

The contention seems to be that in defendant's system these instrumentalities do not exist or operate in combination, as defendant has in effect two regulators, a current regulator which acts alone when it acts at all, and also a voltage regulator which acts alone when it acts at all; that the one does not regulate while the other is regulating, that is, the two do not act together to produce a result, and neither regulator ever determines the standard for which the other shall regulate. But the purpose of the combination of elements of the Creveling patent and the combination of elements in defendant's devices seem to be designed to effect the same general results, and it is not necessary that they operate in precisely the same way, but only in substantially the same way, and identity of form is not necessary to make one ele-

ment in a patent the equivalent of an element in some other structure, nor is identity of form in the whole structure necessary to make the one the equivalent of the other. If in defendant's structure we find all the elements of the Creveling patent, or their allowable equivalents, and to accomplish a given result all the elements of the complainant's structure act all the time, and in the defendant's these elements are so arranged and changed that they may and do operate singly, that is, the one operates while the other is inactive and then the inactive one operates while the other, previously active, rests, and it be a fact that the constant and efficient action of all the elements at the same time and all the time in the complainant's device is nonessential, is infringement avoided? I think not, for if in a given device there be two wheels, and both move at the same time and all the time, but the movement of but one succeeding the movement of the other is all that is necessary to effective operation and result, is infringement avoided by so changing the form and arrangement that the one wheel absolutely rests and is at a standstill when the other moves; constant action or movement of both all the time being nonessential to the claim? I am of the opinion that the two coils of defendant's simplex regulator do interact and do influence each other. It seems to me plain that both are at all times energized, and that both are at times sufficiently energized so that the plungers of both are mobile and acting upon the shunt field carbon rheostat. The series coil is at all times on hand and available to resume its active participation in the control whenever the storage battery charge becomes depleted and a longer charging current is feasible or proper. Neither of the coils referred to can be omitted. There is not independence of action. They do cooperate sometimes simultaneously and sometimes successively. This means that both are necessary, that both operate, and that sometimes both necessarily operate together and that sometimes they act successively. The one, at times at least, influences the operation of the other, and this action is essential.

Judge Hazel held, and the Circuit Court of Appeals confirmed him in holding, that the patent in suit is entitled to at least a reasonably broad construction, and that both defendant's "stop charge" system (Hammer sketch E) and defendant's "taper charge" system (Hammer sketch F) infringe. Here the defendant uses a taper charge arrangement of substantially similar effect. The current coil first regulates and then its standard of operation is changed by the voltage coil in connection with other parts with which it is associated.

I am inclined to the opinion that defendant's structures alleged to infringe are within the claims of the patent in suit and infringe, there being substantial identity of parts, mode of operation, and results.

The defendant insists that Hammer, complainant's expert, misconceives the position of defendant as to infringement. It thus states its position:

"The position of the defendant is that Creveling disclosed and claimed a system whose essential feature was the continued use of a constant current regulator to counteract the effects of speed changes at all times whatever the state of charge of the battery, and that he devised a system having this essential characteristic because he desired to avoid the necessity of using a voltage regu-

lator to counteract speed changes at any time, the advantage that he obtained springing from the fact that the current regulator was a reliable and accurate piece of apparatus, whereas the voltage regulator was a highly inaccurate and unreliable piece of apparatus."

[2] The defendant produces very strong expert testimony with voluminous papers to the effect, if correct, that defendant does not infringe, and the court has not had the benefit of hearing or of a cross-examination of the witnesses on either side. It is venturesome, to say the least, to decide a rather close patent case on affidavits. Cross-examination may, and oftentimes does, materially change the tenor of the testimony of a witness, and this is as true of experts as of other witnesses. The art to which this patent relates is in a sense and to quite a degree new, and, in view of this and the sharp differences of opinion expressed and criticisms made, I have arrived at the conclusion that this matter ought not to be, in effect and for the time being at least, decided on affidavits. The court should have the benefit of cross-examination, if desired by either party, and of a final hearing.

The motion for a preliminary injunction is therefore denied.

THE AMERICANA.

(District Court, N. D. California, First Division. October 14, 1915.)
No. 15740.

SHIPPING ⟸209(1)—LIMITATION OF LIABILITY—SURRENDER OF VESSEL.

A shipowner, on his petition for limitation of liability, is entitled to a stay of proceedings in other courts only on a transfer of the vessel as she was at the end of the voyage on which the liability accrued, or the furnishing of a stipulation for her value at that time. A transfer or stipulation for her value after her loss on a subsequent voyage is not sufficient.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 650, 654, 659; Dec. Dig. ⟸209(1).]

In Admiralty. In the matter of the petition of the Pacific Shipping Company, owner of the schooner Americana, for limitations of liability. On petition by Louis Buttner for an order for appraisement of the vessel. Granted.

Denson, Cooley & Denson, of San Francisco, Cal., for petitioner.
H. W. Hutton, of San Francisco, Cal., for Louis Buttner.

DOOLING, District Judge. On November 30, 1914, the Pacific Shipping Company, as owner of the schooner Americana, filed in this court its petition for limitation of liability accruing to any one upon a voyage of said Americana begun at the port of San Francisco on January 26, 1913. The petition avers that on that date the Americana left San Francisco, bound on a voyage therefrom to Sydney, Australia, via Knappton, Wash., and to return to San Francisco via one or more ports as the master might direct; that she proceeded to Knappton, and thereafter continued on her voyage to Sydney, and was lost at sea, with all hands on board, between the ports of Knappton and Sydney;

that her value does not exceed $1, and has not exceeded that value since she foundered, and that such foundering, and the loss, damage, and injury so occasioned was incurred without privity or knowledge of the petitioner, and without any fault or negligence on its part; that nevertheless certain claims have been made against petitioner for losses and injuries occurring during the said voyage, and particularly that one Louis Buttner was employed as a seaman on the Americana for said voyage to Sydney and return, via Knappton, and that without negligence on the part of the ship he was injured on the high seas, and as the result of such injury he was compelled to have his left arm amputated near the elbow; that he brought an action against petitioner in the superior court of the state of California, and recovered therein a judgment against petitioner for $5,000 and costs, and that the same has not been paid; that thereafter he brought an action in this court against the stockholders of petitioner for the sum of $25,000 for the same injury.

After the filing of this petition, and on September 23, 1915, petitioner made a transfer, to a trustee appointed by this court, of "all and singular the interest of said petitioner in said vessel Americana, her tackle, apparel, and furniture, and in the freight of said vessel for the voyage on which the said vessel was lost," as provided for in section 4285, R. S. (Comp. St. 1913, § 8023), and admiralty rule 54 (29 Sup. Ct. xiv).

Louis Buttner now applies to the court for an order directing the appraisement of the Americana as she was upon her arrival at Knappton, and requiring petitioner to give a stipulation herein for the amount of such appraisement, on the grounds that the voyage from San Francisco was not to Sydney, but to Knappton; that he did not ship for a voyage to Sydney, but only for the voyage to Knappton; and that the voyage upon which he shipped ended at Knappton, and as he was injured before reaching Knappton, the liability of petitioner as to him can be limited only to the value of the Americana upon her arrival at Knappton. This motion is supported by his verified answer, by his own affidavit, and by the affidavit of W. R. Reith, to the effect that the crew of the Americana, including Buttner, signed shipping articles at San Francisco in the cabin of the vessel before the master, the voyage described in said articles being from San Francisco to Knappton, and that there was nothing therein about Sydney; that all the crew left the vessel at Knappton, and an entire new crew, including the master and officers, was shipped at Knappton. A certificate of the shipping commissioner at San Francisco shows that according to the records of his office the crew of the Americana arriving at San Francisco from Newcastle, Australia, was paid off before him on January 6, 1913, and there is no record of said vessel having shipped another crew before him during the month of January, 1913. No countershowing was made by petitioner.

The petitioner is entitled to have its liability limited only upon the condition that it transfer its interest in the vessel, or give a stipulation, under rule 54, for the value of its interest in the vessel, and her freight for the voyage. This means the voyage upon which the liability ac-

crued. The effect of the proceedings to limit liability is to halt all claimants against the vessel or its owner in every other tribunal except the one in which such proceedings are pending. But this is true only when the petitioner shall have transferred the vessel as she was at the end of the voyage on which the liability accrued, or in lieu of such transfer shall have furnished a stipulation for the amount of her value at the end of such voyage, to be ascertained by a due appraisement caused to be made by the court. It cannot be that the mere averment in the petition here that the voyage begun in San Francisco was a voyage to Sydney can preclude the court from securing the claimant Buttner by something better than the transfer of petitioner's interest in a vessel alleged to be worth $1, if, as contended by him, the voyage was from San Francisco to Knappton only; and where the proofs offered by him all tend to show that the voyage upon which he was injured ended at Knappton, and that the ship thereafter entered upon a new voyage, upon which she was lost, and no showing is made to the contrary, other than by the averments of the petition, the court will not halt his efforts to satisfy a judgment already obtained by him for an injury received between San Francisco and Knappton, for the sole reason that petitioner has transferred to a trustee all its interest in a vessel lying at the bottom of the sea, the value of which does not exceed $1. The giving of a stipulation will not preclude petitioner from proving, if it can, that the voyage was really from San Francisco to Sydney; but it will protect Buttner, if it be determined that the voyage ended at Knappton.

The petition will therefore be granted, and an appraisement ordered of the value of the Americana as she was when she reached Knappton, and a stipulation for such value will be required of petitioner, and until such stipulation shall have been filed the restraining order made by this court on September 23, 1915, is hereby suspended.

WEST COAST KALSOMINE CO. v. LUND et al.

(District Court, N. D. California, First Division. October 20, 1915.)

No. 15597.

SALES ⟸418(16)—DELAY IN DELIVERY—MEASURE OF DAMAGES.

Where sellers of chalk failed to deliver it at the time agreed upon, the measure of damages was the difference between the market value when it should have been delivered and its market value when it was delivered; and where there was no change in market value, the buyer could not recover damages, though the contract price was less than the market price and the delay in delivery forced the buyer to buy chalk for use at the market price and though the sellers knew or had reason to know that a delay in delivery would compel the buyer to purchase other chalk, as this was not equivalent to an agreement to reimburse the buyer for any expense incurred in purchasing other chalk, and moreover, it would seem that the buyer suffered no damage, as it could have recouped its loss by selling a part of the chalk received from the sellers at the market price, unless it needed all of the chalk received from both sources.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1197; Dec. Dig. ⟸ 418(16).]

In Admiralty. Libel by the West Coast Kalsomine Company against Henry Lund and another, copartners as Henry Lund & Co. Libel dismissed.

Ira S. Lillick, of San Francisco, Cal., for plaintiff.
McClanahan & Derby, of San Francisco, Cal., for defendants.

DOOLING, District Judge. This cause is submitted upon an agreed statement of facts. From this it appears that libelant bought of respondents on June 6, 1912, 1,500 tons of French chalk, to be paid for on delivery in San Francisco, and to be shipped from Europe to San Francisco in two shipments, the first shipment to be made during June/July, 1912, and the second to be made during November/December, 1912, or January, 1913. The first shipment was not made until May, 1913, at which time 500 tons were shipped, which arrived in San Francisco in July, 1913, and were afterwards delivered to and accepted by libelant. In the meanwhile, however, in March and April, 1913, libelant, to meet the requirements of its business, was compelled to purchase, and did purchase, 295 tons of French chalk at a price greater by $1,242.60 than the price agreed to be paid to respondents for an equal amount. If the chalk had been shipped in June/July, 1912, libelant would not have been compelled to make this purchase.

This action is to recover the said sum of $1,242.60. It is stipulated that the price paid by libelant for the 295 tons was the lowest price at which such chalk could have been purchased at the time and place of such purchase. It is also stipulated that the market price of French chalk, such as was contracted for by libelant, was the same on the day of the delivery of the first shipment to libelant as it was at the time and place at which under the contract it should, within a reasonable time, have been delivered, and that such market price was the same at all times between the date when such chalk should have been delivered, and the date when it was actually delivered. It is also stipulated that libelant reserves the right to show (if it be deemed material) that respondents, at the time of making the contract, knew or had reason to know that the said purchase made by libelant in March and April, 1913, was or would be the immediate, direct, and necessary result of a delayed shipment under said contract, respondents reserving the right to rebut such showing.

But under the circumstances this purchase seems to me to be a false quantity in measuring the damages. The real measure of damages is the difference between the market value of the chalk when it should have been delivered, and its market value when it was delivered. There is no agreement on the part of respondents to recoup libelant for any expense incurred by it in the conduct of its business, and the fact offered to be shown that respondents had reason to know that, if they did not deliver the chalk at the agreed time, libelant would be compelled to purchase other chalk, is not equivalent to an agreement on the part of respondents to pay to libelant any damages that might result from such purchase. In delaying delivery respondents were taking chances only on such

loss as might accrue to libelant by reason of a decline in the market value of the chalk, and not on any loss that might accrue to it by reason of the exigencies of its business. The loss complained of—if, indeed, any loss really occurred—was not due to respondents' failure to deliver on time, but to such failure to deliver plus the fact that libelant was conducting a business which required chalk at that particular time. For this latter element respondents are not responsible.

And after all it is not clear that libelant has suffered any actual damage. It is true that it purchased 295 tons of chalk at an increase over the contract price; but, if I understand the stipulation, this chalk was purchased at the market price, which did not vary between the date of the purchase and the date of delivery by respondents of the first shipment. When this shipment of 500 tons was received, either all of it was required by libelant in its business, or it was not. If it was not, then libelant, by selling 295 tons at the market value, could have recouped itself for the amount paid for the chalk purchased by it from other sources. If all the chalk received from respondents was required by libelant in its business, in addition to the 295 tons purchased by it elsewhere, then this action is in substance an effort to compel respondents to furnish 295 tons more than libelant purchased, and at a price much below the then market value. However, as there was no decline in the market value of the chalk, and as damage resulting from such decline would be the only damage for which respondents could be held liable for delay in delivery, the libel must be dismissed.

A decree will be entered accordingly.

THE GOVERNOR.

(District Court, N. D. California, First Division. October 19, 1915.)

No. 15848.

1. SEAMEN ⇐11—INJURY IN SERVICE—MEDICAL TREATMENT.

Libelant, a fireman on a steamship, was severely injured by falling astride a pipe. The vessel arrived at Victoria, B. C., an hour later, and remained for three hours; but no physician was called and no treatment given, except by a fellow employé, until the ship reached Seattle, eleven hours after the injury. Libelant was in great pain. *Held*, that the nature of the injury was such that it should have been given attention at the earliest possible time, and that in failing to give it when the opportunity offered the master failed to perform his duty, and rendered the vessel liable in damages.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39–44, 187; Dec. Dig. ⇐11.]

2. SEAMEN ⇐11—INJURY IN SERVICE—MEDICAL TREATMENT—JUDGMENT OF OFFICERS.

Due care requires that the judgment of the officers of a vessel when dealing with injured seamen should be exercised, not only with the knowledge they possess, but also with such as they can readily acquire.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39–44, 187; Dec. Dig. ⇐11.]

In Admiralty. Suit by Thomas Morgan against the American steamship Governor; the Pacific Coast Steamship Company, claimant. Decree for libelant.

F. R. Wall, of San Francisco, Cal., for libelant.

McCutchen, Olney & Willard and Ira A. Campbell, all of San Francisco, Cal., for respondent and claimant.

DOOLING, District Judge. [1] Libelant, a fireman on board the steamship Governor, was injured by falling astride a pipe in the engine room; the external nature of the injury being a severe and visible laceration near the medium line in the vicinity of the rectum, and its internal nature being a rupture and laceration of the urethra. The accident occurred about 10 a. m., and an hour before the vessel arrived at Victoria where she remained for something over three hours. From Victoria she proceeded to Seattle, arriving there about 9 p. m., eleven hours after libelant was injured. There was no doctor on board, and none was called at Victoria. Nothing was done to the wound before the vessel arrived at Seattle, other than to cleanse it with warm water and peroxide and dress it with gauze. At Seattle libelant was taken to a hospital, where the wound was properly treated. The master did not visit libelant at any time after the injury, and whatever was done looking to his care was done by the first assistant engineer, though the chief engineer visited and had some conversation with him; the time of such conversation and its tenor being in dispute. He did not examine the injury. This action is to recover damages because libelant was not cared for at Victoria.

There is no claim that the ship was responsible for the original injury, or that libelant was not properly cared for after he reached Seattle. I have no doubt from the testimony that the injury was aggravated and rendered more difficult of treatment by the delay ensuing between the time of the accident and the time that libelant reached the hospital at Seattle. That libelant was very seriously injured is beyond question. The location and character of the injury and the severe shock to libelant's system rendered it imperative that he should receive treatment at the earliest possible moment. The wound was bleeding profusely, and libelant was in great pain, and although the extremely serious nature of the injury was not made clear to the first assistant engineer, who was the only officer that really concerned himself about the matter, until after the vessel had left Victoria on its way to Seattle, it seems to me that ordinary care and prudence required that during the three-hour stay of the vessel at Victoria a physician should have been called.

I know the rule is that the ship will not be held responsible for an error of judgment on the part of the officers, if their judgment is conscientiously exercised with reference to the conditions existing at the time. But I do not believe that, when the real conditions may be so easily ascertained as they could have been at Victoria in the present case, the officers should rely upon their own unskilled judgment to the detriment of the seamen under their care. The very location and external extent of the injury in question should have moved them to

ascertain its real nature, when that could have been done so easily and at such a comparatively trifling expense.

[2] I think that due care requires that the judgment of the officers when dealing with injured seamen should be exercised, not only with such knowledge as they possess, but also with such as they can readily acquire. There is some testimony that libelant expressed a desire to be carried to Seattle. In view of the uncertainty of the recollection of the first assistant engineer upon this point, I cannot find that this is true. But, if it were true, it would not, in my judgment, absolve the ship from the failure of the master, or those acting for him, to ascertain libelant's real condition at Victoria. I am firmly of the opinion that a due regard for the rights of seamen should require, and does require that in a case like the present, when an early opportunity is presented of easily ascertaining the nature and extent of an injury, the location and external appearance of which shows that it may be serious, the officers should take advantage of such opportunity, and failing to do so, they fail to accord to the seaman the care to which he is entitled.

The amount which should be awarded to libelant is not easy to determine. I think, however that for the increased pain and suffering, and the probable longer duration thereof due to the delay in treatment, it should not be less than $1,200, and a decree will be entered for such sum.

UNITED STATES v. AMERICAN CAN CO. et al.

(District Court, D. Maryland. February 23, 1916.)

MONOPOLIES ⇐20—COMBINATIONS IN RESTRAINT OF TRADE—SUIT FOR DISSOLUTION.

Defendant American Can Company was organized in 1901 with capital stock, common and preferred, of $88,000,000, $78,000,000 of which was issued to the promoters in payment for 95 plants which made probably 90 per cent. of the cans then manufactured for sale in the United States and options on which had been secured by the promoters. They paid for the plants in cash or its equivalent in stock at one-half par value $23,500,000. New plants with new machinery of equal capacity could have been built for not to exceed $10,000,000. For some of the plants they paid many times the value of the physical property. They also required the sellers if individuals, or if corporations their officers, to sign agreements not to again engage in the business for 15 years within 3,000 miles from Chicago. Defendant also acquired patents on can-making machinery and made contracts with the principal manufacturers of the best machinery intended to prevent others from buying it for a term of years. During the first year, defendant largely increased prices; but, the effect being to induce others to enter the business, it abandoned the policy. About two-thirds of the plants purchased were closed. By the end of 12 years, when the government brought suit for its dissolution, defendant was perhaps marketing no more cans than the aggregate of its competitors. For some years before the suit, defendant did not attempt to do away with competition, or to monopolize the business, but its methods and prices were fair and its standing good with customers and competitors. The most of the concerns absorbed by it and of others afterward acquired went out of existence. *Held*, that the organization and early methods of de-

fendant were intended and calculated to restrain competition in the manufacture and sale of cans, and to monopolize the same, and were clearly illegal as in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209 (Comp. St. 1913, §§ 8820, 8821); that while its large capital and business make it a potential instrument which may be used to restrain or monopolize a part of the commerce among the states, so long as no attempt is being made at present to so use them, and in view of the fact that former conditions cannot be restored, and that under its present methods by reason of its widespread business packers are enabled to make more beneficial contracts for the purchase of cans for future use, both from it and its competitors, than ever before, no public interest would be served by its dissolution, but that such interest would be better served by permitting the suit to stand open for such future action as changed conditions may require.

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

In Equity. Suit by the United States against the American Can Company, the Sanitary Can Company, the Missouri Can Company, the Martin Wagner Company, the Boston Wharf Company, the Max Ams Machine Company, the Freeman-Duncan Transfer & Realty Company, the Hawaiian Pineapple Company, Limited, the American Sheet & Tin Plate Company, Daniel G. Reid, Fred S. Wheeler, Henry W. Phelps, Franklin Rudolph, Rensselaer H. Ismon, W. F. Dutton, Roy A. Burger, Frank D. Throop, William T. Graham, Edmund C. Converse, Francis L. Hine, James McLean, George C. McMurtry, William Henry Moore, Joseph W. Ogden, Ray L. Skofield, J. Hobart Moore, William Y. Bogle, George W. Cobb, William A. Wagner, Edward A. Kerr, Frederick W. Wagner, Charles M. Ams, Emil Ams, Joseph B. Russell, William G. Duncan, and Michael Espert. On final hearing. Decree deferred.

George Carroll Todd, Asst. Atty. Gen., Henry E. Colton and William T. Chantland, Special Asst. Attys. Gen., and Samuel K. Dennis, U. S. Atty., of Baltimore, Md., for the United States.

John Barton Payne, of Chicago, Ill., George R. Willis, of Baltimore, Md., L. A. Welles, of New York City, and Frederick R. Williams, of Baltimore, Md., for defendants.

ROSE, District Judge. The United States, hereinafter called the "government," brings this proceeding under the fourth section of the Anti-Trust Act of July 2, 1890. It says that the American Can Company, a New Jersey corporation, was formed and has since been maintained in violation of the first and second sections of that statute. Originally, there were 9 other corporate and 27 individual defendants. By consent at the hearing the petition was dismissed as to 5 of the former and 8 of the latter. All of the defendants other than the American Can Company were brought into the case because the government thought they had taken part, either in its illegal organization, or in its subsequent unlawful acts. It will be referred to many times. The other defendants will be mentioned much less frequently. For brevity, it will be called the "defendant."

It has put 516 witnesses on the stand; the government 346. Between 1,500 and 1,600 exhibits have been filed. The record covers more than 8,700 printed pages. Nevertheless, an ordinary collision

case on the admiralty side of the court, or a moderately contested proceeding in bankruptcy, would raise more issues of fact. The government proved one set of circumstances. By cross-examination the defendant sought to minimize their effect, but it offered no evidence in contradiction. When its turn came, it proved other things. The government attempted to show from defendant's witnesses that, either they were not as well informed as they supposed themselves to be, or that there were many things in economics undreamt of in their philosophy; but, as a rule, it did not undertake to show that they were wrong as to any actual fact of real materiality or importance.

What Has Been Proved.

What has been proved is: First, that the defendant was organized to monopolize interstate trade in cans, and to attain that object such trade was unlawfully restrained by it, and by those who formed it and directed its earlier activities, and that some of those individuals still participate in its management and control. Second, for some time before the filing of the petition in this case, it had done nothing of which any competitor or any consumer of cans complains, or anything which strikes a disinterested outsider as unfair or unethical.

Legal Contentions of the Parties.

The government says that certain restraints once illegally imposed by the defendant upon the trade are still in force, in part at least. The defendant replies that, if in any sense so much is true, such restraints have long ago become theoretical rather than real, and, if the court thinks it worth while, the defendant has no objection to their being declared illegal, or even to an injunction forbidding their further enforcement.

The real controversy between the parties goes much deeper. The government says the defendant, by its size, its wealth, and its power, exerts a great influence upon the entire trade in cans, and that this influence, in some very important respects, notably as to the fixing of the price of packers' cans, is so great that it may, without straining words, be said to dominate the market.

The defendant answers its size is not a crime. The government replies, in substance:

"True, provided such size is the result of natural and legitimate growth, but not when it is the outcome of unlawful means used for the very purpose of securing a control of the market. In the latter case, so long as the control continues, the illegal purpose is still in process of execution, and, if nothing short of dissolving the defendant into a number of smaller companies will completely emancipate the trade, the court must decree such dissolution."

"The combination among the once independent concerns might have been otherwise effected. They might have subjected themselves to control of a single will, while each still preserved its individual existence. In that event, it would be clear that the court could and should put an end to the agreement among them."

Reference is made to those cases which hold that the way in which the combination is brought about is immaterial. If it seeks an end forbidden by the anti-trust acts, and that end is attained in whole or

in part, the government has a right to demand that it be dissolved.

The defendant's answer may be thus summed up:

"With a very few exceptions, only one of which is of any real importance, all the units which have at any time come under its control are dead, beyond the hope of resurrection. The court cannot call back to life the many can-making concerns which died that the defendant might come into being, or which have since yielded up their lives to it. No order of court can make the dead breathe again."

"The number of once independent concerns absorbed by it can, it is true, be ascertained. If the court is bound to come as near as it can to putting things back as they were, it must dissolve the defendant into a like number of parts. Everybody feels that it is under no such obligation. The government does not ask that the defendant shall be divided into more than about half a dozen separate corporations. Why will it be content with a dissolution perhaps one-twentieth as drastic as would be required to restore the original status? Obviously, because it recognizes that a court of equity neither will, nor should, cause loss, destruction, or inconvenience, unless it has reasonable and probable grounds to believe that by so doing it will accomplish affirmative good. Its business is to prevent and remedy, not to punish. If it will not order a dissolution into 100 parts because nothing would be gained thereby, it will not decree a division into 6 or even into 2, unless it believes that good will follow. It must deal with facts as it finds them. If an illegal agreement is still in force, it must end it. If the agreement has long since been executed, and is itself at an end, the court may, if it can, put things back where there were before the agreement was made; but, if Humpty Dumpty cannot be set up again, the court must do the best it may with conditions as they are. The record shows that any dissolution will do more harm than good."

To this the government replies that:

"Even if for the sake of the argument the soundness of defendant's statement of legal principles should be admitted, it remains true that defendant acquired its controlling position in the trade as the result of an unlawful combination; that such control, even when legitimately acquired, if not illegal, is at the best a danger; and that, by the dissolution asked for, it can and should be ended."

Why the Facts Are Reviewed.

It is upon the answers which the law requires to be given to these contentions that the judgment of this court must turn. Any statement of facts, in addition to that already made, other than those which bear upon the present relation of the defendant to the can trade, and upon the probable effect of its dissolution, or of its remaining undissolved, upon the public interests, is therefore, strictly speaking, unnecessary. The case may not stop here. It is not probable that either side will accept the conclusions above stated as being at once both accurate and complete. The court of first instance should give the appellate tribunal the benefit of its examination of the evidence, whenever the facts are disputed, or the inferences which should be drawn from them are contested.

Moreover, the history of the formation of the defendant, and of its subsequent conduct, of its effect upon its competitors, actual or potential, and upon the first and upon the ultimate consumers of cans, may be of far-reaching social and economic interest. All the 18 volumes of the record have been carefully studied to make sure what were the real issues in this case. It will be worth while to summarize the story they tell.

Packers' Cans and General Line Cans.

The can-making trade has always made a distinction between cans for hermetically sealing food products, and cans for other purposes. They call the former packers', the latter general line, cans. Almost all packers' cans are now made of certain standard shapes and sizes, which are, or which are intended to be, the same, no matter from what shop they come. On the other hand, general line cans are of every variety, shape, and size, according to the use to which they are to be put, and the taste of him whose goods are to go in them.

There have therefore always been more customers for machinery for making packers' than for the manufacture of general line cans. The progress of invention in the former has, accordingly, been more rapid. Modern machinery for the fashioning of packers' cans doubtless costs far more than that in use 16 or 17 years ago, but even now it can be installed at an expense which is small as compared with the outlay necessary to equip such a plant as is required in many other industries. The small manufacturer has much greater difficulty in so fitting himself for the manufacture of general line cans, as to enable him to compete in all their kinds on approximately equal terms with a powerful rival. He cannot afford to buy all the types of machines which might be more or less advantageously employed in making some sorts of general line cans, because he will have very little use for some of them. He can wisely buy only such as are fitted for the making of the relatively few varieties of cans for which he can build up a considerable demand, or which can be used for some of the simpler operations required for the making of many kinds. Favored by local conditions, such as proximity to markets, etc., he may still make partially by hand, and sometimes may competitively sell, some sorts of general line cans.

Can Making for Sale and Can Making for Use.

There have always been, as there are now, can makers who sell all the cans they make, can makers who use all they make, and still others who make a part or all of those they use and who habitually or occasionally sell some of those they make. It was formerly quite common for packers, and even for very small packers, to make the cans they used. Most of the work was done by hand. The machines they had were cheap and simple. Many packers, especially those whose canneries were in rural districts or in small towns or villages, felt it expedient, if not necessary, to find work throughout the year for some of the hands whose services they needed in the packing season. This practice was going out of fashion before the organization of defendant. To-day it is almost extinct among small packers. On the other hand, tin cans are now used for many purposes for which they were not then employed. There are concerns, each of which use great quantities of them, and of these a number prefer to make those which they need. Moreover, in some regions, peculiar conditions make it almost necessary that the user shall be also the maker. For illustration, salmon packing is one of the most important, if not the most important, of all Alaskan industries. The season's supplies needed for

the canneries on the banks of these far northern rivers, and for the men who work in them, must be sent up from the states. On the return voyage little is brought back except canned salmon. An empty can takes as much room in the vessel's hold as a full one, while the tin needed to make several thousand cans will occupy no more space than a case of a few dozen filled tins. Therefore those used in Alaska are made at the canneries there. A circumstance which illustrates how comparatively easy, from an economic standpoint, it still is to make cans in small factories remote from industrial centers.

Can Making Before Defendant's Day.

In the fall of 1899, or the winter of 1899–1900, there were somewhere from 100 to 175 can makers who sold some or all of the cans they made. Their establishments varied in size and importance from little shops turning out a few hundred dollars worth of cans a year, to well-equipped factories whose sales in the like time ran up to hundreds of thousands of dollars. For the most part, each of them had one plant. There were a few exceptions. The Pacific Sheet Metal Works had factories at Los Angeles, San Francisco, Astoria, and Fair Haven. Norton Bros.' factory was at Maywood, Ill. Corporations controlled by it had plants at Baltimore and on Long Island. There was a Hunt plant at Cleveland, and another at Kansas City. The relations between Black and Krebs at Baltimore and the Dugdale Can Company at Indianapolis were close, as were those of the R. Tyne Smith Can Company of Baltimore and the Tri-State Can Company of Keokuk. Doubtless there were other such instances, but there could not have been many. From time to time there were price agreements between a few of the larger makers in particular sections of the country; for example, in Baltimore among the so-called Big Four, and in the Chicago-Indianapolis district. These were, of course, terminable by any of the parties at any time. In the light of our present knowledge, they were doubtless illegal, as they were certainly nonenforceable. There was always the probability that one of the parties to such a gentlemen's agreement might suspect that some one of the others was not acting as a gentleman should, and then, as apparently happened in 1898, open competitive warfare took the place of the more or less uneasy truce which had for a while prevailed. In short, although in certain districts barriers against competition were from time to time erected, some of which proved for a while more or less effective, actual competition in large parts of the country was always operative, and in all sections and at all times there were the potential possibilities of a competition which in a few hours might become real and intense. So far as the record discloses, there never was any restraint upon the perfect freedom of competition in the sale of general line cans.

It is not easy to say what the condition of the can-making industry, as viewed from the standpoint of those engaged in it then, was. The difficulty arises from the fact that most of the witnesses who have testified each tell two mutually contradictory stories. In one breath, they describe the actual conditions of the business under the strain

of the competition, subject to which it was then carried on, as very bad. They paint its future prospects as gloomy in the extreme. In the next breath, when asked to explain the reasonableness of the prices at which they sold out to defendant and which might be anywhere from 2 to 25 times the tangible value of all they had in the business, they wax eloquent over the large profits they were making and the hopeful outlook that the future had for them.

The facts probably were that many, if not most, of the can factories, in common with almost all other lines of business, had felt acutely the hard times from 1893 to 1898, augmented as they were by the sharp price war in packers' cans in the last-named year. About that time tin plate fell to what apparently was the lowest point it ever reached. As a result, packers' cans then sold for less than they have ever brought at any other time, before or since. Many of the can makers had shared in the improvement in general business conditions which set in shortly after midsummer of 1898, and in the period which followed some of them doubtless did very well indeed. The men in that business, like all others, had their ups and downs, their trials and their worries, among which not the least was the energetic efforts of their competitors to get their customers away from them.

Comparatively few of them were well equipped with the best machinery then obtainable. Not many of the plants were housed in buildings erected for them. Most of them occupied structures which had been originally put up for other purposes. Relatively little high skilled labor was then, or apparently now is, required in can making. Under such conditions, provisions for the employés' comfort and health were not likely to be what they should have been.

General Conditions in 1899–1901.

The period of depression which followed the panic of 1893 was by one cause or another prolonged until the close of the Spanish-American War, five years later. When the tide turned, it did so with a rush. In a few weeks the industrial and financial world passed from the nadir of pessimistic gloom to the zenith of optimistic glamour. Some men made fortunes almost over night, and countless others hoped to. Some of the earlier combinations, or so-called "trusts," whose formation and activities had led to the passage of the act under which this proceeding was instituted, had been very successful. It was quite as true that a number of others had in the panic, or in the subsequent era of depression, gone down to destruction. The misfortunes of those who failed were forgotten, or, when recalled, were laid to individual mismanagement. Most people believed that, if a monopoly could be secured in any line of business, the profits which would be earned would be almost unlimited. Some shrewd men knew that, in that state of public opinion, the money, which would be made by those who promoted the combination of most of the leading competitors in any line of industry, might be magnificent. Perhaps even they, to a greater or less extent, shared in the general opinion that 2 and 2 so put together would make, not 4, but 22. But whether it was sound or not made little difference to them. They did not expect to get their re-

ward from the successful operation of the combination. With good management they might realize their profits before it had really started in business.

It was almost universally supposed that there were no legal obstacles in the way of combining any number of individual plants, no matter how large a proportion they might constitute of all theretofore engaged in any one line of business. Men thought that United States v. Knight, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, had been decided upon the facts as the world knew them to be, and not as the subsequent decisions of the Supreme Court showed, merely upon that small portion of such facts which the record in that case happened to disclose.

From 1898 to 1902, or thereabouts, the work of forming new combinations went rapidly on. In some industries, as in the manufacture of steel, there was special and real need for bringing under one control the whole series of operations which began with the mining of the ore and ended with the delivery of the finished product to the ultimate consumer. In still others, there were peculiar conditions which seemed to make some consolidation expedient. In many there was something or other which might have been bettered. In all, some of the things which one would rather have had otherwise were brought about by the pressure of the competitive struggle. The panacea popular in financial and business circles, if not among the consumers, was the elimination of competition.

One of the difficulties in finding out how far any particular combination was really the result of internal economic and industrial forces is that those forces never worked alone. The activity of promoters who might be men already in the trade, but who sometimes never had been, usually bore a large part in bringing about a consolidation. Often it had more to do with the result than all other causes combined, and in some cases it is difficult to resist the conclusion that it was about the only reason why amalgamation was ever attempted. It is quite possible that in an industry like can making, as it was carried on in the closing years of the last century by more than 100 separate concerns, no union, however desirable from the standpoint of either the can makers or the public, could have been brought about except by the efforts of some individuals who thought they could make a quick and large profit for themselves by uniting the various plants under one management, no matter what the immediate or even the ultimate results of such union might prove to be. If that be so, those who think the result desirable will hold that promoters' profits and the extravagant sums required to induce so many independent manufacturers to sell out were a part of the inevitable price of achieving a useful purpose. Unfortunately, under such circumstances the cost of getting rid of competition sometimes proves almost as great as that of letting it alone.

Defendant's Genesis.

To pass from the general to the particular: The men who really brought about the organization of the defendant do not appear to have

been more than five in number, and only one of them, Edwin Norton, was a can maker. He did practically all the work of persuading, inducing, or coercing the can makers to sell out. He and his brothers had been for a number of years the largest and doubtless the most generally known manufacturers of cans in the country, as he was certainly one of the most active and aggressive. The factories of his firm had probably the best equipment of labor saving machinery. Certainly in this respect they were surpassed by none. He had been a party to the price maintaining agreements and a prominent figure in the price war already alluded to. The idea of forming a can combine seems to have occurred to him more than once, although the record appears to indicate that the scheme which was actually carried through originated, not with him, but with the defendant William H. Moore and his partner and brother, the defendant J. Hobart Moore. With them from the beginning, or at all events from a time preceding the actual formation of the company, were associated the defendant Daniel G. Reid and one William B. Leeds, now dead. Counsel have said that Norton is also dead, although that fact does not appear to be stated in the record. The other three of the original five, namely, the two Moores and Reid, although defendants, all of them directors, and two at least of them active in the management of the defendant, have not testified.

The record shows that in the latter part of 1899 Norton was commissioned by the Moores to get options on can-making plants, and then, or later, on plants for making can-making machinery, as well. He set about this mission promptly, and apparently had little difficulty in getting many of the desired options. These, by their terms, were to expire, if not exercised, on May 1, 1900. According to his contemporaneous written statement, the work of obtaining those desired had been practically completed before the 25th of April, 1900. Before that date came around, there had been a slump in the stock market, and for a short while financiers laid aside their rose-colored glasses. Though the first options had named Norton as the prospective buyer, the fact that Judge (William Henry) Moore was the leading spirit in the new venture was stated by Norton and was generally known. In April of 1900, Norton wrote to those from whom he had obtained options, telling them, among other things, that the slump in the stock market had made it unwise to go ahead, and requesting an extension of the option to January 1, 1901, so as to give Judge Moore ample time to put the thing through properly, when conditions were right.

For the purpose of discussing the situation, various meetings of the can makers who had given options, or who it was hoped would give options, were called by Norton, and some of these meetings he attended in person. Among other things, it appears to have been suggested at them that it would be expedient, in view of the prospective consolidation, to maintain prices. The testimony seems to indicate that the price of cans during 1900 was considerably higher than it had been in the immediately preceding years. Subsequently further extensions of the options to April 1, 1901, were asked and secured. They were,

as to most of the plants, exercised about the 20th of March of that year, and, as to nearly all of the rest, within 60 days thereafter.

What Proportion of the Can-Making Plants Sold Out.

The parties are not in agreement as to the precise number of plants taken over by the defendant. Controversy is over classification, rather than as to the ultimate facts. The president of the defendant on April 21, 1903, in his report to its stockholders, said that when it was formed, and since, it had taken over 123 plants. Almost all of these were acquired at or within 60 days after defendant's organization. A few of them were establishments not engaged in the making of cans, but in the manufacture of can-making machinery. It is not worth while to try to estimate accurately the number of can-making plants acquired by the defendant at or about the time of its formation. To put them somewhere over 100 will be near enough the truth. The industry of one of the counsel for the defendant has picked out of the record and marshaled in its brief the names of 77 concerns which were in business at the time defendant was formed, and were not acquired by it. A comparison of this list with the record shows that a number of them were engaged in canning or in other lines of industry and sold a part of the cans they made. In many cases, the purchase of the can-making plants apart from the business with which they were connected would have been impossible. Still others were small hand shops, sometimes making other things besides cans. As to many of them, the record gives little or no information except that individuals, firms, or corporations by their names are believed by witnesses to have been in business in 1901. A very few of them are still making cans. If in 1901 their output had been as large as it now is, some of these surviving would have been considered important.

It is significant that nearly all which now exist began business in 1900 or 1901, after everybody knew that a scheme to combine the existing plants was on foot. Whether the then prospective absorption of the existing factories led to a belief that there would be room for other concerns, or to the hope that a new shop would also be bought, as a number were, it boots not now to inquire. The evidence is convincing that everybody then in a position to know believed that the purpose of defendant's promoters was to absorb practically all the can-making plants of any importance. At the time it was generally supposed that they had succeeded in so doing. The defendant was sometimes referred to as the hundred per cent. trust. One of the members of the firm of Norton Bros., a brother of Edwin, testified that he himself never thought it had 100 per cent. of the country's can-making plants, but he did believe it had from 95 to 98 per cent. of the total capacity, excluding those concerns which made cans for their own use. It is very possible that even this estimate is somewhat too high. Nevertheless, many exceptionally well-informed witnesses found great difficulty in recalling, in their section of the country, the name of a single can plant which was not taken over by defendant. No such approach to precise accuracy as is possible in the great steel industry which can be carried on only in plants of considerable magnitude is possible

here, but there is every reason to believe that the defendant acquired the business and plants of concerns which on the 1st of January, 1900, made 90 per cent. of the cans used in this country and not made by establishments which themselves used the whole or a part of their output.

Why Did So Many Can Makers Sell Out?

How were so large a proportion of the can makers induced to sell? Fear of what would happen to them, if they did not, unquestionably had more or less influence with a good many of them. There is some testimony that Norton told some of them that if they did not sell out they would be put out.

The record does not affirmatively show that such threats were frequently made. They were not required. Apart from anything he said, apprehension was quite general that the only choice was between going out or being driven out. The country was at that time familiar with stories of the fate of those who in other lines of business had refused liberal offers from combinations previously formed. The records of the so-called Anti-Trust cases have since shown that some of these tales were not without foundation in fact. What was most feared was that a can maker who did not go into the combine would have difficulty in getting tin plate, the raw material of his business. The concern to which the defendant the American Steel & Tin Plate Company succeeded, and which, together with that successor, will be called the "Tin Plate Company," had been then recently organized. Prominent among those who officiated at its birth were the Moore Bros., Reid, and Leeds. Norton and others spoke as if the relations between the proposed can company and the new Tin Plate Company would be very close. Throughout the can trade it was currently believed that they would be. In point of fact, it is probable that they did not become as close as Norton then wished everybody to think, or as close as he then, himself, expected. There is testimony that he afterwards said that for this purpose the defendant had been born a year too late. An intimate connection between the Tin Plate Company and the defendant was a danger to all other can makers. If it should suit the defendant to wage a price war, its competitors would be hopelessly handicapped, if it were able to buy its raw material appreciably cheaper than they. Nor were price discriminations all that they feared. Failure to make deliveries when and as required might be even more destructive to their business. Before the defendant was formed, it became known that it had acquired many options on patents for can-making machinery, and apprehension that it would be difficult for outsiders to secure an up-to-date line of machinery was rife, and, as the sequel shows, was amply justified.

Moreover, at that time few people knew anything of the ability of a small producer to maintain himself in competition with a rival having resources exceeding his 10, 20, or 100 fold. Possibly, the last word on that subject has not yet been spoken, but the experience of the last 15 years has apparently shown that in many lines of business the small

man can, under such conditions, live and even thrive. Then, many feared that it was not possible.

It is to be borne in mind that, for reasons already stated, few of the can makers were, or could have supposed themselves to have been, even moderately equipped to carry on a competitive struggle with a rival possessed of many times their capital. Some of them who were financially stronger than most of the others were elderly men, or were in poor health, or for other reasons were loath to venture upon so perilous a warfare.

It is not suggested that there was any general, intense, and settled objection to selling out to the defendant, or its promoters. If there had been, doubtless so many would have postponed giving options that the idea that everybody was going in could not have so rapidly spread. If it had not, a good many of those who did sell out might never have done so. All that is meant is that, except for the fears already stated, a number who gave options would not have done so, and some of those who really were willing enough to give them would have taken a chance on standing out for even a larger price than they received.

Prices Paid for Plants.

As a rule, the prices paid were liberal, not only to the verge of extravagance, but in cases almost beyond the limits of prodigality. If Norton sometimes showed the can makers that there was steel in his scabbard, his hands always dropped gold. The record does not disclose a single case in which the price named in the option did not exceed the value of all the tangible property transferred. The amounts paid appear to have ranged all the way from 1½ to 25 times the sum which would have sufficed to have replaced the property sold with brand new articles of the same kind. Before agreeing on the figures to be inserted in an option, Norton does not appear to have taken the trouble either to make, or to cause to be made, any inspection or appraisement of the plant to be transferred. Under such circumstances, the ratio between the real value and the price named depended more upon the nerve or the impudence of the seller, than upon any estimate of his property's probable worth to the new combination.

The defendant has no record of what was paid for the different plants so acquired. Wherever the seller was still alive, could be located, and was in physical and mental condition to testify, the government has proved by him what he received for his property, and so far as he could, or would, tell what it had cost him. In some cases the former information, in many the latter, could not be obtained.

From a careful study of what the record discloses, I have reached the conclusion that the amount which the promoters agreed to pay for the plants taken over through them was probably somewhere around $25,000,000, of which not more than $23,500,000 was given for the 95 plants turned over to the defendant on the day after it was organized. It is certain that for half, and not improbable that for a third or less, of that money, defendant could have purchased land, erected buildings, and equipped them with machinery which

would have had a greater capacity, could have been operated at a smaller cost, and would have been at least as well, if not better, located with reference to the needs of the consumer and the facilities for transportation.

It is true that not all of the sellers received their whole price in cash. A month or more before the formation of defendant, Moore Bros., calling themselves managers, circulated a subscription agreement. This paper set forth that it was proposed to organize the defendant; that its stock was to be one-half common and one-half preferred, the latter entitled to a cumulative dividend of 7 per cent. per annum; that by the issue of $39,000,000 of preferred stock and the like amount of common, the defendant was to get $7,000,000 cash for general corporate purposes, and the real property, plants, buildings, fixtures, machinery, tools, patents, trade-marks, and good wills of 95 named concerns. For every $100 of purchase money, a subscriber was to receive a share of preferred and a share of common stock, each of the par value of $100. Some of the sellers of plants took all of the consideration in stock on that basis. Most of them took some of it. Within limits, efforts were made to induce them so to do. They were assured, and doubtless with entire truth, that the new company could not be formed at all unless the larger part of its stock was subscribed for by those whose plants it was to absorb. Yet no one of the sellers was actually forced to take stock. Some of those who received among the highest prices, both absolutely and relatively, did not take a share, as, for example, one concern which was paid $500,000 for a plant which had cost it from $60,000 to $70,000. From one incident, to be hereafter referred to in another connection, it must be inferred that the stock as late as the 10th of the succeeding October could still be sold at the subscription price, although the same incident strongly suggests that, if at that time any large quantity had been offered for sale, a bad break in the market would have followed.

Restrictive Covenants.

With very few exceptions, all the options contained a clause which bound the sellers, in the event that it was accepted, not to engage for 15 years in can making within 3,000 miles of Chicago. Where the seller was a corporation, its principal officers personally bound themselves by like covenants. In some few instances, can makers declined so to restrict their freedom, and still their plants were bought. Nevertheless, the promoters obviously attached considerable importance to securing such covenants. It is in evidence that the owners of one plant struck it out from the first option they signed. Afterwards, they were induced to give another with it in, but in return were allowed to raise their price from $300,000 to $700,000.

Purchase of Stocks of Merchandise, etc.

As weeks and months might elapse between the giving of an option and its acceptance, some provision had to be made by which in the interval the prospective sellers could carry on business with fairness to themselves and to the would-be buyer. The price named in the option was intended to cover only what may be summarized as the

plant, patents, and good will of the business, including its real estate or leasehold interests. It was agreed that at the time the sale was consummated all fuel, raw material, and partially or wholly finished products should be bought at the then market price. The purchaser bound itself to assume all leases and bona fide contracts for the purchase or sale of material, raw or manufactured.

Organization of Defendant.

All the preparations deemed necessary having been made, the defendant was on the 19th of March, 1901, incorporated under the laws of New Jersey. As was then, if not now, the fashion, the incorporators and first directors were all employés of a New Jersey Trust Company or of law firms concerned in the organization. The capital of defendant was fixed at $88,000,000, one-half common, one-half preferred.

On the day after the incorporation, these directors received from one McCaughy, to whom all the later options had been given or assigned, a proposition to sell to the defendant the 95 plants which had been named in the subscription agreement, and to pay it $6,995,000 in cash. The $5,000 more needed to make up the $7,000,000, promised in the agreement in question, had already come into the defendant's treasury in the form of payments for the qualifying shares of preferred stock issued to the first directors. His price was $38,995,000 in par value of preferred and $39,000,000 in par value of common stock. The company was, of course, to assume all his obligations to buy the merchandise of the plants taken over. Then the minutes carefully state that "statements and estimates by Mr. Edwin Norton, familiar with said properties and the business thereof, were made to the board relative to the value and earning capacities of the properties and business aforesaid," and the directors thereupon resolved that their acquisition was necessary. McCaughy's proposition was accepted. He was a clerk in Moore Bros.' employ.

It will be borne in mind that not one of the five directors who, on behalf of the defendant, bought, nor McCaughy, who sold, had a dollar's worth of interest in the transaction, or, so far as it appears, ever expected to have. It is to be regretted that in organizing large corporations there ever was a real or supposed reason for all this elaborate make-believe, for the putting of dummies in the foreground while the real principals kept themselves in the rear. It is true it was the fashion. Everybody who took any part in the transactions, or who at the time had any real interest in them, knew, or upon the slightest inquiry could have found out, that none of the men who figured on the corporate minutes as buyers or sellers were in fact such; that the directors, in spite of going through the form of listening to Norton's estimates, etc., had never exercised any judgment of their own, and had never been expected to. Nevertheless, if there is no purpose in going through such play acting, it had better be omitted. If it accomplishes anything, it must be in the way of making it easier for those who really will what is done to escape responsibility for it, if they should ever want to. Whenever in the course of an investigation of the corporate history the facts come out, they tend to make

very many people who are neither lawyers nor wise in the ways of large corporations feel that juggling and deception are a part of corporate life. Danger to the community lies that way. So much by the side.

The Promoters' Share.

As has already been stated, the prices named in the options for the 95 plants, extravagant as in most cases they were, could not apparently have exceeded $23,500,000. The promoters were to furnish $7,000,000 cash, or, in all, in stock and money they were to lay out $30,500,000, for which they received $39,000,000 preferred and $39,000,000 of common stock. At the price of $100 for a share of common and share of preferred, their return was to be the difference between $39,000,000 and $30,500,000 or $8,500,000, a sum which, in cash, wisely expended, would itself have sufficed to have given the defendant far better can-making facilities than it secured.

Defendant and its counsel insist that it and what it has done have been of great benefit to all connected with the can-making industry. It is fair to presume that its promoters must have thought so to, otherwise they would scarcely have been justified in rewarding themselves upon so liberal a scale for having brought it into being. They, of course, assumed some heavy responsibilities. How serious these were it is not possible now to estimate. Much of the stock had been taken by the sellers of individual plants; much of it had not been. Doubtless a good deal of it was absorbed by the public. In the end, the defendant itself relieved the promoters from the burden of some of it. Something more than six months after the defendant was organized, or, to be precise, on the 10th of October, 1901, there was a meeting of its executive committee. On behalf of McCaughy, it was stated that in securing the plants he had found it necessary to obtain advances on the stock of the defendant and that he was forced to sell some of it; that he had received an offer of $1,052,300 for such stock at the original price of $100 for a share of common and a share of preferred, but, before he sold elsewhere, he wished to make the same offer to the defendant. It will be rememberd that McCaughy had no interest in the transaction and did not own any of its stock, and was a mere employé of the Moores. Of the six members of the executive committee present when his proposition to be relieved of the stock was accepted, four were among the five original promoters, namely, W. H. Moore, Reid, Leeds, and Norton. The record does not disclose how the defendant ultimately came out on this transaction. It is certain that shortly after that time its stock declined below the figure named, and for a number of years remained below.

The chief purpose, however, for referrring to this incident, is because of the light it throws on another phase of the defendant's history. It will be remembered that it was supposed to start its business life with a cash working capital of $7,000,000. This purchase of its own stock reduced that sum, at least temporarily, to $5,947,700. It had agreed to purchase, and in fact had purchased, the stocks of merchandise, etc., of the plants taken over at and within the first three

months of its organization. One of its books in evidence seems to show that the money expended for this purpose was about $6,250,000. In other words, it really began life without a free dollar to its name, an experience which was by no means unusual in the flotations of that period.

Control of Can-Making Machinery.

Much can-making machinery, more or less in use as late as 1900 had never been patented, or, if it had been, the patents on it had expired. A great many of these machines were of such simple construction that they could be made in almost any fairly equipped machine shop. To secure control of all such would have been impossible. Some of the most modern machines, those by which a large part of the work formerly done by hand was performed automatically, were, however, covered by patents. If these patents could be secured and arrangements made with the few machine shops in the country which were then equipped for turning out machinery of that class, competition in can making and can selling would be greatly hampered. Indeed, if the possibility of competitors obtaining such machinery could be cut off for a comparatively limited period, possibly even for a year or two, the can company which acquired a number of plants equipped with such machinery, and which could obtain more of it from the manufacturers, could, if its operations otherwise were wisely carried on, secure a domination of the market, which could not be seriously shaken for years to come. The record shows that the defendant did acquire such control, although, for reasons to be subsequently pointed out, it did not reap all of the results which it naturally expected therefrom. It sought for six years to close to its competitors the machine shops which really counted. The largest manufacturer of automatic machinery for can-making purposes was the E. W. Bliss Company. For the sum of $25,000 a quarter, that company agreed that for six years it would not make certain can-making machinery for anybody other than the defendant. The latter had made some claim that patents owned by it covered such machines. The Bliss Company did not think they did. In any event, it is unusual for the owner of patents to pay somebody else $100,000 a year not to infringe. From the Adriance Machine Company defendant agreed it would annually for six years take $75,000 worth of machinery. That amount represented the full capacity of the machine company. To the Ferracute Machine Company, in return for exclusive privileges, the defendant guaranteed a profit of $10,000 a year for six years. Defendant induced the Bliss Company to break contracts which the latter had already made to furnish such machinery, and, when the injured parties sued the Bliss Company for damages thus resulting, the defendant paid both the expense of defending the suits and the substantial judgments some of the aggrieved parties recovered.

An interminable mass of evidence has been taken to show what machines for can making were in use at different periods, which of them at particular times were covered by patents, and which were not, and the various shops in the country at which such machines could

be made. It is impossible to review this testimony in detail. The record amply justifies the assertion that for a year or two after defendant's formation it was practically impossible for any competitor to obtain the most modern, up-to-date, automatic machinery, and that the difficulties in the way of getting such machinery were not altogether removed until the expiration of the six years for which the defendant had bound up the leading manufacturers of such machinery. The contracts between the defendant and some of these machine shops were sometimes evaded. The machine makers had reserved the right to sell machinery for export to countries other than the United States and Canada. Some of that machinery was exported and brought back to the United States. Some of it never got further than the dock in New York or Jersey City, and thence found its way to a can-making factory somewhere in the United States. The demand for can-making machinery which sprang up at the time the defendant was organized, and largely in consequence of the policy which it then pursued, stimulated the supply, and other inventors and other machine shops, before very long, began to turn out some very good can-making machinery.

Tin Plate at Preferential Prices.

The record does not disclose whether the promoters of the defendant really had reason to believe that they would be able practically to shut off the supply of tin plate from their competitors, as Norton in 1900 and early in 1901 was at least willing that the trade should think. As already stated, none of the promoters have seen fit to tell their story under oath. As it turned out, all the Tin Plate Company was willing to do was to bind itself to sell its tin plate to defendant at a certain fixed figure, below the price at which it sold to any one else. This preferential discount or rebate amounted, when the published list price of tin plate was $3.50 a base box, to about 64 cents on the quantity of plate required to make 1,000 3-pound packers' cans. This difference, the record shows, was far from negligible. In a close competitive struggle it might well have proved a decisive factor.

Dismantling Plants.

The defendant began to shut up plants so soon as it got possession of them. It kept on shutting them up until by April 21, 1903, it was operating only 36 can factories, and 3 machine shops, and it then proposed to close 5 more of the former and 1 or 2 of the latter. There has been a good deal of profitless dispute as to the proper term to describe what was done. What the government terms "dismantling" the defendant prefers to speak of as "transferring" or "concentrating." What actually took place is clear enough, whatever one may choose to call it. Two-thirds of the plants bought were abandoned within two years of their purchase. Many of them were never operated by the defendant at all, and others were closed after a few weeks or a few months. Where they had any machinery for which use could be found at some other of defendant's plants, such machinery was transferred to the place where it could be used, which might be a few blocks away in the same city or hundreds of miles off in another

state. Where it was possible that a piece of machinery might some day be of some use, although there was no immediate call for it, it was sent to some abandoned factory building to be there stored until it was wanted, or until it became clear that it never would be. Such machines, and there appear to have been many of them, as were too obsolete for economical use, were broken up and their fragments sold as junk. Defendant has offered much testimony which shows that what it did, did not reduce the aggregate productive capacity of its plants below that of those purchased by it. Nevertheless, it is quite probable that, during the process of closing old factories with a view of concentrating production, there may have been a period in which the defendant was not able to turn out as many cans as it could have made had it simply continued to operate all the shops it had purchased to their full capacity. If so, the time during which this was true probably did not exceed a few months, or a year or two at the most; but, in any event, the reduction in productive capacity was a mere temporary incident, even if it be regarded as an inevitable one of the policy of concentration, and was not in itself the end sought or desired. Defendant shut down most of the plants it bought because that was by long odds the best thing to do with them. Cans could be made cheaper elsewhere.

Purpose for Which Defendant Was Formed.

Defendant denies that in its formation or early conduct there was any purpose to restrain competition, or to secure a monopoly. It alleges that its organizers always had in mind the obtaining of some of the beneficent results which the record shows have in fact been realized. Its promoters have not seen fit, under the sanction and test of cross-examination, to tell us so themselves. Apart, however, from any presumption which may be drawn from their failure to take the witness stand, the facts dispose of this contention. The contemporaneous declarations of Norton show the purpose was to get into the combine all the important can makers and, so far as was practicable, the important makers of can-making machinery, as well. The carrying through of the plan was always understood to be dependent upon the securing of the greater number of the plants then engaged in business, a matter really of no importance, if the purpose in view had been nothing more than to engage in can making on a large scale and with up-to-date facilities.

No can factory at that time needed any other plant purchased to make it a complete economic unit. In this respect, conditions differed from those which at that time existed in the steel industry.

The business of lithographing on tin for the purpose of turning out decorated cans was then coming into vogue. There were can factories which had a decorating department. Most of them did not have. There were a few shops which decorated, but did not make, cans. It does not appear that the work of turning out completed cans was in any other respect divided between or among two or more factories. All the shops, however small, did all the work of converting tin plate into the finished can. If there had been any urgent reason for uniting

more closely tin lithographing and can making, there was no difficulty in doing so. Neither required any very large initial investment in machinery or tools.

There was no other conceivable reason, than the desire to suppress competition, for buying plants which it obviously would not pay to run, and at prices which in most cases far exceeded the cost of fitting up, with brand new and up-to-date machinery, factories capable of turning out several if not many times as many cans in the same time. It is in this connection that the prompt and wholesale dismantling is significant. What was done in that respect shows that the plants were bought, not for use, but to get them out of the market. If it be urged that they had an established business, and good will which it was worth defendant's while to pay for, the answer is twofold: First, that according to other claims of defendant, the methods followed by those concerns in their dealings with their customers were such that their good will was valueless, or certainly would become so when they were brought into competition with the manner of doing business defendant now says it was even then its purpose to adopt; and, second, that defendant paid quite as extravagant prices for plants which had neither good will nor established trade, for the simple reason they had not yet begun business at all. As, for example, one factory which had not made a can, and which had cost $16,000, was bought for $80,000, and another in this city, the machinery of which then recently purchased had cost $12,200, was sold to the defendant for $40,000. Very similar was the case of a man whose father had given an option on his established plant. The son thereupon put $10,000 in machinery and sold it to defendant for $20,000 of its stock and $40,000 in cash. He apparently thinks he did not get quite as much as he should.

There can be no possible explanation of such transactions, except that the defendant and its promoters wanted to extinguish competition and did not stop to inquire how much it would cost to do so. There could not have been any reason for paying a bonus of $100,000 a year to the Bliss Company, and less amounts to Adriance and Ferracute, except to make the re-establishment of competition more difficult. Securing, where possible, the covenants which bound the sellers not to engage in like business for 15 years within 3,000 miles of Chicago, had the same end. One who sells his business with its good will may, in order that what he offers may command its maximum value, lawfully bargain that he will not impair its worth by engaging again in that business anywhere in the region in which he had formerly carried it on. Such a limited restraint is lawful because it is reasonable and does not go beyond the occasion for it, but there is no legitimate reason why one who has carried on a business in one city and in the region within 100 or 200 miles of it should be asked to bind himself not to engage in the same kind of business in some place thousands of miles away. Some cases have held that, under peculiar conditions, a nation-wide restraint may be lawful. Assuming without deciding that that is true, it can only be when the business sold had itself extended from ocean to ocean. Not a single concern, which at or about the time of defendant's organization was bought by it,

had ever sold cans in any portion of the greater part of the territory in which it and its officers were required for 15 years to abstain from going into business. Many of them, probably, had never shipped a can more than a couple hundred of miles from their factories. The record shows that even now freight rates, the imperative necessity on the part of the purchaser that he shall be sure of reasonably prompt deliveries, and other causes, impose very marked geographic limitations upon the area in which a single factory can sell its output in substantial quantities. Defendant now seems to argue that no significance should be given to these restrictive covenants. The reason by which this argument is sought to be sustained is rather out of the ordinary. It is said that no attention should be paid to these covenants because they were clearly illegal, and every one knew they were. One reply is that people who were acting under the advice of about as able lawyers as were to be found anywhere do not deliberately and repeatedly do clearly illegal things without having a purpose in so doing, and especially do they not pay $400,000 to a single firm in order to have that illegal thing done by its members.

It is true that defendant has taken no legal proceedings to enforce these agreements, although the industry of one of its counsel has brought together in its brief 34 cases in which, according to him, the record shows that persons who have entered into the covenant broke it. Nevertheless, it was by no means always the idle thing the defendant now says it was. Defendant's representatives did not always speak in that tone. They more than once reminded persons who had signed it of its existence. It meant something even to defendant's counsel when they were cross-examining witnesses in this case. They frequently and quite naturally showed that they thought rather ill of one who had made such an agreement and had not kept it. In point of fact, some of its signers, perhaps many of them, believed it to be binding. Still others, and they were unquestionably numerous, having signed it, and taken money or money's worth for signing it, felt in honor bound to keep it. Such men cared nothing for what a court might say as to its legal enforceability. Their consciences enforced it as against themselves. The only possible reason for exacting its signature must have been to make probable that nowhere in the country would their skill be available for can making.

Prices Raised.

With practically all the can plants in the country in its hands, with the control of the really effective can-making machinery secure for some time to come, it seemed that it would be a long while before there could be any chance for competition worth bothering about. Many people thought so. As already stated, many of the most experienced men in the business had been largely influenced in their selling out by the fear that successful competition with defendant could not be carried on. This forecast did not take sufficiently into account the extent to which, from the start, the defendant found itself handicapped, by the way in which it had been formed. The absurd prices paid for can plants, which it did not want, and could not

use, and the immense sum absorbed by its promoters, had resulted in a tremendous overcapitalization. As already pointed out, it started with scarcely any free working capital. It could not wait for its profits. They must be made at once and in large volume, otherwise it would be upon the rocks before it was well started on its voyage. Prices had to be raised. This raising had the added advantage of furthering the general acceptance of the idea that the defendant was going to be a tremendous money maker. In that way the process of absorption of the large mass of its undigested securities with which the promoters were doubtless still struggling would be greatly aided. Prices were put up. There is much dispute as to how great the rise was. That, of course, depends largely on what basis is taken for the comparison. As compared with the prices prevailing three years before, it was very great. It was appreciable, but not so striking, when contrasted with those quoted after the formation of the defendant had become probable or certain. Comparisons of one year with another during that period are difficult because of the violent fluctuations which then took place in the price of tin plate. Tin plate from 1896 to 1898 was low, being lower in the last-named year than any year before or since, while from 1899 to 1902 it was higher than at any other year from the time when the making of it had become actually established in this country, down to the filing of the petition in this case. It was very decidedly higher in 1900 than it was in 1901.

Defendant argues that whatever rise in prices it made was slight. The uncertain recollections of witnesses as to what took place at a particular period 13 or 14 years before they testified are not usually of great value. More importance may justly be given to the recorded facts of actual transactions then made; but, for the understanding of the real significance of some of them, more knowledge as to all the surrounding circumstances is required than can be now easily obtained. It is not worth while to go into such inquiries.

Competition Revives.

What happened shows that prices were put up to a point which made it apparently profitable for outsiders to start making cans with any antiquated or crude machinery they could find in old lumber rooms or which they could have made for them in a hurry, or even to resume can making by hand. The evidence on these points is absolutely conclusive. Can making became attractive. Any number of people began to make cans, or, at least, began to try to make them. Perhaps in some cases the prices which had been paid for can shops made them hope that if they could get a can shop they would be able to sell out at a figure which would make them comfortable for the rest of their days. At first, the defendant seems to have thought it would try to buy them out, and it bought a few of them, as already has been mentioned; but in a few weeks, if not in a few days, it became plain that such policy was impossible. In the first place, its money was gone. It still had between $2,000,000 and $3,000,000 of stock which might be sold, but there was already doubtless so much of that stock seeking a purchaser that it was becoming more and more difficult

to keep quotations up to the issue price. There were too many new shops to buy them all, and, as it has turned out, it was easy enough to start some more. The real remedy would have been to reduce the price of cans. If defendant had not been under the necessity of realizing large and quick profits, doubtless it would have done so. Its mere cost of operation, excluding any allowance for capital investment, must have been below that of many of its poorly equipped competitors, who then rushed into the field. But, if prices had been reduced, the idea that there was a speedy fortune to be made by defendant's stockholders would have been too speedily dispelled. Other devices were resorted to. The attempt to keep up the price of cans was persisted in. In an effort to do so, the defendant itself sent brokers into the market and bought some millions of cans from its rivals. Some of these were very badly made, as was to be expected from new shops, equipped with wretched machinery and hastily rushed into business. These cans were stored for a while, and ultimately such of them as were salable at all were sold for what they would bring. Possibly these purchases did keep up the price longer than would otherwise have been the case.

Raising Prices During the Canning Season.

Following the practice which had been common before its day, and to put an end to which it now says was one of the principal objects of its formation, defendant raised its prices as the canning season of 1901 advanced, until they reached the maximum in August, September, and October of that year. Taking the price of tin plate into account, they were then roughly about 60 per cent. greater than the prices which from 1910 to 1913 prevailed, and for which cans had been purchased in a number of the years preceding defendant's formation. The defendant seems to have realized its mistake, and the 1902 prices were materially lower. In 1903, prices were again rather sharply raised, but by the close of the packing season of 1904 they had been brought down to a trifle above that which has been their subsequent average. By that time the opportunity absolutely to monopolize the market had been lost. It is true that many, apparently the great majority, of the people who in 1901 rushed into can making were forced out of business, so soon as prices came down from the abnormal heights to which they had been lifted. The record contains quite a suggestive list of such concerns whose history was like that of the seed sown on stony ground; but there were others who went into the business with more resources, both in money and brains, and, consequently, with greater staying powers. The demand for can-making machinery had stimulated the supply, and, while the so-called "independents" were not until 1907 able to get the best automatic machinery, they could after 1902 obtain far better machines than were accessible to them in 1901. Moreover, tin plate mills, other than those controlled by the Tin Plate Company, were being established. Those who were minded to stay in the can-making business as competitors with the defendant were free by this time from the apprehension that it could cut off their supplies of either tin plate or machinery. It

doubtless could get the former cheaper and the latter better than they could, but it was greatly overcapitalized, and they might stay in the struggle with some reasonable chance of surviving.

The Legal Situation in Defendant's Early Years.

Such is the history, as the record discloses it, of the genesis of the defendant, such the story of its organization and of its conduct during the first years of its existence. It is clear an attempt was made both to restrain and monopolize the interstate trade in tin cans. Trade was restrained. For a moment a substantial monopoly was obtained, and in many sections of the country, long maintained. So far as one can judge, it might have been held almost or quite everywhere, had not the very determination to make it ostensibly perfect at the start, combined with the reward which the promoters felt they were entitled to take at the beginning, compelled it to attempt a premature harvesting of the monopolistic fruit. Upon such state of facts, had the government then asked for a dissolution of the defendant, it is difficult to see how the demand could have been refused. No matter what view might have been taken on any of the questions now still open to dispute as to the construction or application of the Anti-Trust Act, there was a restraint of competition and an attempt to monopolize, which, so far from being merely incidental to any legitimate purpose, had themselves put obstacles, and unnecessary obstacles at that, in the way of attaining the benefits which larger capital, better organization, and more efficient business methods might have naturally brought about.

The Recent Conduct of Defendant.

Beside charging the defendant with in effect fixing the price of cans throughout the country, the government specifies certain unfair practices of which it says the defendant has been guilty, and alleges that there are still others of which the government has no certain knowledge, but which would be developed in the course of taking the testimony.

Before considering the question of how far the defendant does determine the prices at which cans are sold, it will be more convenient to inquire to what extent, if at all, the evidence sustains these other charges of the government. At the outset, it may be said that the testimony has disclosed nothing in the recent conduct of defendant, other than that which the government particularizes, to which any serious exception, or indeed any exception at all, can be taken.

Charge That the Can Company Compels Consumers to Take all Their Cans from it Under Penalty of Getting None.

The government's petition charges that the defendant induces or compels its customers to enter into long-time contracts to purchase cans exclusively from it, and prevents them from dealing with such independent establishments as exist, by threats, among others, that it will cancel contracts it already has with them, and will refuse to sell more cans to them. It is true that defendant sells a large portion of its cans under contracts by which, for a definite time, it agrees to

furnish, and the customer to buy, all of the cans he will need in his business. Many of these contracts are for two or three years, some for as long as five.

Contracts for Season's Requirements.

Prior to the formation of the defendant, packers' as well as general line cans were almost exclusively sold under contracts which required the seller to furnish, and the buyer to take, a certain definite number of cans within a certain limited time, at a fixed price. There might be some leeway as to quantities. It is possible that sometimes the contracts, either by their terms or by the way in which the parties acted under them, really amounted to a bargain to supply at a fixed price a packer's requirements for the season. Such cases were, however, rare. The rule was otherwise, and under it the packer was often put to great inconvenience, and not infrequently suffered serious loss. Sometimes strikes among the can-maker's employés, a breakdown in his machinery, or his inability to get tin plate, prevented prompt delivery. More often it turned out the buyer had not bargained for all the cans he needed. Until the season was well advanced it was not possible to know how many he would require. He was usually under contract to take all the tomatoes or other fruits or vegetables raised by certain farmers and growers. Too much or too little rain, destructive hailstorms, early frosts, might cut down the crop. None of these troubles might be experienced, and the output might be large. The canner could seldom afford to carry over any great number of cans from one year to another. He was therefore afraid to bargain for more than he felt reasonably sure he could use. When they did not suffice, he was forced to buy at the prices then prevailing. Usually the same crop conditions which sent him into the market simultaneously drove others there. The can makers, as a rule, sold the cans for which contracts were early made at very low prices. They looked for their profits to the late season demand. Then the canner had to have cans, and frequently had to take the first he could get, no matter what was asked for them. The difference in price between cans bought early and those bought late was often great.

Not long after the defendant was formed, it made some contracts by which it undertook to supply a packer with all the cans he would require for a season at a price which was to remain fixed through the year, no matter how many he took. Many of these contracts contained provisions by which the cans taken early in the year would be furnished at a somewhat lower price than those which were not ordered until late in the season; but the prices, whether they varied with reference to the time of delivery or not, were fixed in advance. So far as one may judge from the record, the inauguration of this practice was more accidental than intentional. As already stated, during the first year of defendant's existence, it followed the old custom of the trade of raising its prices as the season progressed. During March and early April, it sold three-pound cans at $24 a thousand. On April 25th it advanced them to $24.50; on May 1st, to $25. Another dollar was added on the 1st of June, and still another on the

1st of July; the price then being $27. On August 1st, when the tomatoes were beginning to ripen, $3 a thousand more was put on, so that $30 was asked. That figure continued until November 1st, when, Jack Frost having presumably put an end to most of the demand for packers' cans for that season, a drop of $7.50 a thousand was made. $2.50 more was taken off on December 1st, so that the price when packing was going on was 50 per cent. greater than it was after the season had closed.

No clear statement of the circumstances under which originated the practice of contracting to furnish a packer with all the cans he would need for the season, at a price determined in advance, is found in the record; but its advantages from the standpoint of the consumer were so great that it speedily went into almost universal use, and, after defendant's first year, there does not seem to have been anything more than a very moderate difference between its midwinter and its midsummer prices. Under the old method of selling, in years of bounteous crops, the canner would be required to pay for the extra cans he needed a price very much in excess of that ordinarily prevailing, while in years of scarcity of canable fruits and vegetables he would have cans on his hands which could be sold only at a material loss. Many consumers have testified. They are practically unanimous in their approval of the new method. They know in advance what the cans will cost them, and make their own contracts and arrangements accordingly. Only a large company can carry on business and sell cans in that way. Probably it can only safely do so when it has a number of factories located in different parts of the country. A shop, the possible production of which could not exceed a certain figure, could not well afford to do all its business under such contracts, because, if it did, it would either have to limit its engagements, so that in years of ordinary consumption it would sell only a percentage of its possible output, or else would expose itself to the possibility of heavy damages in years when there was a large demand because it had contracted to furnish more cans than it could make. The larger the plant and resources of any particular can maker, the less dangerous such contracts would be to it. Even so, there would be risks, and serious ones at that, unless he had factories in different canning sections in which it was not likely the crop conditions would be precisely the same.

Contracts for More Than One Year.

From the record it appears doubtful whether the practice of making contracts for more than one year originated with the defendant or with some of its competitors. In such agreements the seller finds it necessary to protect itself, and also its customers, by providing that the price shall rise or fall with the rise or fall of the price of tin plate. An inducement usually given by the defendant, and such of its competitors as make these long-time contracts, is the reduction in price of 25 cents a thousand from the regular list price of cans. This discount, which never amounts to more than 2½ per cent. of the price, is relatively as well as absolutely small. If a man wants to make a contract for a long term, he will probably prefer to make it with a

strong concern rather than with one which is financially not so robust. It is therefore possible, or indeed probable, that the coming into fashion of these long-term contracts has in that way been of more advantage to the defendant than to its competitors; but, if so, the result appears to have been accidental rather than premeditated.

The charge of the government that the defendant refuses to sell persons who will not make long-term contracts with it, or refuses to sell those who buy any of their cans from its competitors, is disproved. Probably a hundred or more witnesses from different parts of the country testified that though they were under contract to take their cans from competitors of the defendant, and had in fact been taking their cans from such competitors for years, the defendant was always ready and willing to sell them cans when any accident or mistake, either at the plant of the competitor, or on the part of the transportation lines, left the consumer unsupplied. Such cans were sold them at the regular list prices; that is, at the prices the defendant charged those who bought exclusively from it. Indeed, it would appear that some of the defendant's competitors conduct their business upon the assumption that defendant will do this very thing. They feel they can safely agree to furnish many customers with all the cans they will need in a season, because, if they are asked for more than they can make, they know at what price the extra amount needed can be obtained from the defendant. In that way they are able in advance to calculate accurately the maximum risk they will run.

Effect Upon the Trade of the Preferential Prices at Which Defendant Obtained Tin Plate.

The government alleges that the same persons, in the main, who organized and always dominated the defendant, organized the American Tin Plate Company, since absorbed by the defendant the American Sheet & Tin Plate Company. It says some of them are now directors of the United States Steel Corporation, which owns substantially all the stock of the American Sheet & Tin Plate Company. These allegations may, for the purposes of this case, be taken as established. It also may be admitted that, at the time the government's petition was filed, the defendant the Tin Plate Company produced, if not 60 per cent. of the tin plate consumed in the country, as the government alleged, at least 50 per cent. as it itself admits, and that it is by far the largest single producer of tin plate.

Down to some months before the institution of these proceedings, the Tin Plate Company was under covenant to give the defendant its tin plate at a fixed number of cents a base box less than it furnished such plate to any one else. Since April, 1913, it sells the defendant below its published list prices, but it no longer binds itself to require all others to pay those prices. Whether it has exercised the liberty thus reserved, the record does not show. The preferential rebates received by the defendant from the Tin Plate Company in the period from 1902 to 1913 amounted to the large sum of $9,000,000. The answers of both the defendant and the Tin Plate Company claim that these transactions were normal and the allowances were those

which would naturally be made to an exceedingly large consumer. The facts seem to show that the parties themselves did not so regard them. Tin plate was billed to the defendant at the fixed list price, and the rebate was subsequently paid. Great precautions were taken by the defendant to conceal the facts from most of its bookkeepers, and even from some of its officers. The rebates, when obtained, were entered upon the books of the defendant in such a way as to conceal their origin. During the early years of defendant's career, its competitors in most, if not all, instances, were compelled to pay the full list prices. It has often been possible, in recent years, for such competitors as were considerable consumers, and who were familiar with the conditions and knew how to bargain to advantage, to buy tin plate from the so-called "independents" at some cents below list figures. This was especially true, of course, at times when the demand for tin plate was relatively small. The amount of reduction they could secure depended upon circumstances and frequently, probably usually, has been less than the amount of defendant's preferential. It has only seldom been more. The effect of such a bargain as that which long subsisted between the defendant and the Tin Plate Company may be very far-reaching. For years the defendant was under contract to sell the largest fruit packers on the Pacific Coast cans cheaper than it sold them to anybody else. For eleven years it bought its tin plate from the Tin Plate Company under an agreement by which it got it at a lower price than any other consumer. The Tin Plate Company itself is a subsidiary of the United States Steel Corporation. To make the chain complete, all that would seem necessary would be a company which operates a large number of wholesale and retail grocery stores, and to have that concern make a bargain with a canning company enjoying the special preferential rates. Whether such a chain, if established, would do any harm, this record does not require to be decided, and furnishes little data upon which such a decision could be based. As already stated, the preferential ended in April, 1913, some seven months before this suit was brought. The defendant still buys its tin plate at prices lower than the quoted list prices of the Tin Plate Company; but it no longer has a right to require the Tin Plate Company to allow it such a reduction below any price at which the Tin Plate Company may sell to others. The government claims that its investigation of the status of the defendant had begun before April, 1913, as the defendant knew. It says that the change in the agreement was the result of such knowledge. The preferential contract had, however, in fact been terminated before this suit was brought. It will be unwise to decide as to the legality or illegality of such an agreement in any case which does not make it necessary to do so. If any such exclusive privileges have been granted in form or in fact since the 15th day of October, 1914, they will be subjected, not only to the provisions of the so-called "Sherman Act," but also to those of the second section of the act of the date mentioned (Act Oct. 15, 1914, c. 323, 38 Stat. 730), in so far, if at all, as the same may be applicable.

Making Cans for One's Own Use.

The government further charges that, because the defendant buys its tin plate cheaper than anybody else, it has extended its control over the can trade by selling cans to packers who make their own, at prices lower than those at which they can make them. Unquestionably, defendant has sold cans to some users at prices which made it cheaper for such users to buy from it than to make their own cans. It does not appear that in any of these cases the defendant sold its cans below its regular list prices, and, in most of the cases in which users found it more profitable to buy from it than to make their own cans, the situation would have been the same had it paid the same price for its tin plate as everybody else. Had it paid as much as other can makers for its tin plate, it might have charged more for its cans. If it had done so, there are doubtless instances in which it would still have paid some canners to make their own cans, although, at the price which actually prevailed, it did not.

The ordinary packers' cans are not hard to make. They do not require a high degree of skill in the workmen. While the cost of the best machinery for making them is now much greater than it once was, it is, after all, not very large. Nevertheless there are many packers who are not able to make their own cans as cheaply as they can buy them, either from the defendant or from its competitors, or else do not save enough by making them to lead them to think it worth while to take the trouble and risk of so doing. The fact that in a number of instances can users have ceased to make their own cans and bought them from the defendant proves little. Sometimes it is true the defendant has purchased the can-making machinery belonging to such consumers of cans. The amount paid may not infrequently have been more than the machinery would have brought in the open market. It does not ever appear to have exceeded the cost to the customer and usually was less. In such transactions, it is difficult to see anything that might not well be done by any can maker who thought he could thereby for some years secure the patronage of a large customer.

Defendant's Concealment of Its Control of Its Subsidiary Companies.

The government's petition charges that the defendant has concealed its control of some of its subsidiary companies, and has caused them to be carried on as if they were among the number of its independent competitors.

An attempt was made to show that this was the case with the Sanitary Can Company and the Union Can Company of Rome, N. Y. The stock of each of these concerns was bought by the defendant in 1908. At that time public announcement was made that the defendant had acquired an interest in them. It is true that the extent or character of that interest was not stated, and that the defendant maintained the separate corporate existence of each of them and operated them largely through their own officers and employés; that, under such circumstances, these companies have since advertised their wares without saying anything about their connection with the defendant scarcely furnishes ground for criticism.

The like cannot be said as to what it did or caused the American Stopper Company to do. Since 1905, that company has been a subsidiary of the defendant. The fact was not publicly disclosed until 1909. During the intervening four years, the Stopper Company advertised itself as the largest maker of tin boxes "outside of the trust"; the trust, of course, being the defendant. Deliberate deception was also for years employed to conceal its ownership of the Union Stockyards Can Company of Chicago. Defendant's control of this concern dates from November, 1906. Down until the close of 1909, if not longer, it was operated as an independent company. During this time one of the defendant's high officers conveyed its orders to the nominal head of the dependent company. By his directions, the connection between the two was kept secret. There were those in the trade who, nevertheless, guessed that there was some relation between them; but, as its manager testified, he lied down their suspicions. The reason for all this mystery was the usual one in such cases. The defendant wanted to use the Stockyards Can Company to fight its general line competitors in the Chicago district, while still maintaining its own prices. The manager of the subsidiary testified that, if he could get the trade of such competitors without cutting prices, he was told to do so, but, if a cut was necessary, he was to make it.

There can be no question as to either the moral or legal character of such methods. Laying aside all ethical considerations, the wonder always is that a great company like defendant does not see that it cannot afford to be caught in such a position, and, in the long run, caught it is likely to be. The loss of dignity and prestige in the public eye must usually cost more than was gained, even if nothing worse happens. It is like enough to suffer from lowering the moral tone of its own employés. The practice referred to, however, ceased three years or more before the institution of these proceedings.

Subsequent Purchases of Can Plants.

The government charges that defendant, since its organization, has, by purchasing a number of competing plants, continued its attempt at monopoly. Defendant has bought control of 12, 2 of them before January 1, 1903, the other 10 between April, 1905, and June, 1909. None were taken over in the 4½ years immediately preceding the filing of the petition.

The first bought was that of the Andrews-Bones Company of Omaha. It was a small concern. The price paid was little above its apparent value. The transaction was without significance.

The lease of the factory of the Union Can Company of San Francisco, for a term of five years from January 1, 1903, was a more important transaction. Norton had sought an option upon it. He failed to get it, because the California Fruit Canners' Association, which was and is a large consumer of cans, in self-defense, as it thought, bought 60 per cent. of the company's stock. About a year after defendant's organization, it and the Canners' Association reached an understanding. The association then agreed that for five years it would buy all

its cans from defendant. The latter promised to charge every other canner on the Coast, with two exceptions, $1 a thousand more than the association paid; the discrimination against the two exceptions to be but half as great, or only 50 cents a thousand. The association has apparently ever since bought its cans from the defendant. The lease of the Union Can Factory was one of the terms of the alliance between defendant and the association. Somewhere about 1908 that plant was abandoned. The defendant bought some of its machinery; the rest was stored.

It is unnecessary to inquire closely into the nature and effect of this incident, or series of incidents. Giving them all the significance for which the government contends, they show nothing more than that as late as January 1, 1903, defendant was still attempting to accomplish its original illegal purpose, although it was working to that end with much less thoroughness and system than it once had used.

The next purchase, made in the spring of 1905, was that of the American Stopper Company of Brooklyn. That and the acquisition of the Union Stockyards Can Company of Chicago in November, 1906, were made in part at least with the purpose of using those concerns in one of the least defensible ways in which powerful corporations have waged war upon their competitors. In each case, as already stated, the fact of defendant's ownership was for years denied, and one, if not both, of these subsidiaries was put to the same use as the fighting ships which figure in United States v. Hamburgh-American S. S. Line, 216 Fed. 971. From any other standpoint the purchase of the Union Stockyards Can Company was unimportant. It was a feeble concern, without any apparent power to continue effective competition.

The Stopper Company was a much stronger organization. Its origin was modest enough. It was formed in 1900 to make, as its name indicated, bottle closures. In 1901, after the organization of the defendant, it began manufacturing decorated tin boxes. Its going into this line was in part the result of the high price to which defendant had at that time raised the price of cans. The Stopper Company's business grew and flourished. In 1905, when its real estate and machinery were worth perhaps a quarter of a million, its annual consumption of tin was about 20,000 base boxes a year.

In November, 1905, the Norton-Edgar Can Company was purchased. This concern was organized by one of the numerous Norton brothers. It manufactured paint and varnish cans principally. It started business early in 1903, and less than three years afterwards was sold out to the defendant. It never was prosperous.

In the month of November, 1906, the United Can Company and the Federal Can Company, both of San Francisco, and the Kendall Can Company of Astoria, were acquired. The two former were managed by a gentleman who had once been in defendant's employ. In May, 1904, he and his associates bought the United Can Company. It was then a small concern. Under their management it flourished, and by 1906 was selling 40,000,000 cans a year. They took over the property of the Federal Can Company, and with it certain exclusive licenses to operate in the Pacific Coast States under patents belonging to

the Max Ams Machine Company. The Kendall Company was a sublicensee of the Federal Can Company. The purchase of these three companies and their exclusive licenses materially strengthened defendant's hold upon the can trade of the Pacific Coast.

About January 1, 1909, the Union Can Company and the Utica Industrial Company, both of Rome, N. Y., as well as the New Hartford Canning Company of New Hartford in the same state, were acquired. All three were closely allied. They were apparently controlled by Sanford F. Sherman, a brother of the late James S. Sherman, then Vice President elect of the United States. The New Hartford Canning Company was primarily engaged in the business of canning fruits and vegetables. Since 1880 it had made its own cans and sold the surplus. Norton had attempted to get it for the defendant, but had failed. The Union Can Company was not organized until 1906. The two concerns together annually consumed about 90,000 base boxes of tin plate, and sold about one-half of the packers' cans used in the state of New York. The Utica Industrial Company was principally engaged in constructing machines under patents it owned. These patents were for the invention of one Charles W. Graham, who was in the company's employ, and who appears to have had quite a genius for developing automatic can-making machinery. The three companies were prosperous, but the volume of their business compelled them to borrow money. Mr. Sherman had to indorse their paper. He wished to be free of the burden. He opened negotiations with defendant and effected a sale for $275,000, a price apparently liberal, perhaps even generous, but far removed from the extravagant sums which defendant had formerly paid.

The New Hartford Can Shop and the machine shop of the Utica Industrial Company were dismantled, and some of the obsolete machinery of the former was junked.

It is perhaps worth while to note that, of these 12 concerns, only two made cans prior to March, 1901. Norton had tried to get both of them. He failed because their owners were large can consumers and feared to surrender the control of their can supply. It is, of course, obvious that these purchases of a dozen plants during a period of some seven years do not even tend to show that the defendant from 1902 to 1909 made any attempt to secure all or a greater part of the can-making plants of the country, as in 1900 and 1901 Norton and those for whom he acted did. In many, if not in most, of the cases in which the defendant did buy, the sellers sought it. The effect of the purchase was the same, no matter who began the negotiations; but, in judging defendant's intent, the fact that the owners came to it, and not it to them, is significant.

Alleged Monopolization of the Sanitary Can Business.

The defendant made one other purchase. It was in some respects more important than any or all of the others, for through it defendant secured the prominent place it still holds among the makers of so-called "sanitary cans."

A packer understands a can by that name to be one in which the whole top in one piece is put on the can after the latter has been filled,

and in which such top is secured in such a manner that the medium used to seal it hermetically does not come in contact with the contents of the can. Such cans had been used in Europe for years before the formation of the defendant. Max Ams was a firm engaged in the business of putting up canned fish, jellies, condiments, etc., and had a large export trade. Its European customers objected to the hole and top cans sealed with solder then almost in universal use in this country. The rubber gaskets employed in Europe for sealing cans were not available here, and, if they had been, the time and cost of inserting them would have been a serious obstacle to their use. One of the firm invented a liquid compound which could, in connection with machinery, types of which had already been developed in this country, be used to seal the cans. About 1904, he thought his experiments had succeeded to an extent sufficient to justify him in exhibiting his methods at the packers' convention of that year. In 1902, the Max Ams Machine Company was incorporated and began to manufacture, or rather to adapt, machines for closing such cans. The defendants Bogle and Cobb were connected with the Cobb Preserving Company of Fairport, N. Y. They became interested in sanitary cans and, at the instance of Ams, began to manufacture them on a larger scale than he was equipped to do. They were canners, and they made the cans for their own use and sold the surplus. The consumption of sanitary cans increased. In 1904, they organized the Sanitary Can Company, and thereafter their business in making and selling sanitary cans grew from about $150,000 to nearly $2,000,000 four years later. They had troubles. Things did not always work right. A good many of their cans were defective, or the packers did not know how to use them and claimed they were. They had to pay out large sums in damages. They branched out largely. They built additional factories in different parts of the country. The very rapidity of their growth imperiled their financial condition. Not only were the resources of the company itself strained, but so were those of the individuals largely interested in it. Along came the panic of October, 1907. The men at the head of the company, and who had indorsed its paper, became somewhat alarmed for their future. They feared they had on hand more of a task than their means would enable them with safety to handle. They looked about for a possible purchaser. The defendant naturally occurred to them. The fact that it was the largest concern in the business made them, as a few months later it made Sherman, turn to it. In periods of stress, it frequently happens that the largest competitor in any line of business is the only possible purchaser for one of its smaller rivals, who has become financially involved. As, for example, the United States Steel Corporation was the only concern which could in a hurry and in a time of panic buy the Tennessee Coal & Iron Company, when those interested in the latter had to have instant relief. The largest organization in any line of business may not unnaturally grow otherwise than by the use of what ordinarily would be thought of as its competitive advantages. The fact that any of its competitors who feel they must sell are most likely to make it the first offer, and that usually acceptance is for it a far less se-

rious matter than it would be for almost any one else, is one of the causes which contribute to such expansion.

At the same time, defendant entered into certain contracts with the Max Ams Machine Company, by which it secured for some years the exclusive right to use the latter's closing machines. Of what significance are these transactions? The defendant, before they took place, had begun the manufacture of sanitary cans, which of course were sold in competition with those made by the Sanitary Can Company. Those cans were coming into public favor. Defendant might, even if it had not been already far and away the most powerful factor in the entire can trade, have wished to secure plants which made a specialty of such cans and were fitted for their manufacture. In short, had it not been conceived in the sin of defying the Anti-Trust Law, such a purchase could hardly have been said to show an intent to restrain competition or promote monopoly.

The weight which should be given to these various purchases and to the fact that similar transactions are like enough to take place in the future, whether defendant specially wishes them or not, may be most profitably considered in connection with the government's contention that the defendant's size and power is so great that through them it dominates the industry, and, because such size and power were in the first place illegally acquired, the court must now take them away.

Prices of Sanitary Cans.

The government charges that, through the control the defendant has acquired over the sanitary can business, it is able to exact, and does exact, for those cans a higher price than for other kinds of packers' cans, although they cost no more to make. Sanitary cans are sold at higher prices than packers' cans of like sizes, and it is probably true that they are no more expensive to manufacture. It is, however, the custom of can makers to furnish, to purchasers of such cans, can-closing machines at nominal, or at all events at very low, rents. There has been in the last few years a rapid improvement in these machines. Those in use one year frequently became obsolete a year or two later. It is therefore quite possible that the margin of profit on sanitary cans is in fact no greater than on the old hole and top cans. It would not be surprising, however, if the reverse were true. In most lines of production, greater profits are made on comparatively new things than on those which have been known and used for many years. It does not appear that any special significance should be attached to the figures at which sanitary cans are sold.

Defendant's Control of Prices.

The government alleges that, ever since the defendant was formed, it has controlled, and at times has increased, the general market prices of cans. It is charged that not only does it fix the price of the output of the plants controlled by it, but that so great is its predominance in the industry that those prices are followed of necessity by the independent manufacturers, and thus all substantial price competition is eliminated. It is said that defendant has exercised, and at the time of the filing of the petition was still exercising, this control to lower

or raise unduly and arbitrarily the price of its product. There is no question that since 1901 the defendant has very largely fixed the price at which packers' cans have been sold throughout the United States. It has competitors who now sell approximately one-half the cans which are sold in the country. There is no evidence of any price agreement between it and them. There is no reason to think that there is on this subject any understanding of any kind, however vague or indefinite. Nevertheless, the prices it fixes are the standard prices from ocean to ocean and from the lakes to the gulf. It is impossible, except under very peculiar circumstances in extremely limited amounts, and during the shortest periods, for anybody to get more for packers' cans than defendant charges. Its largest competitor is the Continental Can Company. The latter sells nearly one-fourth of the cans not sold by defendant. So far as packers' cans are concerned, it appears always strictly to follow the defendant's prices. The record mentions a few instances of alleged price cutting by the Continental Can Company. These instances are so rare and so obviously opposed to the general trend of its policy that it appears probable that with one exception the witnesses who testified as to them misunderstood the facts or did not accurately recall them. It did sell the makers of Campbell's soups, who were very large consumers, at perhaps 20 cents a thousand below defendant's prices. The Continental Can Company was organized in 1904 very largely by the Edwin Norton who played so conspicuous a part in starting the defendant. There is no evidence that the Continental Can Company's strict adherence to the prices fixed by the defendant is the result of any agreement or understanding. It is possible that it is due entirely to the belief of the well-informed managers of the Continental that a trade war carried on by cutting prices would not be to its advantage. A number of the smaller competitors of the defendant, concerns the total output of each of which does not exceed perhaps one-twentieth of its, sell their cans at defendant's prices when they can, and, when they cannot, they cut those prices anywhere from 25 cents to $1.50 a thousand. They never drop much lower. It may be that their cost of production prevents. It may be that, if they named prices sufficiently attractive to draw much trade from defendant, they would get more than they could handle. If they attempted rapidly to extend their facilities, a sudden drop in defendant's prices might catch them in a position in which they would be in deadly peril of financial ruin. They never name their prices for the year until the defendant's have been made public. On the other hand, the potential, if not the actual, competition to which defendant is exposed, prevents it from arbitrarily fixing its prices at a higher figure. The experience which it had at its formation has taught it that such a course is, from its own standpoint, unwise and may be disastrous.

It is not possible to arrive at a definite conclusion as to the prices of general line cans. They are of many different sorts, sizes, and shapes. Each user is likely to insist on a can adapted to his particular requirements, real or fancied. The publication in advance by the defendant, or by anybody else, of prices for such cans, would be im-

practicable, and in fact is never attempted. The consumers make their own bargains with the various can factories in what manner and for what length of time best commends itself to their judgment.

The evidence shows that sometimes the defendant offers general line cans at prices lower than any of its competitors, and sometimes one or more of its competitors names prices below its. While as a result of defendant's size and the wide distribution of its factories its action is perhaps the most important single factor in determining the price of general line cans, it does not fix and control the prices of such cans, to anything like the extent it does those of packers' cans.

How Far Defendant Has Served the Industry.

Thus far consideration has been chiefly given to the government's charges against the defendant. Some of these have been held not well founded. It has been said that others are made out.

Defendant has directed much of the nine volumes of testimony it has offered, to show that whatever criticisms might be made as to the way in which it was formed, and to certain of its isolated acts since, it has on the whole served the can trade well, and that its dissolution would do harm and not good. There is no room for question that since 1901 there have been many improvements, not only in can making, but in can selling and in can delivery as well, and that these improvements are greatly appreciated by all who buy cans from can makers. There is the usual difficulty, in such cases, in telling how much of these good things are because of that which defendant has done and how much would have come about if defendant had never been thought of.

The Tendency of Can Prices.

By 1904, if not earlier, the defendant had definitely abandoned the policy of charging prices which to the consumer seemed unduly high. It is natural, nevertheless, to ask whether since that time prices have been lower or higher than they would have been had it never come into being. The record does not give any certain answer to this question. A great many consumers of cans testified that the price has tended downward. Up to the time of the closing of the evidence in this case, that was generally true. There were fluctuations, and the downward trend was slight; but there was such a trend. A comparison of the price of tin plate and of cans from 1897 to 1913 shows that the prices of the latter for 1911, 1912, and 1913 were just about the same as they were in 1897, 1898, and 1899, when allowance is made for the difference in the cost of the former. The margin between the cost of the tin plate and the selling price of the cans seems to have been as great when, as now, cans were made and sold at prices fixed by the defendant, as it was when they were made and sold by its numberless predecessors in the business. The cans have been better, in that they have been more uniformly well made. With the machinery now in use there is no reason to think it costs appreciably more to make good than bad cans. The manufacturing cost is now less than it was before defendant's formation. It is true that each

laborer employed now receives more wages than he did then, but so great has been the improvement in machinery that the actual labor cost per thousand cans is now materially less than it was 15 years ago. Moreover, as a result of better methods of manufacture, much less solder is now used, and a net saving of some importance is thereby effected. A reduction in the price of cans does not appear to be among the benefits the defendant has conferred upon the trade.

Standardization of Sizes.

Defendant takes some credit to itself for bringing about a standardization in packers' cans, so that a No. 1, a No. 2, or a No. 3 can, of any one of the recognized types of openings, is now precisely the same, no matter from what shop it comes. A good deal of progress in this direction had been made before defendant was organized. The first effect, not of its formation, but of the policy adopted by it in its earlier history, was probably to retard rather than to accelerate this tendency. The prices it quoted brought about, as has been seen, an opening or reopening of a number of shops poorly fitted to make good cans. The owners of such establishments probably gave little thought to standardization or to any similar problem. Subsequently, the influence and example of defendant made greatly for uniformity. It is, however, probable that, even if it had never come into being, the pressure from the canners and other sources would e'er this have resulted in the general establishment of the standards now in use. It is very possible that it would have taken longer than it did.

Better Cans.

Defendant makes good cans. It has always done so, at least after the first few months of its existence. The impression produced by the testimony is that it has been more uniformly successful in so doing than perhaps any of its competitors, although the larger and more responsible of these have, in recent years, habitually turned out thoroughly satisfactory packers' cans. The same may be said as to the more generally used of the general line cans, such as those for coffee, lard, or varnish. When it comes to designing and making cans to meet special wants or peculiar tastes, conditions are somewhat different. The defendant has usually at its command a wider range of expert capacity in dealing with the problems which may arise, although of course on any special occasion, any one of its rivals, even a very insignificant one, may happen to solve them more satisfactorily. It has a more varied line of machinery. It is its policy to spare no trouble nor, within reasonable limits, expense to meet its customers' wishes. It is therefore not surprising that some users of certain sorts of general line cans feel that it can be safely depended on to make what they want. Some of them have reason to believe, or to know, that not every one of its competitors can be, and, as they are not certain that any of them can, it gets the business at the same or even a little higher price. Many concerns use many different kinds of cans. Some, but by no means all, of these, like to have all their cans from the same maker. In such cases it not infrequently happens

that the defendant is the only one who will, or perhaps can, bid on the whole order.

It is impossible to say how much of the improvement in the quality of cans and in adapting them to varied uses is due to the defendant, and how much to other causes. It is, however, certain that its influence has been an important factor in bettering these conditions.

Promotion of Scientific Study of Canners' Problems.

The defendant claims, with much reason, to have been the first of the can makers systematically and scientifically to study canners' problems, with a view to discovering the causes of damage to and deterioration in canned goods. It says it has done more in that direction than any of its competitors, or all of them together. A number of years ago the defendant established a laboratory for the investigation of such matters. It has always been ready and willing to use the resources of this laboratory to aid canners, without expense to the latter and whether they bought their cans from it or not. When, some years ago, the National Canners' Association made up its mind that it would like to establish and maintain a well-equipped and efficiently managed laboratory at Washington, the defendant, and for that matter its principal competitors, furthered the project by contributing liberally, apparently in some rough proportion to the number of packers' cans sold by each.

Contracts for Season's Supplies.

From the canner's standpoint, the most important respect in which the condition of the industry has, since 1901, changed for the better, has been the practically universal substitution of the agreement to supply all cans needed by a packer during a particular season for the theretofore existing practice of contracting for a definite number of cans. This change has been highly beneficial. It would have been difficult, if not impossible, to have brought it into general use, so long as the can factories were on the average as small as they were in the last century. All the larger and stronger can makers in the business now follow it. As has already been intimated, it may be doubtful whether some of these could safely do so to-day if they did not feel that, even in seasons of unusually and unexpectedly large crops of cannable products, the defendant would be able and willing to supply their customers at reasonable prices with any cans which they might not be able to furnish.

Prompt Deliveries.

Almost every canner of food products, out of the hundreds who have testified in this case, and many who use cans for other purposes, are emphatic as to the supreme importance of prompt deliveries. Many users of cans have limited storage facilities. They cannot take in many at a time. A delay in the arrival of cans may mean to them the entire loss of the product which was to be packed. Fire, flood, or other accidents may put a stop to the operation of any one can fac-

tory. The defendant has many shops, most of its competitors but one. The probability of its delivery of cans being altogether prevented by a factory accident is therefore almost negligible. Prompt delivery at short notice cannot, however, be assured unless the can factory is near the place of consumption. If there is a long railroad journey between, accidents and mistakes on the lines may postpone the arrival of cans which have been shipped in due season. The testimony shows that for this reason users of cans often prefer to deal with a neighboring factory, whether of the defendant or one of its competitors, in preference to buying cheaper elsewhere. The defendant has always given special attention to insuring prompt deliveries, and apparently has been rather unusually successful in so doing. Moreover, it stands ready to do its best to furnish cans on the shortest notice to any one who wants a carload or many carloads, and at its published prices. The failure of prompt delivery from one of its factories, or from a factory of one of its competitors, is no longer by any means so serious a matter as such an event formerly might have been. From one or the other of its shops the defendant is usually able in brief space to place the cans where they are needed. No concern which had not a number of plants and ample resources, both in men and money, could have done what the defendant has accomplished in protecting can users against serious delays in delivery. Perhaps this has been its most valuable service to the trade.

Storage Agreements.

Cans are bulky articles. In most sections of the country the packing season lasts but a few months, and in some but a few weeks. Can factories can, or course, make the best use of their facilities by running on full time all the year round; but, if they do, they must provide expensive storage facilities for the cans they make in the six or eight months of the year in which there is little or no use for them. When everybody wants them at once, loading and switching facilities are likely to be overtaxed. On the other hand, all canners necessarily have to have some place in which to store part of their products until they are able to sell them. Such space may well be used, before the packing season, for the storage of empty cans. At some packing houses, storage facilities are limited. At others they are quite extensive. A packer of the latter class can, early in the year, conveniently take in a part at least of his season's supply. Before defendant's day, can makers sought to induce packers to do so by selling cans for winter delivery at decidedly lower prices than they would make if the cans were not to be shipped until summer. Many packers were not and are not able to avail themselves of such a proposition, which moreover is now less attractive than it formerly was, because the difference between the off-season's and mid-season's prices is, as a rule, much less than it was 17 years ago. Many packers cannot take in their cans long before they expect to ship out their finished products because, by the custom of the trade, cans are sold for cash on delivery; that is, they are shipped draft with bill of lading attached. It has now been for some years the practice of defendant and some of its stronger com-

petitors to solve the problem, in part, by storing upon the packer's premises the whole or a part of his season's supply. The arrangement takes the form of a lease by him to it of storage room. The rent it pays is usually nominal, although in a few cases it has been a little more than nominal. The defendant then ships its cans to the customer, who stores them as its property in the warehouse, or part of the warehouse of which it is in form the tenant. When he needs the cans, he takes them out in carload lots and pays for them. Then, and not until then, do the parties intend the title shall pass to him. The arrangement is one which should be useful to both parties, and particularly so to the canner if he happens to have limited capital or credit. He gets a supply of cans before he needs them. He is to that extent independent of can factory or transportation accidents. The can maker, at little or no cost, largely increases its storage facilities. The defendant may not have originated this plan, but it has extensively used and popularized it. Perhaps its only disadvantage is that it tempts canners, who are financially weak, to use cans before they pay for them, and to conceal the fact by making false reports as to the date upon which the cans were used. Sometimes bankruptcy or insolvency follows, before the cans are paid for, and various legal as well as moral complications result. On the whole, however, there can be but little question that the practice has been both convenient and economical.

Good Feeling in the Trade.

A man or an institution may be of great service to the community, or to a portion of it, and still be very unpopular in it. He is likely to be if those who are served feel themselves compelled to do things, even although those things are for their own good. The evident good feeling between defendant and its customers and competitors proves that neither can makers nor can users feel that for a number of years defendant has tried to force them to do anything. The defendant asked a great many witnesses, a hundred or more doubtless, whether they thought its dissolution would be desirable. None of them answered yes. Some of them did not know whether it would be or not. An overwhelming majority testified that such a dissolution would be hurtful to the industry. It is true that not many of them who so said could give convincing or conclusive reasons for the opinion that they expressed, but the fact remains that nobody in the trade feels that the defendant is hurting anybody, or for a number of years past has hurt anybody, or has tried to.

Consumers of cans were, when the testimony was taken, paying less money for cans then they had frequently paid in the past. Few of them were aware that this reduction in price was due almost entirely, if not entirely, to cheaper tin plate. Prices were relatively stable. They fluctuated as to most kind of cans scarcely at all within a year, and usually but little from year to year. Users were practically certain of being able to get what cans they wanted when and as they wanted them. In short, defendant having great facilities habitually used them to give intelligent, courteous, and kindly aid. It is unmistakably popular in the trade.

The government might properly reply that those who buy cans do so for the purpose of selling their products in them. So long as they are certain that their competitors are not getting cans materially cheaper than they are, so long as they are not exposed to violent fluctuations in the prices, they are not much concerned as to whether cans could be a little cheaper or not. Their attitude of mind is perhaps illustrated by one witness who said he could make his own cans, and, as he figured out, he could make them cheaper than he could buy them; but, if he did, all his competitors would do so. Prices of their wares to their customers would go down, and in the end he would have the trouble, worry, and responsibility of making his own cans with no larger net profit. His attitude is natural enough, but it shows that the protection of the ultimate consumer cannot always be left to the middleman.

The competitors of the defendant are satisfied. It apparently is willing to sell cans at a price at which they can compete with it and still make money. As has sometimes been suggested, it seems to hold an umbrella over them. They have no cause to complain. They are growing, most of them. All the more important certainly are.

Defendant's Share of Can Trade.

In 1913, in round numbers, one-third of the cans manufactured in the United States were made by people who used those they made. One-third was made by the defendant, the other one-third by other people who, like it, made cans to sell. There has been much testimony taken and a great deal of controversy as to whether the cans made by people who made them for sale, other than the defendant, were more or fewer than those made by it. Into that question it is not proposed to go. For all practical purposes, one made about as many as the other. It is not perceived that the decision of this case or of any material issue in it can possibly turn on whether the aggregate of cans made by defendant is a few million more or a few million less than the aggregate of those made by all other persons who make them for sale.

It is probable that, when defendant was first formed, it took over factories which at that time, or a few months earlier, made in the neighborhood of 90 per cent. of the cans manufactured for sale. In the first few months of its existence, competitors sprang up like mushrooms. The record does not give us any figures as to the aggregate volume of business done or cans made by defendant's competitors, except for the year 1913. At that time, as already stated, they sold about one-half, a little less or a little more, as you choose. The progress from year to year of some of the larger concerns is shown. The percentage of their growth has usually been higher than that of defendant, sometimes much higher; but we know nothing accurately of various concerns that made and sold cans at various times since 1901, but who no longer do so. As has already been stated, some considerable competitors have since 1901 been absorbed by the defendant. The latter's consumption of tin plate for each year from 1903 is stated in the record. The country's total production of such plate for each of those years is also given. The figures of the ex-

port of such plate do not appear to be stated, but they are easily obtained from the official statistical abstract. It is true that in such abstract the exports and imports of terneplates are not separate from those of tin plate, although the domestic production of each is separately given. Assuming that the same proportion of terne as of tin plate is exported and imported, the amount of tin plate retained for consumption in each year can be ascertained. Any possible inaccuracy in the assumption made as to the amount of terneplate going into foreign trade cannot appreciably affect the percentage of the total amount of the country's consumption of tin plate properly chargeable to defendant. This proportion varies somewhat from year to year. It was as low as 27.9 per cent. in 1906, and as high as 34.5 per cent. in 1911. The latter was a year in which there was an unusually large demand for packers' cans, a demand which the defendant seems to have been able to meet more readily than its competitors. Doubtless some of the apparent fluctuations from year to year are occasioned by the fact that the tin plate retained for consumption in any particular year may be more or less than the amount which in the same 12 months is actually consumed. However, as the defendant in each of the years 1903 and 1904 seems to have used about 30.7 per cent. of the total tin plate retained for domestic consumption, and in the year 1912, 29.9 per cent., and in 1913, 30.3 per cent., or an average for the two years of 30.1 per cent., it may be said that in a decade there has been no appreciable change in the proportion of the country's tin plate which defendant has consumed. Of course, not all the tin plate goes into cans, but almost all of it does.

Cans Made for Use, Not for Sale.

About one-third of the cans made in this country are made by concerns who themselves use them. The government says that, in determining the degree to which the defendant has succeeded in monopolizing the trade, such cans should not be taken into account. The defendant as strenuously insists that they should be. As a technical proposition, the government would seem to be right. Cans made by persons who use them are not as cans traded in. In considering the cans which as such form part of the commerce of the country they may be excluded, and indeed, from that standpoint, must be.

If an attempt was made in a particular city to combine all the bakers, and such attempt was successful, it would probably be held that a state law, couched in the same phraseology as the federal Anti-Trust Act, except that it would be restricted to intrastate commerce, would be violated, in spite of the fact that in that city one-half or two-thirds or even three-quarters of the bread consumed was actually baked in the kitchens of private families.

Yet the fact that one-third of the cans used in the country are made by the people who use them is one of great significance. It shows that any considerable rise in the price of cans, due to other causes than the increased cost of production, or of raw material, would probably lead to two things: First, a number of the well-equipped can factories which now confine their production to the needs of

their owners would begin manufacturing for the general trade; and, second, many other consumers of cans, who now buy them, would then begin to make them for themselves. Such a possibility imposes a check of no mean efficiency upon the actual power of the defendant greatly to raise the price of cans.

The number of consumers who formerly made their own cans was both absolutely and relatively greater than it is to-day. Small canners, except under peculiar conditions, such as those with which the Alaskan salmon canneries have to deal, no longer make them. On the other hand, so far as one may make a guess from imperfect data, it is probable the proportion of all kinds of cans made by those who used them is nearly or quite as large as it was 15 or 20 years ago. What has happened has apparently been that there has been a great increase in the consumption of cans, not only for packing fruits and vegetables, but for many other purposes, and that especially for those other purposes the consumption of particular factories or companies has become very large, and that a number of these find it to their interest to make their own cans.

The government contends that the defendant's real predominance in the trade is much greater than the figures and percentages show. It says a good many of the cans which swell the total of independent producers are made in small shops or factories which survive solely because they are individually insignificant, and cater to an almost purely local trade which deals with them because they are at hand. Such concerns are not competitors of defendant in any very important sense. Some, or many, of such shops, would always contrive to live, no matter how complete defendant's domination might be in every sense which counts. All this may be and doubtless is true, but that they do still exist, and might live under conditions still more unfavorable, is a fact which must be taken into account in determining how unlimited defendant's domination of the industry is or can become. That there are such small factories, and they serve a real need, is one of the reasons assigned by a number of witnesses why in their opinion a true monopoly in can making is impossible. It does not even to-day take very much money to go into can making, and if one has industry, character, some little ability, and a fair average of luck, to stay in it. The instant defendant attempts to exert oppressively its great influence in the trade and what may be conceded to be its present domination over prices, these small shops would extend their output and many others would be opened.

Earnings of Defendant.

It is not well, in dealing with such great and many-sided problems, to ignore any of their conditions, even those the immediate legal bearing of which may be obscure, or even apparently nonexistent. The defendant's financial condition for some years after its formation was none too good. The mistakes of the promoters had been too serious. Before the petition in this case was filed, it had greatly improved. By the time at which this opinion is written, it has fared so well that the day seems near at hand at which all arrears of the

cumulative dividend of 7 per cent. per annum on its more than $40,000,000 of preferred stock will be paid. It would be unwise, in the present state of speculative optimism, to attach undue importance to the prices which are quoted for securities of companies which have, or are said to have, war orders. Yet it is a fact that the common stock of the defendant, which when issued avowedly represented nothing more substantial than hopes, is now selling at something like $60 a share and the preferred at $110. The plants which were taken over at and about the time of defendant's formation could have been duplicated for probably not exceeding $10,000,000. $7,000,000 of cash went into its treasury. At present prices, the securities which represent the original $17,000,000 will sell for $68,000,000, or four times as much. This $51,000,000, or so much of it as will remain when prices are more nearly normal than they are now, has been earned in supplying an article, the ultimate consumers of which comprise almost every individual in the entire population. The poorest and most struggling of the people are relatively, to their total expenditures, large consumers of canned goods. It is true that in the countless steps and many processes which come between the original producer of the fruits or the vegetables or other things which are canned, and the ultimate consumer, there are costs, charges, and profits which in the aggregate far exceed the fraction of a cent a can which the last analysis represents, even as things are and have been, the defendant's gross profit on the sale of each container. If defendant had never been formed, no one can be sure that cans would now be lower.

Conclusions.

One who sells only one-half of the cans that are sold does not, of course, possess a monopoly in the same sense as he would if he sold all or nearly all of them. Yet he may have more power over the industry than it is well for any one concern to possess. No one can say with any certainty that anybody would be better off if defendant had never, in any way, restrained or controlled absolutely free competition in cans. All that can be argued is that, in view of the declared policy of Congress, the legal presumption must be that which was done was against the public weal.

If it be true that size and power, apart from the way in which they were acquired, or the purpose with which they are used, do not offend against the law, it is equally true that one of the designs of the framers of the Anti-Trust Act was to prevent the concentration in a few hands of control over great industries. They preferred a social and industrial state in which there should be many independent producers. Size and power are themselves facts some of whose consequences do not depend upon the way in which they were created or in which they are used. It is easy to conceive that they might be acquired honestly and used as fairly as men who are in business for the legitimate purpose of making money for themselves and their associates could be expected to use them, human nature being what it is, and for all that constitute a public danger, or at all events give rise to difficult social, industrial and political problems.

The law wishes that industrial and trading corporations shall operate under the checks and balances imposed by free and unrestrained competition. Doubtless, no one is blind to the evil which such competition itself brings with it, precisely as no thoughtful man can close his eyes to the difficulties which some of our constitutional checks and balances put in the way of securing an ideally efficient government. Congress wished to preserve competition because, among other reasons, it did not know what to substitute for the restraints competition imposes. It has not accepted the suggestions of some influential men that the control of a certain percentage of industry should be penalized. It has not yet been willing to go far in the way of regulating and controlling corporations merely because they are large and powerful, perhaps because many people have always felt that government control is in itself an evil, and to be avoided whenever it is not absolutely required for the prevention of greater wrong.

The problem presented by size and power is one of such far-reaching difficulty that Congress has said, while it does not see how to deal with them when acquired in the legitimate expansion of a lawful business, it will prevent their illegitimate and unnatural acquirement by any attempt to restrain trade or monopolize industry. Perhaps the framers of the Anti-Trust Act believed that, if such illegitimate attempts were effectively prevented, the occasions on which it would become necessary to deal with size and power otherwise brought about would be so few and so long postponed that it might never be necessary to deal with them at all. In administering the anti-trust acts, a number of great and powerful offenders against them have been dissolved. So far as is possible to judge, the consuming public has not as yet greatly profited by their dissolution. It is perhaps not likely that any benefit could have been expected until in the slow course of time the ownership of the newly created corporations gradually drifts into different hands. In most of the cases in which dissolution has been decreed, the defendants had, not long before proceedings against them were instituted, done things which evidenced their continued intent to dominate and restrain trade by the use of methods which interfered more or less seriously with the reasonable freedom of their customers or their competitors.

As has been shown, defendant for a number of years past has done nothing of the sort. While it had its origin in unlawful acts and thereby acquired a power which may be harmful, and the acquisition of which in any event was contrary to the policy of Congress as embodied in the statute, it has for some time past used that power, on the whole, rather for weal than for woe. In this case, if a dissolution be decreed, it will have as its sole reason the carrying out of the policy of Congress that a trading or industrial corporation shall not, by an attempt to restrain or monopolize trade, become so powerful that it exerts an influence on the industry far greater than that of any of its competitors. A court of equity, in deciding that it will so decree, will not consider whether public good might not be furthered by punishing those who do or try to do illegal things. To administer punishment is not within its province. To make clear the futility of such attempts, by striking

down all that has been done to that end, is as far as it can go. But here we are face to face with the fact that the court cannot undo much that has been done. During the 16 years which elapsed between the decision of United States v. Knight, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, and that of United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, much water ran over the dam. Until the opinion in the latter case was handed down, it doubtless would have been inexpedient for the government to have begun proceedings against all combinations, a part of whose original motive was the restraint of trade and the bringing about of monopoly. Before such suits can be instituted, the government must investigate. Such investigations, when simultaneously directed against many large concerns, disturb business. In postponing even such preliminary inquiries until after the Supreme Court had laid down the law, the government was very likely wise.

Nevertheless, time has gone by. Conditions have changed. In this can industry it is absolutely impossible to put things back where they were on the 1st of March, 1901, and, if it were possible, probably highly undesirable.

The record shows that there are many ways in which a large and strong can maker can serve the trade, and a small one cannot. Perhaps it did not require much testimony to show that he who is strong and rich has more ability to serve than he who is poor and weak, provided always that there is an equal wish to do so.

Defendant once sought to emancipate itself from restraints of competition. Its power is great, but, as has already been pointed out, is limited by a large volume of actual competition and to a still greater extent by the potential competition, from the possibility of which in the present state of the industry it cannot escape. Those in the trade are satisfied with it. They do not want it dissolved. Whether its dissolution would profit any one is doubtful. The first and immediate effect would almost certainly be the reverse, whatever larger good might in the end come from it.

I am frankly reluctant to destroy so finely adjusted an industrial machine as the record shows defendant to be. Yet the government, too, has its rights, and has thus far been properly insistent upon them. The case most nearly in point is United States v. International Harvester Co., 214 Fed. 987. There is in that case a strong dissent from a very able judge. Nevertheless, the decision of the court cannot be lightly pushed aside.

The government recognizes that the situation which existed before defendant was formed cannot be restored. What it principally fears is that the defendant will, to the public prejudice, hereafter dangerously use the strength which it gained by its original lawbreaking. Defendant's reply, that in that event it will be time enough for the government to act, does not fully meet the case. If this petition be dismissed upon its merits and without qualification, defendant might be entitled to claim in any future proceeding that nothing here in issue may be there used against it. Nor would a dismissal without preju-

dice, as was proposed in Judge Sanborn's dissenting opinion in United States v. International Harvester Co., supra, altogether meet the case.

An immense volume of testimony has been taken. Much of it could not be again secured. An attempt to do so would involve a useless waste of time and money. In this case counsel on both sides worked with tireless energy. And yet nearly 2 years elapsed between the filing of the petition and the argument in court. It has now been 4½ months since that hearing. The history of the defendant from its organization to the filing of the petition is now of record. It has been fully digested and briefed by counsel. This court has spent many months in its study and has reached, as has already been stated, many definite conclusions as to facts. Why should all this work be wasted? If the defendant shall hereafter do anything which will justify or require the action of the court, there would seem to be no reason why the government should not promptly get the relief, to which it would then be entitled, at little cost to anybody. That result can be easily obtained if a start may then be made from where we now are, which would be impossible if proceedings have to be begun all over again. A dislike for useless waste and destruction makes one loath to follow the authority which may be understood as requiring the breaking up of defendant's organization, in spite of its proved power for good, albeit with serious possibilities of evil. A like instinct rebels against taking any course which may hereafter involve this or any other tribunal's going again over any part of the ground which in this proceeding has once been covered.

Under the circumstances, would it not be better simply to retain the bill, without at present decreeing a dissolution, but reserving the right to do so whenever, if ever, it shall be made to appear to the court that the size and power of the defendant, brought about as they originally were, are being used to the injury of the public, or whenever such size and power, without being intentionally so used, have given to the defendant a dominance and control over the industry, or some portion of it, so great as to make dissolution or other restraining decree of the court expedient. It is, of course, not suggested that this court should or could undertake the regulation of defendant's business. Courts have no such power and no fitness for its exercise. What is proposed is, in default of a better way, of dealing with a somewhat unusual and very difficult condition. It is to be hoped that, before any occasion to act upon the power reserved shall arise, Congress will substitute some other method than dissolution for dealing with the problems which arise when a single corporation absorbs a large part of the country's productive capacity in any one line.

I shall take the course indicated, unless one or the other of the parties insist on my entering such a final decree as will enable them to seek at once a review by a higher tribunal. If either of them does, I am not prepared now to say that they will not be within their rights, and that it will not be my duty to do what they ask. That question is reserved until the occasion for deciding it shall arise.

HOME TITLE INS. CO. OF NEW YORK v. KEITH.

(District Court, E. D. New York. March 3, 1916.)

1. INTERNAL REVENUE ⟸19(1)—STAMP TAX—STATUTORY PROVISIONS—"OR."
Under Act Oct. 22, 1914, c. 331, § 5, 38 Stat. 753, imposing a stamp tax on deeds and other documents therein mentioned or on the paper upon which the instrument is written by any person who shall make, sign, or issue it, or for whose use or benefit it shall be made, signed, or issued, section 6, imposing a penalty for making, signing, or issuing or causing to be made, signed, or issued any such document or paper without the stamp, and section 11, providing that any person registering, issuing, or transferring any such instrument without the tax shall be guilty of a misdemeanor, the stamp need not be attached to the paper before the paper is signed or partially executed if it is subsequently affixed before the paper is issued, as the word "or" is disjunctive as to persons but conjunctive as to a complete act of making, signing, and using.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸19(1).

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

2. INTERNAL REVENUE ⟸19(1)—STAMP TAX—STATUTORY PROVISIONS—"CAUSING, AND FOR WHOSE BENEFIT DEED IS ISSUED."
The grantee of land named in a referee's deed executed as part of an action for the foreclosure of a mortgage is a person causing the deed to be issued and for whose use and benefit it is issued within Act Oct. 22, 1914, §§ 5, 6, so as to impose on it the duty of seeing that the stamps thereby required to be affixed are affixed.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸19(1).]

3. INTERNAL REVENUE ⟸19(1)—STAMP TAX—STATUTORY PROVISIONS.
Act Oct. 22, 1914, § 5, imposing a stamp tax with respect to deeds and other documents, as applied to a deed executed by a referee appointed in an action to foreclose a mortgage is not invalid as imposing a tax upon the state's exercise of its governmental functions, as the tax imposed is an excise tax on the business transaction involved in the purchase of the land and its transfer to the purchaser, and the transfer is in its nature the same as any transfer from one individual to another.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸19(1).]

At Law. Action by the Home Title Insurance Company of New York against Henry P. Keith. On demurrer to the complaint. Demurrer sustained, and complaint dismissed on the merits.

Harry Percy David, of Brooklyn, for plaintiff.
Melville J. France, U. S. Atty., of Brooklyn, for defendant.

CHATFIELD, District Judge. The plaintiff brings the present action in order to raise the question so frequently presented in the course of the business conducted by the various title companies in this city, when deeds conveying the title to property bought in upon a sale in foreclosure must be executed and delivered by a referee who acts by appointment of the court and under authority of the statutes of the state, in selling the property, receiving the consideration therefor, and delivering the deed as a part of the foreclosure action through

dice, as was proposed in Judge Sanborn's dissenting opinion in United States v. International Harvester Co., supra, altogether meet the case.

An immense volume of testimony has been taken. Much of it could not be again secured. An attempt to do so would involve a useless waste of time and money. In this case counsel on both sides worked with tireless energy. And yet nearly 2 years elapsed between the filing of the petition and the argument in court. It has now been 4½ months since that hearing. The history of the defendant from its organization to the filing of the petition is now of record. It has been fully digested and briefed by counsel. This court has spent many months in its study and has reached, as has already been stated, many definite conclusions as to facts. Why should all this work be wasted? If the defendant shall hereafter do anything which will justify or require the action of the court, there would seem to be no reason why the government should not promptly get the relief, to which it would then be entitled, at little cost to anybody. That result can be easily obtained if a start may then be made from where we now are, which would be impossible if proceedings have to be begun all over again. A dislike for useless waste and destruction makes one loath to follow the authority which may be understood as requiring the breaking up of defendant's organization, in spite of its proved power for good, albeit with serious possibilities of evil. A like instinct rebels against taking any course which may hereafter involve this or any other tribunal's going again over any part of the ground which in this proceeding has once been covered.

Under the circumstances, would it not be better simply to retain the bill, without at present decreeing a dissolution, but reserving the right to do so whenever, if ever, it shall be made to appear to the court that the size and power of the defendant, brought about as they originally were, are being used to the injury of the public, or whenever such size and power, without being intentionally so used, have given to the defendant a dominance and control over the industry, or some portion of it, so great as to make dissolution or other restraining decree of the court expedient. It is, of course, not suggested that this court should or could undertake the regulation of defendant's business. Courts have no such power and no fitness for its exercise. What is proposed is, in default of a better way, of dealing with a somewhat unusual and very difficult condition. It is to be hoped that, before any occasion to act upon the power reserved shall arise, Congress will substitute some other method than dissolution for dealing with the problems which arise when a single corporation absorbs a large part of the country's productive capacity in any one line.

I shall take the course indicated, unless one or the other of the parties insist on my entering such a final decree as will enable them to seek at once a review by a higher tribunal. If either of them does, I am not prepared now to say that they will not be within their rights, and that it will not be my duty to do what they ask. That question is reserved until the occasion for deciding it shall arise.

Section 11 provides that any person who shall register, issue, or transfer, or who shall cause to be issued, sold, or transferred, any instrument, document, or paper without the tax, shall be guilty of a misdemeanor, etc.

The plaintiff argues that a person buying at a judicial sale is neither the party for whose use or benefit the instrument is issued, nor the party who causes it to be issued, nor is he the party signing or issuing the same. The penalty against failure to attach the stamp is directed, first, to the person who fails to duly stamp, as required, the paper which must bear a stamp before it can be recorded.

[1, 2] Section 6 of the law imposes the penalty upon any one who makes, signs, or issues (that is, uses or delivers) the deed. But this does not mean that the stamp must be attached to the paper before the paper can be signed at all. It simply places upon each of these individuals the responsibility of being charged with a misdemeanor if the paper is not duly stamped before its actual issuance or use, and of course the lack of the stamp must be rectified before recording. The "or" is disjunctive as to persons but conjunctive as to a complete act of making, signing, and using.

Under section 8, the initials of the person using or affixing the stamp and the date must be placed upon the stamp as a cancellation. It would not be held that a signature or partial execution of the paper, followed by a subsequent affixing of the stamp, was a failure to comply with section 6, if the stamp was properly affixed and canceled before the paper was issued. But all persons sharing in the transaction, if the paper is not properly stamped in time, are liable. Hence a grantee or vendee who participates in the making or issuing of a paper without the proper stamp could be charged in the criminal sense with acts equivalent to "causing" it to be issued without a stamp, and section 6 is not governed by the meaning of the words "caused to be issued," as viewed from the steps in the foreclosure suit, in order to determine upon whose motion or by whose application the deed was issued.

The transfer of title and the paper evidencing that transfer is issued for the use and benefit of the person who gets the title. It is issued, so far as the foreclosure suit is concerned, because the statute requires it and as evidence of the performance of the necessary steps in the action. But its delivery as a deed is solely for the purpose of placing a marketable title in the vendee's name, and that title and its record are for the use of the vendee within the meaning of the tax law. If any expense is rendered necessary in the purchase or use of such stamps, that could be included by the referee in the same way that, if the referee found it necessary to use postage stamps for the conveyance of some document by mail, he could include the purchase of these stamps. His so doing would not impugn or impair the validity of the law requiring the use of postage stamps. Nor does the fact that the government requires the use of postage stamps on mail matter show that their purchase and use by a referee would be taxable as a disbursement.

[3] The first point must therefore be decided against the plaintiff, and it throws no light upon the constitutional question raised under

the second point. Under point 2, the plaintiff seeks to show that the statutes relating to foreclosure procedure in a state court in conducting a foreclosure, and the actions of the officer of the state court in carrying on the foreclosure suit, up to and including the delivery of a deed to the purchaser, with the receipt of the money from him therefor, are all operations of the state in the exercise of its legal rights as an independent sovereignty, with respect to matters which have not been delegated by the several states to the federal government, and it is contended that they are therefore not taxable by the federal government in any form or guise whatever.

This argument is presented in two forms, first, as illustrated by the inability of the federal government to impose a tax upon state salaries or the activities of the state per se. Collector v. Day, 78 U. S. (11 Wall.) 113, 20 L. Ed. 122.

It is said in the Income Tax Cases, 157 U. S. 584, 15 Sup. Ct. 690, 39 L. Ed. 759, that:

"The United States have no power under the Constitution to tax either the instrumentalities or the property of a state."

In U. S. v. Railroad Co., 84 U. S. (17 Wall.) 322, 21 L. Ed. 597, it was held that the United States could not tax a municipal corporation, which of course was created with the authority of a state.

In South Carolina v. U. S., 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737, it was held that the federal government could not prevent a state from discharging its legitimate functions of government, which would include the establishment of a judiciary, the employment of officers to administer and execute the laws, and similar governmental functions. Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

It would follow from this that the federal government could not impose a tax, either in the form of a stamp tax or the collection of money for the exercise of the state's jurisdiction to perform its governmental functions, nor by so doing limit the decision of matters between litigants, nor to provide for and carry out the sale of property in satisfaction of an obligation which is to be fulfilled, including the necessary steps taken to dispose of either surplus property or the remaining questions of the litigation in the court proceeding.

This proposition raises directly the question whether the apparent requirement that any person (i. e., the referee) must affix a stamp to the deed conveying the property to a purchaser in a foreclosure action (or otherwise the purchaser must see that it is done in order to be able to record his instrument, and to relieve the referee from the effects of having failed to comply with the law) imposes a tax upon the operations or the process of the court, and therefore upon the exercise of its sovereignty by the state; or whether it is merely an excise tax upon the business transaction involved in the purchase of the land and its transfer to the purchaser, or an excise tax upon the use of an instrument of the nature required to complete such a purchase.

It has been held in so many instances that an excise tax of this nature is valid if it does not come within the scope of the cases which

have just been cited, i. e., it is valid if the paper is only evidence of action by the state authority and not a governmental transaction in the exercise of that authority, where the business privilege is not separable from the right of the state to carry on its own functions, that it is unnecessary to consider whether a proper tax of this nature is legal.

The question which is difficult of determination is to decide when a tax is proper, and, as has been pointed out by the attorney for the plaintiff, a statement, that the tax in question is valid because a tax of some other sort is valid, begs the question at issue at the outset. If the tax is valid, it necessarily falls into the category of the other taxes which are valid. If it is not valid, it must be because of some distinguishing feature which immediately takes it out of the valid class.

The matter must be disposed of, therefore, as one of principle, and involves directly therewith the proposition next raised by the plaintiff, that the attempt to tax the functions of the state courts or the state government involves the power to prevent their action, either by destruction (that is, by exhaustion of the resources usable in the transaction) or destruction by prohibition of action unless coupled with some impossible condition.

The plaintiff cites such cases as Fifield v. Close, 15 Mich. 505, and Veazie Bank v. Fenno, 75 U. S. (8 Wall.) 533, 19 L. Ed. 482, holding that an actual tax upon state sovereignty (involving the right to make the tax equal to the amount of property involved) is unconstitutional. In the latter case, the proposition was recognized that a tax and prohibition against the issuance of currency, unless the tax be paid and compliance with the national law satisfied, was in effect a prohibition against the existence of other bank notes which might comply with a state statute and not with the federal statute. In such case, the subject-matter must be within the jurisdiction of Congress in order to render the tax constitutional, as otherwise it would be an interference with the operation of rights of state sovereignty which had not been transferred or conferred upon the federal government.

The same proposition is conversely stated and is the basis of the decisions in McCulloch v. State of Maryland, 17 U. S. (4 Wheat.) 159, 4 L. Ed. 579; Osborn v. United States Bank, 22 U. S. (9 Wheat.) 326, 6 L. Ed. 204; Weston v. City Council of Charleston, 27 U. S. (2 Pet.) 289, 7 L. Ed. 481; Dobbins v. Erie County, 41 U. S. (16 Pet.) 279, 10 L. Ed. 1022; and the Bank Tax Case, 69 U. S. (2 Wall.) 200, 17 L. Ed. 793—in each of which a state tax upon some activity authorized by federal law was held unconstitutional.

But in the present case no tax is specifically directed against the exercise of the authority of the state nor based upon the exercise of that authority by the state. The tax is estimated upon the transfer of real estate. A sale in foreclosure is the sale of property for the purpose of realizing cash with which to pay off an obligation, and in transferring that property in consideration for the cash a deed is necessary as an evidence of title. The certificate of the referee and a receipt for the property would be sufficient to meet the requirements

of the court if the provisions of the real estate law and the necessities of the purchaser did not call for what is known as a deed, as a muniment of the purchaser's title. He obtains for cash property which has previously been the property of another person, and the transfer of that property for cash is as liable to taxation as the transfer of property between two individuals for cash. In other words, it is an incident of business which is subject to an excise tax, and the paper evidence of the business may be the specific instrument which is taxable.

It cannot be said that the power to impose such a tax could in any way destroy or be made equal in amount to the value of the privilege or the value of the property as to which the privilege was exercised. The mere language of a tax law requiring the state to purchase and use stamps to a small or large amount upon the court papers constituting the record of the proceedings in the foreclosure action, would be open to the objection of unconstitutionality in both ways. It would of itself be an interference with the sovereign power of the state, and it would directly assert the right of the federal government to indirectly control, or even to prevent the exercise of the state authority. But the tax upon a referee's deed is exactly alike in amount and in nature to the tax upon the individual deed.

This is not a direct prohibition or interference with the proceedings of the state court, but only compels the purchaser to receive a deed bearing the proper tax, in exactly the same way as if he were purchasing from an individual. Further, it is not an indirect attempt to exercise authority over the state court's action, for it could not interfere with or be increased in amount, so as to equal and thus wipe out the transfer intended, unless by the same provision all transfers of real estate were affected in the same way and, even, entirely prevented.

We need not argue the question whether the federal government would have the power to prevent all transfers of real estate, by excessive taxation, for we have started with the assumption that some taxation of the transfer of real estate is within the proper exercise of federal authority. In a foreclosure sale, the price sought must be sufficient to cover the lien and the expenses. If these expenses include a stamp tax, then the purchaser must bid sufficient to cover that tax, or a deficiency will result. If deficiency results, the expenses, including the stamp, would still be paid, and the deficiency would be transferred into a loss to the party who had invoked the authority of the state court and who had not protected, by buying in the property, or by bidding up to an amount which would cover his claim and expenses, or would result in a deficiency judgment, which in the theory of the law will recompense the mortgagee for the amount which he does not realize from the sale of the property.

But in its nature the transfer of the property for the cash which it does bring is exactly the same as the transfer of property from one individual to another for the cash which the purchaser may pay. The deed which goes to make his title is exactly the same in effect in each instance, and its taxability does not depend upon the identity nor the

authority of the person making the deed, and hence the addition of a stamp is not a limitation upon the authority of that person, but is merely an excise tax upon the transfer involved in the purchase. In this light it is reconcilable with the provisions of the statute in question, and there seems to be no reason for holding that the act is unconstitutional.

The demurrer will be sustained, and judgment absolute dismissing the complaint upon the merits may be entered.

AMERICAN BANK NOTE CO. v. BLUE RIDGE ELECTRIC CO.

(District Court, N. D. Georgia. March 9, 1916.)

No. 13.

CORPORATIONS ⇐579(2)—REORGANIZATION—RIGHTS OF CREDITORS.

Where plaintiff, a creditor of the N. Co., acquiesced in and agreed to become a party to a plan of reorganization and was told that its claim would be taken care of in the reorganization by the persons who largely controlled the organization of the B. Co. for the purpose of taking care of the secured and unsecured debts of the N. Co., and in the reorganization stockholders and other creditors were provided for or paid in bonds of the B. Co. or otherwise, and the property of the N. Co. which would have been liable for plaintiff's debt had passed into the hands of the reorganized company without plaintiff's debt being taken care of, the B. Co., which was a party to the plan by which such properties were acquired, *held* liable to plaintiff for an amount equal to the value of bonds to the amount of plaintiff's claim, as of the date when bonds were delivered to other creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2309, 2313, 2316; Dec. Dig. ⇐579(2).]

In Equity. Suit by the American Bank Note Company against the Blue Ridge Electric Company. Decree for plaintiff.

H. A. Alexander, of Atlanta, Ga., for plaintiff.

H. H. Dean, of Gainesville, Ga., and Robert C. & Philip H. Alston, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. Since the argument of this case, and since the briefs were furnished me by the counsel respectively, I have endeavored to find an opportunity to go through this record. I have recently been able to do so, and have gone very carefully through the evidence, books, documents, and oral testimony.

On January 3, 1914, I made a brief opinion in this case on the questions then arising, and I stated then that:

"This examination has satisfied me that the complainant states a case against the Blue Ridge Electric Company, and my conclusion is that the case against the Blue Ridge Electric Company is for an original undertaking on its part, considering all the allegations of the bill and the amendments.

"It was the people who finally organized the Blue Ridge Electric Company who had made the agreement with the American Bank Note Company to take care of it in the reorganization of the North Georgia Electric Company. The debt, of course, was due by the North Georgia Electric Company, and while there was a change in the name and a change in the corporate organization, sub-

stantially and really, going behind the corporate organization and the corporate name were the same people and the same properties. The Etowah Power Company was in it, it is true, but the main property was the property of the North Georgia Electric Company, which made the contract and which owed the plaintiff the debt.

"Under the allegations of the bill, the Blue Ridge Electric Company was mainly organized for the purpose of taking care of the secured and unsecured debts of the North Georgia Electric Company and thereby getting a clean transfer of the North Georgia Electric Company's property, through the Blue Ridge Electric Company, into the Georgia Power Company. Everybody connected with the reorganization, so far as this record shows, were the people upon whom the American Bank Note Company, according to its allegations, had a right to rely for the protection of its debt, and the bonds issued by the Blue Ridge Electric Company were based largely on the North Georgia Electric Company's property, which was certainly responsible to the plaintiff for its debt.

"The payment of the stockholders of the North Georgia Electric Company out of the securities issued by the Blue Ridge Electric Company in preference to the creditors of the company was, of course, illegal as against the creditors. A corporation cannot effect a reorganization by obtaining a new corporate name, issuing bonds and stocks on the old corporate property, and taking the same for the benefit of the old stockholders in preference to the creditors of the old corporation. That this is true will not be questioned, probably, by any one. The allegation of the bill is that that was done in this case."

I then proceeded to state an allegation of the bill which was not supported by the evidence in the case. It was this:

"If the allegations of the bill are true, there are still bonds of the Blue Ridge Electric Company in the hands of the Knickerbocker Trust Company, the trustee therein, subject to the direction and order of the Blue Ridge Electric Company, and which it states it was its right to have and which it is now willing to accept."

The proof did not show this allegation to be correct, that there was still bonds of the Blue Ridge Electric Company, at the time named, in the hands of the Knickerbocker Trust Company, so that that ground of right to recover was abandoned.

The opinion then proceeds:

"The record shows that C. Elmer Smith and E. L. Ashley controlled largely in the organization of the Blue Ridge Electric Company, and that Smith, and probably Ashley, and also Carlisle, president of the North Georgia Electric Company, had given the complainant company, through their statements in writing, reason to rely upon having its debt provided for and taken care of through the reorganization plan.

"I think as against the Blue Ridge Electric Company the plaintiff has stated in its pleadings a cause of action on which it is entitled to recover, if the case made by the pleadings shall be properly proven."

The correspondence spoken of above is as follows:

"August 24, 1909.

"W. A. Carlisle, Esq., President, North Georgia Electric Company, Gainesville, Ga.—Dear Sir: What has become of our claim against your company? If you will be good enough to advise us the present condition of affairs, and when we may expect a settlement of the account it will be very much appreciated. You will recall that it was about a year ago that we signed your agreement.

"Yours very truly, C. L. Lee, Treasurer."

"September 1, 1909.

"C. L. Lee, Esq., Treas., 70 Broad Street, New York City—Dear Sir: Yours of August 24th at hand.

"We hope that this fall or early winter the option, held on our properties by the parties with whom we are dealing and in whose behalf the agreement signed was obtained, will be taken up and your account provided for.

"They have been putting money into a transmission line about Atlanta and are adding to the income of the company by the sale of power there where a number of good power contracts have already been made and others are pending. You have been patient for a long time and we hope can bear with the situation a little longer, as we have assurances that the option will be taken up and our creditors claims cared for.

"Respectfully, W. A. Carlisle."

"September 23, 1909.

"C. Elmer Smith, Esq., York, Pa.—Dear Sir: Re North Georgia Electric Company. In June, 1908, we signed an agreement to accept certain securities in settlement of our claim against the above company. We are now informed that you have taken other steps toward reorganization, and that you have had drawn up a new agreement more favorable to the creditors than the first.

"We will be glad to have you send us a copy of any proposed agreement and at the same time let us have the benefit of your opinion regarding the probable outcome of our claim.

"Yours very truly, C. L. Lee, Treasurer."

"October 1, 1909.

"C. Elmer Smith, Esq., York, Pennsylvania—Dear Sir: Re North Georgia Electric Company. Some time ago we wrote you regarding a form of agreement which we understand you have issued in connection with the above company. Thinking possibly this letter may not have reached you we beg to request that you let us have a copy of any agreement, as you will recall we are creditors of this company.

"Yours very truly, C. L. Lee, Treasurer."

"York, Pa., October 2. 1909.

"American Bank Note Co., New York, N. Y.—Gentlemen: In answer to your letter of the 1st would state, that the affairs of the North Georgia Electric Co., have not yet been straightened out, but I expect that they will be between now and the 1st of January. A reorganization is being effected and your affairs will be taken care of with the balance of the creditors.

"Your recent letter was turned over to Mr. Ashley, my attorney for attention.

"Yours truly, C. Elmer Smith."

This makes a strong basis for the plaintiff's claim of having been wrongfully treated, because Smith and Ashley were undoubtedly the main persons connected with the organization of the Blue Ridge Electric Company, and, indeed, of the two other companies involved here, the Atlanta Power Company and the Georgia Power Company.

The main ground upon which the plaintiff is entitled to recover a decree in its favor in this case is this: That it had a debt against the North Georgia Electric Company, that a reorganization of that company was effected in which the stockholders received a large amount for their stock, and the properties of the North Georgia Electric Company, which would have been liable for the plaintiff's debt, went into the hands of the reorganized company without its debt being taken care of. As a matter of fact, the evidence shows, without passing, for the moment, on who did it, that all the properties of the North Georgia Electric Company did go into the hands of a new company, which might, I think, be properly called a reorganized company, and that the stockholders of the North Georgia Electric Company were paid or properly secured, and in the same transaction all the debts, both secured and unsecured, of the North Georgia Electric Company, were paid except this debt of the American Bank Note Company. Why it was left out it is impossible to say. There is no reason for it given in the evidence. There is some slight effort to show that the

North Georgia Electric Company did not owe the debt, but the evidence is overwhelmingly to the contrary, and that certain blank bonds were printed for it by the American Bank Note Company and delivered to it. All of the testimony is to this effect.

It may be taken as a fact, I think, for the purpose of determining this case, that the North Georgia Electric Company, at the time of this transaction, owed the American Bank Note Company the amount claimed by it. It is also true that the American Bank Note Company was led to believe, especially by C. Elmer Smith, that its debt would be taken care of in the reorganization then contemplated and to some extent progressing. C. Elmer Smith, with the assistance of Eugene L. Ashley, was the main support, controlling and dominating this entire reorganization movement.

The main question we come down to in this case, for the purpose of trying to determine it correctly, is whether the Blue Ridge Electric Company was really a party participating in the transaction by which the properties of the North Georgia Electric Company were acquired and the stockholders paid for their equity in the same. It is perfectly clear to me that the American Bank Note Company has rights against somebody, either natural persons or corporations.

It seems that at one time in the course of the transactions it was contemplated that the Blue Ridge Electric Company should take care of the secured and unsecured debts of the North Georgia Electric Company, but that subsequently, by a number of changes in plans, the payments were really made to these stockholders and creditors of various kinds of the North Georgia Electric Company by the Atlanta Power Company. The testimony of Mr. Arthur A. G. Luders is as follows:

"Mr. Luders, please state what, if any, connection you had with the exchange of stock of the Georgia Power Company for stock in the North Georgia Electric Company and the Etowah Power Company? A. I personally delivered to the subscribers to a certain agreement dated June 3, 1909, which agreement was made between certain stockholders of the North Georgia Electric Company and the Etowah Power Company and the Georgia Power Company, the stock of the Georgia Power Company, which, under the terms of that agreement, they agreed to take in exchange for their stock in the North Georgia Electric Company and the Etowah Power Company.

"Q. What were the respective proportions of stock? A. The stockholders in the North Georgia Electric Company received 25 per cent. in stock of the Georgia Power Company, and the holders of the Etowah Power Company stock received 10 per cent. of their holdings of such stock in the stock of the Georgia Power Company.

"Q. You personally attended to that? A. I personally delivered or mailed the stock of the Georgia Power Company to the stockholders of the North Georgia Electric Company, and received in exchange from them either their stock, or an order for their stock, which they had previously deposited with the Carnegie Trust Company of New York, in pursuance of said agreement.

"Q. Please state how the stock of the Georgia Power Company came to be in your personal possession? A. It was delivered to me by E. L. Ashley, vice president of the Atlanta Power Company.

"Q. He instructed you what to do with it? A. He did.

"Q. And his instructions were to make these exchanges, as stated? A. His instructions were to make the exchanges as stated, and, when exchange was made, to report it so made to him.

"Q. I hand you one of the original contracts of June 3, 1909. Please examine it, Mr. Luders, and state whether or not the persons whose names appear in that contract received stock of the Georgia Power Company in the proportion stated? A. All of the persons whose names appear as subscribers to this agreement received stock in the proportion stated. * * *

"Q. Mr. Luders, will you please state what part, if any, you played in the exchange of the bonds of the North Georgia Electric Company and the Etowah Power Company and with the unsecured accounts? A. There were certain subscribers to the agreement of June 3, 1909, who held bonds of the North Georgia Electric Company, refunding bonds, of the refunding issue, and certain of them who held notes or claims against the North Georgia Electric Company, which in certain cases these notes or claims had been assigned to the Atlanta Power Company and deposited, under the terms of the June 3d agreement, with the Carnegie Trust Company of New York. In pursuance of the agreement which the Atlanta Power Company made with the subscribers to that agreement, bonds of the Blue Ridge Electric Company were delivered to those subscribers to that agreement who held these unsecured claims, and I either received an assignment of their claims or an order on the Carnegie Trust Company for the assignment of it.

"Q. They were also exchanged for the old bonds? A. In certain cases. In some cases the old bonds were purchased outright by S. Fahs Smith.

"Q. Well, after he got the old bonds by purchase, didn't he make the exchange for the Blue Ridge Electric bonds? A. Yes. I can't— yes, I can too. He received in some cases the bonds of the Blue Ridge Electric Company direct from the trustee of the Blue Ridge Electric issue.

"Q. I show you, Mr. Luders, in the part of the June 3d agreement, Schedule A, the sundry unsecured notes and sundry open accounts. Please state whether or not those persons received Blue Ridge Electric bonds. A. This list of sundry unsecured notes shows certain persons, all of whom, with the exception of D. M. Stewart, received Blue Ridge Electric Company bonds at par in exchange for their unsecured notes, and accrued interest. The list of sundry open accounts shows certain persons of whom the following received Blue Ridge Electric Company bonds in exchange for their open accounts: W. A. Carlisle, Jno. A. Roebling Sons Company, General Electric Company, C. M. Merrick, E. P. Curby, Elwood Allen, E. S. Greenleaf, W. S. Huntley, W. H. Slack, W. R. Pomeraine, and F. E. Pomeraine, and of the sundry open accounts of the Etowah Power Company."

In connection with the letter written by C. Elmer Smith to the American Bank Note Company, in which he informed them that their claim would be taken care of in the reorganization and mentioned the fact that he had turned the matter over to Mr. Ashley, his attorney, for attention, this being Mr. Eugene L. Ashley, it is important to note that the officers of these various corporations during the period of these transactions were as follows:

Atlanta Power Company: C. Elmer Smith, president; and Eugene L. Ashley, vice president.

Georgia Power Company: C. Elmer Smith, president; and Forrest Adair, vice president until June, 1911, when he was succeeded by one A. W. McLimont.

Blue Ridge Electric Company: S. Fahs Smith, president until December 22, 1910, when he was succeeded by Augele L. Ashley; and W. A. Carlisle, vice president.

And the further fact that C. Elmer Smith and Mrs. Ashley, wife of Eugene L. Ashley, owned all of the stock, except a few qualifying shares for directors, of the Atlanta Power Company, and the Atlanta Power Company subscribed for the stock of the Georgia Power Company.

Also, that S. Fahs Smith, who bought in the properties of the North Georgia Electric Company in question here, was the brother of C. Elmer Smith, and, so far as it appears here, had no interest personally in the matter, but was simply acting on behalf of his brother and others in the acquisition of these properties.

It is difficult to understand, and more difficult to explain, the relation of these different corporations to the transactions by which they obtained the title to and possession of these properties of the North Georgia Electric Company, but certain things coming out of this mass of testimony and maze of facts and transactions are clear. First, it is perfectly clear from the evidence here, and from the recognition of the parties engaged in these reorganization plans, that the debt of the North Georgia Electric Company to the American Bank Note Company was a debt justly due and to which there was no real defense. Second, it is also satisfactorily shown that all of the properties of the North Georgia Electric Company were acquired by paying to the stockholders of that company what they regarded as sufficient consideration for their stock; also, that all the debts, secured and unsecured, of the North Georgia Electric Company, were provided for and paid in one way or another, sometimes in bonds of the new company and sometimes in cash, except this debt to the American Bank Note Company. Why it was not paid, and why the parties engaged in this reorganization have declined to pay it, is wholly unexplained. Third, it is satisfactorily shown, in my opinion, that the Blue Ridge Electric Company was a party to all this plan by which these properties were acquired, and whoever else may be liable to the American Bank Note Company, it clearly is to this extent at least: It was entitled to receive, as other unsecured creditors did, the bonds of the Blue Ridge Electric Company, dollar for dollar, for its debt and interest. One of the main equities of the American Bank Note Company is the fact that it acquiesced in and agreed to become a party to these plans of reorganization conceived and carried through by C. Elmer Smith and Eugene L. Ashley, and these plans, as shown by the evidence, resulted in the payment of the accounts of other unsecured creditors in the bonds of the Blue Ridge Electric Company.

I think the plaintiff is entitled to a money decree for the value of those bonds at the time they were turned over for other debts to the other creditors of the North Georgia Electric Company. The evidence here does not show what that was. When the value of these bonds at the time they were turned over to the other creditors is established, the plaintiff will be entitled to a money decree for the amount of the value of the same. That is, taking its debt and interest up to that time, it will be entitled to the amount of the debt so ascertained in bonds, and will be entitled to a money decree for the value of that amount of bonds at that time, with interest on such amount from that time.

The effect of a consolidation, merger, or absorption of a corporation on its unsecured liabilities will be found in a note to the case of Atlantic & B. R. Co. v. Johnson, from the Supreme Court of Georgia, 11 L. R. A. (N. S.) 119.

I leave out of the question entirely the matter of the proof of this claim in the equity proceeding under which the property of the North Georgia Electric Company was sold, because of the company's repudiation of the same and of the apparent acceptance by the defendant of such repudiation. Both parties seem to acquiesce in treating the case without reference to this, and I have so considered it.

When evidence is produced to show the amount for which the plaintiff is entitled to a money decree under the above statement, the same may be entered.

In re H. B. HOLLINS & CO.

Ex parte H. B. HOLLINS & CO.

(District Court, S. D. New York. May 4, 1915.)

1. PLEDGES ⇐47—RETURN OF PROPERTY UPON PAYMENT OF DEBT.
A pledgor of bonds to secure a loan had a right to reclaim all of the bonds upon payment of the total loan, but had no right to reclaim any part of them by paying a proportion of the loan.
[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 111, 112; Dec. Dig. ⇐47.]

2. PLEDGES ⇐46—RETURN OF PROPERTY UPON PAYMENT OF DEBT.
A pledgee of 1,200 bonds to secure a debt of $1,000,000 repledged 127 of them to secure its debts to different parties, and the remaining 1,073 to a bank to secure a loan of $950,000. The pledgee became bankrupt, and the pledgor bought the loan of the bank and sold enough of the bonds, with other collateral security held by the bank, to pay the loan, leaving in its hands 138 of the bonds and a certain amount in cash. *Held* that, where the 127 bonds exceeded in value the balance of the debt, the pledgor had paid all needed to redeem the bonds repledged to the bank, as the pledgee had put it out of its power to return the 127 bonds.
[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 109, 110; Dec. Dig. ⇐46.]

3. PLEDGES ⇐42—REPLEDGING PLEDGED SECURITIES—REDEMPTION.
Where a pledgee of bonds pledged them with securities of its own to secure an indebtedness to a bank exceeding the pledgor's indebtedness to it, its own securities were in the first instance liable for the excess of the indebtedness above the pledgor's indebtedness, and the pledgor was entitled to marshal the pledgee's securities first upon the indebtedness, though it had agreed that the bonds might be repledged, not only for the amount of its indebtedness to the pledgee, but for as much more as the pledgee could get, as the purpose of this agreement was not to enable the pledgee to raise capital for its business on the equity of the pledgor.
[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 101; Dec. Dig. ⇐42.]

In the matter of H. B. Hollins & Co., bankrupts. On motion by the alleged bankrupts for the payment of money to them. Petition dismissed.

See, also, 212 Fed. 317; 225 Fed. 618; 230 Fed. 920.

This is a motion by the alleged bankrupts to compel Crossman & Sielcken to pay over some $4,800, the balance of a fund which they hold in their hands under the circumstances hereinafter detailed. The alleged bankrupts have passed through a composition and are seeking to reduce to possession some of the assets of the estate.

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

Before bankruptcy the alleged bankrupts lent to Crossman & Sielcken $1,000,000 upon the pledge of 1,200 New York City 4½ per cent. bonds, on which they had a right under the contract themselves to borrow, not only up to the amount of their own advances, but as much as they could get besides. A part of these bonds they delivered to the First National Bank and Equitable Trust Company upon two loans, pledging the bonds delivered in each case for more than $833.33 a bond, that being the proportion of $1,000,000 which each of the 1,200 bonds would bear if it was distributed proportionately. By far the greater part of the bonds, 1,073 in all, however, they pledged to the Chase National Bank upon a loan of $950,000, giving as collateral along with them $80,000 of St. Louis & San Francisco bonds of their own and $5,000 Northern Pacific stock belonging to one Ulrich, who was heavily in their debt.

After the bankruptcy Crossman & Sielcken bought the whole loan of the Chase National Bank, with the permission of this court, and had sold the St. Louis & San Francisco bonds, the Northern Pacific bonds, and enough of the 1,073 New York City bonds to pay the loan. There remain in their hands 138 New York City bonds and $13,900.90 in cash. The alleged bankrupts now seek to reclaim that portion of this surplus which the value of St. Louis & San Francisco bonds and Northern Pacific stock bore to the total collateral pledged to the Chase National Bank.

Crossman & Sielcken contest the jurisdiction of this court and contest the merits as well. The supposed source of jurisdiction rests upon the facts as stated and also upon the seventh article of the petition upon which Crossman & Sielcken got leave of this court to buy the loan. That article is as follows: "That as above set forth almost the entire equity in the collateral held as aforesaid by the Chase National Bank belongs to your petitioners. The interest of the owners of the other collateral as aforesaid can amount to only a few hundred dollars, which your petitioners will pay over from the proceeds of sale to such owners or to the receiver herein as may be directed by the court or by said receiver."

William C. Armstrong, of New York City, for alleged bankrupts.
Leonard B. Smith, of New York City, for Crossman & Sielcken.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] Crossman & Sielcken had the right to reclaim all the bonds upon payment of the total loan, but they had no right to reclaim any part of them by paying a proportion of the loan. Had not the alleged bankrupts put it out of their power to deliver the 127 bonds pledged to the First National Bank and to the Equitable Trust Company, Crossman & Sielcken must have paid, not only the Chase National Bank loan, which they have done, but $68,322.81 in addition, which is the balance of what the alleged bankrupts lent them. When they had done that, they might keep all the surplus and demand the 127 bonds, pledged on the First National Bank and Equitable Trust Company loans. In fact, however, the alleged bankrupts did put it out of their power to comply with their contract; they cannot deliver the 127 bonds upon payment of $68,322.81. Certainly this excuses Crossman & Sielcken from performance according to their contract; they have a set-off equal to the value of the bonds so pledged which cannot be delivered, and this set-off is much greater than the unpaid balance, $68,322.81. Therefore they have paid all that they need to redeem the bonds upon the Chase National Bank loan.

[3] The trouble, however, is that Crossman & Sielcken did not use their own money altogether in paying the Chase National Bank; on the contrary, they used the securities of the alleged bankrupts, and it is upon this account that the alleged bankrupts insist that the surplus

should be shared ratably with the money used. If Crossman & Sielcken are entitled to marshal the securities of the alleged bankrupts first upon the loan, this is not correct; otherwise, it is. Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102, stands squarely with them, but it is a mistake to suppose that in this feature of the case it gets any authority from Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, which cites it only upon the general question of whether a broker's customer is an owner of stock or an obligee of a contract. The crucial point in the case rests in the fact that Crossman & Sielcken gave the alleged bankrupts express leave to repledge for any sums they might choose, thereby taking the case out of the class where the pledge to the bank was either wholly unlawful or for a sum larger than the broker had the right to repledge. In each of these cases the alleged bankrupts admit that the customer may marshal the bankrupt's property first upon the loan. In re Leavitt & Grant, 215 Fed. 901, 132 C. C. A. 139.

Where the pledge is a conversion, there is no doubt an obvious equity favoring the customer against the general creditors; the latter agreed to take the risk of the bankrupt's solvency, while the customer risked only his good faith. It must be conceded that, where the agreement is as in the case at bar, this ground vanishes, though it should also be remembered that the implied agreement generally is in fact what was expressed here, for the parties understand that the broker will repledge for any amount he can get of the banks. However that may be, the question here is upon an express agreement. In Skiff v. Stoddard, supra, the reasoning was that insolvency had changed the equities of the situation, and that, while the customer could have demanded of the broker his application of his own securities first, it was not so as against his general creditors, whose money might well have purchased those securities. It is hard to see how the question could arise while the broker remained solvent; but, if so, it is also hard to see how insolvency should give the general creditors greater rights against the customer than the broker had. A solution must be found, I think, with all respect, in the situation as it was created when the loan was made. At that time the broker selected from his general estate these securities to be applied upon the loan, and the question really is whether he intended them to be used in priority to the customer's securities pledged along with them. It would, however, be a fiction, I think, to treat the case as though there were generally any actual intent about it. True, a broker might show that he added of his own securities all that were necessary for the loan, over and above what he had advanced upon his customer's securities. In such case his intent would be clear to have his own securities go for any such balance.

Generally we have only the case where the whole block of securities is pledged together, and the question is not of any intent, but of what would have been thought fair at the outset, or, as we say, of the implied intent. The customer's agreement that the broker may repledge for any sum is not intended, I believe, for the purpose of allowing the broker to raise capital for his business out of the equity of his cus-

tomers in their securities. He pays them no interest upon them, and no honest broker would attempt to use such a contract for such purposes. The purpose is to enable the broker to place the securities in a general loan, to get money upon which to carry the securities, and not to compel the banks to figure upon each security a given amount, which they would not do. If the parties were faced at the outset with the proposal that the broker's own securities were not to be used to carry so much of the loan as exceeded his advances to the customer, I cannot believe that they would so understand their contract, unless, of course, the customer's margin was less than the margin required by the bank for the same loan. To that extent a genuine extinction may exist.

If this be true, it follows that, when a broker pledges his own funds along with a customer's under such a contract, the situation is no different from a pledge without it, except in this: That the pledge is not a conversion and the broker has not misused his powers. In the case at bar there is no reason to suppose that the alleged bankrupts' securities were pledged with the bank in order to get an advance equal to what the alleged bankrupts were willing to give on the bonds alone. The loan, so far as appears, was in the general course of business, and so much as the alleged bankrupts borrowed on the bonds over what they had lent, they borrowed for their own purposes. In such a case they should be held to have pledged their own securities in the first instance wholly for the excess.

It is therefore unnecessary to consider the point of jurisdiction. The petition is dismissed.

In re H. B. HOLLINS & CO.

Ex parte HILLQUIT.

(District Court, S. D. New York. February 23, 1916.)

BANKRUPTCY ⇐=385—FUNDS—DISTRIBUTION.

In bankruptcy, where some of the creditors were entitled to share in a special fund, and an order approving a confirmation reserved their claims for future liquidation, such liquidation must be had before the consideration for the composition will be distributed; the court, under Bankr. Act July 1, 1898, c. 541, § 12e, 30 Stat. 549 (Comp. St. 1913, § 9596), has the right to distribute the consideration and dismiss the case, for unless their claims were liquidated prior to distribution they might receive a larger proportion than other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 595, 596; Dec. Dig. ⇐=385.]

In Bankruptcy. In the matter of the bankruptcy of H. B. Hollins & Co. Ex parte application by Morris Hillquit for distribution of a fund. Claims of persons entitled ordered liquidated before distribution, with order to receiver to file petition to review.

See, also, 212 Fed. 317; 225 Fed. 618.

Lexow, Mackellar & Wells, of New York City, for bankrupts.

Hillquit & Levene, of New York City, for applicant.

LEARNED HAND, District Judge. It seems to me that this case is distinguishable from In re Hollins & Co., Ex parte Hollins & Co., 230 Fed. 917 (the Chase National Bank fund), because several of the claimants here are also creditors whose claims as such were reserved in the order of confirmation for future liquidation. This court, under section 12e, has power to distribute the consideration, and it cannot do this without liquidating the claims. It cannot liquidate the claims until the fund is effectually distributed, since the fund measures the amount left over of the customers' securities, and it is for the value of those securities that they claim to be creditors. If the court had no custody of the fund, this would be a difficulty, perhaps insuperable; but it has, and, having the fund, it has a duty towards its distribution.

Suppose, as an example, the offer of composition had been notes of only 50 per cent. of the face of the claims. In that case it is clear that the claims could not be finally liquidated till the fund had been distributed. Otherwise, those creditors who also had claims on the fund would get a larger proportion of their claims than any other creditors. Although the alleged bankrupts have offered to pay in full, and although in consequence it makes no practical difference, therefore, whether the fund is distributed after or before the claim is liquidated, still the case I have put serves to illustrate the importance theoretically of the distribution of the fund in the liquidation of the claims, and how a bankruptcy court must at least wait until all securities have been applied before finally liquidating. If either the creditor himself have the securities, or the court hold them in its custody, it may proceed itself to apply them on the claims. If the securities were beyond the reach of the court, it would have to wait.

Having such jurisdiction, the court can exercise it only by a complete distribution of the whole fund. An order will therefore pass directing the special master to proceed with the matter. However, it is most important that this question should be settled in advance; otherwise, much time and labor will be lost. If this order is reviewable, it should be reviewed before the merits come for consideration. Therefore I direct the receiver to file a petition to review the order, if such a petition is possible, and if no one else will, and the proceeding will await the determination of the Circuit Court of Appeals before it goes forward. Everybody must wish to avoid the unfortunate result in the case of the Chase National Bank fund.

THORBURN v. GATES.

(District Court, S. D. New York. March 31, 1916.)

1. EXECUTORS AND ADMINISTRATORS ⟸524(1)—FOREIGN EXECUTORS—SUITS AGAINST—STATUTE—CONSTRUCTION.

Code Civ. Proc. N. Y. § 1836a, providing that executors and administrators may sue or be sued in the state courts in like manner as nonresidents, is not meant to apply to reaching assets in the state of New York, but to permit the establishment of claims against foreign executors generally.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2330–2333; Dec. Dig. ⟸524(1).]

2. EXECUTORS AND ADMINISTRATORS ⟸524(1)—FOREIGN EXECUTORS—SUITS AGAINST—STATUTE—SCOPE.

Such being the purpose of the section, it will be limited to permitting suits to reach assets lying within jurisdictions which subject representatives of decedents to foreign suits, since otherwise the purpose of the section could not be validly effected.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2330–2333; Dec. Dig. ⟸524(1).]

At Law. Action by Robert H. Thorburn against Dellora R. Gates, as executrix of John W. Gates and as executrix of Charles G. Gates, John F. Harris, John Lambert, and John Dupee. On motion to set aside the service of summons. Motion granted conditionally.

This is a motion to set aside the service of a summons in an action at law, brought under section 7 of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1913, § 8829]). The facts are substantially the same as in a motion between the same parties reported in 225 Fed. 613; the only material addition being that the testators are alleged to have owned large amounts of real and personal property in the state of New York which came to their executrix, and that her appointment in the state of Texas was irregular—a point which was not, however, pressed upon the argument. The chief purpose of the motion is to secure a reconsideration of the decision before made, upon the theory that under the laws of the state of New York the only possible remedy open to a domestic creditor against a foreign executor is through section 1836a of the Code of Civil Procedure, and that therefore the section is to be interpreted as authorizing such an action somewhat on the analogy of an application by a creditor for administration of local assets.

A. L. Humes, of New York City, for the motion.
John S. Wise, Jr., of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1] In the former case I suggested, but only to reject it, as a possible interpretation of section 1836a of the Code, that it might have been intended only as a way of applying local assets to the claim of a local creditor, and therefore not as an effort to affect property situated in another jurisdiction. The plaintiff, in response to that suggestion, now says that under the law of New York he can collect his claim in practically no other way than by an action under this section; if he is right, and there be no other procedure applicable to his needs, no means by which he can secure the appointment of an executor whom he could later sue, much might be said for his theory. It can hardly be just that a local creditor, who during the lifetime of the testator could

have effected good service anywhere in the Union, should be cut off from recourse to any court save that of testator's former residence as soon as he dies.

[2] Under section 2609 (formerly 2614) of the New York Code of Civil Procedure it is provided that a party to an action about to be brought may propound the testator's will for probate in New York, and upon proper citation may obtain its probate and a grant of letters testamentary to the executor. The existence of personal property in this state would be sufficient to support the jurisdiction of the court, and any creditor could sue the executor thereafter. If the foreign executor took out ancillary letters, as he may do, under article 2 of title 3 of chapter 18, the local creditor could sue him. It is true that there is a practical difficulty in the case at bar to the creditor's getting a local administration, because the will has already been probated in another jurisdiction and the original instrument cannot therefore be produced before the surrogate. Matter of Cameron, 47 App. Div. 120, 62 N. Y. Supp. 187, affirmed on opinion below 166 N. Y. 610, 59 N. E. 1120. However, in the case of Russell v. Hartt, 87 N. Y. 19, the court met this by saying that a commission will serve, if the witnesses come before the commissioner and the commissioner himself examines the will. Yet in Matter of Law, 80 App. Div. 73, 80 N. Y. Supp. 410, affirmed on opinion below 175 N. Y. 471, 67 N. E. 1084, the absence of the will was nevertheless thought insuperable, because the witnesses lived in a jurisdiction other than that where the original will was situated. Under that case, therefore, it probably is true that the plaintiff here could not procure a probate of the will under section 2609 of the New York Code.

However, section 1861 of that Code is a substitute for the old suit in chancery to establish a lost will, or one which is not available for probate, and the language is apt for the present case. The plaintiff has indeed brought such an action, which it still undetermined. In Clark v. Poor, 73 Hun, 143, 25 N. Y. Supp. 908, the General Term for the First Department held that such a suit would not lie where the will had been probated elsewhere; the proper remedy being by ancillary probate. Yet ancillary probate can be instituted only by the executor himself; at least it is not open to a creditor or to one who means to sue the executor. If Clark v. Poor, supra, be right, a creditor like the plaintiff here has no relief against local assets merely because the witnesses to the will chance to live out of Texas where the will is probated. That surely would be a capricious cast of fortune, and it is contrary to the dictum, anyway, of Matter of Law, supra, which was accepted by the Court of Appeals of that state when it accepted the whole opinion in affirming that case. It seems probable, therefore, that the plaintiff is wrong in supposing that his only remedy against local assets is by virtue of section 1836a allowing actions against foreign executors.

However that may be, nevertheless, it would be an unreasonable interpretation to put upon section 1836a to say that it were intended, as it were, to tail up the system of decedents' administration so elaborately detailed in the New York Code. If, under Matter of Law,

supra, there be a casus omissus, it was certainly not to provide against it that section 1836a was enacted, whose language is general in form and cannot possibly be thought to apply so specifically. Moreover, the law of New York certainly contemplates the superintendence of the Surrogate's Court over all proceedings to reach decedents' assets (Bostwick v. Carr, 165 App. Div. 55, 151 N. Y. Supp. 74), as all the scheme of that Code bears abundant witness. An execution under a judgment recovered under section 1836a could hardly be intended to go as of course, at least against local assets; certainly it is hard to see why it should if an attachment is illegal. Bostwick v. Carr, supra. The courts might require recourse to the surrogate as in the case of execution against a domestic executor (sections 1825, 1826); but section 1826 would not apply to the case of a foreign executor, unless there were some administration in actual progress. That section requires the surrogate to ascertain what the estate will pay, and to allow only the proper proportion in execution; if it were attempted to apply the section to the case of judgment against a foreign executor, it would involve some tort of administration, which, as I have shown, is itself provided for by elaborate means.

Of course it might be thought that the section 1836a applied merely to the liquidation of a claim for possible proof in a subsequent administration; but that, too, is an extremely unlikely hypothesis. A creditor is provided with a procedure for proving his claims against any executor, domestic or ancillary, and no duplication is to be presupposed, when the whole result is contingent upon some subsequent administration which may never occur. It seems to me, therefore, beyond any reasonable question that section 1836a could not have been meant to apply to local assets, but rather to permit the establishment of claims against foreign executors generally. Since that purpose could not be validly effected unless it is confined to such assets as lie within jurisdictions which may subject representatives of decedents to foreign suits, I think it should be so limited, so as to remain valid.

A note in the Harvard Law Review for February, 1916 (29 Harv. L. R. p. 442), criticizes my original decision because the statute was not construed as intended to allow a judgment for what it might be worth locally, or in such jurisdictions as, having jurisdiction of decedent's assets, might subsequently admit the validity of the judgment under their own laws. I accept the criticism in both respects so far as it is applicable. In New York it is not applicable, for the reasons I have stated; it would be an anomalous feature in the system for the distribution of decedents' estates adopted in New York. So far as concerns foreign jurisdictions the only question is whether the plaintiff should be asked at the outset to show that his judgment might be good somewhere (that is, that the testator had assets in a jurisdiction which would allow its executors to be sued extraterritorially), or whether he might get his judgment for what it might prove worth. Certainly, after Riverside Mills v. Menefee, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910, not even a state court could grant judgment if the defendant showed by way of defense that there was no such jurisdiction; and if Dewey v. Barnhouse, 75 Kan. 214, 88 Pac. 877,

is to be understood to the contrary, it is no longer good law even in Kansas, unless the statute is merely a part of local administration.

If the question be merely as to who has the burden of proof, it is not perhaps a very important matter; but since the proceeding is fundamentally in rem, it would seem a reasonable attitude to compel the actor to show that there was a res which the judgment might affect. However, I do not care to rest this case upon such a distinction; if the plaintiff deem it of any consequence, I will require the executrix to state in what states she has any assets, and if the plaintiff can show that any of those states would recognize a judgment against a foreign executor here, I will consider that question. The plaintiff must serve a demand upon the defendant within five days after this opinion is filed for such an affidavit, the affidavit must be served and filed within five days thereafter, and the cause will be then heard in five days after the affidavit has been served and filed.

Meanwhile the matter will stand open; if the plaintiff serves no such demand within five days, the motion will be granted.

In re EDEN MUSEE AMERICAN CO.

(District Court, S. D. New York. January 14, 1916.)

1. BANKRUPTCY ⟸259—SALE OF ASSETS—AUTHORIZATION FROM REFEREE—NECESSITY.

Where, though a referee in bankruptcy had concluded to allow a private sale of the bankrupt's assets and had said that he would authorize a private sale for $4,000, no purchaser had then appeared and he did not authorize a sale, the trustee had no power to sell the assets for $4,000, especially where he agreed to give the purchaser 20 days in which to remove the property from the leased premises in direct conflict with an understanding between the referee, the landlord and other parties that they were to be removed within 10 days.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356–358; Dec. Dig. ⟸259.]

2. BANKRUPTCY ⟸268—SALE OF ASSETS—AUTHORITY OF TRUSTEE—NOTICE.

A person contracting with a trustee in bankruptcy to purchase the assets of the bankrupt was charged with knowledge of the trustee's lack of authority to sell and that the sale must have the court's approval, especially where he was told that the sale was subject to the approval of the court.

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

3. BANKRUPTCY ⟸368—TRUSTEE'S COMMISSIONS—CHARGING WITH EXPENSES.

Where a trustee in bankruptcy contracted to sell the bankrupt's assets without authority from the referee, and led the purchaser to believe that the approval of the court was required only as to the time of removal of the goods, resulting in the purchaser moving to set aside an order by the referee, instructing the trustee to sell to a higher bidder, the expense of the proceeding will be charged against the trustee's commissions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⟸368.]

In Bankruptcy. In the matter of the Eden Musee American Company, bankrupt. On motion to disaffirm and set aside an order of the referee. Order sustained, and motion denied.

Maurice L. Shaine, of New York City, for the motion.
Robert D. Murray, of New York City, opposed.

MAYER, District Judge. The motion is to disaffirm and set aside an order made by a referee in bankruptcy, instructing the trustee in bankruptcy to accept the bid of one Karp of $6,500 for certain personal property of the bankrupt and rejecting the offer of one Ament. The record certified up by the referee has been supplemented by a hearing before me, ordered for the purpose of obtaining a full understanding of the whole situation.

The bankrupt's liabilities are about $17,600, as follows (in round numbers): Mr. Hollaman, the trustee, $10,900; Mr. Coleman, the landlord, $4,900 (as his counsel states); and other creditors, $2,800. The property of the bankrupt consisted of wax figures, scenery, costumes, and the like. This property, when scattered and no longer assembled, would have a limited market, and the failure of the Eden Musee, of course, indicated that the day of wax figure exhibitions had passed.

A special meeting of creditors was called for November 18, 1915, to consider whether the trustee should be authorized to sell at public or private sale. The only creditors present were Hollaman and Coleman. This meeting was adjourned to November 26th and then to December 2d.

At these meetings, there was considerable discussion as to the method of sale and the price for which a sale should be authorized. The personal property (excluding good will and the building) had been appraised at close to $30,000, but up to the time of the meeting on December 2d the best bids tentatively offered aggregated $4,000. Mr. Coleman, who seems to have been considerate and indulgent, insisted on having the premises vacated, so that he could erect a building on the land, and was anxious to have a disposition made, so that he would not be subjected to further loss.

Finally the referee concluded to allow a private sale, and said, "You can take your order, then, to sell at private sale for $4,000." To this Mr. Murray, attorney for the trustee, added, "Or better, I understand," and the referee replied, "I know; but you have got to settle it up some time or other." It was then decided to adjourn the meeting until December 7th.

When those present left the meeting, the situation was that the time for removing the goods was an important condition of any private sale, that the referee in effect had said he would authorize a private sale for $4,000, and that no purchaser with a binding offer for that amount or better had as yet appeared. Late that afternoon, Mr. Murray Moss appeared at the Eden Musee and had an interview with Mr. Hollaman, which resulted in an offer by Moss on behalf of one Ament of $4,000, with the proviso that he should have 20 days within which to remove the chattels. Hollaman dictated a receipt, providing

that the sale should be subject to the approval of the court. Moss refused to sign such a receipt, saying that he understood Hollaman to state that the court had authorized him to sell for $4,000, and Hollaman answered, in substance, that that was correct, but that they might have difficulty as to the time within which the property should be removed. The draft receipt was thereupon torn up, and a new receipt drawn up and signed, and Moss paid down $400 to bind the bargain. The receipt as signed read:

"New York, Dec. 3, 1915.

"Received from David Ament, 1472 Madison Ave., four hundred dollars deposit on account of four thousand dollars for the purchase of the chattels of the Eden Musee as per schedule. This money is accepted with the understanding that twenty days is to be allowed the purchasers to take the chattels from the building. Light and heat to be furnished by the trustee. The balance of this amount, $3,600, to be paid Monday morning, December 6th, by certified check, before twelve o'clock, and possession then given to the purchaser. Rich G. Hollaman, Trustee."

The parties agreed to meet at the referee's office the following (Saturday) morning. Hollaman testified that he told Moss that the sale must be subject to the approval of the court; but it is apparent that the only outstanding question was the time of the removal of the chattels, and that Hollaman and Moss regarded the price as settled. I am further satisfied that they both thought they could arrange the removal in a manner satisfactory to the referee.

The parties met the next morning at the referee's office; but he was otherwise engaged, and through his clerk told them to return Monday morning. The clerk said that the sale must have the referee's approval, and thereupon Hollaman tendered the $400 back, and this Moss refused to accept.

On Saturday night, December 4th, one Karp heard about these chattels, examined them Sunday, and on Monday he and other bidders appeared at the referee's office. Mr. Coleman's attorney evidently protested, and the following colloquy occurred:

"The Referee: Mr. Hollaman had no business to consent to it. It was stated here exactly what Mr. Coleman's position was, how his contracts were held up; he was losing money every day. The only method we said we would deprive him of the building was either at private sale or an auction on 10 days' notice. You undertake to give him 20 days.

"Mr. Hollaman: I didn't know—

"The Referee: You ought to have known. Did you take advice of your counsel?

"Mr. Hollaman: I did not.

"The Referee: You ought to have done so.

"Mr. Murray: Mr. Hollaman communicated with me the following morning, and I told him that this would have to be approved by the court, and that—

"The Referee: I can't approve of that.

"Mr. Murray: — And that any agreement which anybody may have made with him, they must have known that it should have the approval of the court.

"The Referee: Mr. Coleman has rights as well as other people. I made a short adjournment until Tuesday to see whether you could sell at private sale, if you wanted to sell at private sale. The proper thing to do would be to put the whole thing up at auction. That would give about 10 days' notice. You or somebody has undertaken there to give the purchaser 20 days' time. I cannot approve of it. It is not just at all to Mr. Coleman."

Mr. Coen, the then attorney for Ament, offered to raise the bid and remove the property in 10 days. The referee took further bids, fully heard the parties, and finally concluded to take Karp's offer to pay $6,500 and remove the goods within 10 days. The formal order was signed at the duly adjourned meeting the next day, December 6th.

[1] If, on December 2d, the referee had authorized a sale to Ament, he would undoubtedly have approved such a sale, no matter what higher price was later offered; for it is highly important that an unequivocal verbal statement may be relied upon as implicitly as a formal court order. But that was not the situation. The trustee on December 2d had no power to sell (and especially in this case, where the price was under 75 per cent. of the appraised value), and in fact he made a contract, as the referee pointed out, in direct conflict with the understanding as to the time when the goods were to be removed.

[2] Moss was charged with this knowledge as matter of law, and, in addition, was told that the sale was subject to the approval of the court. Moss was naturally anxious to bind the trustee, and the trustee was anxious not to let an intending purchaser get away. The result is that Moss was led to believe that the approval of the court related only to the time of the removal of the goods, but that was important in the view of the referee; and persons dealing with trustees in the sale of goods must always know that a sale to be effective must have the court's approval.

The difficulty is that the trustee, who is apparently an earnest, forceful business man, accustomed to doing things in his own way, did not realize that bankruptcy estates must be administered in accordance with certain rules and requirements, and that, when papers are drawn and executed without advice of an attorney, trouble is likely to follow. When creditors elect lawyers as trustees, controversies like this rarely occur; but this is not the first time that a layman trustee has made a dispute possible, because he has acted on his own initiative and without consulting counsel.

[3] For the purpose of setting a precedent, the trustee, on his accounting, will be surcharged, against his commissions, with the expense of this proceeding. Receivers and trustees in bankruptcy are thus informed that, where controversies such as this arise through their fault (however good their purposes may be), they and not the estate will pay the bill.

The referee's order is sustained, and the motion denied.

THE CASCO.

THE NO. 21.

(District Court, D. Mass. January 24, 1916.)

Nos. 1440, 1441.

1. BANKRUPTCY ⊜210—CONFLICTING JURISDICTION—COURTS OF BANKRUPTCY AND ADMIRALTY.

Admiralty jurisdiction over vessels is not of such exclusive and fundamental character that for the purpose of enforcing maritime liens it may take vessels from the custody of another court without that court's permission; but, on the other hand, the jurisdiction of a court of bankruptcy over the property of a bankrupt estate is exclusive from the time of the filing of the petition, and it has no power to surrender its exclusive control over the administration of such property to another court.

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

2. BANKRUPTCY ⊜210—PRIORITY OF JURISDICTION—SURRENDER OF PROPERTY BY BANKRUPTCY COURT.

A court of bankruptcy will not, if it has the discretionary power, direct the surrender of vessels in possession of its receiver and admittedly belonging to a bankrupt estate to an admiralty court to answer to the suit of a libelant, who desires to enforce maritime liens against them, although for a liability which arose before the bankruptcy.

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

In Admiralty. Suits by the T. A. Scott Company against the dredge Casco and against the dump scow No. 21; the Eastern Dredging Company, owner. On motion by libelant for order requiring the receiver in bankruptcy for the owner to surrender the vessels to the marshal. Motion denied.

Martin Gilbert, of Boston, Mass., for libelant.

MORTON, District Judge. The Eastern Dredging Company owned the dredge Casco and dump scow No. 21. It is a Maine corporation, and involuntary proceedings in bankruptcy were instituted against it in the district of Maine on December 3, 1915. On those proceedings a receiver was appointed by the United States District Court for that district on December 3, 1915; and on the next day an ancillary appointment of receiver was made by this court, covering the property of the bankrupt in this district. The receivers at once took possession of said dredge and said dump scow. Thereafter, on January 5, 1916, the T. A. Scott Company filed these libels in rem against said vessels, which at that time were in this district in the custody of the receiver. The libels are founded on salvage services rendered to each vessel prior to the institution of the bankruptcy proceedings. The libelant moves that the order of this court in the receivership proceedings, restraining all persons from interfering with property in the possession of the receiver, be so modified as to permit the marshal to arrest the vessels in order that these salvage claims may be tried out here in the admiralty court. The receiver, acting

on an order of the District Court for the district of Maine, opposes the motion. The motion is filed in the admiralty cases only, but as the merits have been fully argued I shall treat it as if made in the ancillary bankruptcy proceedings also.

If the vessels had been seized under the admiralty process, before the bankruptcy proceedings were begun, the admiralty court would not surrender them. The Philomena, 200 Fed. 859 (Dist. Ct. Mass.). In a case in which the admiralty court took possession of the vessel after the institution of the bankruptcy proceedings, but before the adjudication, this court denied a petition by the receiver in bankruptcy that the proceeds of the sale of the vessel be turned over to him, and proceeded with the admiralty case. The Bethulia, 200 Fed. 862 (Dist. Ct. Mass.). In The Geisha (D. C.) 200 Fed. 864, a similar petition was denied in a case where the libel was filed before the bankruptcy proceedings began, but possession of the vessel was not taken by the marshal under his warrant until after the adjudication in bankruptcy had been ordered, the vessel being apparently still in the bankrupt's possession. If a vessel in the possession and control of receivers in equity, and being operated by them, becomes liable for a maritime tort, it was held that the admiralty court ought not to be prevented by the equity court from taking possession of the vessel and determining the claim against her. Paxson v. Cunningham, 63 Fed. 132, 11 C. C. A. 111 (C. C. A. 1st Circuit). See, too, The Jonas H. French, 119 Fed. 462 (Dist. Ct. Mass.).

In the present case the alleged liability of the vessels arose before the bankruptcy proceedings were begun, but possession of them had been taken by the receiver in bankruptcy before the libel was filed; and the question is whether he shall be ousted to allow the admiralty court to proceed.

[1] It is settled that the admiralty jurisdiction over vessels is not of such exclusive and fundamental character that, for the purpose of enforcing maritime liens against them, they will be taken from anybody in whose possession they may be found. The admiralty court has no right to seize vessels in the custody of another court without that court's permission. Taylor v. Carryl, 20 How. 584, 15 L. Ed. 1028. It is clear that the libelant is not entitled to the desired order as a matter of right.

The utmost that the libelant can claim is that, as a matter of sound discretion, this court should permit the seizure of the vessels in the admiralty cases. It is not clear that the court has authority to grant such permission. In the first place, the property in question is being administered by the District Court for Maine, and it is doubtful whether this court has any authority to direct the Maine receiver, although he has an ancillary appointment here, to relinquish property in his possession.

"The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition." Day, J., Acme Co. v. Beekman Co., 222 U. S. 300, 307, 32 Sup. Ct. 96, 100 (56 L. Ed. 208).

"The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts wherever situated into custodia legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, 27 Am. Bankr. Rep. 262." Day, J., Lazarus v. Prentice, 234 U. S. 263, 266, 34 Sup. Ct. 851, 852 (58 L. Ed. 1305).

"The decision in Babbitt v. Dutcher, 216 U. S. 103, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, 23 Am. Bankr. Rep. 519, to the effect that District Courts other than the court in which original proceedings in bankruptcy are instituted possess power in proper cases to exert ancillary jurisdiction in aid of the court in which the bankruptcy proceedings are pending, lends no support to the contention that the court which had full power could not exert its ample authority without invoking the ancillary power of another and different court." White, C. J., Robertson v. Howard, 229 U. S. 254, 261, 33 Sup. Ct. 854, 856 (57 L. Ed. 1174).

"* * * When the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a res, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court." Moody, J., Murphy v. Hoffman, 211 U. S. 562, 570, 29 Sup. Ct. 154, 157 (53 L. Ed. 327).

See, too, Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. ——, Nov. 1, 1915.

[2] Again, it is doubtful whether a bankruptcy court may, under the present act, properly surrender property admittedly belonging to a bankrupt estate to another court for the determination of liens and claims against it.

"We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them." Van Devanter, J., United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 217, 32 Sup. Ct. 620, 625 (56 L. Ed. 1055).

"A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy." 225 U. S. 218, 32 Sup. Ct. 625, 56 L. Ed. 1055.

The court also held that creditors "are entitled to have this authority exercised."

"Of the fact that the suit was begun in the Circuit Court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration or to confide them to another tribunal." 225 U. S. 218, 32 Sup. Ct. 625, 56 L. Ed. 1055.

"After the petition has been filed no other court can make any order, or decree, which will deprive the court of bankruptcy of its exclusive control over the administration of the bankrupt's property." Dyer, J., Re David H. Sage (D. C.) 35 Am. Bankr. Rep. 436, 442, 224 Fed. 525, 529.

Even if I have the power to allow the motion, and it is, as the libelant urges, a discretionary matter whether to do so, I am clearly of the opinion that my discretion ought not to be so exercised. The bankrupt owned many vessels used in dredging operations, and was doing work at various points on the Atlantic Coast. It is on many accounts desirable that its affairs shall, so far as possible, be settled in one court. The United States District Court for Maine, of course, exercises admiralty jurisdiction and is familiar with the law applicable to cases of salvage. It has expressed the opinion that the possession of the receivers should not be disturbed, and that the libelant's claim against the vessels in question should be made in connection with the bankruptcy proceedings; and that opinion, although made ex parte, ought not to be disregarded unless justice to the libelant plainly requires such action. No great hardship is imposed on the libelant by requiring it to prosecute its claim in the District Court for Maine instead of here. And if it be thought that the referee in bankruptcy cannot well deal with a matter of this character, the libelant is free to apply to the Maine court to make a special order for the hearing of these claims.

Motion denied.

In re BENSEL et al., Board of Water Supply.

CITY OF NEW YORK v. SAGE.

(District Court, S. D. New York. February 18, 1916.)

1. EMINENT DOMAIN ⟸134—COMPENSATION—VALUE—USE FOR SPECIAL PURPOSE.

Where a lot was available for use as a reservoir site only in connection with a large number of other tracts, so that it could not be supposed that the site could ever be secured as a whole for a reservoir without the exercise of the power of eminent domain, the added value of the lot because of its availability for such use cannot be allowed the owner in condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 356; Dec. Dig. ⟸134.]

2. EMINENT DOMAIN ⟸238(7)—COMPENSATION—DETERMINATION—POWER OF COURT.

The provision of the New York Constitution requiring the award in proceedings by a city to condemn a reservoir site to be made by a jury or by commissioners does not prevent the court, on appeal from an award by commissioners separated into two parts, one of which should not be included in the award from entering the order for the amount found in the other part of the award.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 674, 687; Dec. Dig. ⟸238(7).]

3. EMINENT DOMAIN ⟸238(7)—COMPENSATION—DETERMINATION—PROCEDURE.

There is no rule of New York procedure which requires the court in such case to order another full trial, instead of entering the order for the proper amount, as it could do if the amounts were specially found by the jury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 674, 687; Dec. Dig. ⟸238(7).]

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4. EMINENT DOMAIN ⊂=265(4)—COSTS—STIPULATION.
A stipulation in condemnation proceedings to enable the owner to get his money at once, which provided that he should give security for the money paid at that time, does not release him from liability for costs awarded against him on appeal.
[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 693; Dec. Dig. ⊂=265(4).]

5. APPEAL AND ERROR ⊂=1198—PROCEEDINGS AFTER REMAND—POWER OF LOWER COURT.
On remand from the Supreme Court, the District Court has no power, except to enter a decree in conformity with the mandate.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4668; Dec. Dig. ⊂=1198.]

6. EMINENT DOMAIN ⊂=265(4)—COSTS—STATUTE.
The requirement by the New York statute that a city condemning a reservoir site shall furnish the owner with three printed copies of the evidence does not relieve the owner from liability for costs for certifying the record on appeal and the supervision fee and for printing the record in the Circuit Court of Appeals.
[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 693; Dec. Dig. ⊂=265(4).]

Petition by John A. Bensel and others as the Board of Water Supply of the City of New York to acquire land for a reservoir site. On remand from the Supreme Court after a writ of certiorari by the City of New York from an order awarding damages for land belonging to William Sage, Jr. 239 U. S. 57, 36 Sup. Ct. 25, 60 L. Ed. ——. Final order entered.

Edward A. Alexander, of New York City, for claimant.
Archibald R. Watson, Corp. Counsel, of New York City, opposed.

LEARNED HAND, District Judge. [1] I can see no reason to suppose that there was any practical way of uniting this land with adjoining lands into a reservoir site except by the right of eminent domain. The possibility which Mr. Justice Holmes has in mind is that the land might have an added value due to its availability for such a union through the usual course of the market, just as a corner lot has added value in the city of New York if available for an apartment house. Nobody can suppose that a reservoir site can result in that way, or without the right of eminent domain as a necessary condition. If so, no part of the availability value is to be included. "The city is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain." Even though there was a possible prospect of other cities competing for the land, they would have each proceeded by eminent domain; indeed, that possibility was expressly suggested by Judge Coxe in the Circuit Court of Appeals. 206 Fed. 369, 124 C. C. A. 251. When the Supreme Court (239 U. S. 57, 36 Sup. Ct. 25, 60 L. Ed. ——) considered the matter, they certainly had in mind no such possibility.

It is not contended, I believe, that anywhere in the record is there

any evidence that, except by eminent domain, a union of lots for a reservoir was feasible. Obviously, the suggestion, if made, would be fantastic. Therefore the opinion of that court requires an award of the amount already fixed as a fair value of land and buildings; i. e., $7,624.45.

[2] The point that the Supreme Court had no power to do anything but reverse the award and require a new trial depends upon the Constitution of the state of New York, which requires the award to be made by a jury or by commissioners. If the award had been of a bulk sum, then it is probably true that no other recourse would have been open, but to have the commissioners make a new award. However, the commissioners wished to avoid this, so they expressly divided their award into two parts, and now it has been decided that one part should not have been included in the total. When an order is entered upon the opinion of the Supreme Court, it will enforce their award quite as much as if they had said nothing of the other item and had understood the law from the outset. Decisions of the New York courts to the effect that the court can make no new award do not apply to such a case.

[3] Another question also is suggested, though with less confidence. Assuming that the New York Constitution would allow an order to be entered enforcing part of an award separately stated by the commissioners, is there any such procedure open under the New York statutes? Is the award not rather like the verdict of a jury? I have not been referred to any procedure peculiar to New York which prevents so convenient a practice, or requires the cumbersome method of another full trial with its delay and expense. The case seems to me rather to be analogous to the special verdict of a jury upon which, when the facts are all found, the court may enter the appropriate judgment.

[4, 5] The next question is of the stipulation between the parties signed after the decision of the Circuit Court of Appeals. This in my judgment had no effect whatever upon these condemnation proceedings and cannot therefore control the order to be entered. The stipulation was to enable the petitioner to get his money at once, nothing more. In providing that he should give security for the money paid at that time, it should not be thought to have released him from any liability which might arise by way of costs from his mistaken claim to the second award. His liability was unaffected and should be enforced against him quite without regard to the stipulation which was not part of the record. In any case, I have no further power than to enter a decree in conformity with the mandate of the Supreme Court, which I cannot vary in any respect whatever.

[6] As to costs, the only question is of costs in the Circuit Court of Appeals. As to these I do not understand that the petitioner complains because costs in that court have been allowed against him, but only that the amount is not correct, in that under the statute the city is required to furnish the petitioner with three printed copies of the evidence. The items are two—one for certifying the record on appeal, $247.05, and the other the supervision fee and for printing

the record, $148.28. These are items which arise under the United States statute, and have no relation to the printing of the evidence mentioned in the New York condemnation statute. They are items with which the city is chargeable quite independently of the printed copies of the evidence furnished in the Circuit Court, being concerned altogether with the appeal. They are properly taxable, therefore, against the loser.

The order presented by the city seems to me, therefore, to be correct in all particulars, and should be signed. Of course, I have nothing to do at the present time with the enforcement of the bond. That will arise upon scire facias, when the city chooses to avail itself of the security.

UNITED STATES ex rel. LEM HIM v. PRENTIS et al.

(District Court, N. D. Illinois, E. D. March 20, 1916.)

No. 32349.

ALIENS ⊜32(2) — EXCLUSION OF CHINESE — NECESSITY FOR JUDICIAL PROCEEDINGS—STATUTES.

Under Act Cong. Feb. 20, 1907, c. 1134, § 21, 34 Stat. 905 (Comp. St. 1913, § 4270), providing 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 the act (the general immigration statute), or that an alien is subject to deportation under the provisions of the act or any law of the United States, he shall cause such alien, within three years after landing or entry, to be taken into custody and returned to the country whence he came, as provided by section 20 of the act (section 4269), and under section 43 (section 4289), providing that the act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons, or persons of Chinese descent, the Secretary of Commerce and labor may order the deportation of any alien who violates the provisions of the act of February 20, 1907, as amended, or of any law of the United States, except the Chinese Exclusion Law, which requires a formal proceeding in court before an order of deportation can be entered.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⊜32(2).]

Habeas corpus by the United States, on the relation of Lem Him, against P. L. Prentis and another. Order directed discharging petitioner from custody.

Frank T. Milchrist, of Chicago, Ill., for petitioner.

Charles F. Clyne, Dist. Atty., Benjamin R. Epstein and Allan J. Carter, Asst. Dist. Attys., all of Chicago, Ill., for the United States.

CARPENTER, District Judge. The petition shows that on the 30th day of August, 1915, Lem Him was taken into custody by the immigration authorities of the United States at Chicago, Ill. It also appears that the petitioner was taken before a commissioner, and after a hearing ordered deported by the Secretary of Labor. The warrant of deportation recites:

"That he has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the act of November 3, 1893, being a Chinese laborer not in possession of a certificate of residence,

and that he has been found within the United States in violation of section 2, Chinese Exclusion Act of November 3, 1893, having secured admission by fraud, not having been at time of entry a lawfully domiciled exempt returning to resume a lawfully acquired domicile and to follow an exempt pursuit in this country."

The petitioner claims that the Immigration Department had no authority to take him into custody on the charge that he was in this country in violation of the Chinese Exclusion Act; that the Judicial Department alone has authority to order his deportation. The question raised by this petition is not new. It has been passed upon adversely to the petitioner in Ex parte Lam Pui (D. C.) 217 Fed. 456; Ex parte Wong Lee Toon (D. C.) 227 Fed. 247; Ex parte Woo Shing (D. C.) 226 Fed. 141; and by the Court of Appeals for the Third Circuit in Sibray v. United States ex rel. Yee Yok Yee, 227 Fed. 15, — C. C. A. —. On the other hand, Ex parte Woo Jan (D. C.) 228 Fed. 927, holds a contrary view.

It is admitted that the Chinese Exclusion Act requires a formal proceeding in court before an order of deportation can be entered. The act of February 20, 1907, contains the following:

"Section 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by Section 20 of this act." Comp. St. 1913, § 4270.

Section 43 (section 4289) provides that:

"This act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent."

It is urged by the government that the case of United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354, is conclusive against the petitioner. In that case the Chinaman entered the United States surreptitiously in a manner prohibited by the act of February 20, 1907. Any alien entering in the same way would have been subject to deportation. It was claimed, however, that because the petitioner there was a Chinaman he could be deported only under the Chinese Exclusion Act. The court said:

"By the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps. The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese. It is the very reverse of a reason for denying to the government a better remedy against them alone of all the world, now that one has been created in general terms. To allow the Immigration Act its literal effect does not repeal, alter, or amend the laws relating to the Chinese, as it is provided that it shall not, in section 43."

It will be noted in the Wong You Case that the Chinaman there violated a general law applying to all aliens alike, and it was held that

the law applied to him, notwithstanding there was another law which applied to Chinamen in particular.

In the instant case the only delinquency of the Chinaman was a violation of the Chinese Exclusion Laws, and not of the alien law in general. So that, in my opinion, section 21 of the act of February 20, 1907, must mean that the Secretary of Commerce and Labor may order the deportation of an alien who violates the provisions of that act, or of any law of the United States, *except the Chinese Exclusion Law*, because section 43 expressly negatives the thought that the Chinese Exclusion Law has been repealed. It follows, therefore, that the petitioner could not be ordered deported without a judicial proceeding, as provided for in the Chinese Exclusion Act.

With due deference to the eminent authorities to the contrary, I agree with the learned opinion of Judge Cochran, announced in Ex parte Woo Jan, supra.

An order will be entered, therefore, discharging the petitioner from custody.

In re WHITESIDE.

(District Court, N. D. Georgia. March 10, 1916.)

No. 466.

1. BANKRUPTCY ⊂=262(3)—LIENS—SALES FREE FROM LIENS.

Shortly before bankruptcy, a bank obtained judgment against the bankrupt on a note secured by a deed to land and claimed to be infected with usury. The referee, over the objection of the bank, ordered the sale of the land free from liens. The bank did not subject the question to the jurisdiction of the referee by intervention or formal proof of its claim as a secured debt, but desired a determination of the validity of its lien. The referee declined to determine the matter, on the ground that the validity of the claim could not be adjudicated by him, unless the bank filed proof of its secured debt or an intervention for that purpose. *Held*, that the action of the referee would be approved and the sale permitted, leaving the validity of the deed to be determined after the property was sold and the proceeds brought into the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 365; Dec. Dig. ⊂=262(3).]

2. BANKRUPTCY ⊂=210—LIENS—DETERMINATION OF VALIDITY.

The question as to the validity of the security deed, because of its being infected with usury, could be determined in the bankruptcy court as well as elsewhere.

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

In Bankruptcy. In the matter of James T. Whiteside, bankrupt. On review of rulings of the referee. Referee's action approved.

Jas. T. Sisk, of Elberton, Ga., for trustee.

W. D. Tutt, of Elberton, Ga., and Holden, Shackelford & Meadow, of Athens, Ga., for objectors.

NEWMAN, District Judge. This is an application by E. B. Tate, trustee in bankruptcy for James T. Whiteside, for leave to sell the

real estate free from liens and objections filed thereto by the Bank of Elberton. The two reports of the referee, upon which petition to review is filed, are as follows:

"I, Frank L. Upson, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceeding:

"Whether or not an order should be made granting leave to the trustee to sell a tract of 24.9 acres of land in Elbert county free of all liens, and particularly free of the security deed lien held by the Bank of Elberton, same to be divested from the property, and to attach to the proceeds of the sale, to such an amount, extent, and dignity as may be by order of this court of bankruptcy fixed and determined, over the objections made by the bank, which alleged that the real estate in question was not worth more than its lien claim. The trustee denied the validity of the security deed held by the bank. An order was made by the referee overruling the bank's objections, and granting the trustee leave to sell the property free of liens.

"Summary of Evidence.

"James T. Whiteside negotiated a loan through W. O. Jones, representing the Bank of Elberton, of which he was president, for $3,817.15, giving his note therefor and a security deed on a tract of land of $24^{9}/_{10}$ acres, and paying an interest charge of 10 per cent. for the use of the money. This transaction took place in 1909, and thereafter the note was by Jones transferred to the Bank of Elberton and the renewal note was also infected with the usurious rate of 10 per cent. interest. In 1913 another security deed to the same tract of land was given to secure a note in which was embodied the back interest.

"Suit on this note, and the renewal note hereinbefore referred to, was brought by the bank, which suit was filed in the city court of Elberton on January 20, 1914, and a general judgment obtained thereon on May 11, 1914, for $5,543.35, principal, $538.90 interest on judgment, $608.22 attorney's fees, besides costs. In this suit no plea or defense was filed. The petition bringing suit on said note did not show, nor were there any pleadings in said suit showing, usury in said notes, nor did either of said notes show any usury on their face. Said judgment was for the full amount appearing on the face of said notes sued on to be due thereon.

"A voluntary petition in bankruptcy was filed by Whiteside on May 13, 1914, and he was adjudged a bankrupt on May 16, 1914, and on May 29, 1914, at first meeting of creditors, E. B. Tate was appointed trustee and duly qualified as such.

"By stipulation of counsel for trustee and for the bank it was agreed that James T. Whiteside testified at his examination (though the stenographer failed to report it so) that he was insolvent when the suit was brought against him, and when the judgment was obtained thereon, in the city court of Elberton.

"The land in question was in the actual and physical possession of the bankrupt when he filed his petition in bankruptcy, and was taken charge of by the trustee.

"The findings of fact made in my rulings on which the order was based are herewith incorporated as a part of this summary."

The "findings of fact" above referred to are as follows:

"I find that the debt was infected with usury when the money transaction was first made between Whiteside and Jones, to secure which a security deed was given, and that afterwards the renewal notes carried 10 per cent. interest, which was charged the bankrupt by the bank.

"I find that Whiteside was insolvent when the judgment was obtained against him by the bank in the city court of Elberton, and that same was obtained just a few days before his voluntary bankruptcy petition was filed on which he was adjudged a bankrupt. I find that the land in question was

in the bankrupt's possession and that same went into the possession of the trustee."

The second report of the referee is as follows:

"I, Frank L. Upson, one of the referees of said court of bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings:

"Whether or not the validity of the lien claimed by the Bank of Elberton on the 29.9 acres of land in question should have been passed upon by the referee, in view of the fact that no intervention or proof of secured debt had been filed by the bank for that purpose.

"As fully set forth in the certificate preceding, the bank filed objections to the allowance of trustee's petition for leave to sell the land in question free of its lien, and alleged that it made its appearance 'for the sole and only purpose of objecting to the sale of the real estate of said bankrupt, free of liens,' and by amendment filed it does not modify the limited appearance made by it, although insisting that it had a valid lien, and that the land was worth less than the amount of its lien claim.

"It is my understanding of the law that a referee cannot in a summary manner adjudicate the validity of a creditor's lien claim, unless that creditor files a proof of its secured debt, or an intervention, expressly for that purpose.

"It is held in the case of In re Henderson, 206 Fed. 139, 30 Am. B. R. 468, that the validity of the lien claim of a creditor could not be determined by a summary proceeding before a referee, although in this case the converse of the principle therein ruled is invoked, which is that the validity will not be determined for the bank, unless it files an intervention or a proof of its claim for that purpose. In the case cited the creditor objected to the determination of the validity, and in this case the bank desires it; but in neither case did the creditor subject the question to the jurisdiction of the referee's court by intervention or by formal proof of its claim as a secured debt.

"Said question is certified to the judge for his opinion thereon."

[1, 2] I have had considerable doubt about the proper direction to give this case, as it involves rather difficult legal questions. I have finally concluded, however, that the right thing for me to do is to approve the action of the referee, and let the trustee sell the lands; the question as to the validity of the lien of the bank to be heard in the bankruptcy court. The question of the validity of the security deed, because of its being infected with usury, can be there determined as well as elsewhere. To decide otherwise would be to decide the question now in favor of the Bank of Elberton, and I am not prepared to do that. I think, after the property is sold and the proceeds of the sale brought into the bankruptcy court, we can, after careful argument and consideration by the court, determine better what are the respective rights of the bank and the trustee in bankruptcy.

The action of the referee is approved.

UNITED STATES v. ILLINOIS CENT. R. CO.

(District Court, E. D. Louisiana. February 5, 1916.)

No. 2975.

1. CARRIERS ⟸32(2)—CHARGES—DISCRIMINATIONS—SWITCHING CHARGES.
An importer of bananas had a contract with Z. under which all ripe bananas and all bananas that were turning ripe became his property. Upon the arrival of a ship a railroad would furnish cars to move the cargo, and, as the track on which cars for the ripe bananas were usually placed held only five cars, the five cars first placed, when loaded, were hauled off to some convenient team track in the same yard. There they were disposed of from the cars to local buyers; a small percentage of the cars being shipped to other points. *Held*, that this movement of the cars from the wharf track to the team track was for the benefit of Z., and not solely for the convenience of the railroad company, and the company was required to collect therefor a switching charge, contained in its tariffs and schedules on file with the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. ⟸32(2).]

2. COMMERCE ⟸27—CHARGES—DISCRIMINATIONS—SWITCHING CHARGES—"INTERSTATE COMMERCE."
The movement was an interstate movement, within the jurisdiction of the Interstate Commerce Commission, as the intention of the shipper as to the ultimate destination at the time freight starts is the test of its character, and the entire movement of the ripe bananas from the plantation to the team track was a continuous voyage for Z.'s account; the fruit becoming automatically his property as it began to turn ripe, and not remaining the property of the importer until separated from the unripe fruit at the wharf.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟸27.

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

Criminal prosecution by the United States against the Illinois Central Railroad Company. Judgment for the United States.

Joseph W. Montgomery, Asst. U. S. Atty., of New Orleans, La., and H. B. Duncan, for the United States.

W. Catesby Jones, of New Orleans, La., for defendant.

FOSTER, District Judge. In this case an indictment was returned against the defendant for failing to collect a switching charge of $2 per car, as per its tariffs and schedules on file with the Interstate Commerce Commission, for moving certain cars for account of S. Zemurray from the wharf to another part of its levee yard.

The defendant pleaded not guilty, waived the jury, and the case is submitted to me on an agreed statement of facts and some slight testimony to supply missing details in the agreement. There is no dispute as to the facts, however, and they are as follows:

Zemurray has a contract with the United Fruit Company by which all the bananas imported by the Fruit Company which are ripe and turning ripe become his property.

Before a ship arrives, the railroad is notified and furnishes cars to move the cargo. The wharf track on which empties for ripes are usually placed holds five cars. There are usually more than five cars of ripes in a cargo, and as soon as the five cars first placed are loaded they are hauled off to some convenient team track in the same yard. There the ripe bananas are disposed of from the cars to local buyers; the railroad allowing five days' storage without demurrage and making no charges for the switching. A small percentage of the cars is shipped to other points, both in and out of the state.

Under the contract the Fruit Company must deliver and Zemurray must receive all the ripe and turning bananas, and agents of both parties jointly separate and classify the fruit on the wharf as it comes out of the ship. The bananas, of course, all come from foreign countries.

The defendant contends the switching of the cars is for its own convenience and does not constitute a movement; but, if it be considered a movement, it is purely local, and not within the jurisdiction of the Interstate Commerce Commission.

[1] I must disagree with both of these contentions. It is clear that, unless the cars are hauled from the wharf to a convenient team track, Zemurray could not do his local business conveniently, and the service is purely for his benefit. If he could sell his fruit on the wharf, there would be no need of the railroad furnishing cars at all.

[2] It is equally clear that the movement is interstate in its character. It would be useless to attempt to analyze and distinguish the many decisions dealing with the subject, for it is well settled that the intention of the shipper as to the ultimate destination at the time the freight starts is the test of its character, regardless of whether the voyage is temporarily broken, more than one carrier transports it, or it moves on through or local bills of lading. There could be no doubt that all the parties here intended that the ultimate destination of the ripe bananas should be the team tracks. The business is continuous and systematic, and some part of each cargo goes to Zemurray. It will not do to say delivery is made to Zemurray at the end of the ship's tackles, for the fruit becomes automatically his property as it begins to turn ripe, and the subsequent separation of it is a mere detail. All parties know at the time a cargo starts from Central America that a portion of it belongs to Zemurray by the inevitable force of circumstances; and the entire movement from plantation to team track is a continuous voyage for his account.

In my opinion the defendant is guilty as charged on all counts, and there will be a judgment accordingly.

UNITED STATES v. CHENNAULT.

(District Court, E. D. Louisiana. January 26, 1916.)

No. 2978.

INDICTMENT AND INFORMATION ⊂⊃6—JURISDICTION OF COURT—DIVISION.

Judicial Code (Act Cong. March 3, 1911, c. 231) § 53, 36 Stat. 1087 (Comp. St. 1913, § 1035), providing that all prosecutions for crimes shall be had within the division where the same were committed, unless transferred on defendant's application, changed the former law, which required trials only to be had in such division, and an indictment cannot now, as formerly, be found in a division other than the one in which the offense was committed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 29–33; Dec. Dig. ⊂⊃6.]

Claire L. Chennault was convicted of violating the Mann White Slave Law, and he moves for a new trial. Motion granted.

Joseph W. Montgomery, Asst. U. S. Atty., of New Orleans, La. George Wesley Smith, of New Orleans, La., for defendant.

FOSTER, District Judge. In this case the defendant was indicted for a violation of the Mann White Slave Law (Act Cong. June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1913, §§ 8812–8819]). The offense was committed in the Baton Rouge division of the Eastern district of Louisiana, but the indictment was found by a grand jury sitting in the New Orleans division, though impaneled and sworn for the entire district. On motion of the United States attorney, the indictment was transferred to Baton Rouge for trial. The defendant interposed a timely demurrer to the jurisdiction, on the ground that the indictment had not been returned in the Baton Rouge division, and hence the prosecution was not had in that division in accordance with section 53, Judicial Code. The demurrer was overruled, and the case proceeded with to a conviction. The same question is now presented on a motion for a new trial.

Until now it has been the custom in this district to impanel a grand jury only at New Orleans and then proceed as was done in this case. This was far more convenient to the government and the witnesses, and not a hardship, nor in the slightest degree unfair, to the accused. Under the wording of the former statute (Act Aug. 13, 1888, c. 869, 25 Stat. 438), creating the Baton Rouge division, and the decision in Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, there could be no doubt as to the validity of indictments so found and transferred, and the question was never heretofore raised, although the custom continued after the adoption of the Judicial Code. Section 53, Judicial Code, however, makes a material change in the law. The part applicable is as follows:

"When a district contains more than one division, * * * all prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred * * * to another division of the district."

The former act was construed as merely requiring the trial to be had in the division where the crime was committed. The finding of the indictment is no part of the trial. By the Judicial Code the *prosecution* must be had in the division. In Post v. United States, 161 U. S. 583, 16 Sup. Ct. 611, 40 L. Ed. 816, the Supreme Court considered a statute creating divisions in the district of Minnesota, reading as follows: " * * * All criminal proceedings instituted for the trial of offenses against the laws of the United States arising in the district of Minnesota, shall be brought, had, and prosecuted in the division of said district in which such offenses were committed"—and held that the court sitting in one division was without jurisdiction to receive indictments for crimes committed in another division. There is no appreciable difference in meaning between the Minnesota statute and section 53, Judicial Code. The finding by the grand jury of an indictment and its return into court is the beginning of a criminal prosecution. Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386. If a prosecution for crime must be had in the division where the crime is committed, necessarily all of the prosecution must be had there, and hence the indictment must be first returned into court in that division.

The motion for a new trial will be granted, with leave to the defendant to renew the demurrer.

UNITED STATES v. VACCARO BROS. & CO. et al.

(District Court, E. D. Louisiana. January 5, 1916.)

No. 15150.

1. ALIENS ⟸31—ADMISSION OF ALIENS UNDER BOND—AUTHORITY TO REQUIRE.
Under Act April 29, 1902, c. 641, § 2, 32 Stat. 176 (Comp. St. 1913, § 4338), authorizing the making of rules and regulations to govern the admission of Chinese persons into the United States, the Secretary of Commerce and Labor had authority to make a rule requiring the giving of a bond as a condition to the admission of Chinese seamen on shore leave, since while they were not, as sailors, within the terms of the Chinese Exclusion Acts, they would become laborers, within those acts, if they deserted their ships and remained in the country.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸31.]

2. ALIENS ⟸31—ADMISSION OF ALIENS UNDER BOND—RIGHT OF ACTION ON BOND.
A regulation of the Secretary of Commerce and Labor required a bond in the penalty of $500 for each Chinese seaman discharged or granted shore leave at ports of the United States, to secure their departure from the United States within 30 days. Pursuant thereto, a bond was given, and three members of a crew were granted shore leave, and deserted, and failed to depart within 30 days. *Held*, that a suit by the United States for the penalty of the bond was not oppressive and inequitable, as the penalty would hardly do more than recompense the government for the expense of arresting and deporting such seaman.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸31.]

At law. Suit by the United States against Vaccaro Bros. & Co. and others. On exception to the petition. Exception overruled.

Joseph W. Montgomery, Asst. U. S. Atty., of New Orleans, La.
Denegre, Leovy & Chaffe, of New Orleans, La., for defendants.

FOSTER, District Judge. This is a suit to collect a penalty on a bond given to guarantee the return of certain Chinese sailors of the steamship Tinhow granted shore leave. The defendants except on the ground that the petition discloses no cause of action.

Under the authority of section 2 of the Act of April 29, 1902, the Secretary of Commerce and Labor adopted rule 7 of the Regulations Governing the Admission of Chinese, as follows:

"To prevent violations of laws by Chinese seamen, discharged or granted shore leave at ports of the United States, bond with approved security, in the penalty of five hundred dollars for each such seaman, shall be exacted for his departure from and out of the United States within thirty days."

The petition avers the giving of the bond, which is annexed as an exhibit, and that three members of the crew of the steamship Tinhow were granted shore leave in Boston and deserted, and thereafter failed to depart from the United States within 30 days from the date of the bond.

[1] The defendants attack the authority of the Secretary of Commerce and Labor to exact a bond for the granting of shore leave to Chinese sailors, and set up that, as sailors, they are not within the terms of the Chinese Exclusion Acts. Granting that this is so, still it is reasonably certain that, when sailors desert their ships and remain in the country, they become laborers within the full meaning of the term, and in my opinion the Secretary of Commerce and Labor had the authority to exact the bond in question by virtue of the statute giving him the right to make rules and regulations to govern the admission of Chinese persons into the United States. Furthermore, it seems that the bond was not extorted colore officii, but was voluntarily given, and therefore may be collected, although not strictly authorized by law. Moses v. United States, 116 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119.

[2] And it would seem the bond was not without consideration, as it would be practically impossible to maintain Chinese crews on vessels trading regularly with the United States, unless they could be granted shore leave. Undoubtedly, the government could exact under the existing laws very onerous conditions for this permission. By the giving of the bond all of this is avoided. Nor is the suit of the United States oppressive and inequitable, as these Chinese persons, having deserted their ship and entered into the country, would have to be arrested and deported, and the penal sum of the bond would hardly do more than recompense the government for the expense involved.

The exception will be overruled, and the defendant be allowed 10 days in which to answer.

McDANIEL et al. v. HOLLAND.

HOLLAND v. McDANIEL et al.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1916. Rehearing Denied May 4, 1916.)

Nos. 4461, 4467.

1. INDIANS ⟸27(5)—RIGHT TO SUE—REMOVAL OF RESTRICTIONS.
A citizen of the Cherokee Nation, who became a citizen of the United States by Act March 3, 1901, c. 868, 31 Stat. 1447, has the right, after attaining his majority, to sue in ejectment to recover allotted lands conveyed by him while he was a minor, notwithstanding the right of the United States to sue to recover lands in cases where the Indians are still subject to restrictions.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 19; Dec. Dig. ⟸27(5).]

2. INDIANS ⟸13—DOCUMENTARY EVIDENCE—CONCLUSIVENESS.
Under Act May 27, 1908, c. 199, § 3, 35 Stat. 313, providing that the enrollment records of the Commissioner to the Five Civilized Tribes should be conclusive evidence as to the age of an enrolled citizen or freedman, the enrollment record, giving the age of an Indian as 9 years, is conclusive that on that date he had passed his ninth birthday and had not yet reached his tenth, but is not conclusive that he was exactly 9 years of age on that day, and does not establish that he was a minor when he made a conveyance of land one month less than 12 years thereafter.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. ⟸13.]

3. STATUTES ⟸219—EXTRINSIC AIDS TO CONSTRUCTION—CONSTRUCTION BY DEPARTMENT.
A ruling of the Commissioner of the General Land Office that the department should hold that the age of a citizen of the Five Civilized Tribes as given in the application for enrollment should be construed, for the purposes of the government, as representing the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of the birth, except where the records show otherwise was not a construction of Act May 27, 1908, c. 199, § 3, 35 Stat. 313, providing that the enrollment should be conclusive evidence as to the age of the Indian and entitled to weight as a construction by the department having charge of the enforcement of the act, but was merely an administrative plan adopted for the purposes of the government, and does not render the enrollment showing the age only by years conclusive as to the date of birth against a purchaser of land from the Indian.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. ⟸219.]

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

Ejectment by Robert L. Holland against William H. McDaniel and another. Judgment for plaintiff, and defendants bring error, and plaintiff also brings error to so much of the judgment as related to the damages. Reversed, and new trial granted, and plaintiff's writ of error dismissed.

Charles B. Rogers, of Tulsa, Okl. (F. A. Fulghum, of Tulsa, Okl., on the brief), for plaintiff.

George S. Ramsey, of Muskogee, Okl. (L. A. Carlton, of Houston,

Tex., W. A. Chase, of Nowata, Okl., and Edgar A. De Meules and Malcolm E. Rosser, both of Muskogee, Okl., on the brief), for defendants.

James B. Diggs, of Tulsa, Okl., as amicus curiæ.

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

CARLAND, Circuit Judge. This is an action of ejectment by Holland, hereafter called plaintiff, to recover the possession of the S. E. ¼ of the N. E. ¼ and the E. ½ of the S. W. ¼ of the N. E. ¼ of section 16, township 28 N., range 14 E., state of Oklahoma, and damages, from William H. McDaniel and the Paraffine Oil Company, hereafter called defendants. The plaintiff recovered judgment for the possession of the demanded premises and damages for the detention thereof. The defendants sued out a writ of error from this judgment. The plaintiff also sued out a writ of error from the judgment so far as it related to damages. A jury was waived and the action tried to the court. At the close of all the evidence counsel for defendants made the following requests:

"(1) Defendants request the court to find that the enrollment records of the Commissioner to the Five Civilized Tribes do not show or prove that plaintiff, Robert L. Holland, was a minor and less than twenty-one (21) years of age on September 25, 1912.

"(2) Defendants further request the court to find that the enrollment records of the Commissioner to the Five Civilized Tribes show that plaintiff, Robert L. Holland, was more than twenty-one (21) years of age on September 25, 1912.

"(3) Defendants request the court to render judgment against the plaintiff and in favor of them, because there is no evidence to support a judgment for plaintiff."

These requests were denied and an exception allowed. The evidence was as follows: On July 17, 1906, by homestead patent from W. C. Rogers, Principal Chief of the Cherokee Nation approved by the Secretary of the Interior, April 5, 1906, plaintiff became vested with the title to the E. ½ of the S. W. ¼ of the N. E. ¼ of section 16, township 28, range 14, hereinbefore mentioned. By allotment patent from W. C. Rogers, Principal Chief of the Cherokee Nation, approved by the Secretary of the Interior September 5, 1906, plaintiff became vested with the title to the S. E. ¼ of the N. E. ¼ of the above section and range. Both patents were filed for record April 24, 1907, and delivered to the plaintiff June 7, 1907. On September 25, 1912, plaintiff by warranty deed in consideration of the payment of $2,000 conveyed the above lands to the defendant McDaniel. September 5, 1913, McDaniel executed and delivered a lease of the land to one C. C. Webber. October 13, 1913, Webber assigned the lease to W. C. Guiler and C. E. Deloe. On October 16, 1913, Guiler and Deloe assigned the lease to the defendant Paraffine Oil Company. From the records of the Commission to the Five Civilized Tribes there was introduced in evidence by counsel for the plaintiff a record pertaining to the enrollment of Robert Lee Holland, the plaintiff, as a Cherokee citizen. This record showed that Robert Lee Holland was enrolled as a Cherokee citizen by blood October 11, 1900, on the application of

William G. Holland, his father. The application of William G. Holland asked for the enrollment of himself, wife, and children as Cherokee citizens. The testimony taken by the Commission on said application October 11, 1900, shows that the father when asked as to the age of his child Robert Lee Holland testified as follows:

"Q. Give me the name of the next child? A. Robert Lee Holland. Q. How old is he? A. He is about nine, I guess."

As a part of the record of enrollment by the Commission there was introduced what is called the original census card, which represents the finding and judgment of the Commission on the application of William G. Holland as to the facts therein stated. So far as the question of the age of Robert Lee Holland is concerned the census card contained the following entries:

Residence: Cooweescoowee District. Cherokee Nation. Cherokee Roll.
Post Office: Dewey.

Dewey Roll No.	Name.	Relationship to person first named.	Age	Sex	Blood.
10416	1. Holland, William G.		32	M	¼
10417	2. " Rachel	Wife	23		Full
10418	3. " Jesse W.	Son	12	M	⅜
10419	4. " Robert L.	"	9	"	⅜
			October 11, 1900.		

At the lower right-hand corner of the census card that was introduced in evidence by the plaintiff appear the following words and figures: "Date of application for enrollment, Oct. 11, 1900." It was shown by evidence introduced by the defendants that the words "Date of application for enrollment" were placed upon the card before "Oct. 11, 1900," long after the census card had been made out, and that they were placed upon the card so that persons examining the record might know what the word and figures "Oct. 11, 1900," meant. It appeared from the evidence that the census card originally simply contained the word and figures, "Oct. 11, 1900." There is no question, however, but that the date mentioned was the date of the enrollment. The date of birth of the plaintiff did not appear from any evidence introduced unless the census card showed it. It appeared also from the evidence that the Paraffine Oil Company was in possession of the premises engaged in exploring and mining the same for oil and gas.

[1] Counsel for defendants offered evidence which they claim tended to contradict the finding of the Commission to the Five Civilized Tribes as to the age of the plaintiff, Robert Lee Holland. The several offers were denied, but as we view the case it is not necessary to consider the rulings of the court on said offers. It was objected by demurrer to the petition of the plaintiff that he had no capacity to sue. We do not think this contention has any merit. Plaintiff is a citizen of the Cherokee Nation, and by virtue of the act of Congress of March 3, 1901 (31 Stat. 1447), became a citizen of the United States, and at

the date of the commencement of this action September 30, 1914, he possessed every right, privilege, and immunity enjoyed by any other citizen of the United States, so far as the right to commence this action is concerned. It does not appear anywhere in the record that on the date mentioned he was subject to any disability that disqualified him from instituting this action. Counsel for defendants cite the cases of Heckman v. United States, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820; Goat v. United States, 224 U. S. 459, 32 Sup. Ct. 544, 56 L. Ed. 841; Mullen v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834; Bowling v. United States, 233 U. S. 528, 34 Sup. Ct. 659, 58 L. Ed. 1080, as supporting their contention. These cases simply maintain the right of the United States to institute actions in equity to enforce the rights of the government and of the Indians in cases where the Indian is subject to restrictions. We do not find, and would not expect to find, any decision that after the restrictions have all been removed from the Indian he may not maintain an action like the one at bar.

[2] The right of the plaintiff to recover possession of the land in controversy is based upon the following claim: That the enrollment record shows the age of Robert Lee Holland to have been nine years at the date of enrollment, to wit: October 11, 1900, and also that this date was his ninth birthday. Hence Holland would not arrive at the age of 21 years until October 11, 1912, therefore, his deed to McDaniel made on the 25th of September of that year is null and void under the act of Congress of May 27, 1908 (35 Stat. 312). The important question therefore is whether the evidence introduced at the trial showed the plaintiff, Robert Lee Holland, to have been less than 21 years of age when he executed and delivered the deed to McDaniel for the land in question, and not whether he was 9 years of age on October 11, the date of his enrollment. Section 3 of the above act of Congress provides:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman. * * *"

We may accept the record introduced, as conclusive that the plaintiff was nine years of age at the date of the enrollment October 11, 1900; but this does not prove that he was a minor on September 25, 1912, as the finding by the Commission that he was nine years of age on October 11, 1900, is entirely consistent with the fact that he had arrived at the age of 9 years at any time within one year prior to October 11, 1900, for after arriving at the age of nine years he would be 9 until he arrived at the age of 10, which would be a period of one year.

[3] The claim on the part of counsel for plaintiff that the date October 11, 1900, must be conclusively held to be the ninth birthday of the plaintiff seems to have arisen in this way. On the 24th day of August, 1908, and within one month after the act of May 27, 1908, above referred to, went into effect, Mr. Leupp, Commissioner of the General

Land Office, addressed the following letter to the Secretary of the Interior:

"3—2833

"Land 56330—1908 E B H August 24, 1908.

"Subject: Computation of Ages of Citizens of Five Civilized Tribes.

"The Honorable, the Secretary of the Interior.

"Sir: I have the honor to invite your attention to the inclosed letter of August 14, 1908, from J. G. Wright, Commissioner to the Five Civilized Tribes, inclosing letters from R. D. Wellborne, Chickasha, Okl., of August 12, 1908, and C. D. Wolfe, Wewoka, Okl., of August 13, 1908, asking that a rule be laid down for a computation of the ages of citizens of the Five Civilized Tribes. He says that these are but two of numerous inquiries that he has received regarding the same subject, and he believes that the department should pass on the question at an early date.

"He presents the proposition in this manner:

"Whether a citizen of the Cherokee Nation whose age appears on the final roll as fourteen years, the roll being approved as of September 1, 1902, should be considered as not having reached his majority until September 1, 1908, even though it could be clearly established that he was born on April 15, 1887, and would be twenty-one years of age on April 15, 1908.

"He reports that there is nothing in the records of his office to establish the exact age of any citizen except where birth affidavits have been required, and in all these cases the persons in connection with whose enrollment such affidavits were required, still lack several years of their majority. In the other cases, testimony was taken regarding the age of persons for whom application was made, but the answer given in every case, so far as an examination of the records shows, is given in years only, and, while the age is probably that of the nearest year, Mr. Wright says he believes that it may refer to the age of the applicant on his last birthday or his next subsequent birthday, and he expresses the opinion that this character of record leaves the question of age in doubt.

"It is very seldom that a person on being asked his own age, or the age of any one else, gives any other than the age at the last birthday. The rule is so universal, in the opinion of the office, as to justify a holding that in all cases where the age of a minor is given by parents or relatives, the age given relates to the last preceding birthday. The act of Congress approved May 27, 1908 (Public No. 140) provides (section 3):

"* * * the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

"It was necessary that a rule be laid down with reference to the determining of ages of enrolled minors in the Five Civilized Tribes to prevent the production of fraudulent proof as to age by persons who purported to take advantage of the lack of age and experience of allottees, and Congress decided that the records of the Commissioner to the Five Civilized Tribes should be the criterion of age because the presumption would be that at the time application was made for enrollment no circumstances existed that tended to induce misrepresentations regarding the ages of persons in behalf of whom proof was being submitted.

"The office recommends that the department hold that the age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment shall be construed for the purposes of the government, as representing the age of the applicant at that time, and that the date of the application shall be held to be the anniversary of the date of birth, except where the records show otherwise.

"Very respectfully, F. E. Leupp, Commissioner."

On August 27, 1908, the recommendation of the Commissioner was approved by the Secretary of the Interior. This recommendation of the Commissioner, approved by the Secretary, is claimed to be a con-

struction of section 3 of the Act of May 27, 1908 (35 Stat. 312), by the department of the government having charge of the enforcement thereof, and as such to be entitled to great weight, but the clause reading, "and that the date of the application shall be held to be the anniversary of the date of birth except where the records show otherwise," was not a construction of the statute, but was a plan adopted by the Land Department "for the purposes of the government," in the administration of the duties devolved upon it in connection with Indian lands. It may be conceded to have been a convenient plan for the purposes of the government, and no doubt as between the government and the Indian it was workable, but as against the defendants in this action it was, and is, a pure fiction, not supported by even a probability. If in this case the question was whether or not the plaintiff was nine years of age on October 11, 1900, the judgment of the Commission under the statute would be conclusive, but as we have before indicated that is not the question. The question here is was the plaintiff a minor on September 25, 1912; that question the enrollment record introduced in evidence did not determine, and of course, is not conclusive. The enrollment record introduced in evidence left the date of birth of the plaintiff an open question to be established by competent evidence. We do not wish, however, to be understood as deciding this would be so in cases where the Commission has found the date of birth on an application for enrollment.

It, therefore, seems clear to us that there was not sufficient evidence introduced from which the court was authorized to find that the plaintiff was a minor on September 25, 1912, and for this reason the judgment below must be reversed and a new trial granted, and it is so ordered. No. 4467 is dismissed.

UNITED STATES v. NESS.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1916.)

No. 4408.

1. ALIENS ⟸67—NATURALIZATION—JURISDICTION OF COURTS.

Under Act June 29, 1906, c. 3592, § 3, 34 Stat. 596 (Comp. St. 1913, § 4351), conferring jurisdiction to naturalize aliens on state courts of record having jurisdiction in actions at law or equity in which the amount in controversy is unlimited, and section 4 (section 4352), requiring the applicant for citizenship to file a petition, and providing that at the time of filing the petition there shall be filed a certificate from the Department of Commerce and Labor stating the date, place, and manner of the petitioner's arrival in the United States, the absence of such a certificate did not deprive a state court of jurisdiction, as the court had jurisdiction to decide not only whether the petition and the petitioner's procedure were sufficient, but also to determine whether the absence of the certificate was fatal to the petitioner's right to be admitted as a citizen.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 131–137; Dec. Dig. ⟸67.]

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

2. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATES—REVIEW.
Under Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (Comp. St. 1913, § 4374), requiring United States attorneys to institute proceedings to set aside and cancel certificates of citizenship on the ground of fraud or on the ground that the certificate was illegally procured, such a proceeding is a suit in equity to be considered and decided in accordance with the rules and principles applicable to such suits, and the decision of the lower court must be presumed to be correct unless some obvious error of law or some serious mistake of fact clearly appears.

3. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATES—GROUNDS—"ILLEGALITY."
An alien who entered the United States from Canada did not know that any formalities were required and saw no person purporting to be an immigration commissioner. When he applied for admission to citizenship, he was unable to procure and file the certificate from the Department of Commerce and Labor as to his arrival in the United States, required by Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1913, § 4352), but he possessed every essential qualification for admission and he proved every fact required to be stated in such certificate. The question as to his right to admission without the certificate was raised and decided by the court in his favor. *Held*, that the certificate was not illegally procured so as to be subject to cancellation under section 15 (section 4374), even though the court made a mistake in failing to require the certificate as a condition of its decree, as "illegality" signifies that which is contrary to the established principles of the law.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Illegality.]

4. ALIENS ⟸68—NATURALIZATION—PERSONS ENTITLED TO BE NATURALIZED.
Notwithstanding the absence of such certificate, the court's decision admitting him to citizenship was just and right.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

Appeal from the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Suit by the United States against Iver Engebretsen Ness to cancel a certificate of citizenship. From a decree dismissing the complaint (217 Fed. 169), the government appeals. Affirmed.

M. R. Bevington, of St. Louis, Mo. (F. A. O'Connor, U. S. Atty., of New Hampton, Iowa, on the brief), for the United States.

D. M. Kelleher and B. J. Price, both of Ft. Dodge, Iowa, for appellee.

Before SANBORN and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. Is a certificate of citizenship issued by a court after notice, evidence, and hearing, to an alien proved to be entitled in every other respect to receive it, "illegally procured" because he failed to attach to his petition for naturalization a certificate from the Department of Commerce and Labor stating the date, place, and manner of his arrival in the United States? This is the only question it is necessary to decide in order to dispose of this case, although many others are discussed in the briefs of counsel. The question arises in this way: Section 4 of the Act of June 29,

1906, 34 Stat. 596, 597, U. S. Comp. Stat. 1913, § 4352, provides that an alien may be admitted to become a citizen of the United States in the following manner, and not otherwise, and then prescribes many things that he shall do, among them that he shall file a petition in writing signed by him in his own handwriting and duly verified, in which petition he shall state his full name, his place of residence, his occupation, if possible, the date and place of his birth, the place from which he emigrated, the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived, and more than a dozen other facts, and that at the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor "stating the date, place, and manner of his arrival in the United States, * * * which certificate * * * shall be attached to and made a part of said petition." Section 15 of the same act imposes upon the United States attorney for the district in which the naturalized citizen resides the duty, upon good cause shown, to institute proceedings to set aside and cancel any certificate of citizenship obtained by him "on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."

Under this section the United States brought this suit in equity and alleged in its complaint that on May 21, 1912, the district court of Palo Alto county, Iowa, rendered a decree admitting Ness to citizenship and issued to him a certificate of his admission, that the certificate was procured by fraud, and that it was illegally procured in that the certificate of arrival by the Department of Commerce and Labor was not attached to the petition. In his answer to the complaint Ness denied the alleged fraud, admitted that the certificate of arrival was not filed with or attached to the petition, and alleged that the United States appeared and litigated the issue of the sufficiency of his petition and his right to admission to citizenship notwithstanding his failure to attach the certificate of entry, and the court of Palo Alto county, after a hearing, adjudged both questions in his favor. At the hearing in the court below, the parties agreed that prior to the hearing on the petition for the naturalization of Ness in the district court of Palo Alto county, M. R. Bevington, Chief Naturalization Examiner of the Department of Commerce and Labor, for and on behalf of that department, and at its direction, filed a motion in which he stated that the petition should not be granted because it was not supported by a certificate of arrival, and cited authorities which he contended supported his position, and requested a dismissal of the petition, that the Iowa court considered that motion and the authorities quoted at the time the petition came on for hearing, and overruled it, that at that hearing Ness testified that he emigrated from Norway, arriving at Newcastle in Canada about June 11, 1906, that he did not know that the laws of the United States required him to submit to a medical examination, pay an alien head tax, or be registered on entering this country, that he took passage on the Grand Trunk Railway, arrived in Buffalo, where he first entered the United States, on August 21, 1906, remained on the train, passed through

Buffalo into Canada and again entered the United States through some port in Michigan, that he saw no person who was or purported to be an emigration commissioner until after he filed his petition for naturalization in March, 1912, that before it was heard he was advised that it was invalid because it had no certificate of arrival attached, and he made an effort to procure such a certificate and was advised that it could not be furnished to him for the reason that there was no record of his entry into the United States. No evidence was presented at the hearing below of any fraud, misrepresentation, or deceit in the course of the proceedings in the Iowa court. There was no evidence that the proof before that court was not competent and ample to warrant its judgment, unless the absence from the petition of the certificate of arrival was fatal to that judgment, and the court below held, as did the Iowa court, that it was not so and rendered a decree of dismissal of the complaint of the United States.

[1] Counsel for the United States contend that the decision of the court below was erroneous and should be reversed (1) because the absence of the certificate of arrival deprived the district court of Iowa of all jurisdiction of the suit of Ness for admission to citizenship and (2) because the absence of this certificate of arrival caused the certificate of citizenship to be "illegally procured." The test of jurisdiction is not right decision, but the right to enter upon the inquiry and make some decision. The Iowa court had complete jurisdiction of the person of Ness when he filed his petition. Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action or ground for relief, but it includes every issue within the scope of the general power vested in the court by the law of its organization to deal with the abstract question. It is not limited to making correct decisions. It empowers the court to determine every issue of law and of fact within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong. Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316, 318, 8 C. C. A. 635; Insley v. United States, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163; Cornett v. Williams, 20 Wall. 226, 22 L. Ed. 254; Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202; In re Sawyer, 124 U. S. 200, 221, 8 Sup. Ct. 482, 31 L. Ed. 402; Skillern v. May's Ex'rs, 6 Cranch, 267, 3 L. Ed. 220; McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Colton v. Beardsley, 38 Barb. (N. Y.) 30, 52; Otis v. Rio Grande, 1 Woods, 279, Fed. Cas. No. 10,613; Hamilton v. Railroad Co., 1 Md. Ch. 107; Evans v. Haefner, 29 Mo. 141, 147; State v. Weatherby, 45 Mo. 17; Rosenheim v. Hartsock, 90 Mo. 357, 365, 2 S. W. 473; State v. Southern Ry. Co., 100 Mo. 59, 13 S. W. 398; Hope v. Blair, 105 Mo. 85, 93, 16 S. W. 595, 24 Am. St. Rep. 366; Musick v. Railway Co., 114 Mo. 309, 315, 21 S. W. 491; King v. McAndrews, 111 Fed. 860, 863, 864, 50 C. C. A. 29.

The Iowa court was a court of general jurisdiction vested with plenary judicial power to determine all the issues in the proceedings of which it was given jurisdiction, including the questions relating to the lawfulness, sufficiency, form, and propriety of pleadings and procedure in such proceeding. Constitution of Iowa, art. 5, § 6; Code of Iowa 1897, § 3600. Upon this court of general jurisdiction the Congress of the United States, by section 3 of the act of June 29, 1906, conferred full judicial power "to naturalize aliens as citizens of the United States," not on condition that the certificate of the Department of Commerce and Labor of his arrival should be filed with and attached to the petition of the alien, but generally and without any such narrow and technical condition. When therefore the applicant, Ness, filed his petition in that court to be admitted as a citizen of the United States, the judicial power was conferred and the duty was imposed upon the Iowa court to hear and decide, not only whether or not his petition and his procedure were sufficient, not only whether or not the absence of the certificate of entry was excused by the proved fact that none was ever issued because he did not know one was required when he entered and the Department of Commerce and Labor had no knowledge when he entered, but also whether or not such an absence was fatal to his right to be admitted as a citizen, and also every other question as to his petition and procedure and as to his qualifications for admission which it was necessary for that court to decide in order to determine the ultimate question whether or not he was entitled under the acts of Congress to be admitted as a citizen.

An insufficient complaint at law, or a defective petition in bankruptcy, accompanied by proper service of process on the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitle the complainant to any relief, or may not be accompanied by some copy or certificate required by a statute or rule of court. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to jurisdiction of the suit or proceeding. The only facts which conditioned the jurisdiction of the Iowa court to hear and determine the questions relative to the admission of Ness to citizenship were his preparation and filing of his petition in that court asking its issue of a certificate of citizenship to him, and this is equally true, although there was some technical or amendable defect in his petition or procedure, as long as the petition stated substantial cause for his admission to citizenship. In re Plymouth Cordage Co., 135 Fed. 1000, 1004, 68 C. C. A. 434, 438; In re First National Bank, 152 Fed. 64, 69, 81 C. C. A. 260, 265, 11 Ann. Cas. 355.

The result is that the absence of the certificate of entry did not condition the jurisdiction of the Iowa court to hear and determine every material issue presented by Ness on his petition to be admitted as a citizen. The provision of the act of Congress requiring the certificate to be filed and made a part of the petition is like the requirements of the statutes of Iowa that every party on filing any petition shall file with it one plain copy thereof for the use of the adverse party (Code of Iowa 1897, § 3558); that every petition must contain after

the names of the parties the words "petition at law" or "petition in equity"; and that each division of the petition in equity shall be separated into paragraphs numbered as such (section 3559). Such requirements are not jurisdictional, but relate merely to the form of pleadings and proceedings.

[2] We turn to the second question: Was Ness' certificate of citizenship "illegally procured" within the meaning of section 15 of the Act of June 29, 1906, because his petition was not accompanied with a certificate from the Department of Commerce and Labor stating the date, place, and manner of his arrival in the United States? This is a suit in equity to cancel this certificate on the ground that this question should be answered in the affirmative, and this suit must be considered and decided in accordance with the rules and principles of equity jurisprudence applicable to cases of this nature. Luria v. United States, 231 U. S. 9, 28, 34 Sup. Ct. 10, 58 L. Ed. 101. Section 15, says the Supreme Court, "makes no discrimination between the rights of naturalized and native citizens, and does not in any wise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled." 231 U. S. 24, 34 Sup. Ct. 14 [58 L. Ed. 101]. The court below and the Iowa court considered the question here at issue under the evidence produced, and reached the conclusion that this certificate of naturalization was not illegally procured, and the decision of the chancellor below must be presumed to be correct and may not be lawfully disturbed or reversed unless it clearly appears that some obvious error of law has intervened or some serious mistake of fact has been made. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Coder v. Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 94, 15 L. R. A. (N. S.) 372, and cases there cited.

[3, 4] "A court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction." Boone v. Chiles, 10 Pet. 177, 210, 9 L. Ed. 388; Illinois Trust & Sav. Bank v. City of Arkansas City, 22 C. C. A. 171, 193, 76 Fed. 271, 293, 34 L. R. A. 518; United States v. Winona & St. Peter R. Co., 15 C. C. A. 96, 108, 67 Fed. 948, 960; United States v. Northern Pacific R. Co., 95 Fed. 864, 880, 37 C. C. A. 290, 306. Ness entered this country without any notice or knowledge that the certificate of entry was required and as the officers of the Department of Commerce and Labor did not know when he entered they could not give him a certificate on their own knowledge, and if one were given it must be on his statement, or on the statement of some other witness who knew. Ness possessed every essential qualification for admission to citizenship. He had declared his intention to become a citizen and to renounce his allegiance and fidelity to any foreign

sovereignty two years before he applied for admission to citizenship. He satisfied the court by the testimony of witnesses that he had resided in the United States five years, that during this time he had behaved as a man of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same. He declared on oath, at the time of his admission, that he would support the Constitution of the United States, and that he abjured all allegiance and fidelity to every foreign sovereignty. He proved all these facts in the Iowa court and in the court below. He was frank and truthful, and he submitted to those courts on this evidence the question whether or not he could be legally admitted to citizenship, and they both decided that he could be. There was certainly nothing in all this to taint the conscience of the applicant, or to induce a court of equity to act to cancel his certificate.

Moreover, the filing of the certificate of entry was not, like the declaration of intention, the proof of moral character, the renunciation of allegiance, the residence of five years, an essential qualification of admission to citizenship. It was but a matter of mere form of procedure. He alleged in his petition for admission, and proved before the Iowa court, every fact required to be stated in the certificate of entry. He pleaded and proved the date, place, and manner of his arrival in the United States. The certificate of entry, therefore, could have neither added to nor detracted from the right of the applicant to admission to citizenship. It never could have been the intention of Congress to deprive an applicant who had all the essential qualifications for admission to citizenship of that privilege by a mere failure to comply with such a requirement of mere form of the petition or procedure. Even if the Iowa court had made a mistake in failing to require the certificate as a condition of its decree, that mistake would have been a mere irregularity, not an illegality; it would have been a mere mistake in the exercise of its lawful discretion as to the form of the petition and the procedure. There is a wide difference between a mistaken disregard of a provision with reference to the form of pleadings, or the manner of procedure, which are always largely in the discretion of the trial court, and a mistaken disregard of the requirement of an essential qualification of admission to citizenship, such as the declaration of intention, the residence in the United States for five years, the renunciation of allegiance to any foreign sovereignty. The former is a mere irregularity; the latter an illegality. Illegality signifies that which is contrary to the established principles of the law. There was nothing contrary to the established principles of the law in the issue of his certificate of citizenship, to an applicant who had every essential qualification of citizenship, although the certificate of entry which was material only to the date, place, and manner of his arrival, all of which were truthfully pleaded and conclusively proved otherwise, was not attached to his petition. On the other hand, to have denied his petition on that ground would have been a travesty of justice. The power was conferred, and the duty was imposed on the Iowa court to adjudge whether or not this applicant should be

admitted on the evidence before it which proved the date, place, and manner of the applicant's arrival, his possession of the essential qualifications to entitle him to admission as a citizen, and that the reason why he did not file a certificate of his entry was that he entered in ignorance of any requirement of his registry, and that the officers of the Department of Commerce and Labor did not know when he entered, had no record of it, and could not on their own knowledge give the certificate. That court decided that he was entitled to admission, although he had not filed or attached to his petition a certificate of entry. In our opinion that opinion was just and right, and the certificate of citizenship to Ness was not illegally procured. Similar conclusions have been reached in some of the District Courts. United States v. Stoller, 180 Fed. 910, 912; In re Schmidt, 207 Fed. 678, 681; In re McPhee, 209 Fed. 143; In re Pick, 209 Fed. 999.

The decree which dismissed the complaint of the United States is affirmed.

UNITED STATES v. DEANS.

(Circuit Court of Appeals, Eighth Circuit. February 16, 1916.)

No. 4457.

1. ALIENS ⊂⊃68—NATURALIZATION—SUFFICIENCY OF EVIDENCE.

Act June 29, 1906, c. 3592, § 10, 34 Stat. 599 (Comp. St. Supp. 1911, p. 533), provides that, if a petitioner for citizenship has not resided in the state for five years continuously and immediately preceding the filing of the petition, he may establish by two witnesses the time of his residence within the state if for more than one year, and the remaining portion of his five years' residence may be proved by the depositions of two or more citizens. An alien arriving in the country in 1906, who applied for citizenship in July, 1913, testified that he lived in New York from November, 1906, to November, 1907, and in Pennsylvania from that time until November, 1908, when he moved to Arkansas. The subscribing witnesses testified to his residence and good character while in Arkansas, and he filed the depositions of witnesses as to such residence and character while in New York. It appeared that he was out of the country for periods of two and four months during his residence in Arkansas. *Held*, that there was sufficient evidence to sustain the court's finding as to his residence and moral character during the portion of the five years preceding the filing of the petition prior to his removal to Arkansas and during the periods of his absence from the United States, as residence and character once proved are presumed to continue in the absence of countervailing evidence.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊂⊃68.]

2. ALIENS ⊂⊃68—NATURALIZATION—PERSONS ENTITLED TO NATURALIZATION—"CONTINUOUSLY."

Under Act June 29, 1906, authorizing the court to admit applicants to citizenship when it is made to appear to the satisfaction of the court that immediately preceding his application he has resided continuously within the United States for five years, absences from the United States of two and four months during such five years did not in themselves constitute a fatal breach of the continuity of his residence, and it was a question of fact for the court whether, in view of the evidence as to the intention of the applicant and the purpose and effect of his absence, there was a breach in the continuity of his residence, as "continuously" should be given its

common and usual meaning and have a rational sensible construction consistent with the object and purpose of the statute.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊂⊃68.

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

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit by the United States against Christopher James Davis Deans to cancel a certificate of citizenship. From a decree dismissing the suit (208 Fed. 1018), the government appeals. Affirmed.

M. R. Bevington, of St. Louis, Mo. (William H. Martin, U. S. Atty., of Hot Springs, Ark., and W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree of dismissal of a suit in equity under section 15 of the Act of Congress of June 29, 1906, 34 Stat. 596, 601, U. S. Comp. Stat. Supp. 1911, p. 529, to cancel a certificate of admission to citizenship on the ground that it was "illegally procured." This case was argued and submitted with United States v. Iver Engebretsen Ness, 230 Fed. 950, —— C. C. A. ——, and reference is made to the opinion in that case, which is filed herewith, for the rules and principles of equity which in our opinion govern cases of this nature, as well as for the general provisions and effect of the act of Congress which are there found. The United States asks a cancellation of the certificate on account of alleged errors of the court in the trial of the question of the residence of the applicant, Deans, at the hearing of his application for citizenship. The court which tried that question found the following facts and admitted the applicant to citizenship (In re Deans [D. C.] 208 Fed. 1018):

"The applicant is a native of Scotland. In November, 1906, after he had reached the age of 21¼ years, he emigrated to the United States. He is a boiler maker by trade and found employment in Schenectady, N. Y., where he resided for one year. He then moved to Pittsburgh, Pa., where he worked at his trade for one year, and in November, 1908, moved to Little Rock, Ark., where he worked in the railroad shops, intending to make that city his permanent home. In July, 1910, he visited his mother in Scotland, being out of the United States for about two months. He then returned to Little Rock, which he has claimed as his residence ever since he arrived in this state. In December, 1910, he was employed by the Isthmian Canal Commission at the shops in Grogona within the Panama Canal Zone, having passed a satisfactory examination before his employment. He remained there four months, when he was discharged for the reason that he was not a citizen of the United States. He thereupon returned to his former home in Little Rock, Ark., where he has resided ever since. At the time he accepted employment in Panama he intended to remain there only a few months, not exceeding a year, and then return to Little Rock.

"His declaration of intention to become a citizen of the United States was made more than two years prior to the filing of this application. He is a man of good moral character, intelligent, thoroughly familiar with our system of government, and in every way qualified to make a good citizen of the United States, if the facts above recited are sufficient to establish the fact

that he has resided continuously in the United States for more than five years, within the meaning of the naturalization acts."

Deans testified at that trial, among other things, that he was residing in the state of New York and working at his trade of a boiler maker from November, 1906, to November, 1907; that he then moved to Pittsburgh, Pa., and resided there until November, 1908, when he moved to Little Rock, Ark., where he first met and became acquainted with the subscribing witnesses to his petition, Grace and Brickhouse; that he then and thereafter intended to make Little Rock, Ark., his permanent home; that he has resided there ever since; but that he spent two months in 1910 in Scotland and England to visit his mother, and four months, from December, 1910, to April, 1911, in the Canal Zone, when he returned to his home in Little Rock, Ark., about April, 1911. Section 10 of the Act of June 29, 1906, provides:

"That in case the petitioner has not resided in the state, territory, or district for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the state, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States."

As Deans had not resided in the state of Arkansas for five years immediately preceding July 3, 1913, he established by the testimony of the two witnesses Grace and Brickhouse, both in his petition and at the hearing, the time of his residence in the state of Arkansas and his good moral character during that time, and proved by the depositions of two competent witnesses, Lunn and McRae, his residence in Schenectady, N. Y., from November, 1906, to November, 1907, and his good moral character during that time.

[1] The reasons why the United States insists that the decree below should be reversed and that Deans' certificate of citizenship should be canceled, are these: First, because there was no evidence of the residence of the applicant in the United States except his own testimony during the time from July 3, 1908, five years before he filed his petition while he was in Pennsylvania, and November 8, 1908, when he arrived in Little Rock, Ark., and established his residence in that state, and there was no evidence whatever of his moral character during those four months. But there was the competent and conclusive testimony of Lunn and McRae that Deans was residing in the United States from November, 1906, to November, 1907, and that he was a person of good moral character during that time, and this was ample evidence to sustain the finding of the court that he continued to reside in the United States and to have the same good moral character from November, 1907, until November, 1908, when the Arkansas witnesses testified that he was still residing in the United States and maintaining the same good moral character. It is a familiar rule of law that residence and character once proved are presumed to continue in the absence of countervailing evidence, and the

ordinary presumptions and rules of evidence are not reversed in suits to cancel certificates of citizenship.

The second reason for the cancellation of the certificate is that while Grace and Brickhouse testified to the applicant's residence and character from November 8, 1908, until July 3, 1913, when he filed his petition for citizenship, they did not know where he was, or what his intention was, or what his character was, during the two months while he was visiting his mother, or during the four months while he was in the Canal Zone. The answer is, however, that his intention, his residence, and his character were presumed to continue during these brief absences, and this presumption was confirmed and demonstrated to be correct by his continuing residence in Little Rock and his continuing good character from April, 1911, until his petition was filed in July, 1913.

[2] And the third and final reason why counsel for the United States insist that the certificate of citizenship should be canceled is that because Deans visited his mother in Scotland and England during two months and worked four months for the United States in the Canal Zone in 1910 and 1911, the evidence before the court which admitted him to citizenship was insufficient to make it "appear to the satisfaction of the court admitting (him) any alien to citizenship that immediately preceding the date of his application he had resided continuously within the United States five years at least." In the words quoted, the act of Congress conferred the judicial power and imposed the judicial duty upon the court which heard the application of this alien to consider all the evidence and arguments presented to it, and to decide and find whether or not he had resided in the United States continuously for five years immediately preceding his application.

That court decided and found that he had done so. That was a finding of fact, and the evidence presented to that court has convinced this court that any other finding would have been a mistake unless the contention of counsel for the United States that the true construction of the act of Congress is that any absence of an alien during any substantial length of time, such as a few months, or a few days, during the five years preceding the date of the filing of his petition, in itself constitutes a fatal breach of the continuity of his residence is correct. But that contention is too specious and ingenious to be sound. It runs counter to the cardinal rule of construction of statutes that the object and purpose of the enacting body may always be considered and should be promoted. The effect of such a construction and the application of similar narrow and drastic rules of interpretation and practice to this act of Congress would be to prevent aliens of good moral character, possessing every essential qualification to be admitted as citizens, and well disposed to the principles of our government from becoming citizens of this nation. But the purpose of Congress in the enactment of this legislation, and the object of the law itself, was not to exclude, but to admit, such aliens to citizenship. It is as much to the interest of the United States as it is to the interest of aliens of this character that they should become citizens of the United States, and the act of Congress which was

enacted to enable them so to become ought to be so interpreted and administered as to accomplish, rather than to hinder or forbid the accomplishment of, that end. The interpretation sought by counsel for the government flies in the face of the cardinal rules of construction that the word "continuously" should be given its common and usual meaning, and that the requirement that the alien "has resided continuously within the United States five years" immediately preceding the date of the filing of his petition should have a rational, sensible construction, and that the natural and obvious meaning of this requirement should be preferred to any curious, narrow, hidden sense which nothing but the exigencies of a case and the ingenuity of a trained and acute intellect would discover. United States v. Ninety-Nine Diamonds, 139 Fed. 961, 965, 72 C. C. A. 9, 13, 2 L. R. A. (N. S.) 185; Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 75, 80 C. C. A. 25, 29; Brun v. Mann, 151 Fed. 145, 157, 80 C. C. A. 513, 525, 12 L. R. A. (N. S.) 154; Delaware Ins. Co. of Philadelphia v. Greer, 57 C. C. A. 188, 193, 120 Fed. 916, 921, 61 L. R. A. 137; Standard Life & Acc. Ins. Co. v. McNulty, 157 Fed. 224, 226, 85 C. C. A. 22, 24.

If the statement is made that one resided continuously for five years within his house, or within a town, or a ward, or a city, or a state, or a nation, no one understands, or infers, or believes, that this is a declaration that he has never been outside his house, or his town, or his ward, or his city, or his nation, for a day, or a month, or even more, during the five years, and it is unthinkable, in view of the ordinary meaning and understanding of the requirement of the statute under consideration, that naturalized citizens who, during the five years next preceding the filing of their petitions for admission to citizenship, have been beyond the limits of the United States for a few weeks or months and have nevertheless testified that they have resided continuously within the United States during the five years have all testified to an untruth. The true construction of this requirement of five years' continuous residence within the United States is not that a temporary absence of a day, or a month, or of a few months, during the five years, is necessarily fatal to the continuity of the residence. It is that such an absence presents to the trial court the question of fact whether or not that absence and all the evidence before that court of the intention of the applicant, of the purpose and effect of his absence, and of all the facts and circumstances of the case, prove a breach in the continuity of his residence. United States v. Cantini (D. C.) 199 Fed. 857, 860; United States v. Cantini, 212 Fed. 925, 927, 129 C. C. A. 445, 447.

The learned and exhaustive opinion of Judge Trieber in the original case reported in (D. C.) 208 Fed. 1018, is a conclusive demonstration of the correctness of this conclusion, and it leaves nothing to be said upon this subject but the expression of our affirmance and adoption thereof. And our conclusion is that the evidence in the original case on Deans' application for his admission to citizenship duly established his continuous residence within the United States during the five years immediately preceding the filing of his petition, notwithstanding the fact that during that five years he was temporarily without the

United States about six months; that no error in the trial of that case was pleaded in the complaint in this case; that Deans' certificate of citizenship was not illegally procured; and that there was no equity in the complaint to cancel that certificate.

The decree dismissing that complaint is, accordingly, affirmed.

THE CALYPSO.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1916.)

No. 2545.

1. SHIPPING ⟸79—"MASTER"—AUTHORITY AS AGENT FOR OWNER.

The master of a ship is pro hac vice the agent of the owner, and like any other agent his appointment and authorization lie in contract, and unless he is appointed, or his appointment is authorized by the owner, he is not lawfully master, although enrolled as such, and neither the owner nor his interest in the vessel is liable for his acts; and where the ownership is divided the power of appointment rests with those owning more than a half interest.

[Ed. Note.—for other cases, see Shipping, Cent. Dig. §§ 333, 334, 337, 338, 348; Dec. Dig. ⟸79.

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

2. ALIENS ⟸36—VIOLATION OF CHINESE EXCLUSION ACT—FORFEITURE OF VESSEL—MASTER.

The owner of a one-sixth interest in a gasoline launch, without the knowledge or consent of the owner of the remaining interest, and contrary to a written agreement with him, had himself enrolled as master, and as such used the launch to bring a load of contraband Chinese from Mexico to a port of the United States. *Held*, that the interest of the majority owner in the launch was not subject to forfeiture under Chinese Exclusion Act May 6, 1882, c. 126, § 10, 22 Stat. 61, as amended by Act July 5, 1884, c. 220, 23 Stat. 115 (Comp. St. 1913, § 4297), providing for the forfeiture of any vessel "whose master shall knowingly" violate the act.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸36.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Libel by the United States for the forfeiture of the gasoline launch Calypso for violation of the Chinese Exclusion Act. From the decree libelant appeals. Affirmed.

For opinion below, see 217 Fed. 669.

John W. Preston, U. S. Atty., of San Francisco, Cal., for the United States.

Black & Clark, of San Francisco, Cal., and Warren E. Lloyd, of Los Angeles, Cal., for appellee.

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

RUDKIN, District Judge. The present libel was filed in the court below to forfeit to the United States the gasoline launch Calypso, her

boats, tackle, apparel, furniture, and cargo, for a violation of section 10 of the act of Congress of May 6, 1882, entitled "An act to execute certain treaty stipulations relating to China" (22 Stat. 58), as amended by the act of July 5, 1884 (23 Stat. 115). The section in question provides as follows:

"That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found."

The launch in question was built for the respondent, Sassaman, and one Pettenger during the year 1912 at a cost of about $10,000. Of this sum Sassaman contributed $5,000 and Pettenger $1,000. Seven hundred and sixty dollars advanced by the Los Angeles Creamery Company, secured by two mortgages on the launch, and $3,400 advanced by one Singleton and secured by an agreement for a mortgage on the launch, make up the balance of the construction cost. The launch was owned jointly by Sassaman and Pettenger, the former owning a five-sixths interest and the latter a one-sixth interest. On the 22d day of May, 1913, Sassaman was regularly enrolled as master of the launch by the collector of the port of Los Angeles, and thereafter, by his request, and with his consent, Oren H. Dickason was enrolled as master on the 2d day of July, 1913, Ralph L. Lopes on the 15th day of July, 1913, and James H. Castle on the 13th day of September, 1913. Between May and October, 1913, the boat made regular trips between San Pedro and Avalon, Catalina Island, and for some time after October 1st short trips were made locally from San Pedro to Long Beach and to different battleships in the harbor. On the 24th day of November, 1913, Pettenger, without the knowledge or consent of Sassaman, procured his own enrollment as master of the launch, in lieu of Castle, and was enrolled as such master at the time of the contraband voyage which gave rise to the present controversy. Some time prior to Christmas, 1913, Pettenger took the launch on a trip to San Diego for the purpose of smuggling a load of contraband Chinese into the United States; but for reasons not disclosed by the record his plans miscarried. In the early part of 1914 Pettenger, accompanied by three companions and a Chinaman named Lee, took the launch on a trip to Mexico, returning to Monterey Bay with a load of contraband Chinese and contraband opium, which were surreptitiously landed on the 16th day of January. The launch was there seized by government officers, and is clearly liable to condemnation so far as the interest of Pettenger is concerned, and also so far as the interest of Sassaman is concerned, if Pettenger was the master of the launch within the meaning of the law. The court below decreed a forfeiture as to the interest of Pettenger, but denied a forfeiture as to the interest of Sassaman, and from the latter branch of the decree this appeal is prosecuted.

[1] The master of a ship is pro hac vice the agent of the owner, and like any other agent his appointment or authorization lies in contract. The registry and enrollment statutes are only for the protection of the revenues, and if the master has not been appointed

by the owner enrollment cannot make him such. If, on the other hand, the master has been appointed by the owner, the failure to register or enroll will not impair his authority. So, too, the power of appointment and removal rests in those having more than one-half ownership of the vessel. Rev. Stat. U. S. § 4250 (Comp. St. 1913, § 7995).

[2] Unless, therefore, the appointment of Pettenger as master was consented to or acquiesced in by Sassaman, or unless Sassaman has been guilty of some act of omission or commission which renders him or his property liable for the acts of Pettenger, his interest should not be forfeited.

"Penalties and forfeitures, although generally the consequences of crime or guilt, do not necessarily imply the one or the other. As the forfeiture of a man's property is one of the severest punishments that the law can inflict, the mind is naturally perplexed by two considerations of directly opposing tendency—the one being the principle of natural justice, which revolts at the punishment of the innocent; the other, the apparent necessity of doing that very thing in view of public policy, in order to prevent those shifts and subterfuges by which the revenue laws are evaded. The statute must be clear and unequivocal which imposes upon a court the duty of punishing one man for the fault of another. The object of section 3450 is to punish all persons who, with intent to defraud the government of the tax, remove or conceal goods upon which the tax has not been paid, and, in addition to the punishment of such persons, it provides that all conveyances and animals used in the accomplishment of this unlawful purpose shall be forfeited. Undoubtedly there is a presumption against any one whose property is found employed in this unlawful business that it is so engaged with his consent, but can it be that this presumption is irrebuttable? The contention of the government is that, this being a proceeding in rem, it is the guilty thing that has offended, and that this is to be forfeited, irrespective of any participation of its owner. If this team and wagon had been stolen from the owner, it would be clearly unjust, unreasonable, and preposterous to forfeit it because it was used by the wrong doer in the transportation of illicit liquor. If this exception is admitted, it would follow that property has no guilty character, except as connected with persons who have charge of it, and the result is that it is the duty of the court to inquire into the facts; and if it appears clearly that the owner has not hired or loaned it to another for an unlawful purpose, or knowingly permitted it to be in the possession of a party likely to engage in an unlawful business, or negligently suffered it to be controlled by a stranger, whose character gave no assurance that it would not be unlawfully employed, or is in some way justly chargeable with blame or negligence, he ought not to suffer the sweeping condemnation that justly falls upon those who consciously violate the law, and upon those upon whom is laid the duty of vigilance, and who negligently or otherwise fail in that duty." United States v. Two Barrels of Whisky, 96 Fed. 479, 481, 37 C. C. A. 518, 520, and cases cited.

See, also, United States v. Wilton (D. C.) 43 Fed. 606.

Whether Pettenger was master of the launch at the time of the seizure, and whether Sassaman, through negligence or otherwise, has rendered himself and his property amenable to the law for the acts of Pettenger, are questions of fact, to be determined from the testimony. Sassaman testified that he never authorized the enrollment of Pettenger as master, and had no notice that he was so enrolled until long after the seizure; that he had a written agreement with Pettenger that the latter would not take the launch out on any trip without his permission, and that he gave no such permission; that

he had no notice or knowledge that the launch was to be taken out, and no notice or knowledge of the illicit enterprises in which Pettenger was engaged. All the surrounding circumstances seem to corroborate Sassaman, and if a forfeiture is to be decreed the decree must rest on the uncorroborated testimony of an admitted accomplice in crime. The testimony of such a witness is always scrutinized with great care and acted upon with the utmost caution. He is discredited before the law, not only because of his complicity in the crime charged, but because we can never know what motives or inducements have prompted him to testify.

It may be said that this is not a criminal case; but it is none the less a proceeding on the part of the government to declare a forfeiture based on the criminal acts of this witness, and every inducement and every incentive that would prompt him to testify falsely in a criminal case are present in this case. The court below committed no error in declining to accept or act upon the testimony of such a witness, and its decree is affirmed.

WEBER v. HERTZELL et al.

(Circuit Court of Appeals, Eighth Circuit. February 9, 1916.)

No. 4201.

1. APPEAL AND ERROR ⟸917(1)—PRESUMPTIONS IN SUPPORT OF JUDGMENT.

Equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), abolishes demurrers and requires defenses in point of law to be made by motion to dismiss or in the answer. Rule 81 (198 Fed. xlii, 115 C. C. A. xlii), provides that such rules shall be in force from February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where, in any then pending cause, an order has been made or act done which cannot be changed without substantial injustice, the court may give effect to it to the extent necessary to avoid any such injustice. *Held*, that where a demurrer, filed prior to February 1, 1913, was sustained subsequent to that date, but the record did not show when it was submitted, it would be assumed, on appeal, either that it was submitted before February 1, 1913, or that the court treated it as a motion to dismiss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3706; Dec. Dig. ⟸917(1).]

2. JUDGMENT ⟸645—PLEADING JUDGMENT AS BAR.

The defense of res judicata is as much a defense at law as in equity, and there is no necessity for a preliminary decree in equity establishing such defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1158; Dec. Dig. Dig. ⟸645.]

3. INJUNCTION ⟸26(6)—ENJOINING ACTIONS AT LAW—EXISTENCE OF EQUITABLE DEFENSES—"ESTOPPEL IN PAIS."

While an "estoppel in pais" is called an equitable estoppel, it is a legal estoppel as well, and is not treated as a distinctively equitable defense, and can be pleaded in a law case; and hence the existence of such estoppels furnished no ground for a suit in equity to enjoin an action of ejectment and take over the litigation.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 35; Dec. Dig. ⟸26(6).

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

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4. INJUNCTION ⊜26(3) — ENJOINING ACTIONS AT LAW — NECESSITY OF ACCOUNTING.

An action of ejectment would not be enjoined, and the litigation taken over by a court of equity, on the ground that, if an accounting should be decreed, a court of law would be without jurisdiction, where the defendant in the ejectment action, seeking the injunction, did not concede that there ever would be an accounting, especially where the account was short, and no reason was apparent why it could not be adjusted by a jury.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 28, 29, 36–44, 46, 48; Dec. Dig. ⊜26(3).]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by Howard Weber against Freeman E. Hertzell and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

J. J. Shea, of Bartlesville, Okl. (Burdette Blue, of Bartlesville, Okl., on the brief), for appellant.

J. P. O'Meara, of Tulsa, Okl. (C. B. Ames, of Oklahoma City, Okl., and James A. Veasey, of Tulsa, Okl., on the brief), for appellees.

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

SMITH, Circuit Judge. [1] This is an action in equity. The bill was filed by Howard Weber December 2, 1912, and on December 9, 1912, the defendant Freeman E. Hertzell filed a demurrer thereto. By rule 81 (198 Fed. xlii, 115 C. C. A. xlii) of the new equity rules it is provided:

"These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which can not be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice."

The record does not show whether the demurrer was submitted before or after February 1, 1913, but on September 17, 1913, long after the new rules took effect, the court sustained the demurrer and dismissed the case at plaintiff's cost. Of course demurrers were abolished by the new rules, but we shall assume either that the demurrer was submitted before February 1, 1913, or that the court treated the demurrer as a motion to dismiss under rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi).

Howard Weber holds so-called drilling contracts from Oliver Bagby and the Vinita & Chelsea Oil Company upon certain lands in Oklahoma. There was litigation concerning these drilling contracts, to which both Weber and Hertzell were parties in the District Court of Washington county, Okl., where the case was decided in favor of Weber. That case went to the Supreme Court of Oklahoma and was there affirmed. Hertzell et al. v. Weber et al., 31 Okl. 5, 120 Pac. 589. From the opinion in that case a more full statement will be found of the facts in this controversy than we deem it necessary to give here. That case was decided in the district court of Wash-

ington county on February 4, 1910, and in the Supreme Court of Oklahoma on November 14, 1911, and a rehearing denied on June 12, 1912. Before the decision in either court, on December 16, 1909, and on January 8, 1910, Hertzell procured warranty deeds of all the land in question from Josie (Moore) Harrison and Etta Mode and their husbands. The grantors in said deeds owned the lands in question, but they had outstanding thereon leases to Oliver Bagby and the Vinita & Chelsea Oil Company for oil and gas purposes, and these lessees had given the drilling contracts to Weber. Subsequently Hertzell brought a suit in ejectment against Weber under these deeds and for damages for the wrongful detention in the District Court of the United States for the Eastern District of Oklahoma. Thereupon the appellant, Weber, filed this bill in equity in the same court against the appellee, Hertzell, seeking to establish certain estoppels against Hertzell and to restrain the prosecution of the action at law by him to recover the land and damages for the wrongful detention. As before stated, the court sustained the demurrer to this bill, and dismissed it, and the plaintiff, Weber, appeals.

[2] The plaintiff claims that the decree in the Oklahoma courts is an adjudication against Hertzell in the new case now pending in the federal court, but the defense of res adjudicata is as much a defense at law as in equity and there is no necessity for a preliminary decree in equity as to that.

The plaintiff also contends that there are certain estoppels by conduct of Hertzell. The allegations in this connection are of estoppels in pais or equitable estoppels.

[3] It has been held by this court that such estoppels can be pleaded in a law case. Anglo-American Land Mortgage & Agency Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89; Campbell et al. v. Golden Cycle Mining Co. et al., 141 Fed. 610, 73 C. C. A. 260. The same has been held by the Supreme Court of the United States. Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618; Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79; Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167. And the same rule has been announced in many Circuit Court of Appeals decisions from other circuits and by state Supreme Courts.

Of course it is true that a court of equity will not refuse jurisdiction unless the jurisdiction of the law is full, adequate and complete. Boyce v. Grundy, 3 Pet. 210, 7 L. Ed. 655. And it is true that under the peculiar facts in Drexel v. Berney, 122 U. S. 241, 7 Sup. Ct. 1200, 30 L. Ed. 1219, Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167, Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578, Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183, and Donovan v. Pennsylvania Co., 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192, the jurisdiction in equity was sustained but the peculiar facts which resulted in its being sustained in those cases do not appear in this case. They all proceeded upon the theory that there were independent equities in the bills aside from the question as to whether they were equitable estoppels. The use of the term "equitable estoppel" has a tendency to confusion. In the

United States courts a recovery may be had upon the strict legal title and a court of law will not uphold or enforce an equitable title to lands as a defense to their recovery. While an estoppel in pais is called an equitable estoppel it is a legal estoppel as well and is not treated as a distinctively equitable defense.

[4] It is suggested that if the matter should ever come to a stage where an accounting should be decreed a court of law would be utterly without jurisdiction to order such thing to be done. It is quite common in many states to permit in an ejectment action a recovery of damages for wrongful detention. The entire account between these parties is set forth in the transcript and does not take over 4½ pages, and there seems no reason why these accounts could not be adjusted by a jury; but the complainant does not concede that there ever will be an accounting, but claims the case should be resolved in his favor. We cannot find in this suggestion any ground for a court of equity to take over the litigation.

We conclude that all the matters relied upon in the bill in this case were equally available at law as in equity, and that the ruling of the District Court was correct; and it is affirmed.

THOMAS v. SOUTH BUTTE MINING CO.

(Circuit Court of Appeals, Ninth Circuit. March 20, 1916.)

No. 2269.

1. EQUITY ⊜442—BILL OF REVIEW.

A bill of review deals with the state of things existing at the time it is filed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1065–1070; Dec. Dig. ⊜442.]

2. COURTS ⊜322(3)—JURISDICTION OF FEDERAL COURTS—CONSTRUCTION OF STATUTE—"INHABITANT"—"RESIDENT."

In the acts of Congress defining the jurisdiction of the federal courts, the words "inhabitant" and "resident" are synonymous, and an allegation that a complainant corporation is a "resident" of another state is sufficient.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 878, 879; Dec. Dig. ⊜322(3).

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

3. COURTS ⊜314—JURISDICTION OF FEDERAL COURTS—RESIDENCE OF CORPORATION.

A corporation is a resident of the state which chartered it, for purposes of the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. ⊜314.]

4. EQUITY ⊜53(2)—JURISDICTION—ADEQUATE REMEDY AT LAW—WAIVER OF OBJECTION.

The objection that the complainant in a suit in equity has an adequate remedy at law, unless made by the pleadings, is waived.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 174; Dec. Dig. ⊜53(2).]

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5. EQUITY ⊂⊃447(4)—BILL OF REVIEW—NEW EVIDENCE—DILIGENCE.
To warrant a court in permitting the filing of a bill of review for the purpose of introducing new evidence, it must appear that such evidence was unknown to the moving party and could not have been produced on the hearing.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1094; Dec. Dig. ⊂⊃447(4).]

Petition for Order Directing the District Court of the United States for the District of Montana to Receive and Consider Bill of Review.

Suit in equity by the South Butte Mining Company against Thomas D. Thomas. Decree for complainant affirmed. 211 Fed. 105, 128 C. C. A. 33. On application by defendant for an order directing the District Court for the District of Montana to receive and consider a bill of review. Denied.

Allen G. Fisher and Hedweg E. Federle, both of Chadron, Neb., for appellant.

John A. Shelton, of Butte, Mont., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. [1] On February 2, 1914, this court affirmed on appeal the decree of the court below in Thomas v. South Butte Mining Company, Appellee, 211 Fed. 105, 128 C. C. A. 33, and thereafter the mandate of this court was issued to the court below. The appellant now presents to this court a petition for leave to file in the court below a bill of review for the purpose of setting aside and annulling the decree so entered in that court upon the mandate from this court. As was said by Judge Severens in Keith v. Alger, 124 Fed. 32, 59 C. C. A. 552:

"A bill of review is a dernier ressort, devised to relieve a party who has suffered a substantial wrong from the miscarriage of justice in the former proceedings. And the inquiry deals with the state of things existing at the time of filing the bill of review."

The appellant in his petition and the bill of review which he proposes to file alleges two errors of law appearing on the record, and refers to evidence which, he says, is now available, and which was not presented on the former trial of the case.

[2] The errors of law so alleged are: First, that the trial court had no jurisdiction of the cause, for the reason that it was not alleged in the appellee's complaint that the South Butte Mining Company, which was alleged to be a corporation of Minnesota, was also an "inhabitant" of that state; the allegation being that it was a citizen and "resident" of that state. We need devote no time to discussion of this point. It has always been held, in construing the acts of Congress which define the jurisdiction of the federal courts, that the word "inhabitant" is synonymous with "resident." Bogue v. Chicago, B. & Q. R. Co. (D. C.) 193 Fed. 728, 733; Stone v. Chicago, B. & Q. R. Co. (D. C.) 195 Fed. 832; Bicycle Stepladder Co. v. Gordon (C. C.) 57 Fed. 529; Shaw v. Quincy Mining Co., 145 U. S. 444,

12 Sup. Ct. 935, 36 L. Ed. 768; United States v. Penelope, 2 Pet. Adm. 438, 27 Fed. Cas. 486.

[3] The appellant makes the further point that on the proofs the appellee was shown to be a resident of Montana, where it had its principal place of business. We find in the record no proof on the subject. We do find that the appellant admitted that the appellee is a corporation as alleged in its bill. No further proof was required of that fact. A corporation is a resident of the state which chartered it. Shaw v. Quincy Min. Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Stone v. Chicago, B. & Q. R. Co. (D. C.) 195 Fed. 832.

[4] The other error of law alleged is that it appears from the record that the court had no jurisdiction for the reason that the appellee had an adequate remedy at law. The objection that there was an adequate remedy at law was not made in the original suit, and was therefore waived. 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.

It does not clearly appear from the bill or the petition just what new evidence the appellant proposes to adduce in addition to that which was presented on the trial, nor does it appear that it is newly discovered evidence. As we understand the allegations, they are: First, the appellant will offer evidence to show that the appellee on the trial of the cause withheld from the court evidence which was pertinent to the issues. The precise nature of that evidence is not disclosed, and the allegations are not sufficient to show that there was any fraudulent concealment of it. Second, it is claimed that the appellant will show that the appellee is estopped to dispute the validity of his location of the quartz mining claim in controversy by the fact that immediately after the commencement of the suit in the court below the defendant itself procured a mining lode location to be made thereof for its own benefit. We are unable to see how an estoppel could arise from that act, if it were proven. The appellee may have been moved to make such a lode location in order to forestall further hostile acts of locators who might seek to obtain from the appellee property to which it had title under a placer location.

[5] The final answer to all these proffers of evidence which the appellant proposes to produce is that it is not alleged that the evidence was unknown to the appellant and could not have been produced on the original trial of the cause. Purcell v. Miner, 4 Wall. 519, 521, 18 L. Ed. 435; Nickle v. Stewart, 111 U. S. 776, 4 Sup. Ct. 700, 28 L. Ed. 599.

We have not overlooked the petitioner's allegations that owing to his financial condition he was without means to employ counsel upon the hearing of the case in the court below, and was without advice as to the amount of proof required and as to his rights in a court of equity, and that through misadventure he failed to present to the lower court, and was unable to discover the amount of proof which was required from him for the protection of his substantial rights. On account of the fact that the petitioner was without counsel and was himself evidently unskilled in the law, this court took particular

care, on the appeal of the cause to this court, to protect his rights so far as it was authorized to do so on the case made upon the pleadings and proceedings in the court below; and for the same reason this court now examines with scrupulous care the appellant's petition and the proposed bill of review, to determine whether leave should be granted to file the latter. The question is in no respect involved in doubt, and we can find no ground whatever upon which to predicate such relief, assuming, which we do not decide, that this court has jurisdiction of the petition. In such a case it is the duty of the appellate court to deny the petition. Kimberly v. Arms (C. C.) 40 Fed. 548; Society of Shakers v. Watson, 77 Fed. 512, 23 C. C. A. 263; Kissinger-Ison Co. v. Bradford Belting Co., 123 Fed. 91, 59 C. C. A. 221.

The petition is denied.

OLIVER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1916. Rehearing Denied March 6, 1916.)

No. 2586.

1. CRIMINAL LAW ⊂⊃89—JURISDICTION OF COURTS—COMMON-LAW JURISDICTION.

The federal courts have no common-law jurisdiction in criminal cases, and it is essential to the exercise of such jurisdiction that Congress shall have made the act a crime, affixed a punishment to it, and declared the court that shall have jurisdiction of it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 128; Dec. Dig. ⊂⊃89.]

2. RAPE ⊂⊃2—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 1, § 8, subd. 10, authorizes Congress to define and punish piracies and felonies committed on the high seas. Criminal Code (Act March 4, 1909, c. 321) § 276, 35 Stat. 1143 (Comp. St. 1913, § 10449), provides that whoever shall assault another with intent to commit rape shall be imprisoned not more than 20 years. Section 278 provides that whoever shall commit the crime of rape shall suffer death. *Held*, that these statutory provisions are not void, as failing to state what constitutes rape, as Congress may as well define by using a term of known and determinate meaning as by an express enumeration of all the particulars included in that term.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 2; Dec. Dig. ⊂⊃2.]

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Harry Oliver was convicted of an offense, and he brings error. Affirmed.

H. W. Hutton, 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.

ROSS, Circuit Judge. Upon an indictment charging him with an assault with intent to commit rape upon a certain named woman on the high seas while on board of a certain named American vessel, the plaintiff was convicted by the verdict of a jury, upon which verdict judgment of imprisonment was entered against him by the court below, from which judgment the case is brought here by writ of error.

The objections made on behalf of the plaintiff in error to the sufficiency of the proof to support the verdict are, we think, wholly without merit, for which reason we refrain from going into the details of the heinous offense. Nor do we think that the plaintiff in error has any just cause of complaint in respect to the action of the trial court in the matter of instructions to the jury. The charge of the learned judge was fair, and fully covered the crime charged and the case made by the evidence.

[1] But it is insisted on behalf of the plaintiff in error that the indictment was and is without any basis in law, for the asserted reason that there is no statute of the United States defining rape or an attempt to commit that crime. It is, of course, readily conceded that the federal courts have no common-law jurisdiction in criminal cases, and that it is essential to the exercise of such jurisdiction by those courts that Congress shall have first made the act a crime, affixed a punishment to it, and declared the court that shall have jurisdiction of it. Decisions to that effect are so numerous that they need not be cited.

[2] The power of Congress to do so is given by subdivision 10 of section 8 of article 1 of the Constitution, in these words:

"To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."

By the Criminal Code of the United States it is, among other things, provided in section 276:

"Whoever shall assault another with intent to commit murder, or rape, shall be imprisoned not more than twenty years. Whoever shall assault another with intent to commit any felony, except murder, or rape, shall be fined not more than three thousand dollars, or imprisoned not more than ten years, or both. * * *"

And section 278 of the same Code is as follows:

"Whoever shall commit the crime of rape shall suffer death."

The contention on behalf of the plaintiff in error is that those provisions of the statute in respect to rape and assault with intent to commit that crime are void, in that they do not define what constitutes rape. In 1820, in the case of United States v. Smith, 5 Wheat. 153, 5 L. Ed. 57, the Supreme Court had before it for consideration an indictment founded upon a statute which provided:

"That if any person or persons whatsoever shall upon the high seas commit the crime of piracy as defined by the law of nations, and such offender or offenders shall be brought into or found in the United States, every such offender or offenders shall upon conviction thereof be punished with death."

And it was there contended that that statute was of no force or effect because the crime of piracy was not therein defined; and one

of the justices of the court so held in a dissenting opinion. In delivering the opinion of the court Mr. Justice Story said:

"The argument which has been urged in behalf of the prisoner is that Congress is bound to define, in terms, the offense of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the eighth section of the Act of Congress of 1790, c. 9, which declares that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the Constitution. In our judgment, the construction contended for proceeds upon too narrow a view of the language of the Constitution. The power given to Congress is not merely 'to define and punish piracies'; if it were, the words 'to define' would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. And it has been very justly observed, in a celebrated commentary, that the definition of piracies might have been left, without inconvenience, to the law of nations, though a legislative definition of them is to be found in most municipal codes. The Federalist, No. 4, p. 276. But the power is also given 'to define and punish felonies on the high seas, and offenses against the law of nations.' The term 'felonies' has been supposed, in the same work, not to have a very exact and determinate meaning in relation to offenses at the common law, committed within the body of a county. However this may be, in relation to offenses on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty, in the technical sense of the common law. See 3 Inst. 112; Hawk. P. C. c. 37; Moore, 576. Offenses, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offenses against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question. But supposing Congress were bound, in all the cases included in the clause under consideration, to define the offense, still there is nothing which restricts it to a mere logical enumeration in detail of all the facts constituting the offense. Congress may as well define by using a term of a known and determinate meaning as by an express enumeration of all the particulars included in that term. That is certain which is, by necessary reference, made certain. When the act of 1790 declares that any person who shall commit the crime of robbery or murder on the high seas shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference the definitions are necessarily included as much as if they stood in the text of the act. In respect to murder, where 'malice aforethought' is of the essence of the offense, even if the common-law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of 'malice aforethought' would remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the Constitution is therefore wholly inadmissible. To define piracies, in the sense of the Constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done, either by a reference to crimes having a technical name and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted."

The doctrine of that case is that by giving a crime a name known to the law of nations or to the common law a crime is not less clearly ascertained than it would be by using the definition as found in the treatises of the common law, or in the law of nations. "Congress,"

said the court, "may as well define, by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term. That is certain which is, by necessary reference, made certain."

That decision has stood unreversed for nearly 100 years, and upon its authority we rest our judgment affirming the validity of the statute here questioned.

The judgment is affirmed.

UNITED STATES ex rel. HAUM PON v. SISSON.

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 98.

1. ALIENS ⟸32(13)—EXCLUSION OF CHINESE—DECISION AS TO CITIZENSHIP.
The decision of the Secretary of Labor that a Chinese held for deportation is not a citizen of the United States is final, unless it appears that the Secretary acted unlawfully, improperly, or abused his discretion.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⟸32(13).]

2. ALIENS ⟸32(10)—EXCLUSION OF CHINESE—DEPORTATION TO "COUNTRY WHENCE HE CAME."
A Chinese, who comes into the United States from Canada without being entitled to remain here, will be deported, not to China, but to Canada, the "country whence he came."
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92; Dec. Dig. ⟸32(10).]

3. EVIDENCE ⟸15—JUDICIAL NOTICE—BIRTHPLACE OF ALIENS.
The court can take judicial notice that all Frenchmen are not born in France, all Germans in Germany, all Italians in Italy, all Japanese in Japan, and all Chinese in China.
[Ed. Note.—For other cases, see Evidence, Dec. Dig. ⟸15.]

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

Habeas corpus by the United States, on the relation of Haum Pon, alias Charlie Haum, alias Lee Hum, against Harry R. Sisson, Chinese Inspector in Charge, District of New York and New Jersey. From an order of the District Court for the Southern District of New York (222 Fed. 693), dismissing the writ, and remanding relator to the custody of respondent, to be deported, relator appeals. Order of deportation amended and affirmed.

Appeal from an order entered May 4, 1915, dismissing a writ of habeas corpus which had been issued to inquire into the detention of the appellant. The order remanded the appellant to the custody of the appellee to be deported to China, "the country whence he came."

Robert M. Moore, of New York City (B. W. Berry, of New York City, of counsel), for appellant.

H. Snowden Marshall, U. S. Atty., of New York City (Harold A. Content, Asst. U. S. Atty., of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] It is conceded that Haum Pon is not entitled to remain in the United States the only question is whether he should be deported to China or to Canada. He was arrested at Tonawanda, N. Y., by the local police authorities on January 21, 1915, and on the following day a warrant was issued by the Acting Secretary of Labor under which he was taken into custody and several hearings were had at which testimony was given showing that the appellant, with four other Chinese persons, was found on the night of January 21, 1915, under a bridge near the shore of the Niagara river. Footprints in the snow indicated that they had crossed the river in a boat which was found on the river bank. In addition to this, four witnesses identified the appellant as a man they saw in Canada a few days prior to the arrest. It is unnecessary to consider further the evidence relating to the appellant's entry into this country, as we agree with the district attorney that "the proof that he entered the United States from Canada is overwhelming." We also agree with him that the proof fails to establish the appellant's citizenship in the United States and, in any event, the decision of the Secretary of Labor adverse to citizenship is final unless it appears that he acted unlawfully, improperly or abused his discretion. U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; Chin Yow v. U. S., 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

[2] We have then the case of a Chinese person in the United States having come here from Canada and not being entitled to remain here. In Moore v. Sisson, 206 Fed. 450, 124 C. C. A. 356, where the facts were almost identical with those in the case at bar, we held the following propositions:

First. The relators are Chinese persons not permitted by law to remain in this country.

Second. The country from whence they came is Canada.

Third. There is no evidence that they came from China; the contention that they did do so is based solely upon conjecture and presumption.

We therefore directed that the aliens be returned to Canada. No difference of importance is suggested upon the facts and we see no reason for departing from our former decision.

We are referred to the recent case of Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967. In that case the petitioner was a Russian who came to this country in September, 1904, entering at the port of New York and lived in or near that city till 1910, when he removed to Detroit and made his home in that city. On November 17, 1910, he crossed the Detroit river to Windsor, Canada, and brought back with him a woman who, as was subsequently found by the Secretary of Commerce and Labor, was brought to Detroit for an immoral purpose. Subsequently, after indictment and trial he was found guilty and deported to Russia, the court observing:

"Upon the whole, it seems to us that the act reasonably admits of his being returned to the land of his nativity, that being in fact 'the country whence he came' when he first entered the United States."

The difficulty with this case is its want of resemblance. If it had been shown that this appellant was born in China and came here from

China and had committed an offense against our laws while in this country, the doctrine of Lewis and Frick would be applicable. But in the case at bar we know nothing regarding the appellant except that he is, apparently, a Chinese person and that he entered the United States at Tonawanda, Erie county, N. Y., coming direct from Canada.

[3] Under a harsh and drastic law like the one under consideration, there is no obligation on the part of the accused to say anything. He may stand mute if he so desires. There is no presumption that he was born in China because he says nothing on the subject. He may have been born in Canada or even in this country. The fact that Canadian law will not permit that country to receive a Chinese person unless he pays a tax cannot be considered in construing our own statutes. If this Chinaman came here from Canada, and the proof is that he did, that fact is not changed by the refusal of Canada to permit his return there. So far as proof is concerned, there is absolutely nothing to show that he was born in China or that he came from China or that he was ever in China, and yet if this writ be dismissed the appellant will be sent there on mere presumption. It is known that he came from Canada and that is all that is known about him. If the situation creates a legal empassé it is for Congress and not the courts to supply the necessary legislation. In the present age, when the nations are linked together by railroads and steamship lines, when there is practically no habitable unexplored territory, when Asiatics and Africans are found in all the large cities of Europe and America, it is impossible to tell by the mere inspection of a man where he was born or from whence he came. We can take judicial notice of the fact that all Frenchmen are not born in France, all Germans in Germany and all Italians in Italy. We know that all Japanese are not born in Japan. We know that all Chinese are not born in China. The finding that this appellant came from China is not based on proof but on guesswork and conjecture. We think this case cannot be distinguished from Moore v. Sisson.

The order of deportation is amended by providing that the appellant be deported to Canada, and, as so amended, is affirmed.

BELL v. SHAW et al.

In re COOPER.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1916.)

No. 160.

1. BANKRUPTCY ⇐188(1)—LIENS—VALIDITY AS AGAINST TRUSTEE.

Under Bankruptcy 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, the oral reservation of a lien upon the sale of a stock of goods for the amount of an indebtedness which the buyer agreed to assume was not good against a trustee in bankruptcy of the buyer, since it could not

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

have been maintained against a levying creditor and the trustee occupied the same position.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286–289, 291, 293, 294; Dec. Dig. ⊂⊃188(1).]

2. SALES ⊂⊃303—BILL OF SALE—RESERVATION OF LIEN.

A bill of sale granting and conveying a stock of goods and fixtures in consideration of $12,700, the receipt whereof was thereby acknowledged, subject, however, to a note for $3,500, payable to S., which note the grantee thereby assumed and agreed to pay, did not retain a lien on the property for the payment of the note, but merely evidenced an assumption by the grantee of the grantor's indebtedness to S. as a part of the consideration of the sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 859; Dec. Dig. ⊂⊃303.]

Petition to Revise Order of the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

In the matter of William D. Cooper, bankrupt. A petition by Patrick H. Bell, claiming a preferential lien on certain property, opposed by Don B. Shaw, trustee, and others, was dismissed, and the petitioner files a petition to revise. Petition denied.

This is a petition to revise an order dismissing the petition of the petitioner claiming a preferential lien on a stock of drugs, and fixtures, for the sum of $3,500.

The facts as they appear from the record are: That on February 14, 1914, the petitioner sold to the bankrupt a drug store and fixtures for the sum of $16,200, and executed a bill of sale therefor, which was duly filed for record in the office of the recorder for the county where the property was situated, on February 18, 1914.

The bill of sale, which was executed by the petitioner, recites that in consideration of the sum of $12,700 paid to him by W. D. Cooper (receipt whereof is hereby acknowledged) has bargained and sold, and by these presents grants and conveys unto the said W. D. Cooper, the following described goods and chattels.

The bill of sale then describes the drug store and articles sold by him, and contains the following clause: "Subject, however, to a certain promissory note of $3,500.00, dated December 18, 1912, payable to V. W. Sylvester, which said note grantee assumes and agrees to pay." There is nothing in the record to indicate that the Sylvester note was a lien on any of the property.

The bill of sale also contains a covenant to warrant and defend the title against all persons whosoever, "and that said personal property is free and clear of all liens and incumbrances, except as above stated."

On December 30, 1914, William D. Cooper, petitioner's vendee, filed his petition of voluntary bankruptcy, and on the same day was adjudicated a bankrupt, and the respondent D. B. Shaw was in due time elected as trustee of the bankrupt estate, and qualified as such.

On February 10, 1915, the petitioner filed his claim with the referee in bankruptcy, to whom the case had been referred, setting up the facts of the sale as hereinbefore recited; that it had been prepared by the cashier of the People's National Bank of Perry, Iowa, one of the respondents herein, and that, at the time the bill of sale was prepared and executed, the bankrupt and the petitioner Bell agreed that the $3,500 due to Sylvester, and which was assumed by the bankrupt as a part of the consideration of his purchase, was to be a lien upon the personal property transferred; that the cashier of the bank and the bank had actual notice of the creation of the lien; and that, when the People's National Bank obtained the mortgage from Cooper upon the same property, it was agreed by the bank that its mortgage was to be junior to the lien for $3,500 created and retained by Bell; that the mortgage to the People's National Bank also included other property, in addition to the

stock of merchandise sold by the petitioner Bell; that, after the execution of the bill of sale, possession of the stock of goods was delivered to the bankrupt; and that, at the time the petition in bankruptcy was filed, the bankrupt still had in his possession, of the goods, wares, and merchandise sold to him by Bell, more than sufficient to pay the $3,500 payable to Sylvester.

The prayer of the petition was that the note for $3,500, with interest, be declared a lien on the goods sold by Bell, prior, superior and paramount to the claims of the creditors of Cooper and the bank.

The respondent trustee in bankruptcy filed a motion to dismiss the petition, in the nature of a demurrer, upon the ground that the bill of sale does not provide for any lien, and if there was any oral agreement it would be of no effect as against the trustee in bankruptcy.

On the same day the People's National Bank also filed its claim for $9,200 as a preferential claim, by reason of the mortgage it held on the property in controversy, as well as on some real estate conveyed by the mortgage.

The petitioner filed objections to the allowance of the bank's claim, so far as it claimed a lien on the stock of drugs, etc., which it claimed was subject to his lien.

The referee dismissed the petition of the petitioner to have his claim allowed as a lien upon the goods, but allowed it as an unsecured claim, and also overruled his objections to the claim for priority over the bank; sustaining the claim of the bank as a lien against the stock of goods.

Upon a petition for review, the learned trial judge, in an able opinion, approved the ruling of the referee in bankruptcy that the petitioner Bell had no lien which is superior to the rights of the trustee in bankruptcy, but reversed the ruling of the referee as to the claim of the petitioner that the bank's claim was entitled to priority on the stock of merchandise, and further held that the lien claimed by the petitioner Bell, on the stock of goods, was superior to the lien of the bank.

The petitioner now files this petition to review the order of the court, disallowing his claim to priority against the trustee in bankruptcy.

Oscar Strauss, of Des Moines, Iowa (James C. Hume, of Des Moines, Iowa, of counsel), for petitioner.

Charles L. Snyder, of Des Moines, Iowa (E. J. Kelly, of Des Moines, Iowa, of counsel), for respondent trustee in bankruptcy.

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

TRIEBER, District Judge (after stating the facts as above). In this proceeding the bank does not complain of the order of the court so far as it affects its rights, the petitioner Bell alone filing this petition to revise. Therefore the only question to be determined is whether, upon the facts hereinbefore set out, the trial court erred in disallowing the petitioner's claim of a lien on the stock of goods and fixtures sold by him to the bankrupt.

The parties having reduced their contract of sale to writing, it is at best doubtful whether oral testimony to vary it, by adding other agreements thereto, is admissible (Bunday v. Huntington, 224 Fed. 847, 140 C. C. A. 415), especially when the rights of third parties, either purchasers or creditors, who have obtained a lien on the property by reason of a levy, or seizure under process, are to be affected.

[1] By the amendment of 1910 to section 47 of the Bankruptcy Act, the trustee, "as to all the 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 proceeding thereon."

[2] But it is claimed on behalf of the petitioner that, excluding the oral proofs, the clause in the bill of sale, "subject, however, to a certain promissory note of $3,500, dated December 18, 1912, payable to V. W. Sylvester, which note said grantee assumes and agrees to pay," is in effect a retention of a lien on the property for the payment of that note, and the bill of sale having been recorded was notice to the world.

We fully agree with the learned trial judge that no such effect can be given to this clause of the bill of sale. Considering the entire instrument, it is impossible to reach any other conclusion than that the consideration of the sale was $16,200, of which $12,700 was paid to the petitioner by his vendee, and that the balance of the consideration, amounting to $3,500, was the assumption of Mr. Bell's indebtedness to Sylvester, by his vendee.

As stated by the learned trial judge in his opinion:

"If it was the intention, when the sale was made to Cooper, that the bill of sale should give to Bell a lien or mortgage, the parties would have found language with which to describe it, so that the intention would be clearly apparent."

A mere recitation that a part of the purchase money for personalty remains unpaid is insufficient to create a lien. Jones on Liens (3d Ed.) § 1110.

There can be no doubt but that, if a levy had been made upon this stock of goods under a judgment, the petitioner's claim could not have been maintained against such a levy. As the trustee occupies the same position such a creditor would have occupied, the result must be the same. Potter Mfg. Co. v. Arthur, 220 Fed. 843, 136 C. C. A. 589.

The petition to revise must be denied.

MATT J. WARD CO. v. GOELET.

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 148.

1. FRAUDS, STATUTE OF ⊂=49—AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

The lessee of a hotel owned by defendant, whose lease would expire in 1910, employed plaintiff to sell her leasehold interest, and he procured prospective purchasers, willing to purchase if they could obtain a renewal of the lease. In 1907 defendant agreed to grant such renewal, and executed a lease for six years from the expiration of the existing lease, on condition that it might be declared void if the purchasers of the leasehold interest did not fulfill every obligation of the existing lease down to the date of its expiration. Plaintiff claimed that defendant agreed to pay a commission for procuring tenants for this additional term of six years, but it was understood between the parties that defendant would not accept the purchasers as tenants unless they complied with the existing lease until the date of its expiration. *Held*, that the contract between plaintiff and defendant was not to be performed within one year, and was void under the statute of frauds, since, while the rent for the full term of the existing lease might have been paid within the year, it could

not be known until the expiration of the lease whether the purchasers would perform their obligations as to paying taxes, and gas, water, and other assessments, and as to keeping the premises in good order and repair.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 74; Dec. Dig. ⟸49.]

2. FRAUDS, STATUTE OF ⟸138(4)—EFFECT—RECOVERY ON QUANTUM MERUIT.
Though plaintiff could not recover commissions on the express contract, he might recover upon a quantum meruit for services rendered to and accepted by defendant.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 330, 331; Dec. Dig. ⟸138(4).]

3. DISMISSAL AND NONSUIT ⟸58(5)—FAILURE TO PROVE CAUSE OF ACTION ALLEGED.
Though the evidence was sufficient prima facie to make out a cause of action on a quantum meruit, the complaint in an action for commissions was properly dismissed, where the cause of action on a quantum meruit was not pleaded, and plaintiff did not ask leave to amend his complaint, so as to set it up, nor call the court's attention to any such claim.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 139; Dec. Dig. ⟸58(5); Pleading, Cent. Dig. § 1078.]

4. JUDGMENT ⟸570(4)—CONCLUSIVENESS—DISMISSAL OF COMPLAINT.
The dismissal of the complaint in an action on the express contract would not bar the prosecution of an action on a quantum meruit for the services rendered by plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1031; Dec. Dig. ⟸570(4).]

5. LIMITATION OF ACTIONS ⟸46(2)—ACCRUAL OF CAUSE OF ACTION.
Plaintiff's cause of action on a quantum meruit for services rendered to and accepted by defendant did not arise, and limitations did not run, until the expiration of the existing lease.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 241; Dec. Dig. ⟸46(2).]

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

Action by the Matt J. Ward Company against Robert Walton Goelet. Judgment for defendant, and plaintiff brings error. Affirmed.

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, in favor of defendant in error, who was defendant below. Plaintiff's action, begun September 25, 1913, was to recover $5,500 in commissions as a real estate broker for leasing defendant's property, the Hotel Walton, in Philadelphia, to certain lessees, Lukes and Zahn. The complaint alleged the making of an express contract in June, 1907, by which the defendant employed plaintiff as broker to procure tenants for the property and agreed to pay him 1 per cent. on the gross rental for the full term. The answer denied the making of this contract, and set up the statute of limitations as a separate defense. At the close of plaintiff's testimony, defendant moved to amend the answer by setting up the statute of frauds. The motion was granted and defendant moved to dismiss upon both special grounds—the statute of limitations and the statute of frauds. The court held that there could be no recovery in the face of the statute of frauds; the complaint was dismissed. The word "plaintiff," as used in this opinion, covers also Mr. Matt J. Ward himself, who personally conducted the negotiations testified to.

A. I. Sire, of New York City (William L. Stone, of New York City, of counsel), for plaintiff in error.

Cary & Carroll, of New York City (P. A. Carroll, of Boston, Mass., of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] The situation disclosed by the testimony was as follows: In 1907 the hotel was occupied by Mrs. Stafford under a lease expiring August 31, 1910. Plaintiff was employed by her to effect a sale of her interests under this lease and had procured two prospective purchasers, Lukes and Zahn, who were willing to consider the purchase of her unexpired term, provided they could obtain either a renewal of her lease or a new lease to themselves for some years after the expiration of the Stafford lease.

Plaintiff presented this proposition to defendant, who indicated that he would be willing to consent to the transfer of Mrs. Stafford's lease, is she wished to sell out, and to give new lease at a larger rental if the references of the proposed lessees turned out to be satisfactory. After further negotiations there were signed by defendant and Lukes and Zahn on November 18, 1907, an agreement and a lease. Usually, when there is an agreement to execute a lease and subsequently the lease is executed, the agreement is merged in the lease. But in this case both the instruments were signed at the same time, both sides contend that they should be read together and there seems to be no good reason why both should not be considered in ascertaining what was the whole contract, in the negotiating of which plaintiff's services were rendered.

The arrangement was as follows: Goelet leases the property to Lukes and Zahn for six years from September 1, 1910, upon two conditions: First. That Lukes and Zahn become assignees of Mrs. Stafford and enter the premises under her lease. This they did promptly, and for his services in procuring these parties to take over Mrs. Stafford's lease she has paid plaintiff. Second. That this new lease (of November 18, 1907) might be declared void by Goelet if Lukes and Zahn did not fulfill every obligation of Mrs. Stafford's lease down to the date of its expiration on August 31, 1910. If they failed to do so, and Goelet exercised his right to cancel, they would never become tenants, and the result of plaintiff's exertion would be entire failure to procure for Goelet actual tenants for six years from September 1, 1910. What would happen—whether the lease would be canceled or not—no one could possibly tell until 1910.

It is suggested that it was *possible* to eliminate defendant's right to cancel by Lukes and Zahn paying forthwith all the rent reserved under the stafford lease, and it is argued that therefore the agreement is one which might possibly be performed within a year. But this argument is not persuasive because payment of the rent was not the only thing which the lease required from the lessee. It would not be possible to pay in advance the taxes and gas, water and other assessments for the next two years and a half, because no one could tell what they

would be. Moreover one of the obligations of the Stafford lease was to keep the premises in good order and repair; whether that obligation would be performed or not could not be determined until the expiration of the lease. What would happen no one could possibly tell until 1910; whether tenants from that time on had been secured would not be known until then. This condition of affairs was perfectly well understood between the parties who made the contract here sued upon. The plaintiff himself expressly testified that Goelet said he would accept Lukes and Zahn as tenants only if they could "qualify" at the expiration of Mrs. Stafford's lease, which was some three years off. The service which plaintiff undertook to perform was to be the presentation of "qualified" tenants, not there and then, or even promptly, but three years later and defendant stated, as plaintiff testified, "they cannot qualify with me until the expiration of her (Mrs. Stafford's) lease." We concur with Judge Hunt in the conclusion that the express contract alleged and testified to was not one to be performed within a year and that the statute of frauds was a defense to it.

[2-5] Although plaintiff cannot recover commissions under the special contract sued upon, he might recover upon a quantum meruit for services rendered to and accepted by defendant. The evidence would seem sufficient, prima facie, to make out such a cause of action, but it was not pleaded, nor did plaintiff ask leave to amend his complaint so as to set it up, nor did he call the court's attention to any such claim. The court therefore properly dismissed the complaint. Such dismissal will not bar the prosecution of an action on a quantum meruit; nor would the statute of limitations interfere with the prosecution of such a claim, because the cause of action did not arise until Lukes and Zahn qualified at the expiration of Mrs. Stafford's lease, August 31, 1910.

The judgment is affirmed.

FIRST AND CITY NAT. BANK OF LEXINGTON, KY., v. McCROSSIN.

In re NEW METROPOLITAN HOTEL CO.

(Circuit Court of Appeals, Fifth Circuit. March 21, 1916.)

No. 2836.

1. INTOXICATING LIQUORS ⟸327(1)—CONTRACT—INVALIDITY—NOTES.
Acts Ala. 1911, p. 266, § 28, declares that all agreements or obligations of any person to buy or sell exclusively a product or output of beer or other malt or spirituous liquors of any particular person or corporation in any licensed place of business shall be null and void, and that no person engaged in the manufacture or sale of liquors shall be allowed to conduct a retail business for the sale of liquors in his own name or in any other person's name, or furnish money or fixtures for that purpose, while section 34 declares that any person who assists or encourages another in doing any of the acts declared to be unlawful shall be guilty of a misdemeanor. A brewing company which sold beers to a hotel company, recommended to its bank a loan to the hotel company; the brewing company guaranteeing the loan. *Held*, that as the bank had the right to make the loan and the brewing company to sell liquors, notes given the bank by the hotel company are not invalid; it not appearing that the bank was party to any agreements on the part of the brewing company in relation to the sale of its beverages.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 467, 468, 470, 472; Dec. Dig. ⟸327(1).]

2. BILLS AND NOTES ⟸494—ACTIONS—BURDEN OF PROOF.
One attacking a note on ground of illegality of consideration has the burden of proof.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. ⟸494.]

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

In the matter of the bankruptcy of the New Metropolitan Hotel Company. On motion of William P. McCrossin, trustee of the bankrupt, the claim of the First and City National Bank of Lexington, Ky., was disallowed and expunged by the referee, and on petition to review the order it was affirmed by the District Court, and the bank appeals. Order reversed, and cause remanded, with directions.

On the 24th day of June, 1914, the New Metropolitan Hotel Company of Birmingham, Ala., which conducted a barroom in connection with its hotel business, was adjudged bankrupt on its own petition. The appellee, Wm. P. McCrossin, was duly appointed trustee. Appellant, the First and City National Bank of Lexington, Ky., on August 15, 1914, filed its proof of claim, consisting of promissory notes, executed by the hotel company to the appellant, and amounting in the aggregate to approximately $8,000. Subsequently the trustee, McCrossin, filed a motion, seeking a re-examination of the claim, and prayed that it be disallowed and expunged. The referee sustained the motion, and entered an order disallowing and expunging the claim. Upon a petition to review the order of the referee the lower court denied the prayer of the petition, and passed an order, affirming and sustaining the order of the referee and taxing the costs against the petitioner. From the order last mentioned, the bank has appealed to this court.

Pursuant to the stipulation of counsel no written pleadings were filed before the referee, nor does the record contain any reasons assigned either by the trial court or by the referee, for disallowing the claim of appellant. It, how-

ever, appears in the briefs and upon the oral argument of counsel that, to defeat the claim, the trustee relies upon sections 28 and 34 of an act of the Alabama Legislature (Acts Ala. 1911, pp. 266, 268), approved April 6, 1911. These sections are in the following words:

Section 28: "That all agreements or obligations of any person to buy or sell exclusively a product or output of beer or other malt or spirituous liquors of any particular person or corporation in any licensed place of business shall be null and void. Nor shall any person engaged in the manufacture or sale of spirituous, vinous or malt liquors be allowed to conduct a business for the retail of said liquors in his own name or in any other person's name, or to furnish money or fixtures for that purpose, and any agreement, lease or mortgage made for such purpose shall be null and void."

Section 34: "That any person who commits, or aids, or abets, assists, or encourages another in committing any of the acts herein declared to be unlawful shall be guilty of a misdemeanor, and upon conviction must be fined not less than fifty dollars, nor more than five hundred dollars, for the first offense and shall be sentenced to hard labor for the county or imprisoned in the county jail for not less than thirty days nor more than six months, upon each succeeding conviction, unless a different punishment is herein specifically provided for the offense."

A. Latady, of Birmingham, Ala., for appellant.

John P. Tillman, L. C. Leadbeater, and Tillman, Bradley & Morrow, all of Birmingham, Ala., for appellee.

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

MAXEY, District Judge (after stating the facts as above). [1] Referring to the section of the act of the Alabama Legislature, quoted in the statement of the case, counsel for appellee declare in their brief that the obvious purpose of section 28 was to prevent the manufacturer from becoming a retailer of liquors in Alabama, in his own or another person's name, or from furnishing money or fixtures for that purpose. We are not disposed to differ with counsel as to their construction of the statute. But do the facts disclose that the money evidenced by the notes of appellant was lent or furnished in good faith by it, or was it a loan made in fact by the Lexington Brewing Company to the hotel company in the name of the bank to conceal the identity of the transaction? It may be admitted that if the bank actively participated in, or lent itself to, any unlawful purpose on the part of the brewing company, such participation would preclude its recovery on the notes. The question to be determined is therefore one of fact, and after a very careful examination of the record we are unable to say that the facts sustain the contention of the appellee. We regard the loan of the bank to the hotel company as one made in the ordinary course of business. And while it may be indirectly connected with the business transaction between the brewing company and the hotel company, assuming that the transaction was illegal, still the notes of the bank are supported by an independent consideration and require no aid of such transaction to sustain them.

The general principle of law applicable to a case of this character is clearly stated by the Supreme Court in the following language:

"An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the

plaintiff does not require the aid of the illegal transaction to make out his case." Armstrong v. American Exchange Bank, 133 U. S. 469, 10 Sup. Ct. 461, 33 L. Ed. 747.

The bank had the right to lend money to the hotel company notwithstanding it conducted a bar in connection with the hotel business, and the brewing company had, under the Alabama statute, the right to sell it beer, provided it did not violate the exclusive provision of section 28. And although the bank knew that the hotel company sold beer and the brewing company was engaged in its manufacture, and although the loan to the hotel company was made on the recommendation of the president of the brewing company, who was a director of the bank, and notwithstanding the bank took the guaranty of the brewing company to secure the notes, yet these circumstances fall short of tainting the notes with illegality, since the president of the bank, according to his testimony, the truthfulness of which we see no reason to question, states positively that the bank was in no manner a party to any agreement between the hotel company or Mr. Frank, its president, and the brewing company for the sale of any portion of the beer products of the brewing company, and that he knew nothing of any such agreement. He further testified that the loan was made regardless of the sale of beer, and that Mr. Frank informed him he needed the money to make improvements on the hotel and to liquidate its indebtedness.

[2] The burden of impeaching the notes held by the bank for illegality rested upon the appellee, and our conclusion is that he failed to sustain it. The notes, therefore, should be allowed as a claim against the estate of the bankrupt. It follows that the order of the trial court should be reversed, and the cause remanded, for further proceedings in accordance with law and the views herein expressed; and it is so ordered.

In re TURNOCK & SONS.

TURNOCK et al. v. HIBBARD, SPENCER, BARTLETT & CO.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916.)

No. 2270.

1. BANKRUPTCY ⇐397—EXEMPTIONS—APPLICATION OF STATE LAWS.

While, by the express provision of Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (Comp. St. 1913, § 9590), the state law is controlling as to the character and amount of exemptions to be allowed to a bankrupt, the distinction between firm and individual property in the administration of a bankrupt estate is to be determined as a matter of general law in the federal courts, irrespective of the views of the state court of the bankrupt's domicile, in equity or under insolvency acts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 678; Dec. Dig. ⇐397.]

2. BANKRUPTCY ⇐397—EXEMPTIONS—FIRM AND INDIVIDUAL PROPERTY.

Where, shortly before a partnership was adjudicated a bankrupt, it was dissolved and its property was divided among the partners, such prop-

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erty remained firm property, and under the law of Indiana, under which no exemptions are allowed out of partnership assets, the partners were not entitled to exemptions from the former firm property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 678; Dec. Dig. ⊂=397.]

Petition to Review and Revise Order of the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

In the matter of Turnock & Sons, bankrupts. The objections of Hibbard, Spencer, Bartlett & Co. to the trustee's report setting off exemptions to Richard Turnock, Sr., and others, were sustained, and the bankrupts file a petition to review and revise. Petition dismissed.

James Turnock, of Chicago, Ill. (Hughes & Arnold, William E. Wider, and Edward B. Zigler, all of Elkhart, Ind., of counsel), for petitioners.

James H. State, of Elkhart, Ind., for respondent.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. On October 22, 1914, Turnock & Sons, a partnership, was dissolved, and the property, worth $3,500, was divided among the members of the firm, all residents of Indiana. The firm liabilities were $11,000. Each partner knew of the insolvency. The dissolution was for the express purpose of enabling each of them to claim $600 exemptions, and for no other purpose. On October 30, 1914, one of them filed his voluntary petition in bankruptcy, and an involuntary petition was filed to have the firm adjudged bankrupt. Adjudications followed as to the firm and each member individually. The individual assets were merely nominal.

The question arising on the petition to review and revise is whether the referee and the District Court erred in sustaining the firm creditors' objection to the report of the trustee setting off to each partner for exemptions certain property which had belonged to the firm and which in the dissolution division had been apportioned as between them.

[1] While, by the express provision of Bankr. Act, § 6, the state law is controlling as to the character and amount of exemptions to be allowed to a bankrupt, the distinction between firm and individual property in the administration of a bankrupt estate is to be determined as a matter of general law in the federal courts, irrespective of the views of the state court of the bankrupt's domicile, in equity or under insolvency acts.

[2] In re Filmar, 177 Fed. 170, 100 C. C. A. 632, we held that as to the former firm assets coming into the possession of a trustee in bankruptcy a firm creditor is entitled to priority as against individual creditors of a bankrupt partner who had bought out his copartner a month before and had assumed the firm debts. For the purposes of administration, such assets despite dissolution are to be considered partnership property. In re Mayou, 4 De Gex, J. & S. 664. No reason is apparent for a different rule as between the bank-

rupt and his creditors. And as Indiana (Goudy v. Werbe, 117 Ind. 154, 160, 19 N. E. 764, 3 L. R. A. 114), unlike Wisconsin (In re Friedrich, 100 Fed. 284, 40 C. C. A. 378), allows no exemptions out of partnership assets, none can be claimed by these bankrupts out of the property now in the hands of the trustee and specifically identified as part of the former firm property (In re Bergman, 2 N. B. N. & R. 806).

Even if the state law in analogous proceedings were binding, it is to be noted that in Goudy v. Werbe, supra, the dissolution was effected, not, as in this case, by a division of the firm assets among the partners, without making any provision whatsoever for the payment of the debts, but by a sale to one partner, who assumed the payment of the debts. Moreover, that sale was expressly found to have been made in good faith, without intent to hinder creditors, and without any purpose of securing the exemptions.

We cannot agree with Crawford v. Sternberg, 220 Fed. 73, 135 C. C. A. 641, that moneys, withdrawn by each partner with the consent of his copartners, on the eve of bankruptcy and for the purpose of thereby securing an exemption, may be thus retained by him. In so far as such moneys are in his possession at the time of filing the petition, they must be deemed firm, not individual, assets, for all purposes. See, too, Amundson v. Folsom, 219 Fed. 122, 135 C. C. A. 24; In re Abrams (D. C.) 193 Fed. 271.

It therefore becomes unnecessary to determine whether so much of the findings, denominated by the referee "findings of fact," as holds that the dissolution was fraudulent, as to firm creditors, is, in the light of the other findings, a conclusion of law or fact.

The petition must be dismissed.

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

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 162.

1. INJUNCTION ⟸232—VIOLATION—CONTEMPTS—PUNISHMENTS.
A defendant, who violated an injunction obtained against him by a railroad company by selling a cut-rate ticket, and thereby presumably preventing it from selling a full-rate one, might properly, on application of the railroad company, be fined a sum compensating the railroad company for its loss; the fact that such fine might also act as a deterrent being no objection to its imposition.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 519–528; Dec. Dig. ⟸232.]

2. INJUNCTION ⟸232—VIOLATION—CONTEMPTS—PUNISHMENT.
In such case, it would not be sufficient to fine defendant merely the difference between the two tickets, as the company had been put to the trouble and expense of watching defendant to ascertain if he were violating the injunction, of securing evidence of the fact, and of presenting it to the court, and the fine should be large enough to cover all these items.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 519–528; Dec. Dig. ⟸232.]

3. FINES ⟸11—IMPRISONMENT FOR NONPAYMENT.
If defendant should fail to pay the fine imposed, the court could further order that he be imprisoned until he paid the fine; this not being imprisonment for a fixed term as a penalty which defendant was powerless to escape, since he could escape imprisonment by obeying the order and paying the fine, or by satisfying the court that he had no money with which to do so.

[Ed. Note.—For other cases, see Fines, Cent. Dig. §§ 12, 13; Dec. Dig. ⟸11.]

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

Suit by the Delaware, Lackawanna & Western Railroad Company against Harry Frank. From an order denying without prejudice a motion to punish defendant for contempt of court, complainant appeals. Reversed.

Ellis W. Leavenworth, of New York City, for appellant.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The District Court in November, 1909, perpetually enjoined defendant from dealing in certain forms of railroad tickets issued by complainant. The injunction was duly served upon him. On or about June 8, 1915, he violated the injunction. About these facts there is no dispute. Complainant therefore applied, in the same suit, to the same court, praying that defendant be adjudged to be in contempt and punished therefor.

[1-3] Although no opinion was written it seems apparent that the denial of the application "without prejudice" was because the court

was of the impression that it had no authority to grant the relief prayed for because of the decisions in Gompers v. Buck's Stove & Range Company, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, and In re Kahn, 204 Fed. 581, 123 C. C. A. 107. We do not understand that they control this application which is one by complainant for relief; these decisions have not put an end to civil remedies for contempt, which are remedial in their character. The court was not asked to order imprisonment for a fixed term as a penalty for an offense; a penalty which the defendant could not escape by anything it might be within his power to do. Undoubtedly defendent is in contempt of the prohibitory order of the District Court. By his disobedience he has caused pecuniary loss to complainant; had he not sold a cut-rate ticket it would presumably have sold a full-rate one; he may properly in this proceeding be fined a sum, which will fully compensate for such loss; that such fine may also act as a deterrent is no objection to its imposition. It may be difficult to get at the exact sum which will compensate complainant for its loss; it would not be sufficient to fine defendant merely the difference between the two tickets. Complainant has been put to the trouble and expense of watching the defendant to ascertain if he were violating the injunction, of securing evidence of the fact, of presenting it to the District Court and here. The fine should be large enough to cover all these items. If defendant should fail to pay the fine imposed on or before a certain day the District Court could further order that he be imprisoned until he paid the fine. That would not be imprisonment for a fixed term as a penalty which defendant was powerless to escape; he could escape imprisonment by obeying the order and paying the fine, or by satisfying the court that he had no money with which to do so.

The order is reversed.

Ex parte CHAN KAM.

CHAN KAM v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 13, 1916.)

No. 2482.

1. HABEAS CORPUS ⟸92(1)—SCOPE OF INQUIRY—DEPORTATION OF CHINESE—WEIGHT OF EVIDENCE.

On habeas corpus to procure the discharge of a Chinese woman ordered deported for prostitution in violation of Act Feb. 20, 1907, c. 1134, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, 36 Stat. 263, where there was evidence tending to show petitioner's guilt, the court is not required to weigh the evidence.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-89, 92-94, 96; Dec. Dig. ⟸92(1).]

2. ALIENS ⟸32(9)—DEPORTATION OF CHINESE—PROCEEDINGS—EXAMINATION.

Where a Chinese woman was given a hearing at which she was represented by counsel, was acquainted with the charge contained in the warrant of arrest and the evidence on which it was based, and there was no evidence of abuse of discretion or arbitrary action, she was given a fair and impartial hearing, and was not illegally restrained.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⟸32(9).]

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 proceedings by Chan Kam, to secure her discharge from a warrant ordering her deportation. From an order of the District Court, denying the writ, petitioner appeals. Affirmed.

Joseph P. Fallon, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and ROSS, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from an order of the District Court denying petition for a writ of habeas corpus. The appellant is a Chinese woman who was arrested on the 26th day of August, 1913, at Dinuba, Cal., upon a warrant issued by the Department of Labor for the arrest of the appellant on the charge that she was in the United States in violation of the act of February 20, 1907 (34 Stat. pt. 1, p. 898, c. 1134), as amended by the act of March 26, 1910 (36 Stat., pt. 1, p. 263, c. 128) in this: That she was a prostitute, and had been found an inmate of a house of prostitution and practicing prostitution subsequent to her entry into the United States.

In her petition to the District Court she alleged that she was arrested on the aforesaid warrant and taken before the Inspector of Immigration at Fresno, in the state of California, and was examined upon the warrant; that subsequently the Secretary of the Department of Labor had ordered that she be deported from the United States. A copy of the testimony taken upon her examination is attached to the petition.

[1] The alleged illegality of her restraint consists in the abuse of discretion on the part of the immigration officers in failing to give her a fair and impartial hearing. We have examined the testimony, and we do not think it necessary to repeat it here. The Immigration Inspector was of the opinion that the evidence was sufficient to show that she was guilty of the offense charged in the warrant. There was evidence taken upon the examination which tended to show that she was guilty of that charge. We are not required to weigh that evidence.

[2] The only remaining question for us to determine is whether she was given a fair and impartial hearing upon the examination. We find no evidence of abuse of discretion or arbitrary action on the part of the officers in any part of the proceedings. The appellant was represented by counsel at the hearing; she was made acquainted with the charge contained in the warrant of arrest and the evidence upon which it was based; she was also permitted to introduce testimony on her own behalf. We are of the opinion that this evidence does not show that she was illegally restrained of her liberty.

The order, denying the writ of habeas corpus, is therefore affirmed.

In re COOPER.

(Circuit Court of Appeals, Second Circuit. February 15, 1916.)

No. 154.

1. BANKRUPTCY ⊜414(1)—APPLICATION FOR DISCHARGE—OBJECTIONS—BURDEN OF PROOF.

On the hearing of objections to a bankrupt's discharge on the ground that he had concealed from his trustee lots owned by him, and had made a false oath in omitting them from his schedules, where it appeared that he owned the lots at one time, it was for him to show that he had disposed of them before bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720; Dec. Dig. ⊜414(1).]

2. BANKRUPTCY ⊜414(3)—APPLICATION FOR DISCHARGE—OBJECTIONS—SUFFICIENCY OF EVIDENCE.

Where the bankrupt testified that he had sold such lots prior to bankruptcy, but there was no witness as to the alleged sale except himself, and no corroborative evidence, the sale was not shown by satisfactory proof, and the objections to the discharge were properly sustained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 722; Dec. Dig. ⊜414(3).]

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

In the matter of Samuel Cooper, bankrupt. From an order denying a discharge to the bankrupt, he appeals. Affirmed.

Solomon S. Leef, of New York City, for appellant.

Morris Grossman, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. There were two specifications of objection to discharge:

1. That bankrupt concealed from his trustee property consisting of two lots at Massapequa, Long Island, valued at $500.

2. That he made a false oath in omitting these two lots from his schedules.

[1, 2] The bankrupt admitted that he bought the lots seven or eight years before, for $500, payable in installments, and that he still owned them in August, 1912, when he filed a financial statement with R. G. Dun & Co. It was for him to show that he has disposed of them before bankruptcy. His story is that, needing some money for expenses in connection with his family and not wishing or not being able to draw it from the business, he sold the two lots for $200 in October, 1912. To this alleged sale there is no witness except himself, and he introduced not a particle of corroborative evidence. We concur with Judge Hand in the conclusion that sale of the lots is not shown by satisfactory proof and that the objections above stated should be sustained.

Order affirmed.

ARBETTER FELLING MACH. CO. v. LEWIS BLIND STITCH MACH. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916.)

No. 2248.

PATENTS ⊂=288—SUITS—JURISDICTION—VENUE.

Act March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, gave the Circuit Courts jurisdiction concurrent with the state courts of certain suits, and provided that no civil suit should be brought against any person by any original process or proceeding in any other district than that whereof he was an inhabitant, but that, where the jurisdiction was founded only on diverse citizenship, suit should be brought in the district of the residence of either the plaintiff or the defendant. *Held*, that the Circuit Court had no jurisdiction of a suit under Rev. St. § 4915 (Comp. St. 1913, § 9460), brought in a district other than that whereof defendant was a citizen, though the suit was one over which the federal courts had exclusive jurisdiction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460–466; Dec. Dig. ⊂=288.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit, originally brought in the Circuit Court, by the Lewis Blind Stitch Machine Company and another against the Arbetter Felling Machine Company. Decree for complainants, and defendant appeals. Reversed, with directions.

Nathan Heard and Frederick P. Fish, both of Boston, Mass., for appellant.

Edward Rector and Geo. T. May, Jr., both of Chicago, Ill., for appellees.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. We are at the outset confronted with the question of the jurisdiction of the former Circuit Court. The sole defendant served with process pleaded in abatement to the jurisdiction that it was a corporation organized in Maine. The precise question is: Can a defendant, citizen of one state, be compelled to answer a suit brought by a citizen of another state in the Circuit (now District) Court in and for a third state to secure the issuance of a patent under section 4915 of the Revised Statutes (Comp. St. 1913, § 9460)? This involves the construction of Act March 3, 1875, c. 137, § 1, as amended by Act March 3, 1887, c. 373, § 1, corrected by Act Aug. 13, 1888, c. 866, since embodied in Judicial Code (Act March 3, 1911, c. 231) § 51, 36 Stat. 1101 (Comp. St. 1913, § 1033), and copied in the margin.[1]

In Re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, the court held that the clause limiting the venue in civil suits "against any person" to the district of which he was an inhabitant, with the exception specified in the statute, must be confined to suits against citizens of the United States; otherwise, suits could not be brought in the federal courts against, but only by, aliens. The suit involved a patent, and was, like the present case, by express statutory provision, within the exclusive jurisdiction of the federal courts. The court in its opinion stated this as a second reason for its conclusion.

While in Galveston, etc., Ry. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, decided at the same term, it was said "that both the decision and the reasoning in the Hohorst Case were carefully limited to a suit brought by a citizen against an alien," nevertheless we cannot assent to appellant's contention that the second ground of decision in Re Hohorst is a mere dictum; if these cases stood alone, we should be constrained, as other courts had felt themselves constrained, to hold that the venue provisions of the act are inapplicable to suits, such as those involving patents, in which the jurisdiction of the federal courts is exclusive, and that in such cases suit might be brought, as under the act of 1875, in any district in which the defendant is found.

But in Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300, the court held the act of 1888 "inapplicable even upon the assumption that the cause of action was alone cognizable in a court of the United States, as the particular venue of the action was not provided for elsewhere than in that statute." That case did not involve a patent; it arose under the Interstate Commerce Act; exclusive jurisdiction had not been *expressly* conferred upon the federal courts in such cases. But if the act is ap-

[1] See note at end of case.

plicable in such a case, the second ground for the decision in Re Hohorst must necessarily be deemed erroneous and impliedly overruled. There can be no difference in this respect between a patent and any other case over which the federal courts have or are assumed to have exclusive jurisdiction, whether expressly or impliedly conferred upon them. That the Supreme Court assumed, without expressly deciding, that the federal jurisdiction is exclusive in that class of cases, does not in any way weaken the binding force of the decision as holding the act applicable as well in cases of exclusive as of concurrent jurisdiction.

Though the court in Thoma v. Perri (D. C.) 205 Fed. 632, expressed the view that a suit under section 4915 could be maintained in any district in which a nonresident corporation was found, jurisdiction was sustained as well on other grounds. See, too, So. Pacific Co. v. Arlington Heights Fruit Co., 191 Fed. 101, 111 C. C. A. 581, and Fraser v. Barrie (C. C.) 105 Fed. 787.

The decree must be reversed, with directions to dismiss the bill for want of jurisdiction over the person of the defendant.

NOTE.—"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offenses cognizable by them. [See Judicial Code, § 24 (Comp. St. 1913, § 991).]

"But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court;

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." [Judicial Code, § 51 (Comp. St. 1913, § 1033).]

BYERLEY v. BARBER ASPHALT PAVING CO.

(District Court, S. D. West Virginia. February 18, 1916.)

No. 470.

1. PATENTS ⊂=44—ANTICIPATION—ACCIDENTAL PRODUCTION OF PATENTED PRODUCT—"NOVELTY."

"Novelty" is not negatived by the prior accidental production of the same thing, when the operator does not recognize the means by which the result was accomplished, and no knowledge of it is derived therefrom by any one.

[Ed. Note.—For other cases, see Patents, Dec. Dig. ⊂=44.

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

2. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PETROLEUM ASPHALT.

The Byerley patent, No. 524,130, for a process of making asphaltic products from petroleum tar, and for a new asphaltum petroleum product, was not anticipated, discloses invention, and is entitled to a liberal construction both as to process and product claims. Claim 2, for the product, described as "varying in hardness at atmospheric pressure from a rubber-like consistency to a mass of a hardness * * * like the natural asphaltums," is sufficiently broad to embrace such products as are solid as distinguished from liquid and as exhibit a rubber-like consistency. Both classes of claims, also, *held* infringed.

In Equity. Suit by Francis A. Byerley, as executor, trustee, and individually, against the Barber Asphalt Paving Company. On final hearing. Decree for complainant.

W. K. Richardson and Harrison F. Lyman, both of Boston, Mass., for plaintiff.

Henry N. Paul, Jr., of Philadelphia, Pa. (Fraley & Paul, of Philadelphia, Pa., on the brief), for defendant.

KELLER, District Judge. The complainant, as executor of and trustee under the will of his father, Francis X. Byerley, and individually as legatee under said will, instituted this suit claiming infringement by the defendant of letters patent of the United States No. 524,130, granted to said Francis X. Byerley, August 7, 1894, upon an application filed April 28, 1893, for process and product for the manufacture of asphalt, and other products from petroleum.

The claims alleged to be infringed by the process and product of the defendant and by its use of products manufactured by others are claims 1, 2, 3, 6, 7, 8, and 9, which are described in the patent in suit as follows:

"1. The process of making asphaltic products by prolonged exposure of petroleum tar to a pitch-forming noncoking temperature in a still, with agitation of said tar, and exposure of the same to air, substantially as described.

"2. The herein described new asphaltic petroleum products, soluble in benzine, varying in hardness at atmospheric temperatures from a rubber-like consistency to a mass of a hardness and conchoidal fracture like the natural asphaltums, the less hard having also a conchoidal fracture at lower temperatures, melting at from about 200° Fahrenheit to about 400° Fahrenheit according to hardness, and in general having characteristics belonging to asphaltic residual products from a prolonged exposure of petroleum tar to a pitch-forming noncoking temperature in a still with agitation of said tar

and exposure of the same to air in contradistinction to previously known natural or artificial products of a more or less asphaltic character, substantially as set forth.

"3. The process of making asphaltic products, by prolonged exposure of petroleum tar to a pitch-forming noncoking temperature in a still, with exhaustion of the products of distillation, agitation of the tar, and exposure of said tar to air, substantially as described."

"6. The process of making asphaltic or pitchy bodies, by prolonged exposure of petroleum tar to a pitch-forming temperature in a still, with agitation of said tar, and exposure of the same to air, substantially as described.

"7. The process of making asphaltic or pitchy bodies, by prolonged exposure of petroleum tar to a pitch-forming temperature in a still, with exhaustion of the products of distillation, agitation of said tar, and exposure of the same to air, substantially as described.

"8. The process of making asphaltic or pitchy bodies, by subjecting pitch-yielding tar to a pitch-forming noncoking temperature, with agitation of the tar, and exposure of the same to air, substantially as described.

"9. The process of making asphaltic or pitchy bodies, by subjecting pitch-yielding tar to a pitch-forming noncoking temperature, with exhaustion of the products of distillation, agitation of the tar, and exposure of the same to air, substantially as described."

Of these claims, No. 2 is for products, and all the rest are process claims.

In view of prior litigation involving this patent in which its validity was sustained by the Circuit Court of Appeals for the Third Circuit in the case of Francis X. Byerley v. Sun Company, 184 Fed. 455, 106 C. C. A. 537, all defenses set up in the answer of this defendant have been tacitly or expressly abandoned, except two, namely, anticipation and noninfringement, and no references in support of these defenses which were properly urged in the case against the Sun Company and were overruled by the decision in that case are insisted upon or relied upon in the brief of defendant filed before me, in which the defenses here relied upon are stated as follows:

I. The patent in suit is invalid by reason of the prior patenting and publication of the same invention to one John M. Sparrow, in Canadian letters patent No. 35,117, dated October 2, 1890, and an accompanying publication describing the same invention read by David Douglas before the American Gaslight Association in the year 1891, and published in the printed proceedings of that society in September, 1892.

II. This defendant does not infringe upon the claims of the patent in suit, which are specifically limited to the employment of the process described therein for the manufacture of a "solid body" or "pitch" having a consistency precisely defined in the specification; whereas, this defendant has employed its process in the manufacture of much softer bodies, not within the terms of the claims which are limited to the harder bodies both in terms and of necessity because the use of such process for the production of semisolid or viscous bodies like those manufactured by defendant had long been known.

The Sparrow Patent.

Before proceeding to a discussion of this defense, it may be well to call attention to an apparent error in the stated defense.

From the proofs it does not appear that any statement describing the Sparrow patent was made by David Douglas, and published by the

American Gaslight Association, but that W. H. Pearson, Jr., who was superintendent of the Consumers' Gas Company of Toronto, explained a process being used by "parties in Toronto," which may or may not have had reference to the Sparrow process. In any event, it can scarcely be contended that the process described by Mr. Pearson is full enough to serve as an anticipation of Byerley's patent under the provisions of section 4886, R. S. (Comp. St. 1913, § 9430).

As to the Sparrow patent itself, it must stand or fall as an anticipation by the adequacy or inadequacy of the description therein contained to acquaint one skilled in the art with the process which is so circumstantially described and claimed in the Byerley patent.

It seems to me that a simple reading of the Sparrow patent is sufficient to demonstrate that the specifications fall far short of that full and clear description that alone can serve as an anticipation of a duly granted United States patent. Sparrow says that his invention consists of a new and useful process for "separating or driving out the water and volatile matters from the refuse or tar resulting from the manufacture of illuminating gas from petroleum oil, and thereby reduce it to densities suitable for roofing paint, roofing and paving pitches, and for other purposes."

There is here not only no suggestion of the appreciation of a chemical change induced by the process described, but, on the contrary, the idea of such change is expressly negatived by the statement that his process is one for the separating and driving out the water and volatile matters, and no suggestion whatever can be indulged that Sparrow ever had in mind a change in the material used by him other than that involved in "driving out the water and volatile matters." This material (water-gas tar) was a very different material than that commonly used in the Byerley process, and contained as much as 40 per cent. of water, and it was, of course, necessary in order to use this refuse to drive off this water, and I think it is apparent from his whole patent that Sparrow himself never appreciated the fact that his hot air, at whatever temperature applied (as to which his specifications are silent), ever had any effect on his material other than that of "driving out" volatile matters.

[1] The fact that the air as used in the Sparrow process may, or must, have had the same effect as in the Byerley process, is far from conclusive of anticipation, for it is settled law that novelty is not negatived by a prior accidental production of the same thing, when the operator does not recognize the means by which the result is accomplished, and no knowledge of it, or of the methods of its employment, is derived from it by any one. Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. (C. C.) 55 Fed. 307 (in which case, see Judge Taft's statement of this principle); Chase v. Fillebrown (C. C.) 58 Fed. 377; Wickelman v. A. B. Dick Co., 88 Fed. 266, 31 C. C. A. 530; Tilghman v. Proctor, 102 U. S. 711, 26 L. Ed. 279; Topliff v. Topliff et al., 145 U. S. 161, 12 Sup. Ct. 825, 36 L. Ed. 658.

Moreover, it appears from the testimony in this case that it is by no means true that any application of air to tar will result in its change into the artificial asphaltic products of Byerley's process.

These results, under the testimony, are dependent upon conditions affecting temperature, time, apparatus, and air quantities. Defendant's expert, Mr. Forrest (Complainant's Record, pp. ———, Q. 17–20), described a process of defendant "only for the purpose of removing moisture in the residuum and of mixing the materials," the air being blown from six to ten hours to a day or two, and as to this process he swears (C. R. R. A. Q. 250–252) that the air does not operate to modify the character of the mass (material) in any respect.

[2] I reach the conclusion that neither the Sparrow Canadian patent No. 35,117, nor the statement of Mr. W. H. Pearson, Jr., published in the proceedings of the American Gaslight Association in September, 1892, constitute an anticipation rendering the patent in suit invalid.

In this connection, I might say that the file wrapper in Byerley's application is in evidence, and the office correspondence abundantly shows that Byerley strenuously contended (as indeed I think his specification and claims also assert) that his process worked a chemical change in the constituents of the materials used. That it in fact does so is not only not denied, but is admitted by all the expert witnesses, and that Sparrow had no idea of any such change appears to be clear from his own words.

The Defense of Noninfringement.

It is strenuously claimed by the defendant that some, if not all, of its own products which are the subjects of suit do not infringe the claims of the Byerley patent because the Byerley process is limited to the manufacture of asphaltic products having a precisely defined solidity much in excess of defendant's products.

It is true that, in lines 13 to 15 of his specifications, Mr. Byerley says, "This invention relates more particularly to the manufacture of solid bodies from petroleum," but he goes on in the same paragraph to say, "but each of the improvements constituting the same is included for all the uses to which it may be adapted."

It thus appears that for limitation of the several process claims light must be sought in the language of the claims themselves, and the descriptive part of the patent, to wit, the specifications, must be read as merely illustrative unless the clear intent to limit the claims necessarily appears therefrom.

Similarly, the product claim No. 2 is to be interpreted in accordance with its language, and it is entirely conceivable that such claim might be confined by its own language within limits to which the process claims, or some of them, might not be subject.

In the first place, the process patented and claimed by Byerley is described in his patent and is shown by the testimony to be a progressive one, continued for varying lengths of time, but in any case for a considerable period after the materials have been brought to a temperature at which changes described in the specification begin to take effect. Therefore it would seem that, conceding the validity of the patent, it should be liberally construed, with only such limitation upon it as is made necessary by the claims themselves, or the necessary implications arising from the language used in them.

Therefore, in construing the language of the product claim (No. 2) in reference to the degree of hardness of the patented asphaltic products, the expression "varying in hardness at atmospheric temperatures from a rubber-like consistency to a mass of a hardness and conchoidal fracture like the natural asphaltums," while doubtless not covering truly viscous products, the language should be construed as embracing such products as are "solid," as distinguished from "liquid," and exhibit a "rubber-like" consistency regardless of whether they exhibit the same, a greater, or less degree of penetrability under test. I know of no reason why the further distinction between "solids" and "semisolids" should be sought to be drawn, as Byerley was distinguishing these products from previously known artificial asphaltic products, none of which, so far as I am aware, or as has been shown in testimony, bore any other form than that of a thick viscous liquid.

"Rubber-like consistency," as used by Byerley, in my judgment refers quite as aptly, and more so, to the peculiar elasticity of that material, than it does to its penetrability, as elasticity is the peculiar quality of rubber, and this quality is possessed by each and all of defendant's alleged infringing products, and they are each and all "solid" as contradistinguished from even a "viscous" liquid.

With reference to the process claims, I do not find that those in suit are so limited that it can be said that none of them are infringed by each and all of the defendant's processes. They were all made the subjects of lengthy arguments and discussion in the Patent Office, as is shown by the file wrapper (in evidence by stipulation of counsel in this case), and were all allowed as exhibiting distinct differences in the extent of claim and method of statement.

I call especial attention to the language of claim No. 8, which seems very wide in scope, as the process is not limited either as to duration or as to apparatus, and includes as well the use of defendants "kettle" as of complainants' "still"; the only limitation being that it is a process of making "asphaltic or pitchy bodies" by the means set forth in the allowed claim, and I construe this limitation as including any product so produced having a "body" as distinguished from a liquid, and so construed each and all of defendant's products infringe this claim.

Upon the general features of the utility and novelty of the Byerley invention, I do not see any reason to enlarge. They have been referred to in the opinions of both the District Court (181 Fed. 138) and the Circuit Court of Appeals (184 Fed. 455, 106 C. C. A. 537) in the case of Byerley v. Sun Company, and I fully agree with those opinions as herein indicated in my view of the proper interpretation of this patent.

I, accordingly, hold that both "hydrolene B" and "obispo refined asphalt," the purchased products used by defendant and referred to in the evidence, as well as defendant's first, second, and third processes, and the products thereof, are infringements of the patent in suit, and that complainant is entitled to relief, and a decree for an accounting may be drawn.

In re ISRAELSON.

In re LYNCH.

(District Court, S. D. New York. January 13, 1916.)

1. MORTGAGES ⟸199(2)—CONSTRUCTION—RENTS—ASSIGNMENT.
A clause in a mortgage, providing that in the event of default the mortgagees should have the right to take possession of the premises and receive the rents and profits therefrom, and "in the event of any such default such rents and profits are hereby assigned to the mortgagees as further security for the payment of the said indebtedness," authorizes the mortgagees to collect the rents only after taking possession of the property, not while permitting it to remain in the possession of the mortgagor after default.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 513; Dec. Dig. ⟸199(2).]

2. COURTS ⟸368—RULES OF DECISION—DECISION OF STATE COURT.
A decision of a state court construing a clause of a mortgage assigning rents and profits to the mortgagees as operating only after the mortgagee takes possession of the premises after default *held* controlling on the federal court in construing a clause similar in purport and substantially similar in phraseology, rather than a later state decision construing an assignment clause not so similar.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 951; Dec. Dig. ⟸ 368.]

In Bankruptcy. In the matter of Jacob Israelson, bankrupt. Application of William J. Lynch, as receiver of the rents and profits, appointed in proceedings in the state court to foreclose a mortgage, for an order requiring the receiver in bankruptcy to pay over rents collected by him. Application denied.

Peter Eagan, of New York City, for receiver Lynch.

Murray, Prentice & Howland, of New York City, for mortgagees.

Stern, Barr & Tyler, of New York City (Henry C. Moses, of New York City, of counsel), for receiver in bankruptcy.

MAYER, District Judge. Israelson was petitioned into bankruptcy, and on November 18, 1915, Henkel was appointed receiver by this court and duly qualified. Thereafter the Messrs. Rusch commenced an action in the New York Supreme Court to foreclose a mortgage on certain premises owned by the alleged bankrupt, and Henkel was duly made a party defendant in that action. On December 21, 1915, Lynch was duly appointed receiver of the rents and profits in the foreclosure action and duly qualified. Lynch now asks that Henkel be required to pay over to him the rents collected by Henkel up to the date of Lynch's appointment.

[1, 2] On October 22, 1911, the bankrupt defaulted in the payment of the principal sum due under the terms of the bond and mortgage and has defaulted in the payment of interest. Apparently the bankrupt remained in possession of the premises until the appointment of Henkel, and since October 22, 1911, has paid some installments on the principal, as well as interest up to and including July 1, 1915. The complaint in the foreclosure action alleges, as the only ground of default, the failure to pay the balance of the original principal.

It is fair to infer that the alleged bankrupt, as owner, collected the rents up to the time of the filing of the petition in bankruptcy, and that the default was allowed to remain dormant as long as interest was paid and payments on account of principal were made. The fourth paragraph of the mortgage provides:

"Fourth. That in the event of any default mentioned in article third of these covenants the said mortgagees shall have the right forthwith to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues, and profits, after payment of all the necessary charges and expenses, on account of the amount hereby secured, and, in the event of any such default, the said rents and profits are hereby assigned to the mortgagees as further security for the payment of the said indebtedness."

The question is whether the assignment of rents became operative at the time of the default or only upon the appointment of the state court receiver. In Abrahams v. Berkowitz, 146 App. Div. 563, 131 N. Y. Supp. 257, this precise question was before the Appellate Division of the Second Department. In that case the clause under consideration was as follows:

"That if default shall be made in the payment of the principal sum mentioned in the condition of the said bond, or of the interest which shall accrue thereon, or of any part of either, at the respective times therein specified for the payment thereof, the said mortgagee shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues, and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are in the event of any such default hereby assigned to the mortgagee."

It is apparent that the clause in the mortgage in the case at bar and that discussed in Abrahams v. Berkowitz, supra, were similar in purport and substantially similar in phraseology. The expression "the said rents and profits" in each clause clearly means the rents and profits collected by the mortgagee after he has entered upon and taken possession of the mortgaged premises; and it may be here said, as it was in the Abrahams Case, that:

"It is obvious from the language used that the assignment relates only to the rents after the entry and the taking possession of the mortgaged premises."

It is now urged that the Abrahams Case has been distinguished in Sullivan v. Rosson, 166 App. Div. 68, 151 N. Y. Supp. 613 (First Division), which was decided by a divided court, and, according to counsel, is pending, by allowance, on appeal to the New York Court of Appeals. In the Sullivan Case the clause was:

"Sixth. The holder of this mortgage, in any action to foreclose it, shall be entitled, without notice and without regard to the adequacy of any security for the debt, to the appointment of a receiver of the rents and profits of said premises; and said rents and profits are hereby, in the event of any default or defaults in paying said principal or interest, assigned to the holder of this mortgage as further security for the payment of said indebtedness."

It will be noted that this clause provides, in the event of any default, that the rents and profits "are *hereby* * * * assigned" and the court holds that it is competent for the owner of premises to assign rents to accrue in the future and that the assignee is entitled thereto without taking possession, regardless of whether or not he

has a right to re-enter or to have a receiver appointed. The clause in the Sullivan Case is quite different from that discussed in the Abrahams Case and in the case at bar. I think, therefore, that I should follow the Abrahams Case as authority, and, in addition, I agree with its reasoning and conclusion.

The motion is denied.

THE SEGURANCA.

(District Court, E. D. Louisiana. January 24, 1916.)

No. 15328.

SHIPPING ⊂⊃51—BREACH OF CHARTER—LIEN OF CHARTERER.

Where the master of a vessel agreed with the charterer to collect freight on a portion of the cargo on delivery, and to pay to the charterer the difference between the freight so collected and the charter rate, such agreement amounted to a waiver of a provision of the charter party requiring payment of freight in advance, if demanded, and the charterer has a lien on the vessel for the sum so collected and not paid over, which may be enforced by suit in rem.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 203–210; Dec. Dig. ⊂⊃51.]

In Admiralty. Suit by George W. Howe & Co. against the steamship Seguranca and others. On exceptions to libel. Overruled.

John C. Avery, of Pensacola, Fla., and Grant & Grant, of New Orleans, La., for libelants.

John C. Hollingsworth, of New Orleans, La., for respondents.

FOSTER, District Judge. In this case libelants substantially allege that they chartered the steamship Seguranca for a voyage between Pensacola, Fla., and London, England, and, with the authority of the owners of the steamship, relet part of the space; that in accordance with the terms of the charter party libelants paid full freight to the master of the ship on the cargo shipped by them, but the Pensacola Lumber & Timber Company, which had sublet part of the space, desired to pay freight upon its shipment on arrival at London; that the master and agents of the steamship agreed with the libelants that the master should collect freight on that part of the cargo on delivery, and the master gave libelants a five-days arrival note against the freight for the difference between the charter rate and the rate paid by the shipper, amounting to £2,192. 5. 7.; that the ship proceeded to London, made delivery of her cargo, and the master collected the freight as obligated by the five-days note, but, though admitting the collection of £1,450, remitted no part of same to libelants.

The libel further alleges that under the terms of the charter party the ship was required to take not less than 1,008 standards of lumber, but was expected to take more; that the cargo was ordered alongside the ship by the master at Pensacola, and was furnished to more than the amount of 1,008 standards of lumber, or the equivalent, as agreed upon; but when the vessel had only loaded 709 standards the

master refused to receive or permit to be loaded a large part of the cargo then alongside, and libelants, for the purpose of fulfilling the contracts for delivery of same in London, were compelled to secure other means of transporting it, and did so at a cost greater than if it had been taken by the steamship, and they claim on that ground $843.89.

The ship being in the port of New Orleans, admiralty process issued against her, and she was seized. The owners of the ship, through the master, filed a claim for her, and in the usual course she was released on bond. The respondents have filed an exception, setting up that the allegations of the libel do not disclose any admiralty lien upon said vessel and constitute solely an action in personam, and that the court is without jurisdiction to proceed in rem against the vessel.

Respondents rely upon the clause of the charter party that full freight is to be prepaid at the port of loading, on the signing of the bills of lading, if required by the owners, and, further, on paragraph 4 of the charter party, which stipulates for an advance of cash to the master by the charterers for his ordinary disbursements, such advances to be indorsed upon the bills of lading on account of freight, but no draft to be given for such advances; and they say that the master was therefore entirely without authority to sign the five-days note.

The rule is that the freight and vessel are reciprocally bound to each other, and that breaches of charter give rise to liens on vessels, but there are cases denying the lien where the breach of charter has been of a nonmaritime character. However, it has always been held that claims growing out of contracts of affreightment may be properly enforced against the vessel, and there are many cases illustrating the various kinds of claims that have been so adjudicated. The instant case presents but a variation of the usual controversy between charterer and vessel, though perhaps the exact facts may not have been adjudicated before in any of the reported cases. The stipulation in the charter party regarding the collection of freight in advance, of course, could be waived by the vessel, and the master had implied authority to do so. Having done so, the claim of the charterers against the vessel arises from the agreement of the master to collect the freight in their behalf and remit them the difference, and does not arise from the execution of the note. For the purposes of this case, the five-days note may be treated simply as evidence of the amount arrived at by the parties in the settlement between the master and the charterers. It is a well-known custom of the port of New Orleans for the master to give such notes, and his doing so would not take the case out of the usual rule, even conceding that the master had no authority to sign it. Clause 4 of the charter relied upon refers to advances made to the vessel, and has no application to the note here given. With regard to the second cause of action, the allegations show a clear breach of the charter, and there could be no question that the claim to that extent could be enforced in rem.

The exception to the libel will be overruled.

In re GIAQUINTO.

(District Court, S. D. New York. January 28, 1916.)

ALIENS ⊜68—NATURALIZATION—PROCEDURE—STATUTORY PROVISIONS.

Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1913, § 4352), requires petitions for naturalization to be verified by the affidavits of witnesses. Section 5 provides that the clerk immediately after the filing of the petition shall give notice by posting the name of the alien, etc., and the names of the witnesses whom he expects to summon, and that on request the clerk shall issue a subpœna for the witnesses so named by the applicant, but that, if such witnesses cannot be produced upon the final hearing, other witnesses may be summoned. Section 6 provides that final action shall not be had upon a petition until at least 90 days have elapsed after filing and posting the notice of such petition. *Held*, following a former decision of this district, in the absence of controlling authority, that the names of witnesses substituted under section 6 must be posted for 90 days.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊜68.]

Application by Giorgio Giaquinto for naturalization. Application not granted.

MAYER, District Judge. Giaquinto is an applicant for naturalization, and on final hearing one of his witnesses did not appear. He desires to substitute a witness, and the question is whether it will be necessary to post the name of the substituted witness for a period of 90 days, or whether said substituted witness may be summoned and examined without the prerequisite of posting.

The applicable sections of the act of June 29, 1906, are as follows:

"The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States." Section 4, second condition, third paragraph.

"That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpœna for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned." Section 5.

"That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition." Section 6.

It seems that there has been a conflict of authority in reference to this question. Some courts have held that the posting is not necessary: In re Schatz, 161 Fed. 237 (Circuit Court, D. Oregon, April 7, 1908); U. S. v. Doyle, 179 Fed. 687, 103 C. C. A. 233 (Circuit Court of Appeals, Seventh Circuit, April 19, 1910); In re Neugehauer, 172 Fed. 943 (District Court, W. D. Pennsylvania, October 11, 1909); U. S. v. Ojala, 182 Fed. 51, 104 C. C. A. 491 (Circuit Court of Appeals, Eighth Circuit, October 11, 1910)."

In addition I am informed that the posting of the names of substitute witnesses is not required in the United States District Court for the Eastern District of New York and also is not required in certain cases in the northern counties of the state of New York, in which naturalization hearings are held at infrequent intervals, and where such posting would result, at times, in delaying an applicant's admission to citizenship for many months. The authorities which have held that such posting is necessary are U. S. v. Daly, 32 App. D. C. 525, and Matter of Petition of Joseph O'Dea, decided by Judge Lacombe sitting as a Circuit Judge, 158 Fed. 703 (February 25, 1908).

Judge Lacombe's view has been consistently followed in this district, and the question is whether that practice shall be departed from because of the later decisions above cited and because of the inconvenience to the applicant for naturalization. I am authorized by my Associates, Judge HOUGH, Judge LEARNED HAND, and Judge AUGUSTUS N. HAND, to state that in view of the conflict of opinion, and in the absence of a holding to the contrary by the Circuit Court of Appeals for the Second Circuit or the Supreme Court, the ruling of Judge LACOMBE will be followed in this district.

VIRGINIA-CAROLINA CHEMICAL CO. v. EHRICH et al.

(District Court, E. D. South Carolina. March 2, 1916.)

No. 80.

1. ASSIGNMENTS ⊂⊃22—AGREEMENTS TO ASSIGN—NECESSITY OF REGISTRATION.
A corporation made a contract with a manufacturer of fertilizers under which fertilizers furnished were to remain the property of the manufacturer until sold or settled for, and when sold all proceeds of sales, including cash, notes, open accounts, and liens, were to be kept for the use and benefit of the manufacturer and surrendered to it. *Held* that, even though the contract was within the registration laws of the state and invalid as against creditors or a trustee in bankruptcy when not registered, there was nothing to prevent a delivery of the accounts to the manufacturer at a time when creditors had acquired no lien thereon.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 35–39; Dec. Dig. ⊂⊃22.]

2. CORPORATIONS ⊂⊃351—DIRECTORS—LIABILITY FOR NEGLIGENCE—REMEDY.
A suit to charge the officers and directors of a corporation with personal liability for the misappropriation by the corporation of money held by it as agent or trustee for plaintiff, on the theory that they owed plaintiff the duty to so direct and supervise the business of the corporation

as to prevent the misappropriation, was properly brought in equity, upon the theory that the directors are quasi trustees.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1492, 1493; Dec. Dig. ⊂⊃351.]

3. CORPORATIONS ⊂⊃341—DIRECTORS—LIABILITY FOR NEGLIGENCE.

While there is no privity of contract between directors and creditors of a corporation, and while the duty of supervision of the managing officers and employés, and the exercise of reasonable care to protect its assets, is primarily due to the corporation, a creditor or person dealing with the corporation, reasonably relying upon the discharge of such duty by the directors, and showing injury by reason of their failure to discharge such duty, has a remedy against them personally.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1479-1484; Dec. Dig. ⊂⊃341.]

4. CORPORATIONS ⊂⊃333—DIRECTORS—LIABILITY FOR NEGLIGENCE.

A corporation contracted with a manufacturer under which fertilizers were furnished for sale, all proceeds of sales to be held subject to the manufacturer's order. Accounts and obligations for fertilizers sold were turned over to the manufacturer and redelivered to the corporation for collection, and they were collected and misappropriated. The contract and the corporation's receipt for the obligations were signed by the secretary and treasurer, who was also manager of the corporation's business. It was customary for the president to countersign contracts and checks, and it did not appear that the directors other than the officers knew the custom was not observed in the particular transaction. The directors were not negligent in electing the officers mentioned who were apparently competent and trustworthy. It did not appear that any meeting of the directors was held, or was due to be held under the by-laws, between the date when the accounts, etc., were received by the corporation and the dates when they were collected and misappropriated, or that the directors other than such officers knew of the receipt thereof, or of the collection and misappropriation. *Held*, that the directors other than the officers were not personally liable for the misappropriation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1451; Dec. Dig. ⊂⊃333.]

5. CORPORATIONS ⊂⊃333—DIRECTORS—LIABILITY FOR NEGLIGENCE.

That directors of a corporation received no compensation for their services cannot exonerate them of the liability which the law attaches for a breach of their duty to direct and supervise the business of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1451; Dec. Dig. ⊂⊃333.]

6. CORPORATIONS ⊂⊃333—DIRECTORS—LIABILITY FOR NEGLIGENCE.

That directors of a mercantile corporation which misappropriated funds held by it as agent or trustee for plaintiff were also directors of other corporations which received the benefit and use of the funds so misappropriated did not make them personally liable for the misappropriation, in the absence of knowledge on their part of the transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1451; Dec. Dig. ⊂⊃333.]

7. CORPORATIONS ⊂⊃333—DIRECTORS—LIABILITY FOR NEGLIGENCE.

The high character and standing in the business life of the community of directors in a corporation imposed no higher degree of care upon them in the discharge of their duties as directors, though the credit of the corporation was thereby enhanced.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1451; Dec. Dig. ⊂⊃333.]

8. CORPORATIONS ⟸361—DIRECTORS—ACTIONS FOR BREACH OF DUTY—BURDEN OF PROOF.

In a suit to charge directors and officers of a corporation with personal liability for the misappropriation by the corporation of funds collected and held by it as agent or trustee for plaintiff, defendants, who knew of or participated in the misappropriations, had the burden of showing that a part of the amounts collected belonged to the corporation and not to plaintiff, since a trustee or agent mingling his own property with that of his principal has the burden of either making the separation or giving the court the information necessary to enable it to do so.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1506; Dec. Dig. ⟸361.]

In Equity. Bill by the Virginia-Carolina Chemical Company against L. S. Ehrich and others, seeking to charge defendants, managing officers and directors of the Rosemary Mercantile Company, Incorporated, with personal liability for misapplication by the corporation of funds held as agent or trustee of plaintiff. Decree for plaintiff against certain defendants, and bill dismissed as to the other defendants.

Mitchell & Smith, of Charleston, S. C., for plaintiff.
Kelley & Hinds, of Kingstree, S. C., for defendants.

CONNOR, District Judge. The plaintiff, which will be referred to as the "Chemical Company," is a New Jersey corporation engaged in the manufacture and sale of commercial fertilizers. During the year 1910, and prior thereto, it maintained an agency in the state of South Carolina, for the purpose of making contracts for the sale of its manufactured products. The Rosemary Mercantile Company, which will be referred to as the "Mercantile Company," was a corporation created and organized under and pursuant to the laws of South Carolina, with power to conduct a general mercantile business, buying and selling goods and merchandize, including commercial fertilizers. Defendants, other than W. D. Morgan and A. C. Hinds, at the time of and prior to the transaction with plaintiff, were directors of the company. L. S. Ehrich was the president, and B. A. Brown secretary and treasurer.

On February 4, 1910, the Chemical Company entered into a contract in writing, signed by its duly authorized agent, with the Mercantile Company, signed "Rosemary Mercantile Company, by B. A. Brown." The Chemical Company agreed to deliver to the Mercantile Company, at Georgetown, S. C., commercial fertilizers; a schedule of quantity, analysis, and price per ton, being incorporated in the body of the contract.

Among other things, it was provided that, until sold, or settled for, the fertilizers contracted for and delivered should remain the property of the Chemical Company, and, when sold, all proceeds of sales of such fertilizers, including cash, notes, open accounts and liens, and all collections therefrom, should be kept separate and held for the use and benefit of the Chemical Company, and subject to its order. The Mercantile Company agreed to send, on or before May 1, 1910, to the Chemical Company a complete list of time sales, and indorse, if neces-

sary, and surrender to the Chemical Company, all notes, liens, bills of sale, or any other evidence of debt received by the Mercantile Company from purchasers of fertilizers, which were to be returned by the Chemical Company to the Mercantile Company, for the purpose, only, of collection and remittance to the Chemical Company, and when so returned to be receipted for in trust for the Chemical Company. In pursuance of the provisions of the contract, the fertilizers were delivered to the Mercantile Company, a portion of which were sold to its customers, on credit.

On the 29th of August, 1910, the Chemical Company delivered to the Mercantile Company a number of notes, accounts, and chattel mortgages, amounting to $7,717.00, which represented sales on credit of fertilizers delivered to the Mercantile Company under the terms of the contract of February 4, 1910. These notes and accounts had been theretofore delivered to the Chemical Company. The Mercantile Company, "by B. A. Brown," executed a receipt for the notes, to which a schedule was attached, showing names of debtors, securities, and amounts. By the terms of the receipt, the Mercantile Company agreed "to hold same in trust for collection for the account of said company and will hold all collections of same as they are made for the use and benefit of said company and subject to its order as per terms of our contract, dated February 4, 1910." The Mercantile Company collected from, and on account of, the notes, etc., so received by it, the sum of $5,188.80. Of the amount so collected, the Mercantile Company paid to the Chemical Company the sum of $826.89. The uncollected notes, etc., held by the Mercantile Company, when it was adjudged bankrupt, were delivered, by Mr. Ehrich, president, to the Chemical Company. The Chemical Company collected from the accounts so delivered to it $85.50, leaving due the Chemical Company, on account of the collections, $4,276.41. The Mercantile Company became insolvent, and was adjudged bankrupt, March 11, 1911.

The master finds:

"That the president, L. S. Ehrich, and the treasurer, B. A. Brown, had actual knowledge of all transactions set forth in the bill of complaint, but that the other directors, defendants herein, did not have any actual knowledge of the contract and the collections made thereunder, other than such knowledge as they might have, generally, of the method of dealing on the part of the Rosemary Mercantile Company in the purchase of fertilizers."

He further found that defendant J. B. Steele is one of the most prominent men in the financial circles of Georgetown, a director of numerous corporations, and a man of high standing in the community, president of the People's Bank and of the Georgetown Grocery Company. The Mercantile Company had been in existence six or seven years. Defendant lived in Georgetown, about 16 miles from Rosemary, where the company carried on business. He had no knowledge of the transaction with the Chemical Company or the receipt of the notes, etc., nor of collections made therefrom.

Defendant W. H. Andrews had been, for many years, of the most prominent men of the county; identified with large interests and probably known to more people than any one else in that section; lived

in Georgetown. He attended the annual meetings of the directors. Knew nothing about the transaction with the Chemical Company. Knew nothing of the receipt of the securities or the collection of the money.

Defendant R. M. Barnes was a director during the year 1910. It does not very clearly appear when he was elected. Attended two meetings, "not more than three," in Georgetown. Knew nothing of the transaction with the Chemical Company until he was served with process in this case. Was not at all familiar with the management of the corporation. Manager of the Atlantic Coast Lumber Corporation; owned $1,000 stock in the Mercantile Company; paid money for it. "Simply bought the stock and paid no attention to the business. I had nothing to do with the management of it. Don't remember much about it."

Neither of the directors received a salary. On the 14th of May, 1910, the Mercantile Company executed a mortgage conveying to the Georgetown Grocery Company its real estate for the purpose of securing the payment of an indebtedness of $3,000 and an advancement of $2,500. L. S. Ehrich was elected president in 1908, succeeding Mr. McCleary, deceased. B. A. Brown was employed as manager. He was also secretary and treasurer. The business was conducted by him under the management and direction of the president. Mr. Ehrich says:

"The understanding was absolutely that no paper was valid unless signed by the secretary and countersigned by the president."

This testimony was objected to by counsel for plaintiff "unless it was shown by the formal act of the board of directors to be his duty as secretary."

Mr. Ehrich testified that he instructed Brown not to sign a contract with the Chemical Company; that he objected to his doing so. Ehrich was also a director and manager of the Georgetown Grocery Company, and that the Mercantile Company was largely indebted to the Grocery Company; that during the year 1910 the Grocery Company sold goods to the Mercantile Company on credit to a large amount. Mr. Ehrich says that some two months after he told Brown not to sign a contract, when Tucker, the agent of the Chemical Company, was in Georgetown and talked with him about the Georgetown Grocery Company, and then about the Rosemary Mercantile Company having turned over to him the securities; that he immediately took the matter up with Brown; he said that he had done it. Referring to a conversation had with Tucker, before the contract was signed, Mr. Ehrich says that he remembered on one occasion that Tucker asked him about making a contract with the Georgetown Grocery Company and about a contract with the Rosemary Mercantile Company.

"I told him that I didn't know what they wanted that year and that he had better see Brown. I don't recollect any other interview with Tucker."

Tucker says that during the month of February (1910) he saw Ehrich about selling the Georgetown Grocery Company, of which he

was manager, and at the same time suggested that it would save him a trip to Rosemary if he would buy for the Rosemary Company. Ehrich said that he (Tucker) had best go to Rosemary and interview Brown, who knew just exactly what they wanted; that he did not. As the result of that visit, he made the contract. Ehrich did not sign it. While considerable evidence was introduced in regard to the manner of dealing, it is manifest that Ehrich knew before any of the money from the accounts delivered to the Mercantile Company for collection was collected, that Brown had executed the contract, sold the fertilizer, and received the notes and accounts for collection and used by Brown for the benefit of the Mercantile Company; the collections were deposited in the People's Bank of Georgetown to the credit of the Mercantile Company and drawn out upon its checks.

The case, as presented by the findings of the master, which is sustained by the evidence, comes to this:

The Mercantile Company, in the course of its regular business and within the powers conferred by its charter, through its manager, entered into a contract February 4, 1910, with the Chemical Company, for the purchase of commercial fertilizers during the season of that year. By the terms of the contract the fertilizers delivered, until sold, and the proceeds, whether cash or accounts, notes, etc., and the securities taken therefor, were and remained the property of the Chemical Company. At the end of the season, the accounts, notes, chattel mortgages, and other securities held by the Mercantile Company were delivered to the Chemical Company. In pursuance of the terms of the contract, the Chemical Company delivered these accounts, notes, etc., to the Mercantile Company; B. A. Brown signing the receipt therefor. He collected from these claims the sum found by the master and deposited such collections to the credit of the Mercantile Company in the People's Bank of Georgetown, and, except the sum paid to the Chemical Company, found by the master, checked the amounts out for the benefit of the Mercantile Company. Neither of the defendants J. B. Steele, W. H. Andrews, nor R. M. Barnes, had any knowledge of the contract, the receipt of the notes, etc., and the collections made thereon.

[1] Passing, for the present, the question as to the authority of B. A. Brown, secretary and treasurer, who was also manager of the business of the Mercantile Company, to execute the contract of February 4, 1910, or to receive the accounts, notes, etc., from which the collections were made upon the terms set out in the receipt, and bind the corporation, it will be well to dispose of the pivotal questions debated by counsel. The contract of February 4, 1910, was in the usual form and contained the provisions usually found in contracts used by fertilizer companies, dealing with merchants to whom they sold fertilizers to be resold to their customers for cash and on credit. The Supreme Court of South Carolina, in Bank v. Greenville, 97 S. C. 299, 81 S. E. 634, holds that the contract, so far as the registration laws of the state are concerned, does not constitute a mortgage on the accounts, notes, etc.; whereas, the Circuit Court of Appeals of this Circuit, in Townsend v. Ashpoo Fertilizer Company, 212 Fed. 97, 128 C. C. A. 613, holds that the contract constitutes a mortgage

and is, as against creditors or a trustee in bankruptcy, invalid without registration. The question as to the effect to be given by the federal court to the decision of the state court is considered by Judge Smith in Re Floyd and Hayes (D. C.) 225 Fed. 262, in which he followed the decision of the state court. The judgment was affirmed by the Circuit Court of Appeals. In Townsend v. Ashpoo Fertilizer Company, supra, the accounts held by Roof, the customer, had not been delivered to the Fertilizer Company, at the date of his adjudication. It would seem, without regard to the question whether, as held in that case, the original contract was within the registration laws, and therefore invalid as against the trustee in bankruptcy, that, when in pursuance of the terms of the contract, before the adjudication in bankruptcy of the customer, the accounts had been delivered to the Chemical Company, the relation of mortgagor and mortgagee, if it ever existed, ceased, and the Chemical Company held them as its own property.

It does not appear to be very material, except as explaining the transaction, whether Brown was authorized to sign the contract of February 4, 1910, because the obligations of that contract were, so far as these accounts are concerned, executed—discharged. The Mercantile Company ceased to have any duty, or obligation, to the Chemical Company, with respect to the accounts, until delivered. The Chemical Company had, by receiving them, assumed the duty of collection and application of the proceeds to the discharge of the notes which it held against the Mercantile Company for the price of the fertilizer. At the time they were delivered to the Chemical Company, no creditors had acquired any lien upon them. Hence, there was no reason why they should not have been delivered according to the terms of the contract. It was valid as between the parties, without registration. Whatever liability, therefore, was imposed upon the Mercantile Company, must be found in the receipt of them, on August 29, 1910. It is to the breach of duty assumed by Brown for the Mercantile Company, at that time, that the Chemical Company must resort to fix liability upon the Mercantile Company. It is true that, by the terms of the contract, the Mercantile Company agreed to "surrender" to the Chemical Company the notes, etc., "which are to be returned" by the company "for the purpose only of collection and remittance, * * * and when so returned are to be receipted for in trust to the company." These several stipulations were complied with. It is doubtful whether, disassociated from the contract of February 4, 1910, the receipt by Brown, as secretary and manager of the Mercantile Company of the notes and accounts, was within the scope of his power, and imposed upon the corporation any liability, unless it received the amount collected from them. If he had appropriated the proceeds to his own use, it is not clear that the Mercantile Company would have been liable. As he deposited the proceeds to the credit of the Mercantile Company, they could have been reached, while so held, or, if used, the Mercantile Company would have been liable to an action for money had and received or, in equity, for an accounting.

[2] The basis upon which the Chemical Company seeks relief, in this suit in equity, is that the Mercantile Company received the money in trust, and that its failure to pay it over constituted a breach of such trust, and that the defendants, by their negligence, have become personally liable therefor. This contention is based upon the theory that the defendants, by reason of being directors, at the time the notes and accounts were received and collected, and the proceeds misapplied, owed the duty to the Chemical Company to so direct and supervise the business of the corporation that the breach of trust would have been prevented, and the specific money, as collected, been paid over to the Chemical Company. In this respect, the suit is of first impression. Numerous cases are found in which directors of corporations have been held personally liable, either for making representations regarding the value of corporate property, or the financial condition of the corporation, whereby parties have been induced to purchase stock, or loan money, or otherwise extend credit to the corporation. The remedy for wrongs of this character is usually sought by an action for deceit, wherein the loss sustained constitutes the measure of damages. In other cases personal liability is fixed by reason of the negligent failure of directors to give to the business of the corporation that degree of care which is, by law, imposed upon them, resulting either in the loss of the assets by bad management, or the default of managing officers. The liability, in this class of defaults, is measured by the extent of the loss sustained by the corporation, whose agents they are. Liability incurred for breach of duty, in respect to the exercise of due care in the discharge of their duty, may be imposed either in an action at law for damages, or suit in equity, upon the theory that the directors are quasi trustees. Emerson v. Gaither, 103 Md. 364, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114 notes.

This suit is properly brought in equity. Assuming that a liability to execute the trust was imposed by the receipt of the notes and accounts, upon the corporation, and that the Chemical Company would be entitled to a decree against it, directing the payment of the amount collected and not paid over for a breach of trust, the question presented is whether, upon the facts found by the master, the defendants, directors, are personally liable therefor. The foundation of the alleged liability sought to be imposed upon the directors is analogous to that stated by Mr. Chief Justice Fuller in Briggs v. Spaulding, 141 U. S. 132, 145, 11 Sup. Ct. 924, 928 [35 L. Ed. 662], wherein he says:

"It is not contended that the defendants knowingly violated, or permitted the violation of, any of the provisions of the Banking Act, or that they were guilty of any dishonesty in administering the affairs of the bank; but it is charged that they did not diligently perform duties devolved upon them by the act."

That was a suit in equity by the receiver of an insolvent national bank against the directors, in which it was sought to fix them with personal liability, for negligently failing to discharge their duties, resulting in violations, by the cashier, of the provisions of the act and wasting of the assets of the bank. The court discusses their liability,

both as to the violations of the provisions of the statute by the managing officers, and failing to perform their duties independent of the statute.

[3] It is well settled that, while there is no privity of contract between the directors and the creditors of a corporation, and that the duty of supervision of the managing officers and employés, and the exercise of reasonable care to protect its assets, is primarily due to the corporation, a creditor or person dealing with the corporation, reasonably relying upon the discharge of such duty by the directors, and showing injury by reason of their failure to do, has a remedial right against them personally. For torts, deceits, misrepresentations, etc., resulting in damage, the foundation of the liability to the person injured is clear. The same is true when the corporation commits a tort and the officer or director has actual knowledge of and participates in it. When, however, it is sought to fix personal liability for negligence, and extend such liability to corporate acts of which the director has no personal knowledge, or in which he takes no active part, the courts find difficulty in finding the basis, and fixing the extent, of the liability. In Briggs v. Spaulding, supra, defining the duties of directors of banks, in respect to the degree of care which should be imposed, the Chief Justice says:

"Bank directors are often styled trustees, but not in any technical sense. The relation between them and the corporation is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract and not of trust. But, undoubtedly, under circumstances, they may be treated as occupying the position of trustees to cestui que trust."

In a recent work, in which the decided cases are reviewed, it is said:

"In discussing, and determining, the liability of officers and other agents of corporations, for negligence, the judges have employed language which is often irreconcilable and formulated rules which, however well understood in the abstract, have been difficult of application, and have led to conflicting judgments upon facts substantially identical." 7 Ruling Case Law, 491.

The increase in the number and variety, in respect to the character of business in which they engage, of private corporations, have imposed upon the courts the duty of finding a legal basis for fixing the relationship between the corporation, stockholders, and creditors, and its directors. That the court was impressed with the necessity of careful consideration, and the use of well-considered language in Briggs v. Spaulding, supra, is manifest from a careful examination of the opinion written by the Chief Justice. Corporations conduct their operations only through the medium of agents, and these agents must be selected either by the stockholders, directors, or the president, or other managing officers. In the selection of these officers or agents, as in all other matters, the board of directors must act jointly, and as a board; hence it is difficult to fix personal, individual, responsibility for mistakes of judgments, or negligence. After an examination of, and making quotations from, the best considered decisions, the Chief Justice reaches the conclusion that:

"The degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circum-

stances, and in determining that the restrictions of the statute and usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is therefore ultimately a question of fact, to be determined under all the circumstances."

[4] There is nothing in the evidence indicating negligence, in the election of Mr. Ehrich, as president, and Mr. Brown as secretary and treasurer, and manager of the business, or in the extent of the power conferred upon them. Mr. Ehrich was the manager of the Georgetown Grocery Company and, so far as appears, was competent and trustworthy. The same is true of Brown. It appears from his evidence, and from checks introduced, that it was customary for the president to countersign contracts and checks, although he did not sign the contract, or the notes, given to the Chemical Company. This is not material on the question of the liability of the corporation, but is relevant in regard to the manner in which the business was conducted, so far as the personal liability of the directors is concerned. There is no evidence that the directors knew that this custom was not observed in this transaction. The alleged negligence comes to this: The failure of the directors to know that the contract was made, that the notes and accounts were delivered and collected, and the proceeds were not paid over. Unfortunately, the book containing the record of the meetings of the board of directors has been lost. I concur with the master that the loss is not very satisfactorily explained, but there is no suggestion that it was ever in the keeping or custody of the defendants Steele, Andrews, or Barnes. It appears that they held annual meetings. If they did not hold regular meetings so frequently as they should, this cannot be imputed as actionable negligence on the part of individual directors. If the receiver, or other representative of the corporation, was suing for neglect to give that degree of attention to the business which the law required, and it appeared that, by reason of the course which, upon their own statements, the defendants pursued, the assets were wasted or misappropriated, I am of the opinion that he would be entitled to a decree, the amount of which would depend upon the extent to which the corporation sustained loss, by reason of such breach of duty. That, however, is not the case with which we are dealing. The charge is that a specific sum derived from a specific transaction was misappropriated by the managing officer of the corporation, and that he was enabled to do so by reason of the negligence of the defendants. The alleged negligence consists either in their failing to hold meetings of the board of directors, or to make proper examination at the annual meeting, or in failing to examine the books of the corporation between August 29, 1910, when the notes and accounts were received, and the dates upon which they were collected and misappropriated. This date is not fixed, but it must have been during the fall of the year 1910. It does not appear that, during these dates, any meeting of the directors was due to be held under the by-laws, or that any meeting was in fact held. Referring again to the opinion in Briggs v. Spaulding, supra, dealing with a question somewhat analogous, it is said:

"The business of the bank had been conducted for years by the president, assisted by the other executive officers, and it had seemingly been well conducted. * * * Nor was there any violation of law in permitting him to conduct its business, for he was duly authorized to do so under the provisions of the act. We do not mean that this dispensed with reasonable oversight by the directors, but that belongs to a different branch of the enquiry."

To the suggestion that the defendants should have insisted on meetings of the board of directors, or had special meetings called, or otherwise made personal inspection of the affairs of the bank, and, if they had done so, they would have discovered the condition of the bank and prevented losses occurring subsequently, it is said:

"Here, again, it should be observed that even trustees are not liable for the wrongful acts of their cotrustees, unless they connive at them, or are guilty of negligence conducive to their commission."

In that case, there were large transactions in gross violations of express prohibitions of the Banking Act, which it was conceded would have been disclosed by a thorough examination of the books. As to these defaults, it was said that:

"It could not be laid down as a rule that there is an unavoidable presumption of rascality of one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption."

The language used by the Vice Chancellor in Scott v. DePeyster, 1 Edw. Ch. 513, and in Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551, is quoted with approval. From the opinion in Hallmark's Case, 9 Ch. D. 329, the following language is quoted:

"It is contended that Hallmark, being a director, must be taken to have known the contents of all the books and documents of the company, and so to have known that his name was on the register of shares for 50 shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered on the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact."

The Chief Justice says:

"We are of the opinion that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make such an investigation and did not themselves individually conduct an examination during their short period of service, or because they did not happen to go among the clerks and look through the books, or call for and run over the bills receivable."

This, and many of the other cases, found in the reports, involved the duty of directors of banks. Marshall v. Farmers' & Mechanics' Savings Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84. See, also, 7 Ruling Case Law, § 454, and cases cited.

No higher degree of care should be imposed upon directors of mercantile corporations. The right of the Chemical Company to hold the directors to personal liability in this case is dependent upon showing negligence in respect to the specific transaction, and that such negligence was the proximate cause of the wrongful conduct of the secretary and treasurer.

[5] I concur with the standing master that the fact that the direc-

tors received no compensation for their services cannot be pleaded in exoneration of the liability which the law attaches for a breach of duty. While I also concur in his opinion that attending one or two annual meetings and passing upon matters which might be brought before them does not measure up to the standard of care which the law imposed upon them, I am unable to follow his conclusion that this conduct or failure to discharge their duty in this respect affected or resulted in the loss sustained by the Chemical Company. If it be conceded that knowledge of the existence of the contract of February 4, 1910, should be imputed to them, although, as the master correctly finds, in fact, they did not know of its execution, it does not follow that between August 29, 1910, and the time the money was collected and misapplied, there was any duty imposed upon them fixing them with implied or constructive notice that the accounts, notes, etc., had been delivered to Brown, that he was collecting and misapplying the money.

[6, 7] To the suggestion that corporations of which defendants were directors and stockholders received the benefit and use of the trust funds, and they thereby reaped the benefit of them, it would seem that while such corporations would be liable to account for such amounts as they received from notes and accounts belonging to the Chemical Company, in the absence of knowledge that they were doing so, no personal liability would attach to defendants. If they had knowledge that the misappropriation was being made by Brown, they would be personally liable without regard to their relations to other corporations. While very naturally the high character and standing in the business life of the community of the defendants enhanced the credit of the Mercantile Company, the degree of care in the discharge of their duties imposed upon them was no higher for that reason. If the question of their knowledge of the manner in which the business, in respect to this transaction, was being conducted, was in debate, their intelligence, business capacity, and experience would be relevant; but when, as here, the facts are undisputed, the rule of law is not changed by considerations of this character. As private corporations, conducting all manner of business, increase, and the extent of their transactions with persons other than stockholders enlarges, the courts will find a basis for legal liability of directors, to persons dealing with them, which, while not imposing unreasonable burdens or hardships on directors, will fix with more certainty the degree of care which they will be required to exercise, and the extent of their liability to persons who sustain damage by a failure to meet and discharge the obligation. Many of the elements entering into the consideration of the subject are not found in this case.

[8] Without dealing with all of the exceptions filed by the defendants, other than L. S. Ehrich and B. A. Brown, I am constrained to direct that the bill be dismissed as to defendants W. H. Andrews, J. B. Steele, and R. M. Barnes. I concur in the conclusions of the standing master as to L. S. Ehrich and B. A. Brown. It is suggested that a part of the amounts collected from the notes and accounts were due the Mercantile Company for goods and supplies other than the

fertilizers, and that quoad such amounts there was no misappropriation. If this be true, the burden was on the defendants Ehrich and Brown to show the extent of such amounts, so that the master could separate them from those due for fertilizers; it was their duty to keep the amounts collected for fertilizers separate; the receipt states that the amount of the accounts was due for fertilizers. It is well settled, both upon reason and authority, that, when a trustee or agent mingles his own property with that of his principal, the burden is upon him to either make the separation or give to the court the information necessary to enable it to do so. The conclusion to which I have arrived renders it unnecessary to pass upon many of the exceptions to the report of the master, in regard to the admissibility of evidence entries on the books, etc.

A decree will be drawn dismissing the bill as to all of the defendants except L. S. Ehrich and B. A. Brown. The exceptions as to them are overruled; a decree will be signed, as to them, in accordance with the conclusions of the master.

THE ATHINAI.

(District Court, S. D. New York. February 8, 1916.)

1. MARITIME LIENS ⟸9—STATUTORY LIENS—ENFORCEMENT.
   The general maritime law gives no lien enforceable in rem against a ship bringing into port passengers stricken with disease or exposed to infection, and support for such a lien must be found in some statute enacted by competent authority, and the provisions of such statute must be reasonably complied with.
   [Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 13; Dec. Dig. ⟸9.]

2. MARITIME LIENS ⟸57—STATUTORY LIENS—POWER OF STATE.
   It is beyond the power of a state to create a lien enforceable in admiralty by process in rem against a foreign ship.
   [Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 96; Dec. Dig. ⟸57.]

3. MARITIME LIENS ⟸32—STATUTORY LIENS—SUIT FOR ENFORCEMENT.
   Under Public Health Law of New York (Consol. Laws N. Y. c. 45) § 138, as amended by Laws N. Y. 1913, c. 162, § 1, which provides for a lien on a vessel for charges and expenses incurred by a health officer with respect to the crew or passengers of such vessel, to be enforced "in the manner provided in the lien law for the enforcement of liens upon vessels," the filing of a notice by such officer in the county clerk's office as provided in such lien law is an essential condition precedent to a suit to enforce such lien.
   [Ed. Note—For other cases, see Maritime Liens, Cent. Dig. §§ 49–52; Dec. Dig. ⟸32.]

In Admiralty. Suit by Joseph J. O'Connell, as health officer, against the Greek steamship Athinai, to enforce a lien for official disbursements and expenses. Libel dismissed.

Final hearing in admiralty; libel asserting a lien upon the Athinai for the official disbursements and expenses of libelant, under the following circum-

stances: This Greek steamship arrived in New York Harbor from foreign parts on February 28, 1914. She carried numerous immigrant passengers. Libelant acting under authority of sundry statutes of New York, creating his office and defining its powers and duties, inspected the Athinai to discover whether there existed on board any quarantinable disease. He found several cases of meningitis, a malady either epidemic or contagious, and admittedly requiring preventive action by the quarantine authority, viz., himself. This inspection took place at the Quarantine Station on Staten Island. Libelant immediately ordered the passengers removed from the steamship, those actually ill to Swinburne Island, and the rest to Hoffman Island, both of which islands are in the lower harbor. Therefore the passengers had to retrace some miles of their voyage to get there.

This libel is filed in rem to recover the cost to the state of New York, at prices admittedly reasonable, for board, lodging, and hospital service to the afflicted or exposed passengers until such time as libelant considered it safe to hand them over to the immigration authorities at Ellis Island. The charge amounts to $4,551.50, and was first presented to the agent of the claimants on March 30, 1914. No effort was made to hold or seize the steamship itself until this libel was filed July 31, 1914. Release from seizure under the libel was obtained on usual stipulation. The libel sets forth the material part of the foregoing undisputed facts, and then alleges that for the sum of money above stated a lien exists "on said steamship" for the satisfaction of which prayer is made that the vessel be condemned and sold, in the common form.

The Attorney General of New York and Edgar Bromberger, Deputy Atty. Gen., for libelant.

Alvin C. Cass, of New York City, for claimant.

HOUGH, District Judge (after stating the facts as above). It is assumed, for purposes of decision, that quarantine regulations generally are within the powers of the several states, unless and until Congress, in the exercise of the commerce clause of the Constitution, chooses to assume control of that subject. Morgan v. Louisiana, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237.

[1] It is further considered beyond dispute that for services or expenditures such as shown here, the general maritime law provides no remedy or cause of action, enforceable in rem against the ship bringing into port passengers or others (not being members of the crew) either stricken with disease or exposed to infection. The duty, and therefore the liability, of any ship to the crew thereof need not be now inquired into. It follows that in order to justify this libel, support for the asserted lien must be found in some statute enacted by proper authority, and, further (if such statute be found) that the provisions thereof must be reasonably complied with, however beneficial may be the statute, and benevolent its interpretation.

Furthermore, any such legislation, creative of a lien enforceable in admiralty, and upon shipping, must rest upon the making or implication of a contract maritime in its nature, or on the commission of a maritime tort. Thus an act conferring a lien for the building of a vessel does not give admiralty jurisdiction, because of the nonmaritime nature of the contract therefor (Roach v. Chapman, 22 How. 129, 16 L. Ed. 294; Norton v. Switzer, 93 U. S. 355, 23 L. Ed. 903), while for death by wrongful act on shipboard a lien may be conferred because the tort by reason of the place of its committing is plainly mari-

time (The Corsair, 145 U. S. 355, 12 Sup. Ct. 949, 36 L. Ed. 727; The Onoko, 107 Fed. 984, 47 C. C. A. 111, and cases cited).

There is admittedly no statute of the United States affecting the matter at bar. The existence of a lien and jurisdiction to enforce it must ultimately depend upon the Public Health Law of New York (as amended in 1913), as it stood when the Athinai was quarantined.

Section 138 of this statute provides that charges such as now sued for "shall be a lien on the vessels * * * in relation to which they shall have been made"; also that if the owner or agent of the vessel (if the owner does not reside in the United States) does not pay the charges within three days after presentation of same, "the health officer [viz., this libelant] may proceed to enforce such lien in the manner provided in the Lien Law for the enforcement of liens upon vessels."

Section 139 specially provides for recovery of charges for care of passengers (as in this case) thus:

"The health officer may maintain an action against [the owners] to recover for such expenses, which shall be a lien upon the vessel, to be enforced as other liens thereon by him."

Section 103 also generally declares that payment of charges authorized by the statute may be enforced "by process of law against the vessel."

Much might be said as to the nature of the lien sought to be created by these not very well chosen words. There are other sentences of the statute which clearly authorize a physical detention of the ship, until payment made or security given. This is a merely possessory lien, with which (as such) admiralty has no concern.

It is also worthy of note that the act might be construed as merely creating a jus ad rem, such as is asserted by attachment both in admiralty and at common law. Of this it suffices to say that the speculation is not relevant, for by the very framework of this suit—by the nature of the process herein—there is asserted and must be substantiated that jus in re or lien in the nature thereof, without which no action in rem can be sustained.

The nature of a maritime lien is set forth notably by Fuller, C. J., in Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981, and Field, J., in the Rock Island Bridge Case, 6 Wall. 215, 18 L. Ed. 753. Liens created by state statutes for necessaries are, in their nature, maritime, and are accepted in the American admiralty by the anomalous doctrine of The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

It may then be assumed (but not decided) that the Legislature of this state intended to create (at the best) a lien of the nature of a marine lien; i. e., jus in re. Unless that be the case, this libel must be dismissed because brought upon a false construction of the legislative intent.

On this necessary assumption, I do not find it obligatory or useful to discuss the nature of the services rendered or expenses incurred, whether maritime or not, nor to ascertain whether the lien rests upon

a tort by the ship, in bringing into the port infected passengers, nor whether penalties or taxes in support of quarantine regulations may be enforced as liens against vessels, all which matters have been most interestingly presented in briefs of counsel. There is no higher nor more beneficial lien known to marine law than that for necessaries and repairs, and I assume (but do not decide) that the services and expenses here shown rank with such well-known benefits to shipping.

[2] Libelant can ask no more than this; but having made all these concessions, it still remains true, and I think obviously so, that:

(1) It is beyond the power of any state to create a lien enforceable in the admiralty by process in rem against a foreign ship; and (2) if such was the intent of the Legislature, and if such purpose were constitutional, this libelant has not observed the method of procedure by which, and by which alone, he can enforce the lien thus created.

On the first point, The Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770, is substantially conclusive. The reasoning of Brown, J., is inconsistent with any other conclusion. But see especially page 194 of 189 U. S., 23 Sup. Ct. 491, 47 L. Ed. 770, where it is noted that the right of a state to create liens for necessaries furnished to foreign vessels is, "in any case, open to grave doubt," citing The Chusan, 2 Story, 455, Fed. Cas. No. 2,717, and The Lyndhurst (D. C.) 48 Fed. 839. These opinions of Justice Story and Judge Addison Brown render superfluous any remarks of mine; unless ship's repairs are to be regarded as inferior in quality to and different in principle from board and hospital attendance for passengers. That such is not the case is, I think, obvious on statement of the proposition.

[3] As to the second point, it is fundamental that where a method of enforcing a right is given by statute, it must be adhered to, as a prerequisite to relief. This libelant has not filed the notice in the county clerk's office, provided for by the Lien Law of New York (Consol. Laws N. Y. c. 33, § 10), and this he is plainly required to do by the Health Law (ut supra). This was always held a prerequisite for enforcing the state lien for repairs, etc., as is well known to every practitioner familiar with proceedings prior to the passage of the Federal Lien Law. See The Catherine Whiting, 99 Fed. 445, 39 C. C. A. 592.

The libel is dismissed, but as there is lack of jurisdiction, there will be no costs.

MEMORANDUM DECISIONS

CHAN PONG v. UNITED STATES (two cases). (Circuit Court of Appeals, Ninth Circuit. March 16, 1916.) Nos. 2605, 2606. In Error to the District Court of the United States for the First Division of the Northern District of California. George J. Hatfield, of San Francisco, Cal., for plaintiff in error. John W. Preston, U. S. Atty., and Caspar A. Ornbaum, Asst. U. S. Atty., both of San Francisco, Cal. Dismissed for noncompliance by plaintiff in error with rules 23 and 24 (150 Fed. xxxii, xxxiii, 79 C. C. A. xxxii, xxxiii)—failure of plaintiff in error to print record under rule 23, and to file a printed brief, under rule 24.

DUPLEX ENVELOPE Co., Inc., v. A. S. KRATZ CO., Inc., et al. (Circuit Court of Appeals, Fourth Circuit. February 24, 1916.) No. 1404. Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge. Suit by the Duplex Envelope Company, Incorporated, against the A. S. Kratz Company, Incorporated, and another. From a decree (225 Fed. 68) dismissing the bill, complainant appeals. Affirmed. Melville Church, of Washington, D. C. (C. V. Meredith, of Richmond, Va., on the brief), for appellant. George A. Prevost, of Washington, D. C., and Hill Carter, of Richmond, Va. (L. P. Whitaker, of Washington, D. C., on the brief), for appellees. Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PER CURIAM. We are satisfied after careful study of the case that the court below was right in dismissing the bill, and deem it unnecessary to add anything to the views expressed by the learned District Judge. The decree is accordingly affirmed on his opinion. Affirmed.

F. F. SLOCOMB & CO., Inc., v. A. C. LAYMAN MACH. CO. (Circuit Court of Appeals, Third Circuit. March 9, 1916. Rehearing Denied May 3, 1916.) No. 2001. Appeal from the District Court of the United States for the District of Delaware; Edward G. Bradford, Judge. E. H. Fairbanks, of Philadelphia, Pa., for appellant. William S. Jackson and Howson & Howson, all of Philadelphia, Pa., for appellee. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. In this patent case we have had the benefit of an able and illuminating opinion by the judge below, which is reported in 227 Fed. 94. The case was thoroughly argued in this court, and has since had our careful examination and consideration. We find no error in the decree below, and it will be affirmed. An opinion by us would simply be an effort to restate in different language what has already been so well said by Judge Bradford. We avoid needless duplication by adopting his opinion as expressive of our views.

GARDINER v. WM. S. BUTLER & CO., Inc., et al. (Circuit Court of Appeals, First Circuit. December 9, 1915.) No. 1102. Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge. Alexander Whiteside, of Boston, Mass. (C. Claflin Davis and Warren, Garfield, Whiteside & Lamson, all of Boston, Mass., with him on the brief), for appellant. Frederick H. Nash, of Boston, Mass. (Charles F. Choate, Jr., of Boston, Mass., with him on the brief), for appellees. Before PUTNAM and BINGHAM, Circuit Judges, and BROWN, District Judge.

PER CURIAM. This case is concluded, so far as we are concerned, by our decision in Wm. Filene's Sons Co. v. Weed, 230 Fed. 31, —— C. C. A. ——,

passed down at our present session, which two cases were heard practically simultaneously. The judgment of the District Court is affirmed, with interest; and the appellees recover their costs of appeal.

PUTNAM, J. I concur in the result. The District Court applied to this case the rule of Slocum v. Soliday, 183 Fed. 410, 412, 106 C. C. A. 56. I do not know whether the case is governed by this rule or not; but, in the absence of authorities otherwise, I feel bound by it. The application of this case cuts up all the further reasoning contained in this opinion of the court. Therefore I concur that the case is governed by Slocum v. Soliday, and decline to enter into further discussion.

HALL v. NASHVILLE, C. & ST. L. RY. (Circuit Court of Appeals, Fifth Circuit. March 27, 1916.) No. 2849. In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge. S. S. Pleasants and R. E. Smith, both of Huntsville, Ala., and James D. Richardson, Jr., of Murfreesboro, Tenn., for plaintiff in error. Paul Speake, of Huntsville, Ala., and W. B. Lamb, of Fayetteville, Tenn., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. On full consideration of the record and arguments, we find no reversible error in the proceedings in this case. The judgment is affirmed.

HEREFORD v. HOUCHINS. (Circuit Court of Appeals, Fifth Circuit. March 27, 1916.) No. 2735. In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge. S. S. Pleasants and Douglass Taylor, both of Huntsville, Ala., for plaintiff in error. Paul Speake and R. E. Smith, both of Huntsville, Ala., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. We find no reversible error assigned or patent of record. The judgment of the District Court is affirmed.

LAMAR v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. February 11, 1916.) No. 59. In Error to the District Court of the United States for the Southern District of New York. David Lamar was convicted of an offense, and he brought a writ of error, which was heretofore dismissed. On motion. Motion denied. See, also, 227 Fed. 1019, — C. C. A. —. Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The defendant deliberately and with full knowledge elected to proceed in the Supreme Court, which court dismissed his writ. His writ from this court was on October 15, 1915, dismissed. It is too late now to grant the relief asked for. The motion is denied.

MAYOR AND CITY COUNCIL OF BALTIMORE v. THACHER. (Circuit Court of Appeals, Fourth Circuit. February 2, 1916.) No. 1378. Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge. Suit by Edwin Thacher against the Mayor and City Council of Baltimore. From a decree for complainant (219 Fed. 909), defendant appeals. Affirmed. Richard S. Culbreth, of Baltimore, Md. (S. S. Field and Alexander Preston, both of Baltimore, Md., on the brief), for appellant. George M. Brady, of Baltimore, Md., and Frank H. Drury, of Chicago, Ill. (Maloy & Brady, of Baltimore, Md., and Jones, Addington, Ames & Seibold, of Chicago, Ill., on the brief), for appellee. Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PER CURIAM. The decree of the District Court is affirmed, on the reasoning in the opinion of that court. Affirmed.

Ex parte ONG CHEE KOH. ONG CHEE KOH v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. April 14, 1916.) No. 2778. Appeal from the District Court of the United States for the First Division of the Northern District of California. Francis H. Boland, of San Francisco, Cal., for appellant. John W. Preston, U. S. Atty., of San Francisco, Cal. Dismissed by clerk, under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi), pursuant to stipulation of counsel for respective parties.

OSTERMAN v. ANACONDA COPPER MINING CO. (Circuit Court of Appeals, Ninth Circuit. March 28, 1916.) No. 2767. In Error to the District Court of the United States for the District of Montana. L. O. Evans, of Butte, Mont., W. B. Rodgers, of Anaconda, Mont., and D. Gay Stivers, of Butte, Mont., for defendant in error. On motion of counsel for defendant in error, writ of error dismissed for the noncompliance by the plaintiff in error with the provisions of subdivision 1 of rule 16 of the rules of practice of this court (150 Fed. xxix, 79 C. C. A. xxix); the plaintiff in error having failed to file a record thereof and to docket the case by or before the return day required by said rule.

SOUTHERN RY. CO. v. ROBERTSON. (Circuit Court of Appeals, Fifth Circuit. March 27, 1916.) No. 2835. In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge. Lawrence Cooper, of Huntsville, Ala., for plaintiff in error. S. S. Pleasants and R. E. Smith, both of Huntsville, Ala., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. An examination of the transcript in the light of the briefs of counsel satisfies us that there is no reversible error in any of the rulings complained of, that the evidence supports the finding that the plaintiff in error was guilty of negligence, and that the defendant in error did not contribute to her own injury. Judgment affirmed.

In re VANOSCOPE CO. (Circuit Court of Appeals, Second Circuit. February 11, 1916.) No. 214. Petition to Revise Order of the District Court of the United States for the Southern District of New York. In the matter of the Vanoscope Company, bankrupt, in which William D. Lowery files a petition to revise an order of the District Court. On motion. Motion denied. Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. We think this motion should be denied. We cannot intelligently dispose of the matter on this motion, which should be postponed until the matter comes here in the ordinary course.

WOO WAH CHUCK v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. March 16, 1916.) No. 2763. Appeal from the District Court of the United States for the First Division of the Northern District of California. S. C. Wright, of San Francisco, Cal., for appellant. John W. Preston, U. S. Atty., of San Francisco, Cal. Dismissed by the clerk, under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi), pursuant to agreement of counsel for respective parties.

END OF CASES IN VOL. 230