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

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This is a Key-Numbered Volume

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

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

AMENDMENTS TO RULES

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT [1]

Adopted November 1, 1894, and as Amended to June 2, 1916

23.

PRINTING RECORDS.

1. All records, excepting in cases prosecuted under the Act of February 13, 1911, shall be printed under the supervision of the clerk of this court, and upon the docketing of the cause, he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk, and for want of such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed.

2. Upon payment of the amount estimated by the clerk, eighty copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

3. In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers sent up under rule 14, section 4, as are necessary to be printed; and the whole of the record in cases of original jurisdiction.

4. In all cases, excepting those prosecuted under said act of Congress, the clerk of this court shall prepare the record for the printer, index the same, supervise the printing and distribute the printed copies to the judges and the reporter, and one or more printed copies to the counsel for the respective parties.

5. In cases prosecuted under said act of Congress in which it is necessary to print records or other matter under the supervision of the clerk of this court, the clerk shall prepare such records or other matter for the printer, index the same, supervise the printing and distribute the printed copies to the judges and the reporter and one or more printed copies to the counsel for the respective parties.

6. If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying same. If the expense is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel.

7. In case of reversal, affirmance or dismissal, with costs, the amount

[1] For other rules, see 208 Fed. v, 124 C. C. A. v.

paid for printing the record and of the clerk's fee shall be taxed against the party against whom costs are given.

8. The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ten days thereafter, may designate, in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed such order as to costs may be made as the court shall think proper.

All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record as well as the documents to be printed or omitted.

9. At the time of filing the record and docketing the cause counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient size, shall be used in printing the record.

10. In all cases prosecuted to this court in which records or other matter shall be printed under the supervision of the clerk of this court, his fee for preparing the same for the printer, supervising the printing, indexing, and distributing the copies, shall be twenty-five cents for each printed page of the record and index, as provided by law.

24.[2]

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, twenty copies of a printed brief, and serve upon counsel for the defendant in error or the appellee one copy thereof, at least fifteen days before the case is called for argument.

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

(a) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(b) A specification of the errors relied upon, which, in cases brought

[2] NOTE.—Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of rule 7, will not be considered by the court.

See, also, subdivision 2 of rule 26.

up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specifications shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specifications shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(c) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief and serve upon counsel for plaintiff in error or appellant one copy thereof, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

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

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

25.[3]

ORAL ARGUMENTS.

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

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

[3] See, also, rules 35 and 36.

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

4. Any case entitled to be heard at any term or session of the court may be submitted by either or both of the parties on briefs. Consent to submit a case on briefs may be filed at any time prior to, or at the time the case is reached for hearing.

26.

FORM OF PRINTED RECORDS, ARGUMENTS, BRIEFS AND PETITIONS FOR REHEARING.

1. All records printed for the use of the court must be printed on unglazed paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide, excepting in patent cases where counsel furnish to the clerk at the time of docketing the cause patent office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double-leaded is the only mode of composition allowed.

2. All arguments, briefs, and petitions for rehearing, printed for the use of the court, must be printed on unruled white writing paper, nine and one-quarter inches long and six and one-quarter inches wide. The printed page, exclusive of any marginal note, reference or running head, must be seven inches long and four inches wide. Pica double-leaded is the only mode of composition allowed.

35.

ASSIGNMENT OF CAUSES FOR HEARING.

1. Thirty days prior to the opening of any calendar session of the court, the clerk is directed to assign causes for hearing at the rate of one case for the first day of each term or session, and two cases per day for each of the ensuing court days of such term or session. Causes shall be grouped by states, and assignments made, so as to permit the hearing of causes from one state before the causes from the next state in order shall be called; causes from the Northern district of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same state.

2. No change of the day assigned for hearing will be made except by order of the court for reasons shown, and no term or session of the court will be extended beyond the foot of the calendar as made up pursuant to the provisions of this rule.

3. Ten days before each calendar session of the court the clerk shall prepare and cause to be printed a calendar of the causes assigned for the approaching session.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

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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.
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Hon. CHARLES E. HUGHES, Circuit Justice[1].....Washington, D. C.
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Hon. HENRY WADE ROGERS, Circuit Judge.....New Haven, Conn.
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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.
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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[2].....Trenton, N. J.
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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] Resigned June 10, 1916.

[2] Appointed May 15, 1916.

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Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
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Hon. RHYDON M. CALL, District Judge, S. D. Florida.....Jacksonville, Fla.
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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.

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Hon. JOHN W. WARRINGTON, Circuit Judge.....Cincinnati, Ohio.
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Hon. ARTHUR C. DENISON, Circuit Judge.....Grand Rapids, Mich.
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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.
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Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....Cincinnati, Ohio.
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Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.

[a] Appointed June 1, 1916.

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Hon. JEREMIAH NETERER, District Judge, W. D. Washington ..... Seattle, Wash.

[4] Appointed May 10, 1916.

CASES REPORTED

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

MOORE v. FOSTER LUMBER CO.*

(Circuit Court of Appeals, Fifth Circuit. March 13, 1916.)

No. 2832.

1. PUBLIC LANDS ⟸178(1)—TRANSFER OF HEADRIGHT BEFORE ISSUANCE OF CERTIFICATE.

An instrument, executed by a colonist entitled to a league and labor of land under the laws of the Republic of Texas, purporting to convey one-half of the league and labor of land, and authorizing the grantees to locate and possess it and the land officers to issue the necessary title papers to the grantees, transferred to the grantees the headright of the grantor, though not then evidenced by a certificate, and not located upon any specific public land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 579; Dec. Dig. ⟸178(1).]

2. PUBLIC LANDS ⟸178(1)—TRANSFER OF HEADRIGHT BEFORE ISSUANCE OF CERTIFICATE.

The transfer did not, before location, give the transferee any interest, legal or equitable, in the land not then located, but merely gave a right to have the grantor locate and patent the lands for their benefit, or to accomplish this in their own name and for their own benefit, and, upon location, the right to an interest in the land, either legal or equitable, depending upon whether the patent issued to the original owner of the headright, the owner and his assigns, or the grantees direct.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 579; Dec. Dig. ⟸178(1).]

3. PUBLIC LANDS ⟸178(1)—TRANSFER OF HEADRIGHT BEFORE ISSUANCE OF CERTIFICATE.

The right of a grantee under a conveyance by a colonist, entitled under the laws of Texas to a league and labor of land, to locate such land or have it located by the grantor for his benefit, was not a legal interest in land, whether in Texas the common-law distinctions between law and equity were then recognized or not, and the grantee named in a subsequent conveyance by the same grantor acquired no greater interest, even though a certificate had then been issued; the land not having been located.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 579; Dec. Dig. ⟸178(1).]

4. PUBLIC LANDS ⟸178(1)—TRANSFER OF HEADRIGHT BEFORE ISSUANCE OF CERTIFICATE.

As between the grantees named in two conveyances by the owner of a headright under the laws of Texas, those to whom it was first conveyed

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* Rehearing denied May 20, 1916.

in point of time had the prior right, especially where the second grantee was charged with knowledge of the first conveyance by being a grantee in both conveyances.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 579; Dec. Dig. ⊂⊃178(1).]

5. LIMITATION OF ACTIONS ⊂⊃44(1)—ACCRUAL OF RIGHT OF ACTION.

As the conveyance of a league and labor of land which the grantor was entitled to locate under the laws of Texas vested in the grantee no interest in the land prior to its location, the making and recording of a subsequent conveyance by the grantor was a repudiation of the first conveyance, and gave the grantee claiming under the first conveyance notice of the repudiation, and sufficed to start the running of limitation or to fix the time from which the staleness of the claim under the first conveyance was to be reckoned; and, while the grantee under the first conveyance could have proceeded against the grantors or the grantees under the second conveyance, if vested with a legal title, for a specific performance of the trust, such right could only be enforced before the claim became stale, dating from the second conveyance.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 220, 223, 224; Dec. Dig. ⊂⊃44(1).]

6. TRESPASS TO TRY TITLE ⊂⊃25—EQUITABLE DEFENSES—LACHES OR STALENESS.

As under the Texas procedure the defendant in trespass to try title may interpose an equitable title or defense, a defendant takes this privilege ordinarily given only to those coming into equity, with the burdens incident thereto in a court of equity, and all defenses available in equity against such equitable title may be set up, and hence the doctrine of laches or staleness is available as against an equitable title interposed as a defense by a defendant in possession.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 30, 31; Dec. Dig. ⊂⊃25.]

7. TRESPASS TO TRY TITLE ⊂⊃25—STALE CLAIMS—TRANSFER OF HEADRIGHT.

Where the transfer of a headright was repudiated by the grantor in 1838 by making a second conveyance to other parties and no claim was asserted under the first conveyance for over 60 years, during all of which period there was some assertion of claim under the second conveyance, the claim under the first conveyance had become stale.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 30, 31; Dec. Dig. ⊂⊃25.]

8. TRIAL ⊂⊃253(3)—INSTRUCTIONS—EQUITABLE DEFENSES—LACHES OR STALENESS.

Where, in trespass to try title, defendant pleaded an equitable claim or title, to defeat which plaintiff relied upon laches or staleness, and the proof showed the staleness of the claim, the court should either have entertained the defense of staleness and decided it, or submitted the issue to the jury with proper instructions, instead of ignoring such defense in submitting the case to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 616; Dec. Dig. ⊂⊃253(3).]

9. TRESPASS TO TRY TITLE ⊂⊃11—CLAIM OF TITLE UNDER DIFFERENT SOURCES.

In trespass to try title, defendant's claim of an interest in the land under the same title under which plaintiff claimed did not preclude it from also claiming under a different title, if established as the paramount title.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 14; Dec. Dig. ⊂⊃11.]

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Trespass to try title by B. F. Moore against the Foster Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

W. D. Gordon, of Beaumont, Tex., and D. F. Rowe, of Houston, Tex., for plaintiff in error.

Sam Streetman and Newton C. Abbott, both of Houston, Tex., for defendant in error.

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

GRUBB, District Judge. This was an action of trespass to try titles, brought by plaintiff in error against the defendant in error, to recover 429 acres of land out of the John W. Asbury league and labor in Harris county, Tex. The defendant denied plaintiff's title, pleaded title in itself, and also adverse possession of the land sued for under title and color of title for more than 3 years prior to the institution of the suit. The plaintiff replied, to the defendant's assertion of title in it, that such title, if it ever existed, was barred by the statute of limitation of 10 years, and was a stale claim; and also denied the defendant's alleged adverse possession of 3 years.

Title to the land was originally in the Republic of Texas. One John W. Asbury was a colonist in that republic in 1835, and by the Constitution of Texas of 1836, by virtue of that fact, became entitled to a league and labor of public land in the republic. On July 20, 1837, Asbury and wife executed to Isaac Batterson, G. W. Scott, William H. Scott, and James S. Holman an instrument, purporting to convey to Batterson one-half and to the other grantees the remaining one-half of the league and labor of land to which he was entitled as a colonist, authorizing the grantees to locate it and enter upon and possess it when located, and authorizing the land officers to issue to the grantees the necessary title papers. At the time this instrument was executed, no certificate had been issued by the Republic of Texas for the league and labor of land to Asbury, nor had his claim been located on any specific public land. The instrument was recorded May 17, 1838. On March 20, 1838, Asbury executed to James S. Holman and G. W. Scott an instrument, similarly worded, purporting to convey to them jointly one-half of the league and labor of land to which he was entitled as a colonist. This instrument was recorded March 21, 1838. On March 20, 1838, a certificate was issued to Asbury by the proper land officers of the republic for the league and labor of land, to which he was entitled, containing the legal conditions as to payments. On September 4, 1839, a receipt was issued to Asbury for the required payments. On September 21, 1838, or 1839, the certificate was located on the land, a part of which is the land in controversy, upon a survey purporting to have been made for Asbury, by the proper land officers. On the 16th day of January, 1846, a patent was issued by the Republic of Texas, presumably to John W. Asbury, for the league and labor of land, a part of which is here in controversy, but whether or not it ran to his assigns is not disclosed by

the record. This completes the history of the land so far as the proceedings of the land office of the republic relate to it.

The plaintiff claims as grantee of one of two residuary devisees of G. W. Scott. The defendant claims under the other of the two residuary devisees of G. W. Scott, a claim not hostile to the plaintiff, but also claims in hostility to the plaintiff by virtue of quitclaim deeds, executed by the two heirs of W. H. Scott, one of the three grantees of the first conveyance of the headright made by Asbury in 1837. The second conveyance made by Asbury of his headright in 1838 omitted W. H. Scott's name as a grantee, and conveyed the entire half interest to G. W. Scott and Holman.

The determination of the record title to the land depends upon whether W. H. Scott or his heirs or their grantees had any interest in the land involved at the time of the institution of the suit; and this presents the questions as to whether W. H. Scott's title under Asbury's first conveyance of the headright should prevail over that of G. W. Scott, acquired by Asbury's second conveyance thereof, and, if so, whether the W. H. Scott title had, at the time this suit was brought, become a stale claim for lack of earlier assertion. Under the Texas land laws, the owner of a headright could sell his right by verbal or written contract, and in advance of the issue to him of the certificate evidencing his right or of the location of the land. The subsequent issuance of the certificate, location of the land, and issuance of a patent, though in the name of the colonist, inured to the benefit of the grantee, for whom the colonist then held the legal title to the land located.

[1, 2] It follows that the instrument, executed July 20, 1837, by Asbury to W. H. Scott and others was adequate to transfer to the grantees the headright of the grantor, though it was not then evidenced by a certificate and was not located upon any specific public land. This, however, was only a right to a league and labor of land somewhere in the public domain of the Republic of Texas. It is clear that before location, neither the original owner of the headright nor his transferee could be said to have any interest, either legal or equitable, in land not then located. A right to select land from the public domain is to be distinguished from an interest acquired in specific land, when selected. It is manifestly impossible to predicate ownership, either legal or equitable, in unknown lands, to be segregated from the public domain at some future time. The most that can be said of a right acquired before location is that it availed to confer an interest, upon location, either legal or equitable, depending upon whether patent issued to the original owner of the right on the one hand, or to the owner and his assigns or the grantee direct on the other hand.

[3, 4] It seems clear that W. H. Scott, by virtue of the conveyance of July 20, 1837, acquired no interest, either legal or equitable, in the lands afterward selected, until they were, in fact, located in September, 1838, or 1839. His only right, theretofore, under the instrument was either to have Asbury locate and patent lands for his benefit, or to accomplish this in his own name and for his own benefit. This right was not a legal interest in land, whether the Republic of

Texas recognized, prior to 1840, the common-law distinctions of law and equity or not. So that, on March 20, 1838, when Asbury executed the second conveyance, which omitted W. H. Scott as one of the grantees of his headright, W. H. Scott had no legal interest in the land, upon which the certificate might thereafter be located. It is true that the grantees, named in the second conveyance of the headright, acquired no greater interest thereby, since the second conveyance was in identical language in legal effect, and this would be true whether the certificate, which was issued to Asbury the same date, be construed as having been issued to him before or after the second conveyance was executed by him, for there was no location of the certificate at that date, nor until September, 1838, or 1839. Neither W. H. Scott nor G. W. Scott acquired any legal or equitable interest in the land until it was surveyed in September, 1838, or 1839. As between the two grantees, each having received from Asbury the same right in his headright, the first to whom it was conveyed in point of time would have the prior right, especially where, as in this case, the second grantee was charged with knowledge of the first conveyance, by being a grantee in it, as well as in the second. Johnson v. Newman, 43 Tex. 639.

If the title depended alone upon the status as of the time immediately subsequent to the execution of the second conveyance by Asbury, our conclusion would be that the defendant's predecessor in title became invested with either the legal or equitable title to the land upon the subsequent location of the land and issuance of the patent to Asbury, depending upon whether or not the patent ran to his assigns.

[5] However, the making of the second conveyance by Asbury of his headright, omitting W. H. Scott as grantee, is to be held, in the light of the decisions of the Texas courts, to have been a repudiation of his original transfer to W. H. Scott; no interest in the land itself having, at that time, vested in W. H. Scott, so as to make repudiation by him legally impossible. The placing of the second conveyance by Asbury on record, the day succeeding its execution, was notice to W. H. Scott that Asbury had repudiated any trust relation arising between them by virtue of the first conveyance, and sufficed to start the running of the statute of limitation or to fix the time from which the staleness of the claim under the W. H. Scott title was to be reckoned. Abernathy v. Stone, 81 Tex. 433, 16 S. W. 1102; Chamberlain v. Boon, 74 Tex. 659, 12 S. W. 727; Johnson v. Newman, 43 Tex. 629. In view of this repudiation by Asbury, his subsequent acts in having the certificate issued to him, the lands located and the patent issued are to be construed as having been done, not in the interest of W. H. Scott, but in that of the subsequent grantees of the headright under the second conveyance. And while it is true that W. H. Scott could have proceeded against Asbury or against the grantees under the second conveyance, if vested with a legal title, for a specific performance of the trust he had wrongfully repudiated by making the second conveyance, yet such a right could only be enforced before the claim had become stale, dating its inception and accrual from the date of the repudiation effected by the second conveyance of the headright by

Asbury. If there was no assertion of the right to enforce the repudiated trust either against Asbury or against his subsequent grantee, until the claim had become stale, then, at that time, at least, Asbury and his heirs, if the patent ran to him alone, would be considered as holding in trust the legal title for his subsequent grantee; or, if it ran to him and his assigns, the legal title, from that time on, would be in the subsequent grantee of the headright or his privies. Indeed it seems to be a rule of property in Texas that the legal title to land on which a certificate is located vests, immediately upon location and issuance of patent, in the then beneficial owner of the certificate, whether he acquired it by verbal or written transfer, and without respect to the rules governing the technical devolution of legal title.

[6] It is said, however, that the principle of staleness of claim is not available as against one in the position of a defendant in an action of trespass to try titles, who is in possession of the land sued for, and who is asking no affirmative relief. However, we are of the opinion that the defendant was in the equivalent situation of a holder of an equity, asking affirmative relief, though it was in possession and defending. Under the Texas procedure, the defendant is permitted to interpose an equitable title or defense, in an action in trespass to try titles. At common law the holder of an equitable title was not accorded this privilege, but was required to resort to a court of equity to establish his equity, and to restrain the suit at law, in which the legal title would otherwise have prevailed. The Texas procedure, permitting the equitable defense to be interposed in the action at law, relieves the defendant of the necessity of resorting to equity for affirmative relief, its purpose being to avoid circuity of action; but it cannot have been intended to affect the substantive relative rights of the contending parties. As the defendant in the action of trespass to try titles, under the Texas practice, is accorded privileges ordinarily only given those who go into equity, it should follow that the defendant should receive such privileges only with the burden incident thereto in a court of equity, and that all defenses which would be encountered in a court of equity in an effort to establish the equitable as against the legal title should obtain in a forum which was made the equivalent of a court of equity, by having conferred upon it jurisdiction to entertain equitable titles and defenses. This was, in effect, the holding of the Supreme Court of Texas in the case of Robertson v. Du Bose, 76 Tex. 8, 13 S. W. 300. That was an action in trespass to try titles. The defendant relied upon an equitable title. The plaintiff pleaded that the claim based on the defendant's equity was stale. The court entertained the counter defense, based on the alleged staleness of the asserted equitable title, determining that, as there had been no repudiation of the equity by the holder of the legal title, until shortly before the defense based on it was interposed, the claim was, in point of fact, not stale. The court said:

"The objection that the claim of defendant was stale was not a good ground for excluding the instrument from the jury as evidence. The same objection was more appropriately raised by the pleadings and by charges requested by appellant and refused by the court."

In overruling the defense of staleness, the court said:

"There being no repudiation of the trust until this sale, we think the doctrine of laches, or stale claim, had no application until then, and even then the nature of the transaction was not such as to address itself to the favorable consideration of a court of equity, to which the pleading and charges under consideration are addressed."

From this it is clear that the doctrine of laches or staleness is available, when established by the facts, in an action of trespass to try titles in a Texas court, as against an equitable title, interposed as a defense to the action. The cases of Cox v. Bray, 28 Tex. 247, and Johnson v. Newman, 43 Tex. 639, contain expressions in conflict, but we adhere to the later expression of the court in the case quoted from.

[7] The evidence in this case showed without conflict a repudiation by Asbury, who was the original owner of the headright, of his conveyance of July 20, 1837, to W. H. Scott of an interest in it, accomplished by his second conveyance of March 20, 1838, to G. W. Scott and Holman alone. No claim was asserted by W. H. Scott or his heirs to the lands from that date until his heirs conveyed to Simpson in 1899. Possession was first taken by defendant only a short time before this suit was brought. The time in which a claim becomes stale in Texas is, by analogy to its statute of limitation, a period of 10 years. Chamberlain v. Boon, 74 Tex. 659, 12 S. W. 727. In this case, a period of 60 years or more elapsed from the date of repudiation to the first assertion of claim by the heirs of the first grantee of the headright. There was at least some assertion of claim under the G. W. Scott title during all that period. Upon the undisputed facts in the record, we think the claim under the W. H. Scott title had become stale by the failure to assert it, during this long period of time, before possession was taken or ownership exercised under it.

[8] In view of the undisputed character of the proof upon the issue of staleness of claim, it seems unimportant to decide whether the defense of laches, or staleness of claim, interposed in an action of trespass to try titles, is addressed to the judge as a court of equity, as intimated in the last-quoted excerpt from the case of Robertson v. Du Bose, supra, or is to be tried by the jury like other issues of fact.

In this case the District Judge charged the jury that the title to the lands in controversy was in the defendant by virtue of the conveyance of an interest in the headright by Asbury to W. H. Scott on July 20, 1837, unless the jury should find that W. H. Scott subsequently conveyed his interest in the headright to G. W. Scott. The plaintiff excepted to this part of the charge, upon the ground, among others, that it ignored the defense of staleness of claim as against the claim under the conveyance of July 20, 1837, and assigns error here, based on this exception. We think the court below should either have entertained the defense of staleness of claim itself and decided it, or have submitted the issue, presented by it, to the jury, with proper instructions, for them to determine.

[9] As the defendant connected itself with the outstanding title alleged to have been in W. H. Scott and his privies, we do not think that it would have been precluded from relying upon that title, by rea-

son of its also claiming an interest through the G. W. Scott title, if the former had been established as the paramount title.

The judgment is reversed, and remanded for further proceedings in conformity to this opinion.

WHEELER et al. v. CITY AND COUNTY OF DENVER et al.*

(Circuit Court of Appeals, Eighth Circuit. February 10, 1916.)

No. 4286.

1. MUNICIPAL CORPORATIONS ⟸931—BOND ISSUES—VALIDITY—APPLICATION OF CHARTER.

Denver Charter, § 264a, as amended in 1910, relative to the purchase or construction of a waterworks system and the issuance of bonds for that purpose, provides that nothing in the preceding sections or in the charter, except as therein specifically provided, shall apply to the acquisition or operation of a waterworks, and that any provisions of the charter in conflict therewith are thereby repealed. *Held*, that the validity of bonds issued thereunder must be determined from that section alone, especially as the electors knew of existing trouble between the municipality and a water company, and in amending the charter legislated particularly with reference thereto.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1944–1947; Dec. Dig. ⟸931.]

2. MUNICIPAL CORPORATIONS ⟸931—ISSUANCE OF BONDS—SUBMISSION TO VOTE—OPERATION AND EFFECT.

Denver Charter, § 264a, as amended in 1910, created a public utilities commission, authorized the creation of an indebtedness in the sum of $8,000,000 to provide a municipal water plant, such indebtedness to be evidenced by bonds, and provided that, if a water company did not take advantage of its provisions as to selling its system to the city, then at a special election to be held as therein stated there should be submitted to the taxpaying electors the question of issuing $8,000,000 in bonds for the construction of a new municipal water plant. *Held*, that bonds authorized at such an election are not void because of the fact that a complete system of waterworks cannot be constructed for $8,000,000, as there is no provision in the charter prohibiting the issuance of the bonds unless a complete system can be built with the proceeds, and, while it would be unwise for the commission to start the construction of the system under the circumstances without obtaining authority from the voters for the issuance of additional bonds, the courts possess only judicial power, and may not correct unwise legislation or unwise official action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1944–1947; Dec. Dig. ⟸931.]

3. MUNICIPAL CORPORATIONS ⟸931—ISSUANCE OF BONDS—SUBMISSION TO VOTE—CHARTER PROVISIONS.

Denver Charter, § 264a, as amended May 17, 1910, creates a public utilities commission, gives it all the powers of the municipality in the matter of constructing, purchasing, condemning, and acquiring a water plant or system, authorizes the creation of an indebtedness in the sum of $8,000,000 to provide such system, when authorized by a vote of the taxpaying electors, and provides that if a water company, on or before July 1, 1910, shall place a deed of its property in escrow, with a direction to deliver it to the commission in exchange for $7,000,000 of bonds, the commission shall file its acceptance, and at a special election to be held on the first Tuesday in September, 1910, there shall be submitted the question of issuing $8,000,000 in bonds for the purchase and repair of such

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

* Rehearing denied May 16, 1916.

system, and that if the water company fails to comply therewith there shall be submitted at such election the question of issuing such bonds, to be sold or used for the construction of a new municipal water plant. A subsequent paragraph provides that the commission, immediately upon its election, in case the water company has not accepted the $7,000,000 in bonds, shall make a careful investigation of the value of such plant, and a careful estimate of the cost of constructing a new water system, and may submit an alternative proposition at such election for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant in any of the ways within its powers. *Held*, that it was discretionary with the commission whether it would follow this last paragraph, or the preceding one, and its failure to act under the last-mentioned paragraph did not invalidate bonds authorized at an election at which the question of issuing $8,000,000 in bonds for the construction of a new system was submitted, especially as the time between July 1st and the date of the election was entirely insufficient for a careful investigation of the value of the existing plant and the cost of a new system.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1944–1947; Dec. Dig. ⟸931.]

4. MUNICIPAL CORPORATIONS ⟸918(1)—ISSUANCE OF BONDS—SUBMISSION TO VOTE—CHARTER PROVISIONS.

As the charter authorized the creation of an indebtedness to provide a municipal water plant upon a vote of the taxpaying electors, and provided that the question actually submitted should be submitted, the failure of the commission to ascertain the probable cost of such system prior to the special election did not render the vote nugatory.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1919; Dec. Dig. ⟸918(1).]

5. MUNICIPAL CORPORATIONS ⟸918(1)—ISSUANCE OF BONDS—SUBMISSION TO VOTE—CHARTER PROVISIONS.

It was sufficient to submit to the taxpaying electors the question which the law required to be submitted, and the commission's failure to fix the date, form, and maturity of the bonds, as authorized by the charter, prior to the special election, did not affect the validity of the bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1919; Dec. Dig. ⟸918(1).]

6. MUNICIPAL CORPORATIONS ⟸918(1)—ISSUANCE OF BONDS—SUBMISSION TO VOTE—CHARTER PROVISIONS.

The bonds were not void because of the commission's failure to state in the proposition submitted to a vote how it proposed to create a sinking fund for the payment of the principal and interest on the bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1919; Dec. Dig. ⟸918(1).]

7. MUNICIPAL CORPORATIONS ⟸918(1)—ISSUANCE OF BONDS—SUBMISSION TO VOTE—CHARTER PROVISIONS.

An ordinance of the city of Denver provided for a tax sufficient to pay the annual interest on bonds authorized to be issued for the purpose of constructing a waterworks and to provide a sinking fund to extinguish the principal at maturity, and further provided that when the plant should have been constructed so much of the revenue as was not needed for the operation and maintenance of the plant should be paid into the sinking fund, and that no part of the levy should be utilized in the extinguishment of principal and interest until such revenues were exhausted. It was contended that the law only authorized the public utilities commission to provide for a sinking fund to be created out of the net earnings of the water plant. *Held*, that the bonds were not invalid merely

because the commission and council made a provision for a sinking fund that might not have been necessary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1919; Dec. Dig. ⊂⊃918(1).]

8. MUNICIPAL CORPORATIONS ⊂⊃920—ISSUANCE OF BONDS—SUBMISSION TO VOTE—CHARTER PROVISIONS.

Denver Charter, § 264a, as amended in 1910, authorizes the creation of an indebtedness in the sum of $8,000,000 to provide a municipal water plant, such indebtedness to be evidenced by bonds maturing at such times as may be prescribed by the public utilities commission, thereby created, and provides that such bonds may be called for redemption and redeemed by the commission as provided in another section. *Held*, that this provision as to redemption does not deprive the commission of authority, in determining when the bonds shall mature, to determine that they shall be straight 30-year bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1930, 1931; Dec. Dig. ⊂⊃920.]

9. MUNICIPAL CORPORATIONS ⊂⊃918(1)—ISSUANCE OF BONDS—SUBMISSION TO VOTE—CHARTER PROVISIONS.

The failure of the commission to determine whether the bonds were to be straight 30-year bonds or call bonds prior to the election, and to inform the taxpayers thereof before the submission to them of the question of issuing such bonds, did not invalidate the bonds, as it was sufficient to do what the law commanded, and the law did not require that the taxpayers be informed whether the bonds would be straight bonds or call bonds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1919; Dec. Dig. ⊂⊃918(1).]

10. TRIAL ⊂⊃56—RECEPTION OF EVIDENCE—CUMULATIVE EVIDENCE.

It was not error to exclude evidence which was merely cumulative, because the record already showed the facts desired to be proved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 131, 132; Dec. Dig. ⊂⊃56.]

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

Suit by Clara A. Wheeler and another against the City and County of Denver and others. From a decree dismissing the bill, complainants appeal. Affirmed.

The bill in this case was filed by appellants June 21, 1911, in behalf of themselves and all other taxpayers of the city and county of Denver, Colo., similarly situated, who might come in and contribute to the expenses of the action, for the purpose of having $8,000,000 of bonds voted by the taxpaying electors of the city and county of Denver on the first Tuesday of September, 1910, declared null and void, and their issuance by the public utilities commission perpetually enjoined. There was a motion made by appellees to dismiss the bill on the ground that it did not involve a dispute or controversy properly within the jurisdiction of the court, for the reason that the parties had been collusively joined for the purpose of attempting to create a cause cognizable under the laws of the United States. The motion was granted. On appeal this decision was reversed. Wheeler v. Denver, 229 U. S. 342, 33 Sup. Ct. 842, 57 L. Ed. 1219.

When the case was remanded a supplemental bill and amendment was filed without objection. The case subsequently came on for trial, and counsel for appellees made admissions in open court as follows:

"We admit that there was no attempt made by the public utilities commission to comply with the provisions of article 9 of the charter in existence prior to the amendment of section 264a. We insist that section 264a super-

seded the provisions of article 9 which have been alleged in this bill, and that all our proceedings and all our acts were taken under the express terms and provisions and authority of section 264a. We admit that we did not submit at the election in September, 1910, any question, or cause to be submitted any question, excepting the question of whether or not the taxpaying electors wished to issue $8,000,000 of bonds for the purpose of constructing an independent water plant. We admit that there was no special report, or no special investigation, aside from the general investigation, made by the members of the utilities commission between the 1st day of July, and the time of the enactment of the ordinance calling the special election or prior to the special election in September, 1910, in relation to the valuation of the plant of the Denver Union Water Company, or in respect to the question of whether or not an independent plant could be constructed within the limits of the bonds provided and authorized by section 264a."

"We further are willing to admit that the utilities commission submitted no alternative proposition, but they reported to the election commission that there was no alternative proposition to be submitted, and that the vote was taken without the submission of an alternative proposition, insisting that the question of the submission of an alternative proposition lay entirely within the discretion of the public utilities commission. We take the position that section 264a covers the entire matter, and we admit that we have at all times acted under, and particularly with reference to the terms and provisions of section 264a, using that section for the authority of the public utilities commission, and complying in all respects with the terms of that section, and that we have not acted otherwise than under it."

"That up to the time of the election on the 6th day of September, 1910, there was nothing in the minutes or records of the public utilities commission showing that they had up to that time made any estimates, or made any plans, or made any surveys, or taken any other steps toward ascertaining the cost or fixing the cost, or adopting the maximum cost, or any cost, of a water plant for the city of Denver."

Counsel for appellants then called as a witness John R. Freeman, a civil engineer, whose qualifications to testify were undoubted, and after several questions had been asked him which he was not permitted to answer, counsel made the following offers of proof:

"We now desire to make an offer of proof and show by the witness now on the stand that he has made a careful and exhaustive investigation of the situation in the city of Denver and of the available water supplies for the use of the city of Denver and its inhabitants for domestic supplies, and that his examination has covered a period of several years, beginning in 1907, and during the present year has brought his investigation down to date; that he is familiar, after having made such an investigation, with the conditions, and the situation and the cost of the installation of a water plant such as would be necessary to furnish and supply the city of Denver with water for all uses and purposes for all the inhabitants of the city; and that the cost of such a plant, as is required by the terms of section 264a, or any adequate reasonable plant, would range from a minimum of $15,000,000 to $20,000,000, depending on whether or not it was deemed advisable to cross the range of mountains for the water supply."

"We offer to prove by the witness now on the stand, further, that he is familiar with the present water plant now furnishing water to the city and county of Denver, and that the cost of duplicating the present plant would be in excess of $16,000,000.

"And we offer further to prove by this witness now on the stand that the value of the present plant—its reasonable present value is approximately $15,000,000."

"We offer further to prove by this witness now on the stand that that system of waterworks such as is required by section 264a that would be a proper and satisfactory system cannot be built for $8,000,000."

"We offer to prove that such a plant could not be built at any time in the year 1910, nor at any time subsequent to 1910, nor can it now be built, for $8,000,000, or any amount less than $16,000,000."

"We also offer to prove by the witness now on the stand that upon per-

sonal investigation there are no available reservoir sites within a reasonable distance from the city of Denver that can be utilized for the conservation of a water supply for a water plant for the city of Denver that could be built for any reasonable amount, such as would be required in a plant to cost $8,000,000."

"We offer to show that upon a personal investigation by the witness now upon the stand that there are no available reservoir sites at any cost whatever that could be used for a plant to be established for the city and county of Denver."

"We also offer to prove that it is financially impossible and physically impossible to acquire a water supply of sufficient volume at any point from the other side of the range of mountains for use in the city of Denver."

"We offer to show by this witness that, upon investigation which he has made, it is now impossible for the city and county of Denver to acquire any independent water for the use of a water plant for the city and county of Denver, or a new water plant for the city and county of Denver, and that such waters cannot be obtained from any source other than the water now owned by the Denver Union Water Company."

"And that no water outside of the watershed of the Platte river can be obtained for the city and county of Denver."

"And that the water of the Platte—watershed of the Platte river—has been appropriated several times over, and the water cannot now be obtained except at prohibited cost."

"We offer to show by the witness that it would cost to exceed $4,500,000 to place in the city and county of Denver a distributing system for the water."

Counsel then offered to show the same facts by witnesses M. L. Holman and George G. Anderson. These offers were all objected to by counsel for appellees as incompetent, irrelevant, and immaterial. The objections were sustained and exception allowed. A. Lincoln Fellows, a member of the public utilities commission and one of the defendants in this case, was called as a witness by appellants and asked the following question: "I will ask you if there is in the minutes of the public utilities commission any resolution adopting any particular plan for the construction of a new and complete water system for the city and county of Denver as required by section 264a prior to the 6th day of September, 1910."

The witness was permitted to answer, and he stated: "I do not remember any such resolution. I don't think there is one."

Henry W. McElravy was called as a witness by counsel for appellants for the purpose of identifying certain memoranda which he had taken from the minutes of the commission. The memoranda were offered to be introduced in connection with the testimony of the witness for the purpose of showing that the commission prior to the election on September 6, 1910, had taken no action with respect to the investigation of a source of water supply, or made any estimate of the cost of acquiring or constructing a water system for the city and county. These memoranda on objection were excluded and an exception allowed.

Counsel on each side then rested their case, whereupon the court dismissed appellant's bill with costs. This appeal is from the judgment dismissing the bill. The bill alleged and the answer admitted that on August 3, 1913, the public utilities commission passed the following resolution:

"On motion of Mr. Anderson an advisory committee, consisting of A. Lincoln Fellows, C. P. Allen, and E. C. Van Diest, were appointed to act as an engineering committee, under the direction of this commission, for the purpose of making careful study of the present value to the city of the Denver Union Water Company's holdings, and of the proposed projects for furnishing water from the western slope for Denver, and the various storage projects on the South Platte river and its tributaries, and of making estimates of the cost of acquiring or constructing a complete water system for the city of Denver, by any of the methods proposed, taking into consideration the water supplies available, and to make verbal progress reports from time to time as may be desired, and write a final report at the earliest possible date

to this committee, and thereafter directed that the services rendered by said board be paid by the city and which said payment has been made."

The bill further alleged, and the answer admitted, that said board of engineers reported as follows with respect to a new plant: "It should be possible to construct a new water system complete, in serviceable operation and providing service in five years for $12,750,000."

Counsel for appellees, Mr. Nye, in answer to a question from the bench when this appeal was being argued, admitted that a new water system complete for the city and county of Denver, could not be constructed for $8,000,000. The bill alleged: "That a complete water system, such as is required by the provisions of section 264a, of article 9, cannot now, and could not at the time of the adoption of said section, be constructed or completed for said sum of $8,000,000, or for any sum less than $12,750,000, and, with any adequate water supply, $16,000,000." And this allegation does not seem to have been denied by the answer.

Section 264a of the charter of the city and county of Denver, which authorized the issuance of the bonds in question, reads as follows:

Paragraph 1.

"Section 264a. Nothing in the preceding sections or in this charter, except as herein specifically provided, shall apply to the acquisition or operation of a waterworks for supplying the city and county of Denver and its inhabitants with water for all uses and purposes, but a public utilities commission is hereby created, to consist of three members, to have complete charge and control thereof, and to have and exercise all the powers given to the board of public works in chapter IX, as to all public utilities."

Paragraph 2.

"Except as herein provided, each member of said commission shall be elected for a term of six years and shall serve until his successor is elected and qualifies, and his salary shall be four thousand dollars per annum, payable in equal monthly installments by the treasurer out of the general fund upon the warrant of the commission, and Armour C. Anderson, Edwin Van Cise and A. Lincoln Fellows are hereby elected as the first members of said commission to serve, in the order named, from the date of their election to June 1, 1912, June 1, 1914, and June 1, 1916, respectively, and until their successors are elected and qualify. The names of all candidates hereafter nominated for members of said commission shall appear on the official ballot without any party designation in connection therewith. Each commissioner shall give bond in the sum of $10,000 in the manner provided in section 152 of the charter."

Paragraph 3.

"Said commission shall have power to employ a secretary and such legal and technical help as it may deem necessary, and shall, subject to the civil service provisions of this charter, hire all other employés, and shall fix and pay all salaries and wages and shall fix and collect all rates and charges for any service under its control, which rates and charges shall be made as low as good service will permit. Said commission may adopt reasonable rules and regulations, with reference to such service. It shall make an itemized monthly statement of all moneys received and paid out by it, a copy of which it shall file with the city auditor, and shall daily turn over to the city treasurer, as provided in section 260 the money received by it, said money to be paid out by the treasurer only upon the warrant of said commission. Said commission shall have and exercise all the powers of the city and county granted in the constitution or named in the charter in the matter of constructing, purchasing, condemning and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes and everything pertaining or deemed necessary or incidental thereto. It shall institute and defend all litigation affecting its duties and powers or in relation to its trusts and all expenses thereof shall be paid by the treasurer out of the general fund upon the warrant of the commission,

and it may also call to its assistance the city attorney or any other department of the city government."

Paragraph 4.

"Except as in this section provided, the city and county shall never purchase or acquire or exercise any option, right, privilege or power of purchasing or acquiring any water plant or system from any person, persons or corporation except upon a vote of the qualified electors first had and obtained authorizing the same, and wherever in any ordinance or contract the former city of Denver was given the right, or the city and county now has the privilege or power to purchase or acquire any water system or plant or to extend any contract with reference thereto, the term 'city' used in any such ordinance or contract shall be taken and held to mean the qualified electors of the city and county and not otherwise. No plant owned, acquired or constructed by the city and county and no water rights owned or acquired by the city and county shall ever be sold, leased or otherwise disposed of except upon a vote of the qualified electors first had and obtained, and the same shall be under the sole control and management of said commission.

"Any member of said commission may be recalled and his successor named at any time in the manner provided by the recall section of this charter. Any vacancy shall be filled by the remaining members of the commission and such appointee shall serve until the next municipal election and until his successor is elected and qualifies."

Paragraph 5.

"Upon a vote of the taxpaying electors authorizing the same, as hereinafter provided, the city and county of Denver, shall and it does hereby authorize the creation of an indebtedness in the sum of eight million dollars to provide a municipal water plant or system and everything incidental or necessary thereto for supplying the city and county and its inhabitants with water for all uses and purposes, said indebtedness to be evidenced by its bonds of the par value of eight million dollars, in convenient denominations of not more than one thousand dollars each and bearing four and one-half per centum interest per annum of such date and in such form maturing at such times as may be prescribed by said commission. The council shall pass such ordinances as said commission may deem necessary respecting the issuance of said bonds or to the full exercise of all the power given it, in the form recommended by the commission, and without amendment, and the mayor shall sign the same. Said commission shall issue said bonds only from time to time as they are required for actual use or sale, and the mayor shall sign them and the clerk shall sign and attest them under the seal of the city and the auditor shall register them, with the approval of the president of said commission indorsed thereon. No such bonds shall be used or sold at less than par, nor sold except after advertisement as in this charter provided for the sale of public improvement bonds, and they may be called for redemption and redeemed by the commission in like manner as provided in section 314."

Paragraph 6.

"If the Denver Union Water Company shall place in escrow with the Continental Trust Company of Denver, on or before July 1, 1910, a good and sufficient deed of conveyance from said water company to the city and county of Denver for all the property of every description included and embraced in the appraisement made under Ordinance 163, Series of 1907, free and clear of all liens, incumbrances, claims and demands of every kind and character, accompanied by a valid surrender and release of any and all rights, claims and demands said company or any of its subsidiary, associated or affiliated companies may have against the city and county or against any of said property, with direction in writing to deliver the same to said commission in exchange for seven million dollars of said bonds at par, then the commission shall file its acceptance with said trust company and the same shall constitute a binding contract of purchase. In that event then at a special election which the council shall call within sixty days after the adoption of this amendment, to be held on the first Tuesday in September, 1910, there shall be submitted to the qualified taxpaying electors the question of issuing the

said eight million dollars in bonds, of which seven million dollars at par shall be delivered to said trust company as aforesaid and the other one million dollars of bonds, or so much thereof as may be deemed necessary, shall be sold or used by the commission to improve, repair and add to the water plant so purchased. The ballot shall have printed on it the words, 'For the issuance of eight million dollars in bonds for the purchase and repair of the existing water plant under the provisions of section 264a of the charter,' and on a separate line the words, 'Against the issuance of eight million dollars in bonds for the purchase and repair of the existing water plant under the provisions of section 264a of the charter,' with a space opposite each such line in which the voter may make his mark indicating his vote."

Paragraph 7.

"In case the Denver Union Water Company shall fail or refuse to fully comply with all the foregoing provisions as to the things to be done and performed by it, then at the special election aforesaid, in lieu of the foregoing question, there shall be submitted to the qualified taxpaying electors on the ballot the question of issuing eight million dollars in bonds to be sold or used to construct and put into operation a complete system of water works for supplying said city and county and the inhabitants thereof with water for all uses and purposes. Said ballot shall have printed on it the words, 'For the issuance of eight million dollars in bonds for the construction of a new municipal water plant,' and on a separate line the words, 'Against the issuance of eight million dollars in bonds for the construction of a new municipal water plant,' with a space opposite each such line in which the voter may make his mark indicating his vote. Such bonds, or so much thereof as the commission may deem necessary, shall be sold or used by it to construct and put into operation a complete system of water works for supplying said city and county and its inhabitants with water for all uses and purposes, and said commission shall forthwith proceed to construct the same."

Paragraph 8.

"The said commission shall immediately upon its election, in case the Denver Union Water Company has not accepted the seven million dollars in bonds for its plant as aforesaid, proceed to make a careful investigation of the value of said plant for the uses and purposes of the city and county of Denver and its inhabitants, and also proceed to make a careful estimate of the cost of constructing a complete new water system for the city and county of Denver and the inhabitants thereof and may submit an alternative bond proposition at said special election for the issuance of bonds in such sum as it may deem advisable for the acquisition or construction of a water plant or any part thereof by any of the ways within its powers herein mentioned, and the same shall be placed on said ballot in such form as said commission may determine, and it may also submit any proposition concerning its powers or trust at any municipal election in like manner. If a majority of the votes cast thereon shall be in favor of any proposition submitted it shall thereby be adopted, and in case alternative propositions are submitted, and each receive a majority, then the one receiving the greater affirmative vote shall be the one adopted. Such adoption shall be a sufficient authorization for the issuance of the bonds thereby provided for and the same, when issued, shall be and constitute an indebtedness of the city and county of Denver for the purposes aforesaid, and the provisions in this section relative to the issue, sale and redemption of bonds shall apply thereto. Any provisions of the charter in conflict herewith is hereby repealed."

For the purpose of reference the section has been divided into paragraphs numbered from 1 to 8, inclusive.

It is admitted by the answer to the bill that the public utilities commission under and by virtue of the authority conferred by said section 264a, caused to be prepared and introduced in the city council for the city and county of Denver an ordinance which was duly passed and approved by the mayor of said city and county on July 6, 1910, and known as No. 98, Series of 1910, calling and requiring the holding of an election on the first Tuesday of September,

1910, for the purpose of submitting to a vote of the qualified electors the question of issuing $8,000,000 in bonds for the construction of a new municipal water plant; that thereafter, in pursuance of said ordinance, on the first Tuesday in September, 1910, to wit, on September 6th, in said year, said election was held with the result that the issuance of said bonds was approved by a majority of the persons voting upon said question. The answer also admitted that in all proceedings taken by appellees in respect to the passage of said ordinance, the holding of said election, and the authorization of said bond issue, they proceeded under the provisions of section 264a, and without regard to original article 9 of the existing charter of the city and county of Denver. The answer also admitted that the only question submitted to the qualified electors at the election held September 6, 1910, was in the following form: "For the issuance of eight million dollars in bonds for the construction of a new municipal water plant." "Against the issuance of eight million dollars in bonds for the construction of a new municipal water plant"—and that no other question was submitted by the public utilities commission or otherwise.

It is also conceded that the Denver Union Water Company never at any time complied with the provisions of that portion of section 264a, designated as paragraph 6 herein.

Edwin H. Park, of Denver, Colo. (Henry A. Lindsley, of Denver, Colo., on the brief), for appellants.

Clayton C. Dorsey, of Denver, Colo., amicus curiæ.

George L. Nye and James A. Marsh, both of Denver, Colo., for appellees.

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

CARLAND, Circuit Judge (after stating the facts as above). [1] So far as the legality of section 264a as a law is concerned we think the objections urged in the bill were all decided adversely to the contentions of appellants in Denver v. New York Trust Co., 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101. It was there said:

"That section 264a was merely an amendment of the charter, and that the mode of its submission and adoption was in accord with the applicable restrictions of the state Constitution," and "that the amendment supersedes pro tanto the original provisions of the charter with which it is not in accord. The purpose in adopting it was to introduce something new, to make a change in existing provisions, and being adopted conformably to the constitutional and charter requirements, the new or changed provisions became at once a part of the charter, thereby supplanting or modifying the original provisions to the extent of any conflict."

We also are of the opinion that in view of the language of paragraph 1 of section 264a, and of the general repealing clause at the end of the section, that the validity of the bonds in question, so far as the questions raised in this case are concerned, must be determined from an examination of said section and that alone. We are strongly persuaded to adopt this view not only from the language used but from a consideration of the fact that the electors of the city and county of Denver knew of the trouble existing between the city and county of Denver, hereinafter called city and county, and the Denver Union Water Company, hereinafter called water company, and that they legislated particularly with reference thereto and specifically said:

"Nothing in the preceding sections or in this charter, except as herein specifically provided shall apply to the acquisition or operation of a waterworks for supplying the city and county of Denver, and its inhabitants with water for all uses and purposes."

[2] The first and important contention of appellants why the bonds must be declared void may be stated as follows: The city and county and the public utilities commission, hereinafter called commission, are both without power to issue bonds except as specific authority may be conferred in each instance by vote of the qualified taxpaying electors. This authority when conferred must be strictly construed, and all reasonable doubt of its existence must be resolved against the granting of the power. In the case at bar the qualified taxpaying electors authorized the issuance of $8,000,000 in bonds on condition that they should suffice to provide a municipal water plant or system, and everything incidental or necessary thereto, or construct and put into operation a complete system of waterworks for supplying said city and county and the inhabitants thereof with water for all uses and purposes; that the taxpayers have never voted upon the question of issuing $8,000,000 in bonds to construct a partial or incompleted plant, to finish which and make it usable, would cost a much larger sum, and that to hold that they so voted would sanction a manifest fraud upon the taxpayers. Therefore the issuance of the bonds should be enjoined because upon the record it is admitted that a complete system of waterworks cannot now be and never could have been constructed for $8,000,000. In the consideration of this contention we are of the opinion that we must hold on the record before us that a complete system of waterworks such as would be required to supply the city and county with water, cannot be constructed for $8,000,000.

This court, however, possesses only judicial power. It may not legislate nor correct merely unwise legislation or unwise official action. No one can read section 264a without reaching the conclusion that the taxpaying electors understood that $8,000,000 would construct and put into operation a complete system of waterworks for supplying the city and county and the inhabitants thereof with water for all uses and purposes. Paragraph 8. But are the bonds voted void because the amount of bonds authorized will not construct and put into operation a complete system of waterworks? What rule of law has been violated in the estimate made by the electors as to the amount required to construct and put into operation a complete system of waterworks? What rule of law has been violated conceding the electors made a mistake as to the amount required for the purpose mentioned? It may be conceded that it would be unwise for the commission to start the construction of a waterworks system with only a part of the expense authorized. But as has been stated the judicial power cannot reach merely unwise official action.

It would seem to be the duty of the commission or the city and county to go back to the electors for authority to issue additional bonds; but the judicial power does not extend to compelling the performance of official duty where a discretion is involved. It is urged

as a legal ground for holding the bonds void, that to decide otherwise would be to sanction a manifest fraud on the taxpayers. We do not intend to sanction a fraud upon any one, nor do we, when we decide that the evils complained of on this branch of the case are beyond our reach. In order to hold the bonds void for the reason now being discussed, we would be compelled to construe section 264a as providing either directly or by clear implication that the bonds should not be issued or used unless a complete system of waterworks could be built for $8,000,000. If this was the idea of the electors it would have been an easy matter to have inserted in the section language to the effect, that in case it was found that $8,000,000 would not construct a complete waterworks system that the bonds should not be issued or used. No such proviso was so inserted, and we have no authority so to do. It certainly cannot be the law that simply because the electors authorizing a bond issue have made a mistake as to the amount of bonds required to construct any public improvement, that therefore the bonds are void, in the absence of any legislation or provision that they shall be void in case the public improvement shall cost more than the amount of bonds authorized. It is rather the exception than the rule that public improvements are built within the limit of the amount of money appropriated therefor.

Counsel for appellees cite the case of People ex rel. Murphy v. Kelly, 76 N. Y. 475, in support of the proposition that even if it is conceded that the waterworks system for the city and county cannot be constructed and completed for $8,000,000, that fact would not prevent the issuance of the $8,000,000 already voted, and the commencement of the waterworks system by the commission. In the case cited the trustees of the New York and Brooklyn Bridge had made two requests for money with which to construct the Brooklyn Bridge, of the mayor and comptroller of New York, amounting in the aggregate to $1,000,000. These requests were resisted on the ground that the proviso in the act of the Legislature of New York of 1875 (Laws 1875, c. 300) provided:

"That the whole amount to be paid by both cities [Brooklyn and New York] shall not exceed eight millions of dollars."

It was claimed by the comptroller that the bridge although partially constructed could not be completed for the sum of $8,000,000, and as the cost was limited by law to $8,000,000 no more money should be paid to the trustees.

The action was one in mandamus to compel the payment of the calls made by the trustees of the New York and Brooklyn Bridge. The Court of Appeals of New York, by a divided court, decided that the limitation of the amount to be paid contained in the proviso above mentioned did not prohibit the trustees from proceeding with the construction of the bridge, for the reason that if it had been intended that the trustees should not enter upon the completion of the bridge without first determining whether or not it would cost more than $8,000,000, a matter of such controlling importance would have been expressed in plain and explicit language.

This is along the line of reasoning which we have advanced in reference to section 264a. In regard to the Brooklyn Bridge Case, however, it must be said that at the time the act of 1875 was passed which contained the proviso above mentioned and other matters in connection with the building of the Brooklyn Bridge, there had already been expended upon the bridge about $5,000,000, and there was greater reason for the court to hold in that case that the Legislature of New York did not mean by the proviso above mentioned that the structure then partially completed, upon which upwards of $5,000,000 had been expended, should be lost and rendered worthless unless the expense of its completion could be kept within the sum mentioned. In the case at bar the bonds have not been issued and no work has been done as we understand it, towards the construction of a complete waterworks system, so that the conditions which existed in the Brooklyn Bridge Case do not exist here.

We prefer to place our judgment in overruling the contention now under discussion upon the principle that the bonds in question being within the limit authorized by the votes of the taxpayers, may not be held void merely because a complete system of waterworks will cost more than the amount of the bonds voted, in the absence of some express provision or clear implication that the waterworks system was not to be constructed unless it could be constructed for $8,000,000. Paragraph 7, under which the bonds were voted, provides:

"Such bonds, or so much thereof as the commission may deem necessary, shall be sold or used, by it to construct and put into operation a complete system of waterworks for supplying said city and county and its inhabitants with water for all uses and purposes, and said commission shall forthwith proceed to construct the same."

[3] It is next contended that by virtue of the language of paragraph 8, section 264a, that the investigation and determination by the commission of the value of the water company's plant, and the cost of constructing a new complete plant, was a condition precedent to be performed prior to the vote, which authorized the issuance of the bonds, and the nonperformance of these duties by the commission rendered the bonds so voted void. In regard to this contention, it is manifest that the failure of the water company to in any way comply with paragraph 6, section 264a, rendered it impossible for the council to submit to the qualified taxpaying electors the question of issuing $8,000,000 in bonds for the purchase and repair of the waterworks of the water company. In this condition of affairs there was submitted at a special election called as provided in paragraph 6 the question provided in paragraph 7, and as a result thereof the bonds in question were authorized. The question then is, was it lawful to submit the question provided for in paragraph 7 at the special election provided for in paragraph 6, or was the commission after the water company had failed and refused to comply with paragraph 6 confined absolutely to the provisions of paragraph 8.

Section 264a became a law May 17, 1910. By its terms the water company was to place in escrow a good and sufficient deed of conveyance of its waterworks on or before July 1, 1910. A special elec-

tion was to be held on the first Tuesday in September, 1910, in case the deed of conveyance of the water company should be deposited in escrow, as above stated, for the purpose of determining whether $8,000,000 in bonds should be issued to purchase and repair the existing water plant. This question was not submitted at the special election as the water company did not deposit its deed as provided in paragraph 6, but under paragraph 7 in lieu of the question stated in paragraph 6, the question in paragraph 7 was submitted at said special election. The language of paragraph 7 in regard to the submission of the question therein provided for uses the words "shall be submitted." Paragraph 8 provides that the commission, in case the water company has not accepted $7,000,000 for its plant, as provided in paragraph 6, shall proceed to make a careful investigation of the value of said plant for the uses and purposes of the city and county, and its inhabitants, and also proceed to make a careful estimate of the cost of constructing and completing a new waterworks system for the city and county and the inhabitants thereof, and that said commission may submit an alternative bond proposition at the special election provided for in paragraph 6 for the issuance of bonds in such sum as the commission may deem it advisable for the acquisition or construction of the water plant or any part thereof by any of the ways within its powers.

In the light of what has transpired it would no doubt have been better had the commission proceeded under paragraph 8, still it could not know before July 1, 1910, whether the Water Company would accept $7,000,000 in bonds for its plant, and the time between July 1, 1910, and September 6, 1910, the date of the special election, would in our judgment be entirely insufficient to make a careful investigation of the value of the water company's plant, and of the cost of constructing and completing a new water system. Indeed we think that it would have been impossible for the commission to have performed the duties required under paragraph 8 within the time limited. This is demonstrated by the time that it took the engineering committee subsequently appointed to make an investigation of the cost of constructing a new system of waterworks.

So far as mere procedure is concerned we think the commission's failure to act under paragraph 8 was justified. And we are also of the opinion that such failure to act in no wise invalidated the election which was actually held. The language of paragraph 7 is mandatory, and the question upon which the qualified electors were to vote was clearly defined.

[4] It is further claimed that, whether the commission was obliged to follow paragraph 8 or not the failure to make a careful estimate of the cost of constructing a new system of waterworks prior to the special election at which $8,000,000 in bonds were authorized renders the vote nugatory.

The case of Carlson v. City of Helena, 39 Mont. 82, 102 Pac. 39, 17 Ann. Cas. 1233, is cited by appellants to sustain their contentions that the vote by which the taxpaying electors of the city and county of Denver authorized the bonds in question was nugatory, because prior

to said election the public utilities commission had not ascertained that a supply of water could be had, and the probable cost thereof. The case cited was brought by Carlson as a taxpayer and resident of the city of Helena, to restrain the issue of $600,000 of bonds of the city for the purpose of procuring a water supply and installing a system of pipes for its distribution, and $70,000 of bonds for the purpose of extending one of the sewers of said city.

The facts bearing upon the point decided in that case which it is claimed is an authority in the present case were as follows: On March 3, 1908, the mayor and city council of the city of Helena determined that it was for the best interests of the city to own and control its water supply and water system, and that a supply could be obtained from McClellan creek, and brought into the city by an expenditure of $600,000, and also that a needed extension of the sewer system of the city could be effected by an expenditure of $70,000, whereupon the mayor and city council of the city enacted an ordinance reciting these facts and providing for a submission to the taxpayers of the city of the question whether the limit of indebtedness should be extended to procure the funds for these purposes. The ordinance provided that a special election be held in the city of Helena on the 25th day of April, 1908, for the purpose of ascertaining the will of the taxpayers to be affected thereby, as to whether authority should be given and power conferred upon the city council to increase the indebtedness of said city, over and above the 3 per cent. limit fixed by law, by the issuance: (1) Of water bonds of said city to the amount of $600,000, for the purpose of securing a water supply for said city from McClellan creek and constructing a water system for said city; (2) of sewer bonds to the amount of $70,000 for the purpose of sewer extension. The election was held pursuant to the ordinance and it showed a large majority in favor of both bond issues. Thereupon and in pursuance of the authority given by the electors an ordinance was passed providing for the issuance of the bonds. Judgment was entered by the trial court on demurrer for Carlson and the city appealed.

It was contended in the appellate court that the city council had no authority to submit to the electors the question whether a particular water supply must be obtained, or, if it had, that the question could not be submitted in this restricted form until it had first been ascertained that the particular supply was available and what its cost would be. In other words, the contention was that the council was authorized to consult the taxpayers generally as to whether it might proceed to acquire a supply of water for the city, but that it could not divest itself of the discretion vested in it by law as the governing body of the city by leaving it to the electors to select a particular supply, namely, from the waters of McClellan creek. It was claimed that the objection was fundamental because the discretion to procure a particular supply was vested in the council, and that this discretion could not ordinarily be exercised until the council had ascertained that the particular supply was available, and that the cost of acquiring and installing it could be compassed by the amount of the indebtedness to be incurred. The Supreme Court of Montana sustained this contention. The court said:

"If the council should have first ascertained that the particular supply could be acquired, and that the cost of it, together with the cost of installment, is within the compass of the sum which the city can lawfully expend for that purpose, then there could be no possible objection to allowing the voters to speak as to the propriety of securing the particular supply. The council would then have exercised the discretion which is vested in it by law. If, however, all these matters have not already been determined, the vote becomes nugatory, because the assent given by the voters for the acquisition of the particular supply limits the discretion of the council, with the result that if it is thereafter found that the contemplated supply cannot be secured, or that the cost of installment is beyond the financial capacity of the city or not within the compass of the sum secured by the sale of the bonds under the extension already voted, the debt incurred can serve no purpose. It appears from the complaint that the council has authorized condemnation proceedings to acquire the right to the use of the water of McClellan creek, but that these proceedings have not yet been determined. It thus appears, and it is admitted by counsel for appellant, that the cost of acquiring the right has not been ascertained. If the intention to acquire it should be abandoned for any cause hereafter—and it cannot now be surmised what difficulties may be encountered—the city would have in its treasury the money derived from the sale of the bonds, without any use to which the council could devote it. The orderly course of procedure would be to submit the question generally whether the indebtedness, not in excess of a definite amount within the limit, should be incurred; then the council would be left free, in case the indebtedness should be authorized, to use its discretion in securing one supply or another, according as its judgment would dictate. The discretion of the council in this particular is exclusive, and it cannot lawfully divest itself of it by casting it upon the voters, with the probably, or even possibly, absurd consequences to which we have adverted. 28 Cyc. 277, and cases cited in notes; Dillon on Municipal Corporations (4th Ed.) § 96. Having ascertained that a supply can be obtained, the council may then proceed, and under the authority granted by the electors to incur the necessary indebtedness, to issue and sell bonds, acquire any supply which its judgment may dictate, and have it installed so that it may become available. It might, perhaps, be said that the vote upon the submission in its restricted form could not be held binding upon the council in case it should turn out that the right to the use of the water in McClellan creek could not be acquired. This may with equal propriety be answered by the statement that the voters were not asked to extend the limit generally for water supply purposes, and it cannot be said that assent to incur the indebtedness would have been given if the question had been submitted generally, as the statute contemplates. Skinner v. City of Santa Rosa, 107 Cal. 465, 40 Pac. 742, 29 L. R. A. 512."

There can be no question in this case that the submission of the question voted upon to the qualified taxpaying electors in any way interfered with the discretion of the commission or the council of the city and county as to where the supply of water should be obtained, so the case cited is inapplicable on that point. The case, however, does seem to hold that it was necessary for the council of the city of Helena, Mont., before it submitted the bond proposition to a vote of the taxpayers, to have ascertained whether or not a water supply and water system could be obtained and constructed for the sum of $600,000; and one of the grounds upon which the court seems to have held the bonds void was that the council never did ascertain prior to the vote what a water system for the city of Helena would cost. We all must admit that that would be the business way of going about the matter, but where as in the case at bar the charter authorizes the creation of an indebtedness in the sum of $8,000,000 to provide a municipal water plant or system and everything incidental or necessary thereto for

supplying the city and county and all its inhabitants with water for all uses and purposes upon a vote of the taxpaying electors, and the charter further provides that the question shall be submitted as provided in paragraph 6 of 264a, we cannot conclude that the mere failure of the commission to ascertain the probable cost of a new system would render the vote provided by law nugatory. In our judgment section 264a left it to the discretion of the commission whether it should follow paragraph 7 or paragraph 8.

[5] It is further contended that the commission failed and neglected to fix the date, form, and maturity of the $8,000,000 of bonds prior to the special election of September 6, 1910, and that, therefore, the commission has no power to issue the same. It appears that by the ordinance effective January 15, 1914, the council of the city and county fixed the form and date of the bonds. They were to bear date January 1, 1914, and all the installments of said bonds were to mature not later than 30 years from the date of original issue, and all of the bonds should absolutely mature and be payable 30 years after their date. It also appears from the record that while litigation did not prevent the commission from fixing the form, date, and maturity of the bonds prior to the special election, it did cause the delay to a large extent which happened subsequently thereto.

Paragraph 5 of 264a empowers the commission to fix the date, form, and maturity of the bonds without any limitation as to the time it should do so. The taxpaying electors must be charged with a knowledge of this law, and when they voted the bonds they did so charged with such knowledge. The question submitted to the taxpaying electors was the question the law required to be submitted to them and that was sufficient.

[6, 7] Section 6 of Ordinance No. 4, Series of 1914, provides for a tax upon all taxable property in the city and county sufficient to pay the annual interest on said bonds, and to provide a sinking fund to extinguish the principal of said bonds at their maturity.

Section 7 of said ordinance provides that when the water plant or system shall have been constructed that the revenue derived from the operation of said water plant or system, or so much thereof as is not actually needed for the operation and maintenance of the said water plant or system, shall be paid into the treasury of the said city and county for the purpose of creating a sinking fund to extinguish the principal and interest of the said bonds within the said period of thirty years, and that whenever there is any money so paid into the treasury of the city and county from the revenues of the said water plant, then and in that event and until said sums of money are exhausted, no part of the levy provided for in this connection to be levied upon the taxable property of the city and county, shall be utilized in the extinguishment of the principal and interest of said bonds.

It is now contended that the law only authorized the commission to provide for a sinking fund to be created out of the net earnings derived from the operation of the water plant when constructed; and sections 258, 261, and 263 of article 9 of the charter are cited in support of this contention. We infer from the language of the ordinance

that it was the intention of the commission and council to make such a provision for a sinking fund as would render it certain that the bonds with interest would be paid. The ordinance does provide a sinking fund to be paid out of a net revenue arising from the operation of the waterworks system; and it further provides that no part of the levy provided for in section 6 to be levied upon taxable property of the city and county, shall be used where there is sufficient income arising from net revenue.

It is claimed also that the commission ought to have stated in the proposition submitted to the vote of the taxpaying electors how it proposed to create a sinking fund for the payment of the principal and interest of the bonds. So far as submitting the proposition to the electors is concerned the law did not require it, and we may not say the bonds are void, because something was not submitted to the taxpaying electors that the law did not provide should be submitted. Nor can we hold the bonds invalid merely because the commission and council have made a provision for a sinking fund that may not have been necessary. Any irregularity in this respect can be easily corrected by the commission and council.

[8, 9] It is also contended that the public utilities commission has no authority under section 264a to issue what is termed "straight, flat, 30-year bonds," but they were to issue only "call bonds," and that in any event it was the mandatory duty of the commission to determine whether said bonds were to be straight, flat bonds or call bonds prior to the special election. Paragraph 5 of section 264a provides:

"No such bonds shall be used or sold at less than par, nor sold except after advertisement as in this charter provided for the sale of public improvement bonds, and they may be called for redemption by the commission in like manner as provided in section 314."

It is conceded that the commission under the grant of power to say at what time the bonds should mature would have the right to issue straight, flat, 30-year bonds. But it is claimed that the language last quoted restricts and limits the power of the commission in some way so as to deprive them of their authority to issue straight, flat, 30-year bonds. We do not think so, and consider the reasoning to the contrary highly technical. It is insisted, however, that in any event it was the mandatory duty of the commission to determine whether the bonds were to be straight, flat, 30-year bonds or call bonds prior to said election, and to inform the taxpayers thereof. As we have said before there are many things that the commission might have done, but we think it is enough to require them to do what the law commanded, and we find no command in the law for informing the taxpayers of whether the bonds would be straight, flat, 30-year bonds or call bonds.

Very many authorities have been cited by counsel on both sides upon the questions raised on this appeal. They have all been examined and it would extend this opinion to an unwarranted length to review them however briefly. We have found no case where the facts to which the law must be applied were the same as in this case. The most serious question presented is whether or not the issuance of the bonds should be restrained because the sum voted to construct the waterworks sys-

tem is not sufficient to construct a complete system of waterworks, on the theory that the taxpaying voters would not have authorized the issuance of $8,000,000 in bonds to build a waterworks system if they had known that the system could not be built for that money.

[10] After a careful consideration of this question we have concluded that under the facts in this case the court would not be authorized to speculate as to what the taxpaying electors would have done had they known that $8,000,000 would not construct a complete system of waterworks. We are also of the opinion, as before stated, that we are not warranted in construing section 264a, so as to prohibit the construction of a waterworks system unless said system could be built for $8,000,000. It results, therefore, that the court committed no error in excluding the testimony offered at the trial, as it was either irrelevant and immaterial in itself or because as the record already showed the facts desired to be proved, it was merely cumulative.

Judgment affirmed.

SMITH et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. March 13, 1916.)

No. 2576.

1. CONSPIRACY ⟸48—CONSPIRACY TO DEFRAUD UNITED STATES—QUESTIONS FOR JURY.

On a trial for conspiracy to defraud the United States out of a part of the customs duty on imported coal, whether the United States was defrauded in that some of the coal never reached the scales for weighing, and in that it paid drawbacks for coal delivered to steamers entitled to claim drawbacks in excess of the quantity actually delivered, and whether these results were brought about by a conspiracy between defendants *held* for the jury.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 108–111; Dec. Dig. ⟸48.]

2. CONSPIRACY ⟸43(10)—CUSTOMS DUTIES—FRAUD—INDICTMENT.

An indictment for conspiracy to defraud the United States of customs duties on imported coal, by preventing part of the coal from reaching the scales for weighing and by causing the payment of drawbacks for coal in excess of the quantity delivered to steamers entitled to claim drawbacks, was not sufficient if it merely charged in general terms a conspiracy to defraud the United States.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 97; Dec. Dig. ⟸43(10).]

3. CRIMINAL LAW ⟸1032(5)—OBJECTIONS FOR PURPOSE OF REVIEW—INDICTMENT.

An indictment charged defendants with conspiring to defraud the United States of duties on coal imported into the United States by making and causing to be made false weights and false returns of weights of cargoes and importations of coal, and made like charges as to coal discharged into vessels entitled to claim a drawback. It further charged that defendants so manipulated the scales and weights and method of weighing thereon that they recorded the weights of coal desired by defendants, and not the true weight of the coal, and that they caused all coal weighed on scales upon which the coal handled by their company was weighed to be incorrectly measured and weighed, to the end and for the purpose that they, under the name and guise of such company, should

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

* Rehearing denied May 22, 1916.

receive the profit and gain from such inaccurate and fraudulent weight. *Held* that, where no objection was made to the indictment before trial, or interposed to the introduction of testimony, and no request was made to limit the scope of the charge in the instructions of the court, and defendants were not misled to their prejudice, the indictment, though general in terms and lacking in particulars, was sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2627; Dec. Dig. ⊂⊃1032(5).]

4. CRIMINAL LAW ⊂⊃919(5)—ARGUMENT OF COUNSEL—TIME FOR OBJECTIONS.
An objection to argument of prosecuting counsel, first called to the attention of the court by a motion for a new trial, came too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2199; Dec. Dig. ⊂⊃919(5).]

5. CRIMINAL LAW ⊂⊃1156(1)—APPEAL—REVIEW—DENIAL OF NEW TRIAL.
While it would seem that an appellate court will review an order denying a new trial at least to the extent of determining whether the court below refused to receive and consider proper testimony, where the court considered all affidavits presented in support of such a motion, and after a full hearing denied the motion in the exercise of the discretion vested in it by law, and the circumstances did not plainly require an appellate court to review and reverse the order, it would not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3067; Dec. Dig. ⊂⊃1156(1).]

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

James B. Smith and others were convicted of an offense, and they bring error. Affirmed.

McCutchen, Olney & Willard, Morrison, Dunne & Brobeck, A. P. Black, Stanley Moore and Samuel Knight, all of San Francisco, Cal., for plaintiffs in error.

Matt I. Sullivan and Theo. J. Roche, Sp. Asst. Attys. Gen., both of San Francisco, Cal., for the United States.

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

RUDKIN, District Judge. The indictment in this case was returned under section 37 of the federal Penal Code of 1909. Act March 4, 1909, c. 321, 35 Stat. 1096 (Comp. St. 1913, § 10201). The charging part of the indictment, omitting mere formal parts and the overt acts, reads as follows:

"That the said defendants, and said divers other persons whose names are to said grand jurors unknown, did plan, confederate, conspire, and agree, under the guise and name of the said corporation, to wit, Western Fuel Company, to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by said Western Fuel Company by itself and through other persons, firms, and corporations from divers foreign countries, ports, and places for said Western Fuel Company, and to defraud the United States out of a large portion of the duties due to the United States on divers shiploads and cargoes of coal so imported by said Western Fuel Company and other persons, firms, and corporations, as aforesaid, and coming into the port of San Francisco, by making, and causing to be made, false weights and false and fraudulent returns of weights of such

cargoes and importations of coal, and by further fraudulently weighing and causing to be weighed, by themselves and by the Pacific Mail Steamship Company, a corporation, and by other persons and corporations whose names are to the grand jurors aforesaid unknown, and for that reason not herein stated, and reported to the United States, the weights of all such importations of coal loaded from the bunkers and barges of said Western Fuel Company for fuel on board vessels propelled by steam, and engaged in trade with foreign countries and in trade between the Atlantic and Pacific ports of the United States, and which ships or vessels were registered under the laws of the United States; and, further, to defraud the United States by making, and causing to be made, false returns, weights, and entries of coal shipped and loaded aboard the transports of the United States Army Service and other government ships purchasing coal at San Francisco Harbor; and to that end, and for the purpose of carrying out such conspiracy, combination, and agreement, to maintain on the docks, wharves, and barges owned, operated, controlled, and occupied by said Western Fuel Company and by the said defendants at the port of San Francisco, in the state and Northern District of California, scales and weights which were to be, and were, fraudulently manipulated by the defendants, to the end that said scales should record the weights of said coal desired by the defendants, and not the true weights of the coal placed thereon, and the said defendants did so manipulate said scales and weights and the method of weighing thereon, so that said scales and weights did record the weights of coal desired by said defendants, and not the true weight of the coal so placed thereon, and to further cause fraudulent affidavits and statements to be made by the defendants and by each of them, to the officers of the government of the United States, and to other persons and corporations whose names are to the grand jurors aforesaid unknown, and for that reason not herein stated, and to the Pacific Mail Steamship Company, a corporation, organized and existing under and by virtue of the laws of the state of New York and engaged in the shipping and transportation of freight and passengers, with offices located in the city and county of San Francisco, and which operated, and still operates, American registered vessels engaged in foreign trade and buying coal from said Western Fuel Company for the purpose and to the end that said Pacific Mail Steamship should claim from the United States a greater rebate on the drawback of coal duties permitted where coal is loaded upon American registered vessels engaged in foreign trade than the true weight of said coal would permit said Pacific Mail Steamship Company to claim or was due the said Pacific Mail Steamship Company; and, further, to cause all coal weighed in, on or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed, to the end and for the purpose that the defendants, acting under the name and guise of said Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weight."

Eight defendants were originally named in the indictment. The defendant John L. Howard died during the trial; the defendants Sidney V. Smith, Robert Bruce, and Joseph L. Schmitt were acquitted by direction of the court; the defendant Edward J. Smith was found not guilty by the jury, and a verdict of guilty was returned against the three remaining defendants, James B. Smith, F. C. Mills, and E. H. Mayer. To reverse the judgment entered on this verdict the present writ of error was sued out.

The Western Fuel Company was incorporated during the latter part of the year 1902, and ever since its incorporation has been extensively engaged in the business of mining, importing, buying, and selling fuel coals. The company owns and operates mines at Nainamo and Northfield, British Columbia, but its principal place of business has been San Francisco, Cal. The plaintiff in error Smith was vice president and general manager of the company, and exercised a gen-

eral supervision over all the business and properties of the company, except the mines and mining operations in British Columbia. The plaintiff in error Mills was superintendent of the docks at San Francisco, and had general supervision over the bunkers and barges, the loading and unloading of coal, and over the employés engaged in that work. The plaintiff in error Mayer was check clerk. His general duties were to take the weights of the coal discharged from the vessels, in connection with the government weigher, and to superintend its distribution to the different bunkers, wharves, and yards.

[1] The testimony covers the principal activities of the Western Fuel Company between April 1, 1906, and December 31, 1912. Between these dates, inclusive of foreign coal on hand April 1, 1906, the company imported into the United States 2,159,551 tons of coal, as shown by the invoice weights, or 2,138,831 tons as shown by the outturn or ascertained weights upon which duty was paid to the government. About 70 per cent. of the coal thus imported came from British Columbia, 25 per cent. from Australia, and the remaining 5 per cent. from Japan. In the case of a majority of these importations the ascertained weight was less than the invoice weight. The total of these shortages amounted to 26,044 tons. In other instances, however, the ascertained weight exceeded the invoice weight. The total of these overages was 5,324 tons, leaving a net shortage of 20,720 tons, or approximately 1 per cent. In other words, on the total importations between April 1, 1906, and December 31, 1912, the invoice weights were 20,720 tons in excess of the ascertained weight upon which the duty was computed and paid. Between the same dates sales of foreign coal made from these importations, including a small quantity of coal destroyed by fire, and the coal on hand December 31, 1912, amounted to 2,200,827 tons, or 61,996 tons in excess of the ascertained weight. Between the same dates a total of 563,759 tons ascertained weight was laden on barges from vessels or bunkers for delivery to other vessels for fuel purposes. The total tonnage discharged from these barges was 596,982 tons, or a net overage of 33,223 tons. Of this overage 22,436 tons was discharged on vessels propelled by steam, engaged in trade with foreign countries or in trade between Atlantic and Pacific ports of the United States and registered under the laws of the United States, which were entitled to a drawback of the duties thus paid under the tariff acts of 1907 and 1909. There may be slight errors in these latter computations, as some discrepancies were pointed out during the trial; but it was and is practically conceded that the tonnage discharged from these barges exceeded the ascertained weight of the coal laden upon them by approximately 5 per cent.

A word now as to the manner in which coal is discharged from vessels and weighed by the government weigher, and as to the discharge of coal from barges onto other vessels and the mode of weighing. The imported coal was discharged at different ports such as Oakland, San Diego, and San Francisco; but as the greater part of the coal was discharged at the Folsom Street docks in San Francisco, and as the principal part of the testimony relates to operations

there, we will confine ourselves to a brief description of these docks. The Folsom Street docks are equipped with two sets of bunkers called inshore and offshore bunkers. The tracks upon which the coal cars operate are constructed above these bunkers. When the docks were taken over by the Western Fuel Company some years ago the tracks were planked over so that coal falling from the cars or escaping from the hoppers could not fall into the bunkers; but this permanent planking was removed by the Western Fuel Company and temporary planking substituted in its place. This temporary planking could be moved and replaced by the employés of the company from time to time, but for what purpose does not appear. The coal passed from the hoppers into cars on these tracks and the cars when loaded were drawn onto the scales by electric power and weighed by a government weigher, the weights being taken by the weigher and also by a representative of the Western Fuel Company, usually the plaintiff in error Mayer. As soon as the cars were weighed, they were taken to the different bunkers, or to the yards, and unloaded as Mayer might direct. In the coaling of the vessels of the Pacific Mail Steamship Company and others the coal was laden on barges from the offshore bunkers and discharged from the barges into the ship's bunkers by means of buckets having a capacity of half a ton or upwards. The government weigher was supposed to weigh 1 bucket in 15, or a round of 4 buckets in 60, and the remainder of the buckets were then averaged up with the buckets thus weighed for the purpose of ascertaining the entire quantity of coal discharged into the vessel. The weights taken by the government weigher were also taken by a representative of the Steamship Company, and upon these weights the drawback was paid to such vessels as were entitled to claim a drawback under the law. Up to this point there is little or no conflict in the testimony. It must not be understood, however, that the results obtained are anything more than approximate. The parties were dealing with a base commodity where strictly accurate weights were not taken or required. The coal was wet down from time to time to lay the dust, or to prevent spontaneous combustion, and was at all times exposed to the elements. The difference between the invoice weights and the outturn weights indicates but little, in view of the fact that in many instances the coal was not actually weighed at the foreign port. In a majority of cases the weight was merely estimated by the ship's scale, or by the draught of the ship. How accurate this is we do not know, but evidently it is only an approximation. The fact that a number of tons or a certain percentage was added to the weight thus ascertained does not remove the element of uncertainty. It also appears that the import coal discharged from vessels was weighed on a rising beam. Of course if the weights were accurately taken, the difference between a weight taken on a rising beam and a weight taken on an even beam would be slight; but much would depend on the care and skill of the operator. On the other hand, in the discharge of coal from barges to vessels the shovelers on the barges had more time to fill the buckets weighed than those which were not weighed by reason of the delay incident to the weighing, and naturally

the former would weigh heavier than the latter. If there was nothing in the case beyond this, we would have no hesitation in declaring that the government failed to make a case for the jury, and it is upon this claim that the principal assignment of error is based. For whether the discrepancy in the weights was caused by the elements, by flooding the coal with water, by incompetence or negligence on the part of the government weighers, or through the adoption of a faulty system, the plaintiffs in error are not answerable criminally unless they took some part in bringing these things about. But the testimony did not stop here. There was direct and positive testimony tending to show that at the Folsom Street docks coal was shoveled into the bunkers from the tracks without being weighed; that coal was run from the chutes or hoppers into the bunkers without being weighed; and that trainloads of coal were passed over the scales and dumped into the bunkers without being weighed—all under the express direction of the plaintiff in error Mayer. There was further testimony, tending to show that Mayer pressed his foot or leg against the scale rod from time to time, thus preventing the government weigher from taking accurate weights, and that he was cognizant of the existence of a bent link between two of the cars, which likewise caused inaccurate weights to be taken. There was also testimony tending to show that in discharging coal from the barges into the vessels of the Pacific Mail Steamship Company the buckets weighed were filled to overflowing, while the unweighed buckets were little more than two-thirds full. There was testimony tending to show that this practice was pursued continuously and uninterruptedly; that instructions to that effect were given on at least one occasion by the plaintiff in error Mills in relation to another vessel; that the books and records kept by Mills frequently showed a great disparity between the quantity of coal laden on the barges and the quantity of coal discharged therefrom; that reports showing these discrepancies were made daily to the plaintiff in error Smith and to the Western Fuel Company, and that each and every one of the plaintiffs in error were fully cognizant of these discrepancies, and it is not going too far to say that they were equally cognizant of the causes that produced them.

[2] From the foregoing statement it must be apparent that there was competent testimony tending to show: First, that the United States was actually defrauded, to some extent at least, by reason of the fact that a portion of the imported coal never reached the scales, was never weighed, and that no duty was paid thereon; and, second, that the United States was actually defrauded, to some extent at least, by reason of the fact that it paid drawbacks to steamers entitled to claim drawbacks for coal in excess of the quantity actually delivered to them. We think it equally manifest that there was sufficient testimony to warrant the jury in finding that these results were brought about by the wrongful concerted action of the plaintiffs in error and others, and that a conspiracy existed to that end. But it is claimed in this connection that no such frauds and no such conspiracy are charged in the indictment. It must be conceded that the charge is very general, and we cannot yield our assent to the claim on the part

of the government that an indictment in cases such as this need only charge in general terms a conspiracy to defraud the United States. Keck v. United States, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505.

[3] The indictment in this case, however, charges that the parties accused, planned, confederated, conspired, and agreed together to defraud the United States out of a large part of the import duties on coal imported and brought into the United States by the Western Fuel Company "by making and causing to be made false weights and false and fraudulent returns of weights of such cargoes and importations of coal," and a like charge is made as to the coal discharged from barges into vessels entitled to claim a drawback. It is further charged that:

"The said defendants did so manipulate said scales and weights and method of weighing thereon, so that said scales and weights did record the weights of coal desired by said defendants, and not the true weight of the coal so placed thereon. * * * And, further, to cause all coal, weighed in, on, or about the scales upon which the coal handled by said Western Fuel Company was weighed, to be incorrectly measured and weighed, to the end and for the purpose that the defendants, acting under the name and guise of said Western Fuel Company aforesaid, should receive the profit and gain to be made by such incorrect and fraudulent weight."

No objection was made to the indictment before trial; no objection was interposed to the introduction of testimony under the indictment, and no request was made to limit the scope of the charge in the instructions of the court. In view of these facts, and of the further fact that the plaintiffs in error were not misled to their prejudice, we think the charge, though general in terms and entirely lacking in particulars, was sufficient.

[4] Certain rulings of the court, admitting and excluding testimony, are assigned as error; but these rulings were all unimportant. We observe no error in them; but, even if the rulings were erroneous, the errors were not of a prejudicial kind. Another assignment is based on the argument of counsel to the jury. The language objected to was first called to the attention of the court by the motion for a new trial. The objection came too late.

"When the defendant's counsel in a criminal trial fails to at once call the attention of the court to remarks by the prosecuting officer which are supposed to be objectionable, and to request its interposition, and, in case of refusal, to note an exception, an assignment of error in regard to them is untenable." Crumpton v. United States, 138 U. S. 361, 11 Sup. Ct. 355, 34 L. Ed. 954.

"But here no objection was made and no complaint urged until upon motion for a new trial. Nothing is better settled than that the defendant who deems himself prejudiced by the language of counsel should promptly and publicly object and point out the language deemed improper, and then take exception if the trial judge fail to condemn it. It is too late to predicate error upon the refusal of the trial judge to grant a new trial on account of a complaint made only after verdict and upon a motion for a new trial." Lurton, J., in Chadwick v. United States, 141 Fed. 225, 246, 72 C. C. A. 343, 364.

[5] The last error assigned is based on the ruling of the court denying a motion for a new trial. There is a seeming conflict of authority on the question as to how far, if at all, such a ruling may be re-

viewed on writ of error. Thus in Holder v. United States, 150 U. S. 91, 14 Sup. Ct. 10, 37 L. Ed. 1010, the court said:

"It has also been settled, by a long line of decisions of this court, that the denial of a motion for a new trial cannot be assigned for error."

In Wheeler v. United States, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244, the court said:

"Another contention is that the court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error."

In Addington v. United States, 165 U. S. 185, 17 Sup. Ct. 288, 41 L. Ed. 679, the court said:

"The first 10 assignments of error are based upon a bill of exceptions, setting out simply the grounds upon which the accused asked that a new trial be granted to him. It is only necessary to say that the refusal of the court to grant a new trial cannot be assigned for error in this court."

Similar language may be found in many other decisions, both of the Supreme Court and of the Circuit Courts of Appeals for the different circuits. Yet in Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917, the Supreme Court reviewed an order refusing a new trial because the court below had excluded certain affidavits, and in passing upon the motion exercised no discretion in respect of the matter therein stated. The only distinction between that case and the other cases cited is thus pointed out by the Chief Justice:

"The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error. Henderson v. Moore, 5 Cranch, 11 [3 L. Ed. 22]; Newcomb v. Wood, 97 U. S. 581 [24 L. Ed. 1085]; but in the case at bar the District Court excluded the affidavits, and in passing upon the motion did not exercise any discretion in respect of the matter stated therein."

In McDonald v. Pless, 238 U. S. 264, 35 Sup. Ct. 783, 59 L. Ed. 1300, the court again reviewed an order denying a motion for a new trial. In fact that was the only question before the court. The lower court had refused to receive affidavits of jurors tending to show that their verdict was reached by lot, and its action in so doing was affirmed by the Supreme Court. It seems to be established, therefore, that an appellate court will review such an order, at least to the extent of determining whether the court below refused to receive and consider proper testimony. In the case of United States v. Holt, 218 U. S. 245, 251, 31 Sup. Ct. 2, 5 [54 L. Ed. 1021, 20 Ann. Cas. 1138], the court said:

"We are dealing with a motion for a new trial, the denial of which cannot be treated as more than matter of discretion or as ground for reversal, except in very plain circumstances indeed. Mattox v. United States, 146 U. S. 140 [13 Sup. Ct. 50, 36 L. Ed. 917]. See Holmgren v. United States, 217 U. S. 509 [30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778]. It would be hard to say that this case presented a sufficient exception to the general rule."

Perhaps the true distinction is stated by the court in Felton v. Spiro, 78 Fed. 576, 581, 24 C. C. A. 321, 327, where the court, speaking through Taft, J., said:

"A motion for a new trial is, of course, addressed to the discretion of the court, and, if the court exercises its discretion, and either grants or denies the motion, its action is not the subject of review. This is so well settled that it is unnecessary to cite authorities upon the point. But the motion for a new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. If, now, in exercising this discretion, it is the duty of the court to consider whether the verdict was against the great weight of the evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so, it is clear to us that he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error. In Mattox v. United States, 146 U. S. 140 [13 Sup. Ct. 50, 36 L. Ed. 917], it was held that, where the trial court excluded affidavits offered in support of a motion for a new trial, and in passing upon the motion exercised no discretion in respect of the matters stated in the affidavits, the question of the admissibility of the affidavits was preserved for the consideration of the Supreme Court on writ of error, notwithstanding the general rule that the allowance or refusal of a new trial rests in the sound discretion of the trial court. This furnishes direct support for the view that the refusal of the trial court to consider at all as a ground for new trial that the verdict was contrary to the evidence may be assigned for error here."

The motion for a new trial in this case was based largely on the ground that certain of the jurors had read numerous articles published in two of the San Francisco daily papers during the trial, commenting on the case, and an article in an Oakland paper, commenting on a somewhat similar case in another jurisdiction. Any attempt on our part to give even the substance of these publications, covering a period of almost two months, would unduly extend this opinion. Suffice it to say that the court below considered all affidavits presented in support of the motion, and after a full hearing denied the motion in the exercise of the discretion vested in it by law. And, even assuming now that this court would review and reverse such an order, "in very plain circumstances indeed," as intimated in the Holt Case, no such situation is presented. We find no error in the record and the judgment of the court below is therefore affirmed.

EQUITABLE SURETY CO. v. BOARD OF COM'RS OF MUDDY BOTTOM SWAMP LAND DIST. NO. 1, TIPPAH COUNTY, MISS.

(Circuit Court of Appeals, Fifth Circuit. March 20, 1916.)

No. 2780.

1. PRINCIPAL AND SURETY ⇐117—DISCHARGE OF SURETY—BREACH OF CONTRACT.

Where a surety company signed a contractor's bond after receiving a draft of the contract providing that advances should be made only as work progressed, the owner, having made advances contrary to the contract on which the bond was issued, cannot recover against the surety

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. ⇐117.]

2. PRINCIPAL AND SURETY ⊜162(2)—ACTIONS—EVIDENCE—JURY QUESTION.
In an action on a contractor's bond, evidence *held* to raise the questions for the jury whether surety relied on the contract in executing bond, and whether plaintiff made advances contrary to the terms of the contract.
[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 443; Dec. Dig. ⊜162(2).]

3. PRINCIPAL AND SURETY ⊜39—DISCHARGE OF SURETY—MISREPRESENTATIONS.
A surety on a contractor's bond will be discharged where, through collusion between the contractor and plaintiff, the contract recited a greater consideration than was actually to be paid, which false recital enhanced the risk.
[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 82–85; Dec. Dig. ⊜39.]

4. PRINCIPAL AND SURETY ⊜162(2)—ACTIONS—EVIDENCE—JURY QUESTION.
In an action on a contractor's additional bond, the question whether there was an increased hazard as to which the surety company was not informed, but of which plaintiff knew, it having been caused by its unauthorized advances to the contractor, *held* under the evidence for the jury.
[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 443; Dec. Dig. ⊜162(2).]

Walker, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Action by the Board of Commissioners of Muddy Bottom Swamp Land District No. 1 of Tippah County, Mississippi, against the Equitable Surety Company and another. There was judgment for plaintiff, and defendant named brings error. Reversed and remanded.

C. L. Sivley, of Memphis, Tenn., for plaintiff in error.

Lester G. Fant, of Holly Springs, Miss., and Thomas E. Pegram, of Ripley, Miss., for defendant in error.

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

NEWMAN, District Judge. This case comes before this court for review of the judgment of the District Court of the Northern District of Mississippi, in a suit by the board of commissioners of Muddy Bottom Swamp Land District No. 1 of Tippah County, Miss., against the Delta Drainage Company and the Equitable Surety Company. The suit in the District Court, which had been removed from the state court, was to recover on the bond executed by the Delta Drainage Company, with the Equitable Surety Company as surety, for the faithful performance by the Delta Drainage Company of a contract made by it with the commissioners of the Muddy Bottom Swamp Land District No. 1, for the digging of a canal through the district for which the commissioners were acting. Two bonds were given, and both are in suit; one for $5,000, executed on the 15th day of January, 1912, and the second for $2,500, executed on the 20th day of May, 1912. There was a trial of the case and a verdict and judgment for the plaintiff for $7,361.71. It is for errors alleged to have been committed

in this trial that the case is brought here by the Equitable Surety Company.

The contract between the Delta Drainage Company and the commissioners is as follows:

"Whereas, Muddy Bottom Swamp Land District No. 1, Tippah County, Mississippi, through its duly authorized commissioners, W. L. McBride, Chairman, W. E. Pegram and W. T. Brumley, is desirous of having a canal cut in and for the said district, to be laid out by a civil engineer, approximately as shown by the map of said district, now on file, in the office of the clerk of the board of supervisors of the said county; and whereas, for the said purpose, the said board of supervisors of the said county has duly issued bonds, at the instance of the said district, in the sum of $25,000.00 (twenty-five thousand dollars), which bonds have been duly sold and the proceeds thereof now in the hands of the said commissioners; and whereas, the said commissioners, in session, in said county, on the 10th day of February, 1912, regularly rewarded the Delta Drainage Company of Memphis, Tennessee, a firm composed of John W. Buford, owning one-half, Charles B. Bright, owning one-fourth, and James M. Bridge, owning one-fourth, the contract of cutting the said canal; and whereas, it is proper for the protection of the parties to this contract, and interested in the said work, that contract is drawn entered into between them: Therefore, it is hereby agreed and solemnly bargained between the said Muddy Bottom Swamp Land District, by its said commissioners, hereinafter called the first party, and the Delta Drainage Company, hereinafter called the second party:

"First. The first party may audit all bills for labor, material, expense, freight, rent on machinery, salary and yardage, seeing that no bills are allowed, except in instances where said salary, labor, materials, expenses, rents on machinery, etc., on requisition from the said company, are actually for the use and proper benefit of the said proposed canal, however, the said commissioners may, at any time decline to honor any requisition, if in their judgment, a proper amount of work on the said canal has not been done and completed to warrant the issuance thereof. And in no event, is the aggregate of said bills to exceed the sum of $19.500.00, which is the price agreed upon to be paid for the service and work to be done by the second party, as hereinafter set out; said payments shall not be oftener than once a week.

"Second. That the first party is to secure and maintain for the second party a right of way of the width of fifty feet, the same being twenty-five feet from the center of the canal from each direction, during the time that the said work of the digging and clearing out of the said canal is progressing; all expense incident to the carrying out of this feature of the contract is to be borne by the first party.

"Third. The second party agrees to so clear the said right of way, as may be necessary to cut the said canal; the timber so cut in the clearing thereof is to belong to the second party, that is, so much of it as is needful for them in the carrying out the work of said canal as fuel, timbers, etc.

"Fourth. Said second party shall cut and remove, in addition to the clearing of the said right of way, to the right and to the left of said canal, the sum of one hundred and eighty-three thousand cubic yards of dirt in and from the said canal, as is shown by the aforesaid map, at and for the sum of $19.500.00. This canal is to be of the size and dimensions as to be determined by the civil engineer, who will hereafter specify grades, sections, etc. If it is found that the said civil engineer determines that there are more than one hundred and eighty-three thousand yards of earth to be removed from the said canal, or the commissioners decide that they want the canal larger so as to require more than the said one hundred and eighty-three thousand yards removed, it is agreed that the party of the second part is to have in addition to the $19,500.00 the sum of 9⅓ cents per cubic yard, according to the general terms of the contract.

"Fifth. The second party shall pay and be chargeable with all bills for labor, salaries, machinery, machinery rent, freight, expenses, estimated yardage and all other cost of clearing the right of way and cutting said canal of one

hundred and eighty-three thousand cubic yards of dirt, except as a part heretofore set out as chargeable to first party.

"It is further solemnly agreed and bargained between the parties hereto that the remaining portion, if any so remains, of the said $19,500.00, after paying out the bills heretofore described, be paid to the Delta Drainage Company, upon the completion of the one hundred and eighty-three thousand cubic yards and the acceptance of the said work by the said commissioners.

"It is further agreed and understood that all reasonable diligence and activity must be exerted by the second party to accomplish the proper completion of this work, but the second party is to have proper and fair time to do same.

"And that the second party is to begin the work of digging the said canal at the lower, or northern, end of the same, on deposit of the said $19,500.00, as hereinbefore mentioned. The second party will furnish, as a part of this contract, a contractor's bond in the sum of $5,000.00 for the faithful performance of this contract.

"It is expressly understood that nothing in this contract shall be so construed as to require the contractors to change the size of the canal, where once cut according to engineer's specifications."

It will be seen from this contract that the commissioners were to audit all "bills for labor, material, expense, freight, rent on machinery, salary, and yardage, seeing that no bills were allowed except in instances where said salary, labor, materials, expenses, rents on machinery, etc., on requisition from the said company, are actually for the use and proper benefit of the said proposed canal, however the said commissioners may, at any time, decline to honor any requisition, if, in their judgment, a proper amount of work on the said canal has not been done and completed to warrant the issuance thereof." It was evidently contemplated that payments should be made by the commissioners to the drainage company as the work progressed. The amount to be received by the drainage company is also stated to be $19,500 if the work then contemplated only was done and no new work ordered. If there was any new work ordered, the drainage company was to receive 9⅓ cents per cubic yard for all earth removed in addition to that provided for in the contract and for which the $19,500 was to be in full payment.

Two of the defendant's pleas interposed in this case are as follows:

"Special Plea No. 1.

"For a further plea in this behalf, the said Equitable Surety Company avers, and will show on the trial of this cause that the $4,500 alleged to have been advanced to the Delta Drainage Company, by plaintiff for the purpose of purchasing a dredge boat, if advanced at all, was done without authority of law, and contrary to the statute of the state of Mississippi, and the law under which the plaintiff so operated, and was not provided for or contemplated by the terms of the contract, which plaintiff had with the Delta Drainage Company, and was not within the contemplation of the contract that the Equitable Surety Company here is sued upon and incurred no obligation upon it as surety for the Delta Drainage Company, and was ultra vires, and unlawful, and for which the defendant Equitable Surety Company is in no way liable under the law, or its contracts as surety, and this it is ready to verify.

"Special Plea No. 2.

"For further plea in this behalf, the said Equitable Surety Company, defendant, will show that $1,500 or more of the alleged cash advanced was never in fact advanced to the Delta Drainage Company, by plaintiff, but the item came about in this way: The bonds of said district which aggregated about $24,000 were unlawfully and in violation of a positive statute of the state of

Mississippi, under which said district was organized, sold for at least $1,500 below par, and, in order to evade said statute requiring that said bonds shall not be sold for less than par, the said plaintiff unlawfully and fraudulently charged the Delta Drainage Company with the said difference between the par value of the bonds and the actual amount for which they were sold, and that the said attempted transaction in so far as it affects the Equitable Surety Company is unlawful, fraudulent, and void, and this the said Equitable Surety Company is ready to verify."

The questions made by these pleas were, we think, two of the most important ones raised on the trial of the case As to the payment by the commissioners to the drainage company of $4,500 before the work was commenced, for the purpose of buying a dredging machine, it appears that this payment was made on February 27, 1912, apparently before any work at all had been done by the dredging company in constructing the canal. Plea No. 2, and the question which runs all through the case, is that the drainage company was to receive only $18,000 for the work to be done by it in digging the canal; whereas, it was represented to the Equitable Surety Company that they were to receive $19,500, and that they became surety with this understanding.

On the trial of the case, at the close of all the evidence, the defendants requested the court to give peremptory instructions to the jury in favor of the defendants, which motion was overruled by the court.

After argument by counsel, the court charged the jury. The charge seems to have been to read to the jury the plaintiff's declaration, and then to say to them, after stating the defendant's plea of "not guilty":

"The burden of proof rests on plaintiffs to satisfy your minds by a preponderance of the evidence of the truth of every material allegation in this declaration. If the plaintiffs have so satisfied your minds, it will be your duty to return a verdict for the plaintiff for the amount, I think it is $7,360 odd dollars. You can make the calculations yourselves.

"It is claimed on part of the defendants that one of the reasons for not complying with the contract was that the commissioners so acted as to demoralize and injure the employment of their hands, and but for that they would have been able to complete the contract. As request for instructions along that line has been made, I give you the instruction: 'If you should find from the proof that the commissioners, the plaintiff in this case, interfered with the laborers of the Delta Drainage Company, and so disorganized the labor that the manager, C. B. Bright, could not proceed to carry out his contract, and then offered him a consideration to give up and surrender the contract, and that on this account and at the suggestion and instance of said plaintiff, commissioners, the said defendant, Delta Drainage Company, did surrender said contract and turn the work over to said commissioners, you should find for the defendant.'"

The court then proceeded:

"I also grant this instruction: 'The court instructs the jury if they find from the evidence that commissioners, members of the Muddy Bottom Drainage District No. 1, interfered with the hands or employés and prevented them from work by disorganizing the labor so that the prosecution of the work of digging the ditch contemplated by the contract introduced in this cause, and you are satisfied from the proof that said contract was caused to be breached by the acts and conduct of the plaintiffs in this cause, then you should find for the defendant, Delta Drainage Company.' That is, if these parties interfered with them in such way, and the proof satisfied your mind, then they are not entitled to recover. That is a question of fact for you to determine. You take this case and consider the contract, which will be before you. You take this declaration that is here and refresh your recollection as best you can

with reference to the testimony of the whole case. You weigh and consider every fact and every circumstance in evidence before you and return your verdict here into court."

Before the jury left the box, the Equitable Surety Company presented in writing to the court a number of special requests, which were each and every one refused by the court, and to which action of the court in refusing to give the special requests so asked, and before the jury retired to consider their verdict, the defendant the Equitable Surety Company then and there excepted to the action of the court.

The first of said requests was that the jury be instructed to find for the Equitable Surety Company. The second and third requests were as follows:

"(2) I charge you, gentlemen of the jury, on behalf of the Equitable Surety Company, that if you believe from the evidence in this case that, at the time of the application for the $5,000 bond, there was submitted along with it to the Equitable Surety Company a draft of the contract, which was afterwards executed by the Muddy Bottom Swamp Land District No. 1 the Delta Drainage Company, and according to the terms of the contract the drainage company was to receive $19,500, when, in truth, the total amount to be paid was $18,000, and this fact was not known to the Equitable Surety Company at the time of the execution of the bond sued on, and that the Delta Drainage Company was to be charged on said contract with $1,500 representing the difference paid for the bonds sold and their par value then, this was a fraud upon the Equitable Surety Company and vitiated the contract sued upon, so far as the Equitable Surety Company is concerned, and you must find for the defendant the Equitable Surety Company.

"(3) I charge you, gentlemen of the jury, that if you believe from the evidence in this case that the commissioners of the Muddy Bottom Swamp Land District No. 1 advanced to the Delta Drainage Company $4,500 as a part of the contract price for completing its work before that amount of work had been actually done and completed, and for the purpose of enabling the Delta Drainage Company to purchase a dredge machine, with which to dig the ditch, without the consent of the Equitable Surety Company first had and obtained, then such action on behalf of the drainage commissioners was without authority of law and in violation of the contract made with the Delta Drainage Company, and releases the Equitable Surety Company from further liability on its bond, and it is your duty to find a verdict for the Equitable Surety Company."

The fifth request to charge made by the Equitable Surety Company was along the same line as the third request, but stated the matter in a different way, as will be seen by the request, which is as follows:

"(5) I further charge you, gentlemen of the jury, that if you believe from the evidence in this case that the commissioners of the Muddy Bottom Swamp Land District No. 1 advanced the Delta Drainage Company $7,361.71, or any other amount, as a part of the contract price for work done under the contract with the Delta Drainage Company before a sufficient amount of said work had been done and completed to warrant and justify the payment of the said $7,361.71, or any part of the same, then the Equitable Surety Company is released from all liability under its bond, and the jury must find for the Equitable Surety Company."

The seventh request to charge was to submit to the jury the question of the liability of the surety company on the second bond for $2,500. This charge is as follows:

"(7) I further charge you, gentlemen of the jury, that if you believe from the evidence in this case that the facts set forth in the application for the

$2,500 bond, and filed with the Equitable Surety Company, were suggested by Commissioner W. L. McBride, and further that this bond for $2,500 was intended to cover money which had already been advanced, and not for the purpose of carrying out the faithful performance of the contract made, by the Delta Drainage Company with the said commissioners, and that the Equitable Surety Company had no notice of such purpose and was not informed as to the facts, then such action amounted to a fraud upon the Equitable Surety Company, and it is the duty of the jury to find in favor of the Equitable Surety Company on the $2,500 bond."

There are three questions thus presented upon which the surety company requested instructions from the court to the jury. The first we wish to mention, although not considering them in the same order in which the requests were made, relates to the advancement by the commissioners to the drainage company of $4,500 at the time that it was advanced, and whether or not this was in accordance with the contract.

[1, 2] The contention for the surety company is that the terms of the contract between the commissioners and the drainage company was that payments should be made to the drainage company as the work progressed, and that the contract gave them authority to decline to honor any requisitions which were not made in this way; that is, to pay for work as it was done. This construction of the contract is our construction, that is, that the commissioners were only to pay for work as it was done and not otherwise, and the surety company had a right to rely upon this as an important provision of the contract. If the commissioners departed from the terms of the contract, and paid to the drainage company money in advance of the time that it could be required or reasonably expected under the terms of the contract, the surety company, it seems to us, was entitled to the third charge above referred to and unquestionably to the fifth charge, which left to the jury the question of whether a sufficient amount of work had been done under the contract to justify the payment.

There was evidence tending to show, without stating it more strongly, that the representative of the surety company was furnished with a draft of the proposed contract between the commissioners and the drainage company before the surety company executed the first bond for $5,000. The testimony in the case shows that this draft of the contract furnished to the surety company's representative who issued the surety bond was substantially the contract afterwards entered into, and that, while there were a few minor changes, there was no important difference between the draft furnished to the representative of the surety company and that finally executed between the parties. C. B. Bright, one of the members of the Delta Drainage Company firm, in his testimony, said this:

"Q. Who did you meet in connection with it before you made the contract? A. Mr. W. L. McBride, W. E. Pegram, and W. Y. Brumley, commissioners of the Swamp Land District.

"Q. Is this the same contract exhibited here? A. Yes, sir; I saw it at the time I signed it.

"Q. Have you seen it here? A. Yes, sir—I have not examined it.

"Q. Before going into that, what was necessary for you and your partner to do with reference to giving bond, etc., before you finally entered into that

contract? A. It was necessary to make application to the bonding company for a bond and also submit a draft of the proposed contract.

"Q. And did you do that? A. We did. * * *

"Q. After you had submitted the contract, or rather the skeleton of it, was it all finished at this time? Was the contract finished at this time? A. Yes, sir; it was finished.

"Q. When? A. On February 10, 1912, I believe it was.

"Q. And did you execute the bond at that time? A. The bond was executed previously to that, in January some time, two or three weeks previous to that time.

"Q. You mean signed up? A. Yes, sir; it was signed before that date. I don't just know what date it was, but just before that.

"Q. You mean the bond of the Equitable Surety Company? A. Yes, sir.

"Q. When did you deliver the bond to the commissioners? A. I believe I took the bond with me to Ripley and delivered it to Mr. McBride on that trip as well as I remember.

"Q. Did the surety company have a skeleton of the contract before they made that bond? A. It is my impression they did.

"Q. Do you know whether they did or not? A. Mr. Pegram sent a draft of it to them—I mean the attorney, and the contract which we signed was practically the same thing; there were some small changes, I think.

"Q. You say they had a skeleton contract? A. Yes, sir; it was made out prior to that time, for I remember I submitted the draft of it to the agent, J. J. Morrison, of the bonding company, at the time I made application for the bond.

"Q. You say you submitted a draft of what the contract would be, the proposed contract? A. Yes, sir."

While the testimony of Pegram was not entirely in accord with that of Bright, there was certainly enough in Bright's testimony to have justified the court in submitting the matter to the jury as requested in the special request for instructions which has been referred to, relative to the manner in which payments were to be made by the commissioners to the drainage company.

[3] Coming to the request with reference to what is claimed to be a misrepresentation as to the contract price, we deem this one of the most material matters as to which a request was made. To represent to the surety company that they were to receive $19,500, when, as a matter of fact, they were to receive only $18,000, if the representation was made at the instance or with the knowledge of the drainage commissioners, would certainly be such a serious misrepresentation as would have authorized the court to submit to the jury the question as to whether that increased the hazard and risk of the surety company to the extent that it relieved it from liability on the bond. The application for the bond undoubtedly stated $19,500 as the contract price, and the contract between the commissioners and the drainage company stated $19,500 to be the contract price, and the evidence that this contract, or a draft of it, was shown to the surety company, is as has been stated. We think the surety company was clearly entitled to the charge requested on this subject.

[4] The next question in the case is the liability of the Equitable Surety Company on the $2,500 bond, and that question is based on the fact that in the application for the bond it was represented to the surety company, quoting from the application, that it was for "additional excavating on drainage canal," when as a matter of fact the whole testimony in the case shows that this bond was required of the

drainage company to secure the commissioners against money which they had advanced. In his testimony C. B. Bright says that the above language, to the effect that the new bond was to cover additional work, was put in the application at the request of McBride, one of the commissioners and one of the plaintiffs in this case. This is nowhere denied, so far as we can see, by McBride or any one else. McBride's testimony with reference to this $2,500 bond is as follows:

"Q. What was the occasion of the second bond that you required of the Equitable Surety Co.? A. It was for equipment that the Delta Drainage Company had to have for the work on the ditch; on the right of way of the canal.

"Q. What did this equipment consist of? A. Dredge boat, engine, boiler; all necessary equipment for the excavation of the canal. * * *

"Q. You had two contracts with this company? A. We had an additional bond, but one contract.

"Q. You made a second bond? A. They owed us more money than the bond came to, and we had paid this money out according to the contract. The machinery was being repaired, and we had to have more repairs, and we asked an additional bond of $2,500.

"Q. What time was it made? A. I suppose it was in May. * * *

"Q. When you got this second bond of $2,500, your first bond was January 15, 1912, there was nothing in your contract about the $1,500 these parties claimed you were charging them on the bond sale? A. No, sir; nothing in the contract.

"Q. The last bond you required them to give? A. We required an additional bond.

"Q. For additional work? A. No additional work.

"Q. What was it for? A. To better secure the commissioners.

"Q. They had breached their contract up to that time? A. No, sir; but they had taken up as much or more money as the first bond, and we required an additional bond.

"Q. The $5,000 bond didn't provide for advancing them money? A. We didn't advance any money except according to the contract. The additional bond was as the first one, to secure the commissioners. No additional work was to be done. * * *

"Q. So when you required this additional bond of $2,500 on May 20th, there had never been anything done on cutting the ditch? A. No, sir. Mr. Skinner was the first man who tried to run it, who tried to operate the machinery up to May 25th, about the time of the completion of the right of way. He tried to operate, but failed.

"Q. He tried to operate but failed? A. Yes, sir. * * *

"Q. Then you required this second bond, not for the faithful performance of the contract, but to guarantee you against loss of money advanced before the work commenced? A. It was for the faithful performance of the contract the money that was advanced before the dirt was moved was according to the contract, and then we required an additional bond for $2,500 at this time—

"Q. You said it was before the work was started— A. It was for the purpose of carrying out the contract.

"Q. You advanced the money before the work was done? A. Before the dirt was moved."

The authorities on the question of increased hazard to surety companies above that stipulated for in the contract as to which they guarantee faithful performance, when caused by, or with the knowledge and consent of, the party insured, and also as to misrepresentations as to the character of the contract which is to be insured, are abundant. Mentioning just a few of these authorities, as to the former, see Shel-

ton v. American Surety Co. (C. C.) 127 Fed. 736, affirmed 131 Fed. 210, 66 C. C. A. 94; Fidelity & Deposit Co. v. Agnew, 152 Fed. 955, 82 C. C. A. 103; Prairie States Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412. And, as to the latter, Brandt on Suretyship, § 447; 5 Cyc. p. 744.

Other questions are made in this case which we think it is unnecessary to discuss because of what we have already said. There is a question as to whether the surety company received notice, as it should have done, of the failure of the Delta Drainage Company to proceed properly with the work in carrying out the contract, and also as to the rights of the drainage commissioners to sue; but these need not be determined for the reason that the judgment of the District Court must be reversed and a new trial granted for the reasons we have already given.

Reversed, with direction to the District Court to grant a new trial.

WALKER, Circuit Judge, dissenting.

LEHIGH VALLEY COAL CO. v. WASHKO.

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

No. 138.

1. COURTS ⟸275—UNITED STATES COURTS—ALLEGATIONS AS TO JURISDICTION.
On allegations that plaintiff was a citizen of the United States and a resident of New York City, and that defendant was a Pennsylvania corporation, an action was properly brought in the southern district of New York.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. ⟸275.]

2. EVIDENCE ⟸67(1)—PRESUMPTIONS—CONTINUANCE OF FACT OR CONDITION.
Where the testimony showed that plaintiff was born in Austria, she would be considered an alien until the contrary was shown.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 87; Dec. Dig. ⟸67(1).]

3. ALIENS ⟸2—EVIDENCE OF ALIENAGE.
Evidence that an alien was married in Pennsylvania, without showing whether the man she married was a citizen or an alien, did not show that she had lost her status as an alien.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 2, 3; Dec. Dig. ⟸2.]

4. COURTS ⟸270—UNITED STATES COURTS —DISTRICT IN WHICH SUIT MUST BE BROUGHT.
An alien can maintain a suit in the federal courts against a citizen only in the district of his residence, unless defendant waives his personal privilege to be sued only in such district.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. ⟸270.]

5. COURTS ⟸276—DISTRICT IN WHICH SUIT MUST BE BROUGHT—WAIVER OF OBJECTIONS.
A defendant, informed when an action is brought that plaintiff is an alien suing in the wrong district, may then elect to dismiss the case as

being improperly brought, or may waive the objection and proceed to trial; but, if not then advised that plaintiff is an alien, he waives nothing and makes no election by joining issue on the merits and on the averments as to citizenship, and going to trial, and may raise such point at the trial, when plaintiff's alienage is first disclosed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. ⟸276.]

6. COURTS ⟸277—UNITED STATES COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT—DETERMINATION OF QUESTIONS.

Where, in an action brought by an alien in the wrong district, facts appear indicating that plaintiff has brought the action in the wrong district, the court may suspend the trial to enable plaintiff to produce witnesses on the issue as to whether defendant, when it appeared, joined issue, or went to trial, had knowledge or information that the action was being prosecuted in the wrong district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 818; Dec. Dig. ⟸277.]

7. COURTS ⟸276—DISTRICT IN WHICH SUIT MUST BE BROUGHT—WAIVER.

If defendant, with knowledge or information that plaintiff is an alien suing in the wrong district, takes no step to put a stop to the further prosecution of the suit, he must be deemed to have waived his right.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. ⟸276.]

8. COURTS ⟸277—UNITED STATES COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT—DETERMINATION OF QUESTIONS.

Where, on a trial, facts appear indicating that plaintiff has brought the action in the wrong district, the issue of defendant's knowledge thereof when it appeared, joined issue, or went to trial, is one which the judge may hear and determine, as he would on affidavits, if it were raised before the trial.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 818; Dec. Dig. ⟸277.]

9. COURTS ⟸277—UNITED STATES COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT—DETERMINATION OF QUESTIONS.

While the trial judge exercises his judgment in determining this issue, there is no further discretion to be exercised by him; and if it appears that, at the time defendant appeared and prosecuted its defense to the merits, it had neither knowledge nor information sufficient to form a belief that the averments of citizenship and residence were untrue, it is reversible error to refuse to dismiss.

[Ed. Note.—For other cases, see Courts, Cent Dig. § 818; Dec. Dig. ⟸277.]

10. APPEAL AND ERROR ⟸185(1)—RESERVATION OF GROUNDS OF REVIEW—WAIVER OF ERRORS.

Where, in an action brought by an alien in the wrong district on averments of citizenship and residence in such district, it appears at the trial that defendant did not know such averments were untrue when it joined issue and went to trial on the merits, but the court nevertheless denies a motion to dismiss, defendant's right to assign error is not lost by completing the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166–1168, 1170–1176; Dec. Dig. ⟸185(1).]

11. COURTS ⟸276—DISTRICT IN WHICH ACTION MUST BE BROUGHT—WAIVER.

In an action brought in a district other than that of defendant's residence, on averments of plaintiff's citizenship and residence in such district, it appeared at the trial that plaintiff was an alien, whereupon defendant moved to dismiss on the ground that she had failed to estab-

lish the jurisdiction or the court, and had failed to establish the cause of action alleged. *Held* that, by joining the technical objection to the jurisdiction with the motion to dismiss on the merits, and thus asking for a decision on the merits before determination of the jurisdictional question, defendant waived the technical objection.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. ⊂⊃276.]

12. MASTER AND SERVANT ⊂⊃95½—NEGLIGENCE OF MINE FOREMAN.
That a mine foreman, appointed under Act Pa. June 2, 1891 (P. L. 176), under which the mine foreman is a state officer for whose negligence the mine owner is not liable, had something to do with measuring coal and dealing out supplies in addition to his statutory duties, did not make him any the less a state officer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 358; Dec. Dig. ⊂⊃95½.]

13. MASTER AND SERVANT ⊂⊃118(5)—LIABILITY FOR INJURIES—FAILURE TO SUPPLY PROPS.
There was no failure on the part of a mine owner to provide props, as required by Act Pa. June 2, 1891, where, though they were not stacked up in the galleries, where they would have interfered with operations, there was always a sufficiency of them elsewhere, ready for the mine foreman whenever he might direct their use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. ⊂⊃118(5).]

14. MASTER AND SERVANT ⊂⊃118(5)—LIABILITY FOR INJURIES—UNSAFE PLACE TO WORK.
It could not be inferred that the roof of a gallery in a mine was unsafe when the mine owner finished the construction of the gallery, where it stood for two years before an accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. ⊂⊃118(5).]

15. MASTER AND SERVANT ⊂⊃95½—LIABILITY FOR INJURIES—NEGLIGENCE OF MINE FOREMAN.
Act Pa. June 2, 1891, requires mine owners to place the underground workings of their mines under the charge and daily supervision of a mine foreman, and requires the mine foreman or some competent person or persons designated by him to examine all slopes, shafts, etc., at least once every day, and every working place in the mine at least once every alternate day, and to direct every working place to be properly secured by props or timber, and the safety thereof to be assured by directing that all loose coal or rock shall be pulled down or secured, and that no person shall be permitted to work in an unsafe place except to make it safe. *Held*, that under the Pennsylvania authorities the mine owner is not responsible for the negligence of the mine foreman and his assistants, and if they fail to make their daily inspection, or conduct it so carelessly that they fail to detect dangerous conditions, the owner is not liable, if he did not know they were failing properly to discharge their statutory duty; they being state officers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 358; Dec. Dig. ⊂⊃95½.]

16. MASTER AND SERVANT ⊂⊃291(9)—ACTIONS FOR INJURIES—INSTRUCTIONS.
In a mine employé's action for injuries caused by falling rock, it was error to charge that the mere happening of the accident raised a presumption of negligence and the burden shifted to defendant, as the falling of rock in mines is not unusual or extraordinary, and may happen without negligence, and the doctrine of res ipsa loquitur applies only where

the happening is extraordinary, or out of the usual, so that a presumption of negligence is warranted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1140; Dec. Dig. ⊂⇒291(9).]

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

Action by Katie Washko, an infant, by Frank Dindl, her guardian ad litem, against the Lehigh Valley Coal Company. Judgment for plaintiff, and defendant brings error. Reversed.

This cause comes here upon appeal from a judgment in favor of defendant in error, who was plaintiff below. The action was brought by a widow to recover damages for the death of her husband, who was employed by defendant in its mine in Pennsylvania. He was killed on December 6, 1912, by the fall of a piece of rock from the roof of the gallery in which he was at work hauling water.

Allan McCulloh, of New York City (Clifton P. Williamson and Edward W. Walker, both of New York City, of counsel), for plaintiff in error.

Rufus M. Overlander, of New York City (Herbert C. Smyth, of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The first question raised is one of jurisdiction.

[1-4] The complaint averred that plaintiff was a citizen of the United States and a resident of the city of New York and that defendant was a Pennsylvania corporation and therefore a citizen of Pennsylvania. Upon these averments the action was properly brought in the Southern district of New York. The answer averred that defendant had no knowledge or information sufficient to form a belief as to the allegations of plaintiff's citizenship and residence and upon this, among other issues, the parties went to trial. The testimony introduced by plaintiff showed that she was an alien. Plaintiff's counsel disputes this statement; but the testimony shows that she was born in Austria. She was an alien therefore from the time of her birth and we are bound to consider her an alien until the contrary is shown. There is nothing in the record which shows the contrary; it is not shown by the mere fact that "in 1911 she married in Pennsylvania," without any showing whether the man she married was a citizen or an alien. As the record discloses that at one time she was an alien and fails to disclose that she at any time thereafter lost that status we must regard her as an alien when the action was brought. As an alien she could not maintain suit in the federal courts against the citizen defendant except in the district of its residence, unless defendant waived its personal privilege to be sued only in such district. Whether or not there was such waiver in this case is a matter of contention and reference is made to the former decision of this court in Lehigh Valley Coal Company v. Yensavage, 218 Fed. 547, 134 C. C. A. 275.

[5] Had the defendant been informed when the action was brought that plaintiff was an alien suing in the wrong district, it could then have

elected to dismiss the case as being improperly brought or could have waived the objection and proceeded to trial. But if not then advised that plaintiff was an alien, defendant waived nothing and made no election by joining issue on the averments as to citizenship, by filing general appearance, by joining issue on the merits and by going to trial. When alienage is first disclosed at the trial defendant is entitled to raise the point, unembarrassed by the circumstance that plaintiff's false averments in the complaint had misled it into going to trial on the merits. The Yensavage Case so holds. In the case at bar defendant, at the close of plaintiff's testimony, which disclosed her alienage, moved to dismiss "on the ground that the plaintiff has failed to establish first, the jurisdiction of this court; the plaintiff has failed to establish the cause of action alleged in the complaint, has failed to show any negligence on the part of the defendant."

[6-8] In the Yensavage Case the majority of the court called attention to the proposition that, when facts appeared, which indicated that the plaintiff had improperly brought the action in that District Court, the court might inquire whether the defendant when it appeared, joined issue, or went to trial, did have knowledge or information sufficient to form a belief that the action was being prosecuted in the wrong court, on which distinct issue plaintiff had the right to be heard if he so desired. Indeed the court might properly suspend the trial to enable plaintiff to produce witnesses on this issue. This is undoubtedly correct; if defendant with such knowledge or information takes no step to put a stop to the further prosecution of the suit, he must be deemed to have waived his right. Moreover this distinct issue is one which the judge himself may hear and determine at the trial, as he would on affidavits if it were raised before the trial. It not infrequently happens that plaintiff avers that he is a resident of a particular district, whereupon the defendant on motion shows conclusively by affidavits that the averment is untrue and dismissal follows.

[9] In the Yensavage opinion, however, there is a phrase which should not be broadly interpreted. It is said that the disposition of the motion to withdraw the general appearance for the cause stated would "rest in the discretion of the court." If this be taken as meaning that the trial judge, taking the evidence, exercises his judgment thereon, it is correct; but this court is not to be understood as holding that there is any further "discretion" to be be exercised. If it appears by the proof that at the time defendant appeared and prosecuted its defense on the merits it had neither knowledge nor information sufficient to form a belief that plaintiff's averments of citizenship and residence were untrue, it is asserting a right which it had never waived, and denial by the court of the relief to which that right entitled it would be reversible error.

[10] Upon reflection also we think that it would be unwise practice to hold that, when such error is committed and exception duly reserved, the right to assign error is lost by thereafter completing the trial. Both parties and all their witnesses are in court; the time of court and jury has already been given to the controversy; it is to the public interest that the whole matter be finally disposed of. Under these circumstanc-

es to compel defendant to elect between insisting on his statutory right and the presentation of what may be a meritorious defense, would be a harsh and unnecessary practice; the situation is very different from what it would be, when the question of jurisdiction or privilege is presented in advance of the trial. Nor is the situation the same as when exception to denial of a motion to dismiss on plaintiff's testimony is lost because defendant puts in testimony; the right still remains to renew the motion on all the testimony while under the practice contended for the right to rely upon a privilege which the law gives defendant is gone forever.

[11] The motion made by defendant in the case at bar is substantially the same as that made in the Yensavage Case; it asked for relief both on the technical ground and on the merits. Had it been severed and application been made first to withdraw general appearance so as to raise the technical objection, the question would have been presented whether or not defendant knew of the objection before it went to trial. On that point there would be the sworn statement in the answer that at that time it did "not have knowledge, or information sufficient to form a belief" as to the averment by plaintiff of her citizenship. Opportunity could then have been given to plaintiff to introduce evidence, if she could, to show that defendant did have such knowledge or information before the trial. The trial could have been suspended, or, if necessary, a juror withdrawn, to enable plaintiff thus to maintain her action. By asking for a decision on the merits before determination of the jurisdictional question defendant, under the Yensavage decision, practically waived, with knowledge, the technical objection.

The action is brought under the Pennsylvania Anthracite Mining act of June 2, 1891, P. L. 176 (3 Purdon's Digest, 13th Edition). The following excerpts from that statute, which are found in the briefs, are relevant to the subject-matter here discussed. Public policy in Pennsylvania has concluded that the mining industry was one to be dealt with as a class by itself and has regulated the operations in mines to a much greater extent than it has those in other industrial plants.

Article 17, § 8, provides:

"Sec. 8. That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any owner, operator, superintendent, mine foreman or fire boss of any coal mine or colliery, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid, a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained."

Article 12 contains the following provisions:

"Rule 1. The owner, operator or superintendent of a mine or colliery shall use every precaution to ensure the safety of the workmen in all cases, whether provided for in this act or not, and he shall place the underground workings thereof, and all that is related to the same, under the charge and daily supervision of a competent person who shall be called 'mine foreman.'

"Rule 2. Whenever a mine foreman cannot personally carry out the provisions of this act so far as they pertain to him, the owner, operator or superintendent shall authorize him to employ a sufficient number of competent persons to act as his assistants, who shall be subject to his orders."

"Rule 12. The mine foreman or his assistants shall visit and examine every working place in the mine at least once every alternate day, while the men of such place are or should be at work, and shall direct that each and every working place is properly secured by props or timber, and that safety in all respects is assured by directing that all loose coal or rock shall be pulled down or secured, and that no person shall be permitted to work in an unsafe place unless it be for the purpose of making it secure.

"Rule 13. The mine foreman, or some other competent person or persons to be designated by him, shall examine at least once every day all slopes, shafts, main roads, traveling ways, signal apparatus, pulleys and timbering and see that they are in safe and efficient working condition."

"Rule 24. Any miner or other workman who shall discover anything wrong with the ventilating current or with the condition of the roof, side, timber or roadway, or with any other part of the mine in general, such as would lead him to suspect danger to himself or his fellow workmen or to the property of his employer, shall immediately report the same to the mine foreman or other person, for the time being in charge of that portion of the mine."

"Rule 43. Every passageway used by persons in any mine and also used for transportation of coal or other material, shall be made of sufficient width to permit persons to pass moving cars with safety, but if found impracticable to make any passageway of sufficient width, then holes of ample dimensions, and not more than one hundred and fifty (150) feet apart, shall be made on one side of said passageway. The said passageway and safety holes shall be kept free from obstructions and shall be well drained; the roof and sides of the same shall be made secure."

Article 11, § 2, of said act is as follows:

"Sec. 2. Every workman in want of props, ties, rails or timbers shall notify the mine foreman or his assistant of the fact at least one day in advance, giving the length of the props or timber required; and in case of danger from loose roof or sides, he shall not continue to cut or load coal until the said props and timber have been properly furnished and the place made secure."

In plaintiff's brief it is stated that:

"Rule 43 is the rule which plaintiff relies upon as a basis for defendant's liability."

Other sections which need not be quoted refer to "mine foreman" and "assistant mine foreman," providing for an examination by state authority to ascertain their qualification, certification, etc.

This act and a similar one, the Bituminous Mining Act (P. L. 1911, p. 756), have been frequently construed by the courts of Pennsylvania. They reached the conclusion—under the language of the acts they could have reached no other—that in many important respects the state has taken the conduct of mining operations out of the hands of the owners and has placed it in the hands of state officers. As a natural corollary it has been held that for injuries which result from the failure of these state officers properly to perform their statutory duties the owner will not be held liable unless it be shown that he had knowledge of the failure of the state officer to perform his duties. Reference to these authorities will be found in our opinions in Lehigh Valley Coal Company v. Calausky, 222 Fed. 664, 138 C. C. A. 188, and Vagaszki v. Consolidated Coal Company, 225 Fed. 913, —— C. C. A. ——.

The rock that fell was 6 or 7 feet long, 4 feet wide and a foot thick towards the center, thinning down towards the edges. It was what is called a "saddle," being a peculiar formation of sand slate found in

shale or sand rock; around it was soapstone, a solid sand rock roof. The under or exposed side of a saddle looks like natural rock, its upper side, however, is very smooth, and thus, having no particular bond with the sand rock in which it is imbedded, it is liable to fall out of its place; such fall apparently producing no other derangement of the surrounding parts of the roof from which it falls. When a saddle is found to exist in the roof, it is usually supported by a prop. The gallery in which the accident occurred was an old one; from time to time saddles had fallen; in various parts of it, to prevent such an occurrence, props had been placed; the props nearest to this saddle were distant on one side from 6 to 10 feet and on the other 25 feet. Props were only placed when the roof was found bad. As has been indicated, the above statute provides for careful and repeated examinations to determine the condition from day to day of all galleries and chambers where work is being done, so that dangerous places may be detected and protected by props. The testimony showed that on every alternate day the mine foreman made such an examination of this gallery; on the days when he did not make the examination the assistant foreman, who also testified, examined it. These examinations were made before the miners came in. On these examinations the foreman or assistant foreman carried a torch, looked carefully at the roof, and tested it by striking it with the end of a steel-tipped rod; such being, as the foreman testified the usual and ordinary method used in all mines. In response to a cross-question he said that he never knew of any examination being made by boring into the roof; no evidence that this had ever been tried in any mine was introduced.

[12, 13] There was evidence that the foreman at this mine, in addition to his statutory duties, had something to do with measuring the coal and dealing out supplies; that circumstance did not make him any the less a state officer. Something was said in argument about a scarcity of props; but there was no testimony to support any theory that the owner had failed to provide them. They were not stacked up in the galleries where they would have interfered with operations, but there was always a sufficiency of them elsewhere ready for the foreman whenever he might direct their emplacement.

[14, 15] As to the requirements of rule 43, on which plaintiff relies: there is nothing to show that this gallery, when constructed, was not of the proper width, with proper passageway and safety holes, free from obstructions and well drained, with the roof and sides then secure. Since the roof at this place had stood for some two years, it cannot be inferred that it was unsafe when the owner finished the construction of the gallery. The constant examination to protect against possible changes of conditions which may make a safe place unsafe the state intrusts to its own officers, men whom it has examined, whose qualifications it approves, and whose competency it certifies to. It is the mine foreman or his assistants who, by rule 12, are to examine every working place once every alternate day, to direct the removal of loose rock or the securing thereof by props or timber. It is to the mine foreman, or other person for the time being in charge of that portion of the mine (an assistant), that rule 24 requires any miner or

other workman who discovers anything wrong with the condition of the roof immediately to report.

We are satisfied that, under the Pennsylvania authorities, the mine owner is not to be held responsible for the negligence of persons whom the state has placed in charge of matters which, but for the statute, he would have had attended to by persons of his own selection. If the state officers failed to make their daily inspection, or conducted it so carelessly that they failed to detect dangerous conditions, the owner is not to be held liable when there is nothing to show that he knew they were failing properly to discharge their statutory duty—and there is no such showing here. Golden v. Mt. Jessup Coal Company, 225 Pa. 164, 73 Atl. 1103.

[16] We are further of the opinion that the jury were improperly instructed that the case was one in which the mere happening of the event raises a presumption of negligence and the burden shifts to the defendant. This doctrine of res ipsa loquitur applies in cases where the happening is extraordinary or out of the usual, and therefore a presumption of negligence on the part of those in charge is warranted. But the falling of rocks in mines, like the explosion of steam boilers, is not unusual or extraordinary and may happen without negligence. Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905.

The judgment is reversed.

HUGHES et al. v. UNITED STATES.*

(Circuit Court of Appeals, Fifth Circuit. March 3, 1916.)

No. 2763.

1. POST OFFICE ⊜35—FRAUDULENT USE OF THE MAILS—SCHEMES TO DEFRAUD.
Though defendants were physicians, qualified to administer treatment, and though they did not promise to administer any treatment without intending to do so when paid therefor, a scheme to obtain money from patients, by furnishing medicine or treatment without regard to the needs of the patient for that or any other treatment, or without making such diagnosis as would inform them of the patients' needs, was a scheme to defraud, within Criminal Code (Act Cong. March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), prohibiting the use of the mails in the execution or attempted execution of such a scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊜35.]

2. CRIMINAL LAW ⊜824(9), 1056(1)—INSTRUCTIONS—NECESSITY OF REQUESTS.
The failure of the court to charge a legal principle, such as the effect of circumstantial evidence, was not error, in the absence of a request for such instruction, or an exception based on its omission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1999, 2668, 2670; Dec. Dig. ⊜824(9), 1056(1).]

3. CRIMINAL LAW ⊜776(2)—INSTRUCTIONS—GOOD CHARACTER OF DEFENDANTS.
An instruction that, if the jury believed evidence tending to show the good character of defendants, they should give it the same weight and consideration as any other fact proved, but that if, from the entire evidence, including that relating to good character, they believed defendants

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

* Rehearing denied May 20, 1916.

guilty beyond a reasonable doubt, then the evidence of good character should not alter or influence the verdict, was a correct statement of the law, and covered everything to which defendants were entitled on that subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1844; Dec. Dig. ⊂⊃776(2).]

4. CRIMINAL LAW ⊂⊃649(1)—TRIAL—GIVING TIME TO EXAMINE CHARGE.
It was not an abuse of discretion to deny defendants' counsel 10 minutes in which to examine the court's written charge, for the purpose of framing exceptions or requesting additional instructions, where the charge was a written one, and not long, and there were no unusual conditions, other than the number of defendants on trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1512–1514; Dec. Dig. ⊂⊃649(1).]

5. CRIMINAL LAW ⊂⊃829(1)—INSTRUCTIONS COVERED BY THOSE GIVEN.
Requested instructions, which so far as proper were sufficiently covered by the general written charge given by the court, were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂⊃829(1).]

6. CRIMINAL LAW ⊂⊃1134(4)—MOTION FOR NEW TRIAL—DENIAL—REVIEW.
The denial of a new trial is not reviewable by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 3056, 3067–3071; Dec. Dig. ⊂⊃1134(4).]

7. POST OFFICE ⊂⊃49—FRAUDULENT USE OF MAILS—EVIDENCE.
Where, on a trial for using the mails in furtherance of a scheme to defraud, and for conspiring to commit such offense, the correspondence between defendant and post office inspectors introduced in evidence justified an inference of bad faith and fraud, the fact that only fictitious transactions based on decoy letters written by the inspectors were in evidence, and that no money was shown to have been received by the defendants, did not prevent the jury from inferring the existence of the conspiracy and the fraudulent scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂⊃49.]

8. POST OFFICE ⊂⊃35—FRAUDULENT USE OF MAILS—EVIDENCE.
Certain defendants, who were physicians, engaged in a scheme to defraud patients by obtaining money for medicine and treatment without regard to the needs of the patients. Defendant B. was an assistant of one of the principal defendants at his office, and consulting physician at another office maintained by such principal defendants. He was connected with the principal defendants in an intimate way, and assisted in the illegal business they were conducting. *Held* that, though he was not shown to have personally conducted any of the correspondence relied upon to establish the scheme and the use of the mails to accomplish it, there was sufficient evidence to support a verdict of guilty as against him, as the jury were justified in finding that he was connected with the principal defendants in the conduct of the enterprise, and that, being a physician, he was not ignorant of its guilty character.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊂⊃35.]

9. POST OFFICE ⊂⊃49—FRAUDULENT USE OF MAILS—EVIDENCE.
Certain physicians engaged in a scheme to defraud by furnishing medicine and treatment without regard to the needs of patients, and O. and C., who were not physicians, were employed in their office to dictate letters, send out form letters, pay employés, keep records, and work in

the laboratory. Though they were connected by the evidence with the mailing of letters in furtherance of the fraudulent scheme, their connection with the scheme was apparently that of paid employés, rather than independent or equal participants in the scheme, and, so far as appeared, they performed their duties by virtue of their employment and because of the salary paid them, and not otherwise. *Held*, that the evidence was consistent with their innocence, and did not support a conviction.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂=49.]

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Nathan A. Hughes and others were convicted of offenses, and they bring error. Reversed and remanded as to two of the defendants, and affirmed as to the other defendants.

Nine defendants were convicted upon one trial of conspiring to violate section 215 of the Penal Code and of a violation of that section, and were sentenced to terms of varying length in the penitentiary. All nine defendants sued out writs of error to this court from the judgment of the court below. After the writs of error were sued out, one of the defendants, W. P. Pegram, died, and as to him the writ of error is abated. The remaining eight are prosecuting their writs of error, and assign error here upon the sufficiency of the indictment, upon certain rulings during the progress of the trial, and upon the sufficiency of the evidence to convict.

Guy Graham, H. H. Cooper, and Uvalde Burns, all of Houston, Tex., and Norman A. Dodge, of Ft. Worth, Tex., for plaintiffs in error.

John E. Green, Jr., U. S. Atty., and E. P. Phelps, Asst. U. S. Atty., both of Houston, Tex.

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

GRUBB, District Judge (after stating the facts as above). [1] I. The sufficiency of the indictment was tested by a motion to quash and also by a demurrer. No ruling upon the motion to quash is shown in the record. The demurrer to the indictment was overruled, and this ruling of the court is assigned as error by the defendants Nathan A. Hughes, A. G. Olsen, T. W. Hughes, and O. F. Bourque.

The demurrer criticizes the indictment upon the general ground that it does not set out an offense against the laws of the United States. The indictment contains four counts. The first charges a conspiracy against all the defendants to violate section 215 of the Penal Code. The remaining three all charge the same defendants with the violation of that section. It is contended by the demurring defendants that the counts fail to show the devising of a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent representations or promises, in that it is not charged that the defendants were not qualified to administer the treatment they promised to administer, nor that they did not, in fact, intend to administer such treatment, when paid therefor. It is true that

the indictment does not aver that defendants were not so qualified, nor that they promised with the then intention of not furnishing any treatment, though paid for so doing. The scheme relied upon by the government is a different one. The fraud is alleged to have consisted in soliciting and receiving money from patients, intending to furnish medicine or treatment therefor, without regard to the needs of the patient for that or any treatment, without making any diagnosis such as would inform them as to the need of the patient for any or for what treatment, and with the intent to receive the money, though they knew that the patient paying it had no need of any treatment, or of the treatment to be furnished in consideration of it, or had purposely refrained from informing themselves of his needs in those respects. In other words, the indictment charges the defendants with having devised a scheme to solicit money from patients for promised treatment, not intending to furnish treatment in good faith, but only as a pretext for securing the patient's money. Whether the treatment or medicine furnished was of little or much value intrinsically, in this view of the scheme, was of no consequence. We think the scheme alleged to have been devised by the defendants was one included within and prohibited by section 215 of the Code.

[2] II. The defendants Allen, Marable, Parlan, and Corl assign as error that the court failed to charge the jury upon the effect of circumstantial evidence and upon other questions of law pertinent to the issue. No exception was taken to the general charge on this or any ground, and no request was made by the defendants of the court to charge on any other questions than those covered by it. The court cannot be put in error for failing to charge a legal principle, in the absence of a request to do so, or exception based on the omission. This is the rule in the federal courts. Goldsby v. United States, 160 U. S. 70–77, 16 Sup. Ct. 216, 40 L. Ed. 343; Texas & Pacific Ry. Co. v. Volk, 151 U. S. 73–78, 14 Sup. Ct. 239, 38 L. Ed. 78; Encyc. Pleading & Practice, 266–268.

[3] III. The defendants Parlan, Marable, and Allen assign as error the refusal of the court to give a special instruction, requested by these defendants, upon the effect of evidence tending to show their previous good character. The court denied the charge in the language of the request, but charged the jury that, if they believed the evidence tending to show the good character of these defendants, they should give it the same weight and consideration as any other fact proven in the case, but that if, from the entire evidence (including that relating to good character), the jury should believe the defendants guilty beyond a reasonable doubt, then the evidence as to good character should not alter or influence the verdict. We think this substantially covered what the defendants were entitled to. The effect of the charge was not that evidence of good character was to be considered only in a doubtful case, as was held in the case of Edgington v. United States, 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467, relied upon by defendants. Its direction was that the jury were to consider it, just as much as any other evidence submitted to them, in their inquiry as to whether the defendants were guilty beyond a reasonable doubt, but if, after

having so considered it, along with the other evidence, they reached the conclusion with that degree of certainty that defendants were guilty, then the fact of their previous good character, if proven, should not avail to change their verdict. This was a correct statement of the law.

[4] IV. Error is assigned upon the refusal of the court below to grant defendants' counsel 10 minutes in which to examine the written charge for the purpose of framing exceptions to it or making additional requests to charge. The charge was a written one, and was not long, and there were no unusual conditions attending the request, other than the number of defendants on trial, tending to show that its denial was an abuse of discretion on the part of the court below. Unless we are prepared to say that it is the duty of the judge to grant such a request whenever asked, and an abuse of discretion in every instance to deny it, we cannot hold in this case that its denial was an abuse of discretion.

V. Certain assignments are based on remarks made by the court below to counsel for some of the defendants during the progress of the trial. We have examined the assignments, and do not think prejudicial error is shown by the record to have been caused by the remarks excepted to.

[5] VI. The defendant Bourque, and the defendants T. W. Hughes, N. A. Hughes, and A. G. Olsen, requested specific instructions shown in the second bill of exceptions, which were not given by the court below. We think these instructions, so far as proper, were sufficiently covered by the general written charge given by the court.

[6] VII. Error is assigned upon the action of the court in denying defendants a new trial. This action of the trial court is not reviewable in this court.

[7] VIII. Each of the defendants requested the court to direct a verdict in his favor, which the court in each instance declined to do, and error is assigned upon its refusal. The contention of the defendants is that there was not sufficient evidence to connect the defendants with the conspiracy, or with the violations of section 215, charged in the indictment. The defendants N. A. Hughes, T. W. Hughes, August Marable, J. F. Allen, and Edward Parlan are shown by the government's evidence to have been physicians and principals in the business that was being conducted at the two locations mentioned as the seats of the conspiracy, and the jury were authorized to infer from the evidence that these defendants were responsible during the period covered by the years 1912 and 1913 for whatever was being done on the premises at each location, and that they shared or were to share in the profits of the transactions, knowing their actual character. It was also open to the jury to infer from the evidence that the purpose of the business that was being conducted during the period mentioned, at those places, was not the bona fide treatment of disease, but a scheme to secure money from patients, with no purpose to treat them in good faith as promised, but merely as a pretext for taking the money solicited. The correspondence between the inspectors and the defendants, introduced in evidence, was of a character, which justified the jury

in drawing the inference of bad faith and fraud, if they saw fit. The fact that only fictitious transactions, based on decoy letters written by inspectors, were in evidence, and that no money is shown to have been received by the defendants, did not prevent the jury from inferring the existence of the conspiracy charged in the first count or the fraudulent scheme charged in the remaining three. We think there was no error in submitting the cases of these defendants to the jury.

[8] The evidence as to the connection of the other living defendants, Bourque, Olsen, and Corl, who are prosecuting writs of error, is somewhat different. The defendant Bourque is shown to have been engaged as the assistant of the defendant Dr. J. F. Allen, at 602½ Main street, in the city of Houston, and as consulting physician at the other office of the defendants at 304½ Main street in the same city. He was at the latter address first, and it was at this address that the principal defendants, other than Allen, were in charge. The employés at the former address are shown to have been sent by the defendant N. A. Hughes, who employed them, to the latter address, to work for the defendants there engaged, among whom was Bourque. It seems clear that Bourque had been connected with each location, and with all the principal defendants, in an intimate way, and had assisted in the illegal business the evidence tends to show they were conducting. Bourque being himself a physician, the jury were authorized to infer that he could not have been associated with the principal defendants in the conduct of the enterprise, as shown by the record, without having become acquainted with its illegitimate character. While the evidence tends to show that he was only an assistant of the defendant Allen at the office at 602½ Main street, it also tends to show that he was a consulting physician at the other location, and so acted in an equal rather than in a subordinate capacity. He is not shown to have personally conducted any of the correspondence, which the government relied upon to establish the alleged fraudulent scheme, and the use of the mails to accomplish it; but, if the jury were satisfied of the existence of a conspiracy between the principal defendants and himself to commit the fraud, it was not necessary for the government to show his participation in the correspondence. We conclude that there was sufficient evidence to justify the jury in finding that he was connected with the principal defendants in the conduct of the enterprise, which was the basis of the prosecution, and that his being a physician precluded the inference that he was ignorant of its guilty character. If he participated in it in any way with knowledge of its character, he would be guilty of the offenses charged. We cannot say that the jury were not justified in reaching the conclusion of his guilt.

[9] The remaining defendants, Olsen and Corl, were not physicians. The record shows that they occupied the office of the principal defendants by virtue of an employment by them. The duties performed by Corl were to dictate letters, send out form letters, pay the employés off, keep the records, and work in the laboratory. Olsen performed similar duties; but the evidence as to his dictation of letters and send-

ing out form letters is less convincing as against him. The evidence tends to show that they were both employés of the principal defendants, and that they, in turn, exercised some control over the porters and stenographers, who were employed by the principal defendants. There is as much evidence in the record to connect Olsen and Corl with the business, so far as the mailing of letters is concerned, as there is against any of the defendants. The distinction which differentiates them is that what was done by Olsen and Corl seems to have been done in their capacity of paid employés, rather than as independent or equal participants in the scheme. Their connection with it, so far as appears from the record, only differs from that of the government's witnesses, who were stenographers and porters of the principal defendants, in degree, and not in kind. They were all paid employés of the principal defendants, vested with more or less authority, and charged with differing duties, but still, so far as the record shows, all performing their duties by virtue of their employment and because of the salary paid them, and not because of being principals and beneficiaries in the conspiracy. It cannot be contended that the evidence of the government witnesses is self-incriminating; and yet it serves to connect them with what the defendants did at the places and during the period of the conspiracy, to at least the same approximate degree, as does that relied upon by the government to convict the defendants Olsen and Corl. Like the government witnesses, Olsen and Corl were not physicians; their relation to the other defendants, so far as appears from the record, was nothing more than that of paid employés; their service in the laboratory is not shown to have materially differed from that of the government witnesses who were porters.

If the admitted connection of the government witnesses with the business is consistent with their innocence, as of course it is, then it would seem that the connection of the defendants Olsen and Corl with it should be held to be equally consistent with their innocence. The substance of the proof against them is their presence in the offices of the principal defendants, their employment by them, and the performance of the duties of their employment. This could only avail to connect them with the conspiracy, if it implies a guilty knowledge of the character of the business in which they had assisted. Such an implication would equally serve to convict the government witnesses, who were admittedly in the offices of the defendants and performing duties in the conduct of the business by virtue of a similar employment. In view of the facts that the record shows the defendants Olsen and Corl to have been laymen and employés, and not physicians or employers, we do not think their guilt is established, from the facts set out in the record, beyond a reasonable doubt. As employés merely, it is consistent that they did not share in spoils of the alleged conspiracy, except in the way of paid wages. As laymen it is consistent that they acquired no knowledge of the illegal character of the business, through their contact with it. The distinction between these two defendants and the remaining defendants lies in the fact that they are not shown to have acted in doing what they did in their own interest and for their own benefit, but as agents of the other defendants, and are not

shown to have had the medical knowledge that would have authorized the jury to infer that what they did as agents they did with that consciousness of wrongdoing which would be essential to make them co-conspirators with the other defendants.

As to the defendants N. A. Hughes, T. W. Hughes, August Marable, J. F. Allen, Edward Parlan, and O. F. Bourque, the judgment of the District Court is affirmed. As to the defendants A. G. Olsen and J. E. Corl, the judgment of the District Court is reversed and remanded.

GRETSCH v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. March 24, 1916.)

No. 2003.

1. BANKRUPTCY ⊂=493—CRIMINAL OFFENSES—"CONCEALMENT" OF PROPERTY.
"Concealment" of property by a bankrupt from his trustee, either by conversion of the property or by secretly retaining it, is a positive act committed at some time or other with respect to a physical thing, and wherever that act is done there alone the court has jurisdiction of the offense.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 910; Dec. Dig. ⊂=493.

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

2. BANKRUPTCY ⊂=485—CRIMINAL OFFENSES—CONCEALMENT OF PROPERTY—OMISSION FROM SCHEDULE.
Since the criminal offense of fraudulently concealing property from the trustee in bankruptcy, prescribed by Bankr. Act July 1, 1898, c. 541, § 29b, cl. 1, 30 Stat. 554 (Comp. St. 1913, § 9613), is in the same subsection with clause 2, which prescribes the offense of making a false oath or account in relation to any proceeding in bankruptcy, it must be presumed that they refer to different offenses, and that the mere omission of property from the schedule is not a concealment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 906, 908; Dec. Dig. ⊂=485.]

3. BANKRUPTCY ⊂=493—CRIMINAL OFFENSES—CONCEALMENT OF PROPERTY—VENUE.
Where the testimony fails to show that any property concealed by a bankrupt from his trustee was ever in the district in which the voluntary petition in bankruptcy was filed, the offense was not committed there, and a prosecution for the offense in that district deprived the bankrupt of his right under Const. Amend. art. 6, to be tried by a jury of the district in which the offense was committed, though that court had acquired jurisdiction over him and his estate, wherever situated, for all purposes of bankruptcy, under Bankr. Act, § 5c. (Comp. St. 1913, § 9589).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 910; Dec. Dig. ⊂=493.]

Buffington, Circuit Judge, dissenting.

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

Mark J. Gretsch was convicted of fraudulently concealing property from his trustee in bankruptcy, and he brings error. Reversed.

Elgin L. McBurney, of New York City, for plaintiff in error.

J. Warren Davis, U. S. Atty., of Trenton, N. J.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The defendant (plaintiff in error) was tried and convicted in the District of New Jersey for a criminal violation of the Bankruptcy Act. By this writ he raises the question, whether his constitutional right to a trial by a jury in the district wherein the crime was committed, has been invaded.

It appears in the testimony that Birnbaum and the defendant Gretsch formed a partnership in the jewelry business in February, 1914, which ended in bankruptcy in August of the same year. Their salesrooms were in the City of New York. The amount of capital contributed by Birnbaum was inconsiderable, and whether any capital was contributed by Gretsch was a controverted question. By statements of their financial condition to trade associations, falsely made by Birnbaum at the instigation or with the acquiescence of Gretsch, the firm secured credit and purchased jewelry, principally diamonds, in large quantities and of considerable value. When the partnership ended in bankruptcy there was a discrepancy of about $20,000 between the value of goods purchased and receipts from goods sold. Jewelry in that amount had vanished. When the petition was filed, Birnbaum and Gretsch had in their safe in New York only $1,400 worth of jewelry. This likewise disappeared.

Birnbaum was a resident of the State of New Jersey, and Gretsch of the State of New York. They filed a voluntary petition in bankruptcy in the District Court of the United States for the District of New Jersey. In due course they were adjudged bankrupt. It then became their duty to disclose and turn over their property to their trustee. They neither delivered their property to their trustee nor included it in their schedule. Thereupon an indictment was found under section 29b, cl. 1, of the Bankruptcy Act of 1898, charging them with having knowingly and fraudulently concealed from their trustee property belonging to the bankrupt estate, and laying the offense in the District of New Jersey. Birnbaum pleaded guilty; Gretsch stood trial and was convicted. The principal witnesses at the trial were the defendants themselves. Each charged the other with guilt of the crime for which they were jointly indicted. It is not necessary to recite their testimony. It is enough to say that the testimony of whichever one is believed, supported by the corroborating circumstances, was sufficient for a jury to find, that in the formation of the partnership and the conduct of the business, the partners jointly pursued a scheme to defraud their creditors, and each separately pursued a plan to defraud the other, with the result that from $10,000 to $20,000 of partnership property was withheld and fraudulently concealed from the trustee in bankruptcy.

There is no question that the goods were concealed. The question is, whether they were concealed within the territorial jurisdiction of the court that tried the defendant, and whether the defendant's constitu-

tional right to a trial by a jury of the district wherein the crime was committed, was invaded. Article VI, Constitution of the United States.

The undisputed facts upon which this question is raised and argued are: The defendant was indicted and tried for concealing property in the District of New Jersey, when the property alleged to have been concealed had never been in that district; the defendant knowingly and fraudulently omitted to include the property in his schedules and failed to surrender it to his trustee in bankruptcy.

When Gretsch submitted himself to the bankruptcy jurisdiction of the District Court in the district in which his partner Birnbaum was resident, that court unquestionably acquired jurisdiction of him and of his estate wheresoever situated, for all purposes of bankruptcy. Bankruptcy Act of 1898, § 5c; In re Murray (D. C.) 96 Fed. 600; In re Blair (D. C.) 99 Fed. 76. The government, however, goes further and maintains that the jurisdiction of the District Court thus acquired over Gretsch in bankruptcy extends to him and embraces his criminal offenses against the Bankruptcy Act wheresoever committed, and that the physical concealment in a district of New York of property which had never been in the District of New Jersey was an offense committed within the jurisdiction of the District Court for the District of New Jersey.

At the trial, the main controversy centered on the physical concealment of the property that disappeared from the defendant's safe in New York, less regard being given to the very considerable amount of property that otherwise disappeared. On review, there developed two theories as to what constitutes fraudulent concealment of property from a trustee. The first contemplated concealment of property by physical conversion; the other merely by a failure to reveal. We feel that without other circumstances neither constitutes fraudulent concealment, though either may be evidence of it.

[1] The physical conversion of bankrupt assets may be evidence, and perhaps the best evidence, of the concealment of such property. Concealment of property, however, may be accomplished without conversion. Secretly retaining property already in possession, and withholding it from the trustee under circumstances indicating an intention to defraud and conceal, may amount to concealment within the meaning of the statute. But whether property be concealed by conversion or retention, it must be at hand. Concealment is a positive act committed at some time or other with respect to a physical thing. It must, therefore, be done somewhere, and wherever done in violation of the statute, there and there alone has the court jurisdiction of the offense.

[2] Against the theory of conversion, it is urged that property is concealed within the meaning of the statute when the bankrupt omits it from his schedule. We are slow to believe that the mere omission to reveal constitutes concealment. When property is innocently omitted from a schedule, as by mistake or inadvertence, the courts are prompt to allow amendments. In re McKee (D. C.) 165 Fed. 269; In re Bean (D. C.) 100 Fed. 262; In re Eaton (D. C.) 110 Fed. 731;

In re Irwin (D. C.) 177 Fed. 284. When an omission from a schedule is purposely and fraudulently made, the verification of such a false schedule constitutes a criminal offense in itself. Section 29b, cl. 2, provides the offense of making "a false oath or account in, or in relation to, any proceeding in bankruptcy." In re Eaton (D. C.) 110 Fed. 731; In re Royal (D. C.) 112 Fed. 135. As the false oath to a schedule from which property is fraudulently omitted is a criminal offense described by clause 2 of section 29b of the Bankruptcy Act, and as the criminal offense of concealing property from a trustee is prescribed by clause 1 of the same sub-section, we are of opinion that the two offenses separately described do not constitute the same substantive crime. As the two subjects in their nature are susceptible of clear distinction, their treatment in separate clauses of the statute would indicate that they are not the same. While omission of property from a schedule may be evidence of a fraudulent intent to conceal, we do not think that such omission in itself constitutes concealment of property.

[3] As we are of opinion that the defendant's failure to reveal his property by his schedule does not alone constitute the crime of concealing property from a trustee, and as the testimony nowhere discloses that any of the goods charged to have been concealed were ever in the District of New Jersey, we are irresistibly driven to the conclusion that the government did not prove the material averment of the indictment that the property of the bankrupt defendant was concealed by him from his trustee in the District of New Jersey. We therefore find that the defendant was deprived of his constitutional right to a trial by a jury of the district wherein the crime was committed, and that the judgment against him should be reversed.

While Birnbaum pleaded guilty, and Gretsch, upon trial, was found guilty, of the crime charged, the constitutional right of each was alike invaded by indictment in a district in which the crime was not committed. Although the judgment entered upon Birnbaum's plea of guilty is not before us, we venture to suggest to the District Court that a suspension of Birnbaum's sentence and a disposition of the indictment against him, in harmony with the views expressed in this opinion, would tend to uniformity in the administration of justice.

The judgment is reversed.

BUFFINGTON, Circuit Judge (dissenting). I am constrained to record a dissent in this case.

Gretsch, the plaintiff in error, was a resident of New York state and a lawyer of many years practice. When he and his partner, Birnbaum, went into bankruptcy, Gretsch advised their petition be filed in New Jersey. The two men met in New Jersey, prepared their schedules, signed them there and filed their voluntary petition in the District Court of the District of New Jersey. In their schedules, no return was made of some twenty-odd thousand dollars worth of jewelry which both men, when subsequently indicted, conceded had disappeared.

Schedule B, prescribed by the Supreme Court in pursuance of statutory power, requires a "statement of *all* property of a bankrupt," and

subdivision (2) requires a listing of amount and location of stock in trade. It contemplates, not only a listing of all the goods, but a disclosure of where they can be found. For example, item B (1) provides for a return of "machinery, fixtures, apparatus and tools used in business, *with the place where each is situated, viz.,*" and item B (2) for "goods or personal property of any other description, *with the place where each is situated, viz.*"

That the schedules contemplated a listing of all the bankrupts' property, no matter where situate, is shown by the provision that *"all* real and personal property belonging to the bankrupt shall be appraised," etc. The act further provides that the trustee is vested by operation of law with the title of the bankrupt "to *all* * * * 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." Moreover, as the court is granted jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed," and to that end it is empowered to "enforce obedience by bankrupts * * * to all lawful orders, by fine or imprisonment," etc., and further to "arraign, try, and punish bankrupts * * * for violation of this act, in accordance with the laws of procedure of the United States, now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States," it follows that the New Jersey District Court could, had it known the facts, have compelled these bankrupts by attachment and imprisonment to have delivered to the trustee their undisclosed property, no matter where it was located. Their violation of law lay in the fact that their property was concealed, not in the method or means by which such concealment was effected. It is manifest therefore that by making a false disclosure, an affirmative act, and by failing, a negative omission, to return all their property in their schedules, Gretsch and Birnbaum laid the ground for charging them with the statutory crime of having "concealed while a bankrupt, or after his discharge, from his trustee *any* of the property belonging to his estate in bankruptcy." But it is contended that inasmuch as no part of their personal property was ever in New Jersey no crime was committed in New Jersey, and therefore the conviction of Gretsch in this case must be reversed because he was denied his constitutional right:

> That "the trial of all crimes, except in cases of impeachment, shall be by jury, and that such trial shall be held in the state where the said crimes shall have been committed."

In view of the fact that Gretsch was himself a lawyer, that he was defended by competent counsel, that he pleaded to the indictment and chanced an acquittal without mooting this question in the court below, we are not impressed with his later contention that he was really denied any privilege which he prized as a constitutional shield. But, treating the question as a timely assertion of constitutional right, it has seemed to us that the concealment, which it is conceded was made, was criminally made in New Jersey. In determining that fact due regard must be given to the acts of Gretsch himself, done in New Jer-

sey. That the crime of concealment was committed somewhere is clear. The question is: Where did Gretsch commit it? Certainly not before filing the petition in bankruptcy. Assuming he had spirited his goods out of sight in New York with a view to going into bankruptcy, it is clear that such overt acts would not of themselves, and prior to bankruptcy, have constituted the statutory crime of bankruptcy concealment. When did the intent to conceal rise to the level of crime? A crime has been defined in Bouvier's Law Dictionary as:

"An act committed or omitted in violation of a public law either forbidding or commanding it."

When Gretsch therefore went to New Jersey and filed the petition in bankruptcy, and then and there made and placed on record attested statements which concealed the vital fact that he then had in his possession $20,000 worth of property which under the law he should have described, located, and surrendered to the trustee, his prior criminal thought became a criminal deed, because he then and there violated the bankrupt law in not disclosing and scheduling his property. Assuredly failure to disclose what one by law should disclose is concealment.

Concealment is a continuing, persistent act, not an isolated, completed one, for, as said by the Supreme Court in Re Snow, 120 U. S. 286, 7 Sup. Ct. 562, 30 L. Ed. 658:

"A distinction is laid down in adjudged cases and in text-writers between an offense continuous in its character, like the one at bar, and a case where the statute is aimed at an offense that can be committed uno ictu."

Unless concealment lasts, it ceases to be concealment. If Gretsch had hidden his diamonds in New York, and then gone to New Jersey and disclosed their location in the bankruptcy proceedings, however guilty the prior act in New York was in purpose, the subsequent act of terminating the concealment by a disclosure in the New Jersey proceeding left no foundation on which to base the statutory crime. On the other hand, having concealed the goods in New York, and gone to New Jersey and there carried out a guilty purpose by there preparing and filing papers invoking the benefit of a law whose discharge was based on the disclosure and surrender of all his property, does not the conclusion inevitably follow that the guilty purpose, formed in New York, merged into a criminal act in New Jersey, and thus bring the case within the provisions of R. S. § 731, of which the Supreme Court in Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392, said:

"The petitioner relies on those provisions of the Constitution of the United States which declare that in all criminal prosecutions the accused shall have the right to be tried by an impartial jury of the state and district wherein the crime shall have been committed. Article 3, § 2; Amendments, art. 6. But the right thereby secured is not a right to be tried in the district where the accused resides, or *even in the district in which he is personally at the time of committing the crime*, but in the district 'wherein the crime shall have been committed.' * * * When a crime is committed partly in one district and partly in another, it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the Legislature may designate; and Congress has accordingly provided that, 'when any offense against

the United States is begun in one judicial district and completed in any other, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.' Rev. Stat. § 731."

Gretsch's acts or omissions, subsequent to the bankruptcy, in continuing to secrete the goods do not constitute new additional crimes for which he could be indicted. They are merely evidential of the prior crime of concealment. They can all be given in evidence, not as proof of new crimes, but to show the single, statutory concealment which the bankrupt law makes a crime. The location of the goods, the means or method of concealment, are evidential and incidental; the fact of concealment is the all-important and controlling thing. The bankrupt law does not make a separate crime out of every concealment. If it did, a bankrupt could be indicted for every article he had concealed in different places, in different ways, and at different times. He could be indicted for perjury, also, as many different times as there are different articles or lots of articles to which his one false oath applied. If he filed a petition in one district, and had property in half a dozen other states which he was concealing, surely he could not be convicted in each of these several states for each of these several concealments. Yet it seems to logically follow that if Gretsch cannot be prosecuted for concealment in New Jersey, because his goods were in New York, it must be held he could be prosecuted in New York; and if such be the law it logically follows that a bankrupt could be prosecuted in every one of several other states where he had goods concealed. But as said by Lord Mansfield in Crepps v. Durden, Cowper, 640:

"Repeated offenses are not the object which the Legislature had in view in making the statute, but simply to punish a man for exercising his ordinary trade and calling on a Sunday."

We think the impracticable results of such a holding give support to the view that concealment is a single crime, and not a series of crimes; that when a bankrupt has elected in what district to have his estate administered, and then seeks to defeat the due administration of his estate in that district, by a concealment of his goods, that the law will regard the jurisdiction in which he chose to make concealment practically effective as the place where the crime of concealment localized, and that the bankrupt is denied no constitutional shield in so holding. For it will be apparent that cases can arise in these fraudulent concealment cases where, unless by a false return in his schedules, a dishonest bankrupt localizes the crime of concealment, he never will, nor indeed can, localize it elsewhere. If Gretsch's firm, for example, had held accounts for diamonds sold in New York, and they did not disclose those accounts in their schedules filed in the New Jersey district, if their failure to disclose such account in New Jersey was not a concealment, no conviction could ever be had, for the concealment would not localize elsewhere.

Historically the constitutional provision was to stop the practice in vogue before our independence of carrying men from their own neighborhood and trying them for crimes in places where they had

never committed crimes, and where they were not known. In this case, on the contrary, the evidence is that Gretsch advised the bankruptcy be brought in New Jersey because "nobody knows me over there." To invoke this great constitutional shield on behalf of an experienced lawyer, who deliberately chose a neighboring state as a place to procure a fraudulent discharge, and who did not invoke such shield when he was tried by calling it to the trial court's attention, is well-nigh an answer to his contention. While we find no case in which the express question here involved was raised and decided, reference shows that the views expressed above are in harmony with adjudged cases. In Kern v. United States, 169 Fed. 617, 95 C. C. A. 145, the Circuit Court of Appeals of the Sixth Circuit sustained a conviction both for fraudulent concealment and also for making a false oath in a bankruptcy proceeding, where the facts were substantially like the present case. It was there said:

"Moreover, his schedule being indefinite, it would point to no more assets that in aid of it he should actually discover to the trustee, or, at least, to only so much as the trustee would be likely to discover. And, if he had formed the purpose to conceal the other assets from the trustee, his verification of the schedule was a falsehood. The very purpose of it was to show what his assets were and the whole of them. * * * Soon after the commencement of the bankruptcy proceedings the bankrupt fled to Canada, picking up, as there was evidence tending to show, some of his undisclosed assets in other states on his way, and from Canada endeavored to gather in more. * * * After he returned from Canada, the bankrupt by leave of the court filed an amended schedule of assets, which included those he is charged with having concealed; and counsel argues that this related back to his original schedule, and operated as an atonement, which, being made while the proceedings were yet in progress, redeemed his fault, so that in the end nothing was concealed from the trustee. But we are unable to agree that it would have such an effect. The offenses of false swearing and concealment, *when once committed*, could not be retrieved by right and lawful conduct and the doing of things 'meet for repentence,' however they might affect the judgment of the court in imposing sentence."

From this it will be seen that the court in effect held that concealment occurred when the schedules were filed, and this was in accord with Seigel v. Cartel, 164 Fed. 691, 90 C. C. A. 512, where, on a petition for discharge, it was said:

"Not having scheduled or surrendered the property to the trustee, the concealment of the proceeds, within the provisions of the statute, is presumed."

The question of jurisdiction was discussed in the late case of Lamar v. United States, 240 U. S. 60, 36 Sup. Ct. 255, 60 L. Ed. ——, where the court said:

"It reasonably may be inferred from the evidence that the defendant was tried in the right state and district in fact. * * * The personation was by telephone to a person in New York (Southern District), and it might be found that the speaker also was in the Southern District; *but, if not, at all events the personation took effect there.* Burton v. United States, 202 U. S. 334, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392. These objections are frivolous, and the others have been shown to be unfounded."

Admittedly the crime of concealment was committed somewhere, and reason, analogy, and the practical administration of the bankrupt law point to the New Jersey court, where the concealment was made effective, as the place where it should be tried.

GLASS v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. March 25, 1916.)

No. 2061.

1. BANKRUPTCY ⊂=495—OFFENSES—ADMISSIBILITY OF EVIDENCE—CONCEALMENT OF PROPERTY.

In a prosecution against a bankrupt for fraudulently concealing property from his trustee, evidence that defendant, shortly before the petition was filed against him, removed his books and disposed of a large part of his goods, which were then in the district in which the bankruptcy proceedings were subsequently filed and the prosecution instituted, was properly admitted, not as proof of the completed act of concealment, but as evidence of a plan or scheme from which an inference of subsequent concealment could be drawn.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. ⊂=495.]

2. BANKRUPTCY ⊂=485—OFFENSES—"CONCEALMENT OF PROPERTY."

Bankr. Act July 1, 1898, c. 541, § 1, cl. 22, 30 Stat. 544 (Comp. St. 1913, § 9585), which defines concealment to include secrete, falsify, and mutilate, contemplates by "concealment of property" a continuous concealment in cases where the property was physically converted and concealed before bankruptcy and remains secreted and concealed thereafter.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 906, 908; Dec. Dig. ⊂=485.

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

3. BANKRUPTCY ⊂=485—OFFENSES—CONCEALMENT OF PROPERTY—CONSTRUCTION OF STATUTE.

The construction of continuous concealment of property in civil cases under Bankr. Act, § 14b (Comp. St. 1913, § 9598), applies to the concealment under the criminal section, 29b (section 9613).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 906, 908; Dec. Dig. ⊂=485.]

4. CRIMINAL LAW ⊂=741(1)—QUESTIONS FOR JURY—HYPOTHESIS OF INNOCENCE.

While the evidence must exclude every reasonable hypothesis of guilt, where the reasonableness of the only hypothesis of innocence propounded presents a question on which men of ordinary intelligence may differ, it is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1705, 1713, 1727, 1728; Dec. Dig. ⊂=741(1).]

5. CRIMINAL LAW ⊂=829(9)—REQUESTED CHARGES—CHARGE ALREADY GIVEN.

Where the court had properly charged the jury on the presumption of innocence and the necessity of proof of guilt beyond a reasonable doubt, there was no error in refusing a requested charge that if there are a number of theories fairly deducible from the evidence which are compatible with guilt, and a single theory fairly compatible with innocence, the jury must adopt the theory compatible with innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂=829(9).]

6. CRIMINAL LAW ⊂=1044—APPEAL—QUESTIONS PRESENTED—SUFFICIENCY OF EVIDENCE.

Appellate courts need not consider the question whether there was substantial evidence to sustain a conviction, in the absence of a request for an instructed verdict and an exception to its denial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. ⊂=1044.]

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

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

Isidore Glass was convicted of fraudulently concealing property from his trustee in bankruptcy, and he brings error. Affirmed.

I. F. Goldenhorn, of Jersey City, N. J., for plaintiff in error.

J. Warren Davis, U. S. Atty., of Trenton, N. J.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The plaintiff in error (defendant below) was tried and convicted upon an indictment charging him with "the offense of having knowingly and fraudulently concealed while a bankrupt, * * * from his trustee * * * property belonging to his estate in bankruptcy." Section 29b, Bankruptcy Act of 1898.

The defendant was a merchant, having a store in Passaic, another in Paterson, New Jersey, and warerooms in Brooklyn, New York. The latter were used for the storage of goods bought in New York and afterward shipped to Passaic, whence they were re-shipped (at times in original packages) to the warerooms in Brooklyn, and thence disposed of. The testimony discloses that in July or August, 1912, the defendant was in financial difficulty. He represented to his creditors that he was solvent, and that his assets were about $15,000 in excess of his liabilities. He succeeded in quieting his creditors until August 30th, when they made an examination of his merchandise and books at his Passaic and Paterson stores, and found that his previous representations were false, in that he had overstated his assets and understated his liabilities. Being confronted with his insolvency and under threat of bankruptcy proceedings, the next night he removed his books to his dwelling, and the larger portion of his goods from the Passaic store to rooms which he had recently rented in Paterson, and two days later loaded them on trucks and moved them to New York. An involuntary petition in bankruptcy was filed against him on September 6th, and in due course a trustee was appointed. Neither the merchandise nor the books of the defendant so removed, were delivered to the trustee.

[1, 2] The defendant claims that large sales and the payment of his debts with the proceeds, explain the removal of the goods and the disparity between assets found by the trustee and assets which he but recently had. The trial court admitted testimony touching the conduct of the defendant in removing his books and in disposing of his goods during a brief period immediately prior to the date of bankruptcy, upon the ground that such testimony had a probative bearing on their subsequent disappearance. Much of this testimony consisted of statements made by the defendant to his creditors, and acts done by him and his agents in secreting his books and in removing merchandise from place to place, before bankruptcy proceedings were instituted. The defendant complains that in admitting this testimony the court erred, because from its very nature, the offense of concealing property from a trustee can only be committed after bankruptcy proceedings have been instituted and a trustee appointed. Therefore,

evidence of prior conduct was irrelevant. The defendant urges this contention upon the theory that concealment within the meaning of the act must at all times be a physical act in the nature of manual conversion, begun and completed after bankruptcy, and therefore to be proved only by acts done after bankruptcy. This contention is without merit. The testimony was admitted, as stated by the court, not in proof of the completed act of concealment, but as evidence of a plan or a scheme from which inference of subsequent concealment and of fraudulent intent to conceal might reasonably be drawn. "Conceal" is defined by the act to include "secrete, falsify and mutilate" (section 1, clause 22), and by concealment of property, the act contemplates a continuous concealment in instances where property is physically converted and concealed before bankruptcy and remains secreted and concealed after bankruptcy. In re Cramer (D. C.) 175 Fed. 879; In re James, 181 Fed. 476, 104 C. C. A. 224. As evidence of acts committed before bankruptcy is admissible in proof of concealment then begun and thereafter completed, so evidence of acts before bankruptcy is admissible in proof of fraudulent intent with which concealment is completed after bankruptcy. Seigel v. Cartel, 164 Fed. 691, 90 C. C. A. 512.

The case of Gretsch v. United States, 231 Fed. 57, —— C. C. A. ——, recently decided by this court, is distinguishable from this case upon the facts and in the point of decision. In that case, the property alleged to have been concealed had never been in the district in which the offense was laid and the defendant tried. The question was whether the offense of concealing property from a trustee in bankruptcy could be committed in a district when the property had never been in the district, and therefore whether the defendant's constitutional right of trial in the district in which the crime was committed, had been invaded. In the case now before us, all of the property alleged to have been concealed was before bankruptcy in the district in which the defendant was tried, and for aught the testimony shows, some of it may now be there. The question here is, whether testimony of facts indicating concealment of property before bankruptcy is admissible in proof of its concealment, continued and completed, after bankruptcy.

[3] The construction of continuous concealment has been declared by the courts principally in cases arising on applications for discharge under section 14b of the act. 2 Loveland on Bankruptcy, § 651, and cases cited. The construction applies with equal force to concealment of property under criminal section 29b. Each section deals with the same thing, though in different ways, and with different objects. The main difference in the provisions is in the proofs required in proceeding under them, and this is the difference that always maintains between proof required in civil and criminal actions. We find no error in the court's rulings, reviewed under the third, seventh, eighth, ninth and tenth assignments of error.

[4] The court was asked by the defendant to charge that:

"If there are any number of theories fairly deducible from the evidence which are compatible with guilt, and a single theory fairly compatible with innocence, the jury must adopt the theory of innocence."

We are asked to find that the court erred in refusing to give this instruction to the jury, and we are also asked to apply the principle of this instruction in determining whether the verdict was against the weight of the evidence.

The defendant has not indicated the source of this proposition. We imagine that it was intended to embody the principle of the rule, that, to justify conviction of crime, the evidence must be such as to exclude every reasonable hypothesis but that of guilt. Isbell v. United States (C. C. A. 8th Circuit) 227 Fed. 788, — C. C. A. —, and cases cited. While such a rule is recognized, the question is always present —by whom is it to be applied? In some cases no doubt by the court, but certainly not in such a case as this, "where the reasonableness of the only hypothesis of innocence propounded presents at least a question upon which men of ordinary intelligence might honestly differ." Hart v. United States (C. C. A. 3d Circuit) 84 Fed. 799, 804, 28 C. C. A. 612. The trial court was therefore right in leaving the jury to determine whether the defense that the goods were sold before bankruptcy and the proceeds applied to the payment of the defendant's debts, was reasonable or not. The jury found that it was unreasonable, thereby destroying the "single theory fairly compatible with innocence." As we find nothing in the evidence that warrants the supposition that the jury was mistaken, we see nothing in the case to which the instruction could be applied, either by the jury or by this court.

[5] In submitting the case, the court gave the customary and proper instruction with respect to the presumption of the defendant's innocence and the necessity of proof of guilt beyond a reasonable doubt. As this instruction met the requirements of the case, we find no error in the court's refusal to give the additional instruction either in the language or the principle of the prayer. This disposes of the fifth and sixth assignments of error.

[6] The remaining five assignments of error do not command our consideration, because in the matters to which they refer, no motions were made, or, if made, no exceptions were noted. Upon two of these assignments, however, the defendant based his main argument for reversal, namely, the error of the trial court in refusing to direct a verdict for the defendant, and that the verdict rendered was not supported by the evidence. It is a general rule that appellate courts will not consider the question whether there was substantial evidence to sustain a verdict, in the absence of a motion or request for an instructed verdict by the defeated party at the close of the trial, and an exception to its denial. Fielder v. United States, 227 Fed. 832, 833, — C. C. A. —, and cases cited. There was no such motion, request or exception in this case. Nevertheless this is a criminal case, involving the liberty of the defendant. We have therefore been disposed to avail ourselves of our rule, under which we may notice a plain error not assigned, and consider this aspect of the case as if properly before us. We have given the case very full and very serious consideration, and find that the verdict was amply supported by the evidence, and that the court did not err in failing to instruct the jury to render a verdict of acquittal.

The judgment below is affirmed.

OLMSTED-STEVENSON CO. v. MILLER.*

In re MILLER.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1916.)

No. 2628.

1. BANKRUPTCY ⊜446—PETITION TO REVISE—REVIEW OF QUESTIONS OF FACT.
On a petition to revise proceedings in bankruptcy, the court is neither required nor permitted to review the testimony.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊜446.]

2. BANKRUPTCY ⊜396(5)—PROPERTY EXEMPT—GROWING CROPS.
A crop growing when the petition was filed upon a homestead held by the bankrupt under the laws of the United States, upon which final proof had not been made, was exempt, as when an order is made setting aside a homestead to a bankrupt, whether it be exempt under the laws of the state or the laws of the United States, the order of necessity carries with it all growing and unmatured crops.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 668; Dec. Dig. ⊜396(5).]

3. COURTS ⊜366(19)—FEDERAL COURT—STATE LAW—EXEMPTIONS OF BANKRUPT.
Whether a crop growing on a homestead held by the bankrupt under the laws of the United States, upon which final proof had not been made, was exempt, was a question of local law, controlled by the laws of the state, as construed by its highest court.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. ⊜366(19).]

Gilbert, Circuit Judge, dissenting.

Petition for Revision of Proceedings of the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

In the matter of R. S. Miller, bankrupt. An order of the referee, requiring the bankrupt to file a supplemental schedule, was reversed by the District Court (221 Fed. 690), and the Olmsted-Stevenson Company files a petition to revise. Judgment affirmed.

John B. Clayberg, of San Francisco, Cal., for petitioner.

Lewis P. Forestell, of San Francisco, Cal., and Rodgers & Rodgers, of Anaconda, Mont., for respondent.

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

RUDKIN, District Judge. On the 5th day of February, 1914, the respondent, Miller, filed his voluntary petition in bankruptcy in the court below, accompanied by the usual schedules of his debts, assets, and property. At the time of filing the petition the bankrupt was in possession of a homestead held by him under the laws of the United States, upon which final proof had not been made. A crop of wheat growing on this homestead was not included in the schedules filed. An order of adjudication followed the filing of the voluntary petition, and this in turn was followed by an order of discharge some two months later. On the 28th day of October, 1914, the petitioner, Olm-

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

* Rehearing denied May 8, 1916.

sted-Stevenson Company, a creditor of the bankrupt, filed a petition with the referee in bankruptcy, setting forth the failure of the bankrupt to include the growing crop in his schedule, and praying that the case might be reopened and the bankrupt required to file a supplemental schedule containing the omitted property. An order to show cause was made on the filing of this petition, and upon a hearing before the referee an order was made granting the prayer of the petition and requiring the bankrupt to file a supplemental schedule. The order itself is not in the record, but we gather from the opinion of the referee that it was to the effect that the bankrupt should account to the trustee for the value of the crop less certain offsets not material here. A petition was then filed with the court below to review the order of the referee in that behalf, and upon a hearing in the District Court the order of the referee was reversed. The present petition was thereupon filed in this court for a revision of the order of the District Court.

[1] It appears from the record that the court below reversed the order of the referee on two grounds: (a) Because the growing crop was exempt and did not pass to the trustee; and (b) because the trustee was estopped by his conduct from claiming the crop. The first question is one of law arising on the pleadings in the bankruptcy court; but the question of estoppel is one of fact, which can only be determined by a reference to the testimony. There was no finding by the referee or the court below on that issue; there was no agreed statement of facts; and if this court is to determine the question at all, it must do so from a consideration of the testimony taken before the referee. But in a proceeding of this kind we are neither required nor permitted to review the testimony. In re Richards, 96 Fed. 935, 37 C. C. A. 634; In re Boston Dry Goods Co., 125 Fed 226 60 C. C A. 118; In re Taft, 133 Fed. 511, 66 C. C. A. 385; In re Pettingill & Co., 137 Fed. 840, 70 C. C. A. 338; Steiner v. Marshall, 140 Fed. 710, 72 C. C. A. 103; In re Roadarmour, 177 Fed. 379, 100 C. C. A. 611; Hall v. Reynolds, 224 Fed. 103, 139 C. C. A. 659

[2, 3] For this reason the petition to dismiss interposed in this court should perhaps be granted; but in any event we agree with the conclusion of the court below on the merits of the question involved. When an order is made setting aside a homestead to a bankrupt, whether the homestead be exempt under the laws of the state or under the laws of the United States, the order of necessity carries with it all growing and unmatured crops. The homestead is allowed to the debtor in order that he may support himself and his family, not as a mere shelter from the elements; and if he is not entitled to use and retain the growing crops, well may he ask why is the homestead set apart at all. Let us now view the subject in the light of the authorities. The question, of course, is one of local law, to be determined by reference to the laws of the state as construed by its highest court. Our attention has not been called to any decision of the Supreme Court of Montana, but a number of federal cases are cited where the question has been decided adversely to the homestead claimant.

In Re Coffman (D. C.) 93 Fed. 422, it was held that crops growing

on a homestead set apart under the laws of the state of Texas at the time of an adjudication in bankruptcy are not exempt, and must be surrendered to the trustee in bankruptcy. This decision, however, is clearly in conflict with the repeated decisions of the highest court of that state. Alexander v. Holt, 59 Tex. 205; Parker v. Hale (Tex. Civ. App.) 78 S. W. 555; Staggs v. Piland, 31 Tex. Civ. App. 245, 71 S. W. 762; Moore v. Graham, 29 Tex. Civ. App. 235, 69 S. W. 200. In re Daubner (D. C.) 96 Fed. 805, from the District of Oregon, and In re Hoag (D. C.) 97 Fed. 543, from the Western District of Wisconsin, are based largely on the decision in the Coffman Case, and not upon decisions of the local courts.

In Re Sullivan, 148 Fed. 815, 78 C. C. A. 505, from the District of Iowa, the court held that ripe corn standing in the field on a homestead was not exempt. Whether the court intended to distinguish between ripe corn and other growing crops does not appear from the opinion; but in any event the decision seems to be opposed to the decision of the Supreme Court of the state of Iowa in Morgan v. Rountree, 88 Iowa, 249, 55 N. W. 65, 45 Am. St. Rep. 234. In the latter case it was held that moneys due for rent of a homestead are exempt from execution, and in referring to certain cases relating to growing crops the court said:

"It is clear that such crops are not exempt under statutes exempting personal property, unless specified therein. Such crops, if exempt, must, in the absence of such specifications, be so under the law exempting the homestead. The reasoning in these cases seems to us to lose sight of the spirit and purpose of the law exempting homesteads. The conflict in the cases is explained, in part at least, by the differences in the statutes of these states. It will be observed, however, that in none of them is it held that crops, while growing upon the homestead, are not exempt. To answer the question certified, we must ascertain the letter and spirit of our statute exempting homesteads. It is certainly the spirit and purpose to exempt, not only the homestead, but also the use thereof, for without the use the exemption would be valueless. It is not simply as a place of shelter, a place in which to live, that homesteads are exempt, but also as a means of making a living, as is shown by the exemption of one-half an acre in town, 40 acres in the country, and the shop or building, when situated on the exempt premises, in which the head of the family carries on his business. The use of the homestead, as well as the homestead itself, is unquestionably exempt so long as the homestead character is maintained. When the homestead is terminated, by abandonment or otherwise, the exemption ceases; but in this case it was not terminated. We think it is in harmony with the evident spirit and purpose of our statute to hold that the head of a family owning a homestead has the right to hold as exempt, not only the homestead and its use, but also crops or money which he may derive from its use while the property continues to be his homestead. If the homestead is terminated by abandonment or otherwise, the exemption ceases. To hold that the owner of a homestead can only hold as exempt such proceeds of its use as the industry of himself or family has produced would be in many cases to deny the benefits of such exemption entirely."

And in concluding its opinion the court said:

"We are clearly of the opinion that proceeds derived from the use of the homestead while it remained such are exempt to the head of a family."

The court in the Sullivan Case disposed of the decision of the state court by saying that so much of the opinion as related to growing crops was obiter. With this conclusion we are unable to agree. The state

court was discussing the nature of the homestead, with all its incidents, and, while only the question of rents was there involved, yet the rents and products of a homestead are so closely related that what is said of the one is of necessity applicable to the other.

In re Friedrich (D. C.) 199 Fed. 193, from the District of Minnesota, was based on the ruling in the Sullivan Case from the same circuit, in the absence of any controlling decision by the Supreme Court of the state.

The courts which hold that growing crops are not exempt lose sight of the objects and purposes of homestead laws, and the reasons for their decisions are by no means conclusive. These reasons are, first, that growing crops may be sold or mortgaged; and, second, that the exemption statutes do not specifically exempt them. But the power of alienation is incident to the ownership of all property, exempt or nonexempt. The homesteader may dispose of his homestead, and of his other exempt property as well; he may dispose of his household furniture, and even of his clothing; but it does not follow from this that a sheriff or trustee in bankruptcy may seize them. Growing crops are not specifically exempted by statute; but neither are growing trees, fences, or buildings. They are each and all exempt, however, in our opinion, by necessary implication. A growing crop will pass by a sale of the land, unless expressly reserved, and, as already stated, an order setting aside a homestead is equivalent to a sale or other transfer. The reason for the exemption of crops growing on a homestead, given by the Court of Civil Appeals of Texas in Moore v. Graham, supra, is, in our opinion, unanswerable:

"The occupation by the head of a family of a homestead for agriculture is for the purpose of realizing therefrom something to support himself and family, rather than to employ it as a mere place wherein to shelter him and them from the winter's cold or summer's heat. If the exemption extended to him does not include an ungathered crop, whether matured or not, it is of no benefit to the owner. In such an event he and his wife and children would only have the privilege of standing in the house or yard, and seeing an officer invade their field, and take possession of, by virtue of an attachment or execution, the crops growing or standing thereon, and appropriate the fruits of their toil, without any benefit from what the law was intended to secure them."

We see no distinction between crops growing on a homestead claim existing under the federal statutes and crops growing on a homestead set apart by state laws. Perhaps the reason for upholding the exemption in the former case would be stronger than in the latter; but in either case to set aside a homestead to an unfortunate debtor in the spring, and permit a trustee in bankruptcy to invade it in the fall and carry away the crops, is to keep the word of promise to the ear and break it to the hope.

The judgment of the court below is affirmed.

GILBERT, Circuit Judge (dissenting). Section 6 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [Comp. St. 1913, § 9590]) provides that the act shall not affect the allowance to bankrupts of the exemptions prescribed by the state laws in force at the

time of filing the petition; and section 70a (section 9654) provides that the trustee of the bankrupt's estate shall be vested by operation of law with the title of the bankrupt as of the date when he was adjudged a bankrupt, "except in so far as it is to property which is exempt," to all property which prior to filing the petition "he could have by any means transferred," etc. The property here involved could have been transferred, for it is settled by the statutes and decisions of Montana that the owner may mortgage a growing crop. Brande v. Babcock Hardware Co., 35 Mont. 256, 88 Pac. 949, 119 Am. St. Rep. 858. And being transferable under the laws of the state of Montana, it passed to the trustee, unless it was property which was exempt.

It is not contended that it was exempt under the laws of Montana, but it is said that it is exempt for the reason that it was a crop produced upon land which the bankrupt held as a homestead entry under the public land laws of the United States. It may be conceded that growing crops on such a homestead claim are not subject to execution; but the test question here is not whether the crops were subject to execution, but whether they could have been transferred by the voluntary act of the owner. That they could have been so transferred is not questioned. And it is not denied that in every case in which the right of the trustee in bankruptcy to growing crops on the homestead land of the bankrupt has been called in question in the federal courts the right has been sustained. In Re Coffman (D. C.) 93 Fed. 422, it was held that a bankrupt cannot claim as exempt property a crop of cotton growing on his homestead at the time of the adjudication in bankruptcy, although an execution could not have been levied upon the property before its severance. The court said:

"But in a case of voluntary bankruptcy, where the bankrupt comes forward and tenders all of his property subject to execution, to be applied ratably on his debts, in order that he may reap the benefits of the Bankruptcy Act, the question may well be asked: Does he not, by his act, extend an invitation and give warrant to the trustee to come upon his homestead and gather that which belongs to his creditors?"

In re Daubner (D. C.) 96 Fed. 805, was a case in which the growing crop of the bankrupt was upon land acquired by the latter under the United States Homestead Law (Act Cong. May 20, 1862, c. 75, 12 Stat. 392). The court held that the crop passed to the trustee. The court said:

"Upon a sale of the land the growing crops, unless reserved, would pass to the purchaser; but they are capable of reservation and of mortgage and sale by the owner of the land, and when such owner voluntarily goes into bankruptcy he must be held to intend that such of his property and rights as are the subject of disposition by him, and are not expressly exempt, shall vest in the trustee for the benefit of creditors. Such crops are the fruits of the bankrupt's industry, or of his investment of money, or both."

So in Re Hoag (D. C.) 97 Fed. 543, it was held that the bankrupt may not claim as exempt crops growing on his homestead at the time of filing his petition in bankruptcy. In Re Sullivan, 148 Fed. 815, 78 C. C. A. 505, the Circuit Court of Appeals for the Eighth Circuit affirmed the District Court for the Northern District of Iowa in

holding that corn standing in the field on the homestead of the bankrupt, which had fully matured at the date of the bankruptcy, is not exempt under the homestead exemption statute of Iowa. In Re Friedrich (D. C.) 199 Fed. 193, the ruling of In re Sullivan was followed.

But it is held by the majority of this court that those decisions are all to be disregarded, for the reason, it is said, that in two of them the courts erroneously construed the decisions of the state courts, which they professed to follow, that the decision in Re Coffman was in conflict with the decisions of the Supreme Court of Texas in Alexander v. Holt, 59 Tex. 205, Parker v. Hale (Tex. Civ. App.) 78 S. W. 555, Staggs v. Piland, 31 Tex. Civ. App. 245, 71 S. W. 762, and Moore v. Graham, 29 Tex. Civ. App. 235, 69 S. W. 200. All of those cases except the first were decided after the decision in Re Coffman. In Texas, as in some other states, a distinction has been made between crops growing on a homestead and crops which have been gathered and severed from the soil; and it is held that the former take the character of the land as to exemption, but that the latter do not. The decisions so cited from Texas sustain that rule. It is a mistake to say that In re Coffman is in conflict with them. In that case the court held that, where the homestead laws of the state do not include growing crops, the bankrupt cannot claim as exempt property the crop growing on his homestead at the time of the adjudication in bankruptcy, although an execution could not have been levied upon such crop before its severance, and that if, after the appointment of the trustee, the bankrupt gathers and removes the crop, he must surrender the same or the proceeds of the sale to the trustee. The court in that case cited the decisions of the Supreme Court of Texas to sustain the conclusion so reached.

So it is said that the decision of the Circuit Court of Appeals for the Eighth Circuit in Re Sullivan is in conflict with the decision of the Supreme Court of Iowa in Morgan & Hunter v. Rountree, 88 Iowa, 249, 55 N. W. 65, 45 Am. St. Rep. 234. But the Circuit Court of Appeals carefully considered and distinguished Morgan & Hunter v. Rountree. That was a case in which the Supreme Court of Iowa had held that the homestead law of that state created an estate which the owner thereof may enjoy, and that, if he cannot conveniently reside on the homestead, he may lease it and enjoy the rent reserved with like immunity from claims of creditors as would attach to the estate itself. The Circuit Court of Appeals held that the Supreme Court of Iowa, in construing the state statute of exemption, had not decided that the crops growing on an exempt homestead are for that reason alone exempt from liability to creditors of the owner of the homestead.

Many of the reported cases on the subject of exemptions of crops raised upon homesteads are controlled by the provisions of the state statutes whereby the homesteads are created. All of those statutes recognize that the occupation of homestead land is for the purpose of realizing therefrom something to support the claimant and his family, and in some states express exemption is made of all produce, rents, or profits arising from the homestead land, and in most states

provisions are made for the protection of the rights of the homestead claimants. Generally speaking, the right preserved is the right to enjoy a home and the land on which it is situated from liability to forced sale to pay the debts of the owner, with certain restraints upon his right of alienation, but with the power to waive, abandon, or terminate the right.

The possessory right to land under such state statutes differs widely from the right of the settler upon a homestead under the public land laws of the United States. That right is subject to no limitation or restraint, except that the lands acquired by homestead entry shall not in any event become liable for the satisfaction of any debt contracted prior to the issuing of the patent therefor. The homestead involved in the present case is of the latter class. The right of the claimant to the products of the land is not affected by any provision of a state statute, and, of course, it cannot be affected by any decision of the courts of the state in which the land lies. The question here is purely one of the effect of the laws of the United States. Under those laws no right of the bankrupt in the land of the homestead claim passed to the trustee. But the right to the growing crops was subject to transfer by the bankrupt at the time when the petition in bankruptcy was filed. It was property which he could have "transferred," as provided in section 70a. As was said by Judge Sanford in Re Burnett & Co. (D. C.) 201 Fed. 162:

"The mere fact that the property could not have been levied upon and sold at the date of the adjudication would not prevent the bankrupt's title from passing to the trustee, if it were property which the bankrupt could by any means have transferred."

The decisions of the federal courts, so far as they have considered the question here involved, sustain the doctrine which may be thus expressed: When a homestead entryman voluntarily files his petition in bankruptcy and asks the court to declare him a bankrupt, and to accept his estate, and to discharge him from his liability to creditors, the trustee becomes vested of all the bankrupt's transferable property, except that which is exempt under the law of the state; that if a portion of the bankrupt's property is a growing crop, which his labor and money have produced upon a homestead, which he holds under the laws of the United States, and such growing crop is not exempt under the law of the state, he should be held to surrender with it to the trustee the right to enter upon the land, if necessary to remove the crop therefrom; and that where, as here, the bankrupt has harvested the crop, he should be required, as was ordered by the referee in the case at bar, to surrender the same or the proceeds thereof to the trustee, reserving to himself the cost and expense of raising and harvesting the crop.

OLMSTED-STEVENSON CO. v. LANGDORF.*

In re LANGDORF.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1916.)

No. 2627.

Petition for Revision of a Certain Order of the District Court of the United States for the District of Montana, in Bankruptcy; George M. Bourquin, Judge.

In the matter of S. A. Langdorf, bankrupt. On petition by the Olmsted-Stevenson Company for revision, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608), of an order in matter of law. Affirmed.

John B. Clayberg, of San Francisco, Cal., for petitioner.

L. P. Forestell, of San Francisco, Cal., and Rodgers & Rodgers, of Anaconda, Mont., for respondent.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

PER CURIAM. Affirmed, in accordance with the stipulation of counsel for the respective parties, filed August 23, 1915, providing that the above-entitled matter shall abide the decision of this court as rendered in the matter of Olmsted-Stevenson Co., a Corporation, Petitioner, v. R. S. Miller, Bankrupt, Respondent, in the Matter of R. S. Miller, a Bankrupt (No. 2628) 231 Fed. 69, —— C. C. A. ——, and in accordance with the decision this day rendered by this court in the latter matter.

CLYDE S. S. CO. v. WHALEY et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1916.)

No. 1367.

1. ALTERATION OF INSTRUMENTS ⟸3—EFFECT OF—"MATERIAL ALTERATION."

Where plaintiff's agent stored goods with warehousemen, who issued receipts in the name of the agent, not knowing that plaintiff was the real party in interest, the substitution of the name of plaintiff and erasure of the agent's name from the receipts was a "material alteration," which, if made by a party in interest, would render the instrument void, despite the rule that the substitution of one name for another is immaterial, when the name of the real party intended is inserted.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 5–15; Dec. Dig. ⟸3.

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

2. ALTERATION OF INSTRUMENTS ⟸11(2)—EFFECT—ALTERATION BY STRANGER.

A material change in a written instrument avoids it against one party, only when it is made by the other party or with his consent, and an alteration by a stranger, or by an agent without authority, is only a spoliation, not affecting the instrument's validity.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 61–66, 68–71; Dec. Dig. ⟸11(2).]

3. ALTERATION OF INSTRUMENTS ⟸11(2)—AUTHORITY OF AGENT.

A steamship company directed its agent to store goods with defendants, who were warehousemen. Defendants issued the receipts to the agent. *Held*, that for the agent to erase its name and insert that of its principal, the steamship company, was not an alteration preventing the company as an undisclosed principal from enforcing the contract, for an agent of a party to the instrument, not authorized to change it, is deemed a

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

* Rehearing denied May 8, 1916.

stranger, and the agent, because authorized to store the goods, was not empowered to change the receipts.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 61–66, 68–71; Dec. Dig. ⊂⊃11(2).]

4. WAREHOUSEMEN ⊂⊃25(5)—LIABILITY.

Civ. Code S. C. 1902, §§ 1719–1721, respectively provide that warehousemen shall not transfer or remove goods for which a receipt has been given without the written assent of the persons holding the receipt, that warehouse receipts may be transferred by indorsement and delivery, but that those provisions forbidding delivery of property except on surrender and cancellation of the original receipt or the indorsement of delivery thereon, in case of partial delivery, shall not apply to property replevied or removed by operation of law. The agent of a steamship company stored its property with defendant warehousemen, and they issued a receipt in the name of the agent. Thereafter the agent, having erased its name and inserted that of its principal, directed the warehousemen to deliver to it a portion of the goods. *Held* that, as the original receipt was not produced and canceled, nor was delivery indorsed thereon, the warehousemen were liable to the principal for delivery to the agent.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 42–45; Dec. Dig. ⊂⊃25(5).]

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 the Clyde Steamship Company against W. B. Whaley and others. There was a judgment for defendants, and plaintiff brings error. Reversed.

J. P. K. Bryan, of Charleston, S. C., for plaintiff in error.

Huger Sinkler and Nathaniel B. Barnwell, both of Charleston, S. C. (Whaley, Barnwell & Grimball, Mitchell & Smith, and Nathans & Sinkler, all of Charleston, S. C., on the brief), for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The Clyde Steamship Company brought this action to recover $3,592.52, the value of 38 bales of burlaps stored with W. B. Whaley and A. Hasell Heyward, doing business as warehousemen under the name of Boyce's Wharf. By consent the cause was tried without a jury. The District Judge found that the plaintiff should recover nothing, and that the defendant should recover $391.50, its undenied counterclaim for storage. Judgment was entered accordingly, and the cause comes here on error assigned in the rejection of the plaintiff's claim.

The facts are not in dispute. In November, 1907, the Clyde Steamship Company held 251 bales of burlaps in Charleston under bill of lading calling for delivery to the order of the consignor. The shipment was intended for the Goldsmith Manufacturing Company, and was to be delivered to that company on presentation of the bills of lading duly endorsed. The Steamship Company, being pressed for room on its wharf, asked the Goldsmith Company to arrange for it the storage of the burlaps at some other wharf pending the presentation of

the bills of lading. Accordingly the Goldsmith Company arranged to store the goods with Whaley and Heyward on Boyce's Wharf; and the Steamship Company had the goods delivered there. The agency of the Goldsmith Company was not disclosed to Whaley and Heyward, and they issued warehouse receipts for 277 bales of burlaps in the name of the Goldsmith Company as if it were the owner of the entire lot. Afterwards the Goldsmith Company in accounting with the Steamship Company admitted that it had received and stored for the Steamship Company on Boyce's Wharf 251 bales of burlaps, and turned over the warehouse receipts for that number of bales, from which it had erased its own name and written in the place of it the Clyde Steamship Company. On the same day it gave a written order to Boyce's Wharf directing that 229 bales—22 bales short of the 251 bales—be held for the order of the Steamship Company, and the remaining 48 bales of the 277 bales for its own order. Whaley and Heyward knew nothing of the alteration of the receipts or their delivery to the Steamship Company; but they delivered to the Steamship Company the 229 bales according to the written order of the Goldsmith Company. On the other hand, the Steamship Company took the receipts for the 251 bales from the Goldsmith Company, supposing that the alteration had been made before their delivery to the Goldsmith Company. At the trial the plaintiff relied on the receipts, and proof of the agency of the Goldsmith Company as evidence of its right to recover the value of 22 bales, the difference between 251 bales called for by the receipts turned over to it by the Goldsmith Company and 229 bales, the number received by it from Boyce's Wharf. The District Judge held that the erasure of one name and the substitution of the other was a material alteration, which annulled the receipts, and that therefore no recovery could be based on them.

[1] The rule is too well settled for serious discussion that the erasure of the name of the payee or obligee in a written instrument and the insertion of the name of another person is a material alteration, and that such an alteration when made by a party in interest will render the instrument void. The rule is founded upon the public necessity that written instruments should be kept inviolate, and upon the principle that the writing as made by both parties binds and not that which one of the parties has attempted to substitute. Steele v. Spencer, 1 Pet. 552, 7 L. Ed. 259; Ann. Cas. 1913C, 180, note; 10 Am. Dec. 267, note; 86 Am. St. Rep. 80, note; 35 L. R. A. 464, note; 1 R. C. L. 973; 2 Corpus Juris, 1214; Sanders v. Bagwell, 32 S. C. 238, 10 S. E. 946, 7 L. R. A. 743; White v. Harris, 69 S. C. 65, 48 S. E. 41, 104 Am. St. Rep. 791. A limitation of the rule is that the substitution of one name for another is not a material alteration, where it amounts to nothing more than inserting the real name of the party intended. Such a change does not alter the instrument, for the person intended, though incorrectly named, could be shown by parol. Mouchet v. Cason & Hill, 1 Brev. (S. C.) 307; Hanrick v. Patrick, 119 U. S. 156, 7 Sup. Ct. 147, 30 L. Ed. 396; 22 Ann. Cas. 1045, note. Manifestly the erasure of the name "Goldsmith Manufacturing Company" and the substitution of the name "Clyde Steamship Company" was a material

alteration; it was not the mere giving of the real name of the party intended, for Whaley and Heyward did not know the Steamship Company in the transaction.

[2, 3] There is, however, another rule as well established as that just stated. A material change in a written instrument avoids it against one party only when it is made by the other party or with his consent, and a change made by a stranger (that is, one who has no legal interest in the instrument) without authority from the party in interest is only a spoliation, not affecting its validity. An agent of a party to the instrument not authorized to change it is in this sense a stranger without legal interest, and a change made by such agent does not destroy the paper, but leaves it a valid contract binding according to its original form. Flinn & Hart v. Brown, 6 S. C. 229; Equitable Mfg. Co. v. Allen, 76 Vt. 22, 56 Atl. 87, 104 Am. St. Rep. 915; Langenberger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418; Burgess v. Blake (Ala.) 86 Am. St. Rep. 103, note; White Sewing Machine Co. v. Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313; Gleason v. Hamilton, 138 N. Y. 353, 34 N. E. 203, 21 L. R. A. 210; Vanderford v. Farmers' & M. N. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; 2 Corpus Juris, 1336; Kingan & Co. v. Silvers et al., 13 Ind. App. 80, 37 N. E. 413; Tulane University v. O'Connor et al., 192 Mass. 428, 78 N. E. 494. The alteration of the agent does not destroy the instrument, even when the other contracting party makes the obligation to the agent in his own name supposing him to be the principal. In that case, in the absence of fraudulent concealment on his part, the principal, being the real party in interest, has the right to enforce the contract in its original form upon proof that the nominal payee or obligee was his agent.

In Hunt v. Gray, 35 N. J. Law, 227, 10 Am. Rep. 232, John T. Hunt sold a horse for George Hunt and took the note of the purchaser to himself as payee without disclosing his agency. He altered the note without the consent of George Hunt. In holding that the alteration did not annul the paper, Chief Justice Beasley said:

"The alteration of this note was not the act of the plaintiff, because the person who made it was not his agent for that purpose. These were the facts: John T. Hunt was the agent who sold the plaintiff's horse for him; in that transaction he took * * * it to the bank and had it discounted, the proceeds going to the plaintiff. From these circumstances an authority to alter this note cannot be inferred. It was not an act that properly appertained to the transaction to which the agency related. It could not have been within the contemplation of either the principal or the agent, at the time of the creation of the agency. Consequently, the act must be regarded as though done by a stranger, without the concurrence, express or implied, of the plaintiff."

The rule is thus well stated in Spreng v. Juni, 109 Minn. 85, 122 N. W. 1015, 18 Ann. Cas. 222:

"The owner of a promissory note, in which a third party is named as payee, may maintain an action upon it, without indorsement, upon proof of such ownership by evidence other than the note. Cassidy v. Faribault First National Bank, 30 Minn. 86, 14 N. W. 363. Again, a change in a written contract by a stranger thereto is not an alteration, but a spoliation, which does not avoid it, and the obligee may enforce it in its original form, as if no change had been made. If the change is made by an agent having no author-

ity which includes the making of such change, it does not avoid the contract, unless ratified by the principal. 3 Page on Contracts, 1514, 1515; Ames v. Brown, 22 Minn. 257."

The reason of the rule that a change made by an agent, who had authority to take the paper, but not to alter it, does not destroy it, is well illustrated by the case now under consideration. To reduce the matter to its simplest form, let it be assumed that the goods are still in the possession of Boyce's Wharf. The Steamship Company owned the goods. The agency of Goldsmith Company was limited to the storage and taking the receipts. The receipts in whatever form taken, being for the goods of the Steamship Company were also the property of the Steamship Company, and it could recover upon them upon proof that the Goldsmith Company was their agent in storing the goods and taking the receipts. Would the fact that the Goldsmith Company altered the receipts without authority from the Steamship Company make them of no effect? It seems plain on principle and under the authorities cited that the question must receive a negative answer. The authority of an agent to destroy by alteration a paper taken on behalf of his principal is not to be presumed, and there was no evidence of authority to alter. On the contrary, the fact was that the Steamship Company took the receipts without knowledge of an alteration after delivery, supposing that its own name had been inserted before delivery of the receipts.

Under the circumstances we cannot resist the conclusion that the unauthorized change made in the receipts by the agent was a mere spoliation; that they were valid instruments in the hands of the Clyde Steamship Company, and the Steamship Company would be entitled to recover on them upon proof of the agency of the Goldsmith Company if the goods were still in the hands of the warehousemen.

[4] This brings us to the question whether the warehousemen are protected from the plaintiff's claim by delivery to the Goldsmith Company, because they had received the goods from the Goldsmith Company and delivered them to that company without notice of the Steamship Company's interest. We express no opinion as to what would be the rights of the parties under the common law or the rules of equity, because the question is answered by the statutes of South Carolina in force at the date of these transactions.

Section 1719, Code of 1902, prohibits warehousemen from transferring or removing beyond their control goods held on storage for which a receipt has been given without the written assent of the person or persons *holding* such receipt.

Section 1720 provides that warehouse receipts—

"may be transferred by indorsement and delivery thereof, to the purchaser or pledgee, signed by the person to whom the receipt was originally given, or by an endorsee of such receipt; and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods, wares and merchandise therein specified, so far as to give validity to any pledge, lien or transfer made or created by such person or persons; but no property shall be delivered except on surrender and cancellation of said original receipt or the endorsement of such delivery thereon in case of partial delivery. The assignment of warehouse receipts which shall have the words 'Not Negotiable'

plainly written or stamped on the face thereof shall not be effective until recorded on the books of the warehousemen issuing them."

Section 1721 provides:

"So much of the preceding sections 1719 and 1720 as forbids the delivery of property except on surrender and cancellation of the original receipt or the endorsement of such delivery thereon, in the case of partial delivery, shall not apply to property replevied or removed by operation of law."

Other sections of the statute make the delivery of goods by a warehouseman without surrender or cancellation of the receipts a criminal offense, and give a right of action against the warehouseman in favor of any person sustaining damages either immediate or consequential by reason of such violation of the statute.

The provision of the statute that goods in storage should not be delivered except on surrender and cancellation of the receipt, or indorsement thereon in case of partial delivery, was as much a part of the contract as if it had been written in the receipts by the warehousemen. Hence the Steamship Company, which rightfully acquired and held the receipts as its own property, was authorized to rely on this provision of the law as a part of the contract. Indeed we cannot doubt that one of the purposes of the law was to meet just such conditions as have here arisen. Business men as a rule must deliver their goods to warehousemen through agents. But the owner is in a degree protected against fraud and mistake of his agent in having the receipt made out in his own name, by the statute which forbids the warehousemen to deliver the goods to the depositor or any other person without the production of the receipt and due entry of the delivery. If he delivers without the production of the receipt it is at his own risk. The statute is also a beneficent protection to the warehouseman against claimants who do not present the receipts.

Even as to bills of lading which do not fall under the statutes above cited, Chief Justice McIver said for the Court in National Bank of Chester v. Atlanta & Charlotte Air Line Railway Company, 25 S. C. 224:

"It is true that a carrier may safely deliver goods intrusted to him for transportation to the person rightfully entitled to receive them, even without the production of the bill of lading, but in such a case he takes upon himself the burden of showing that the delivery was to the proper person, and this he must show as a matter of defense; for when it is once shown that he has delivered the goods to one not holding the bill of lading, a prima facie case is made out against him, which can only be rebutted by showing that although he made the delivery without the production of the bill of lading, yet he has in fact delivered to the very person who, according to the terms of the bill of lading, was entitled to receive the goods. In other words, the bill of lading in his contract by which he agrees to deliver the goods entrusted to him for transportation to the person named therein or to his order; and if he delivers them to any one else and loss ensues to the person entitled to receive the goods, he becomes liable."

The Supreme Court of the United States has laid down the rule as to warehouse receipts that the obligation of the warehouseman is "not to deliver without a surrender of the receipts." "The duty of the warehouseman is performed when he gets the property into his own possession before he issues the receipt, and transfers that posses-

sion when demanded to the lawful holder of the receipt." Insurance Co. v. Kiger, 103 U. S. 352, 26 L. Ed. 433. Under a statute prohibiting a warehouseman from transferring or removing beyond his immediate control goods for which a receipt has been given without the written consent of the holder and the production of the receipt, the Court of Appeals of Kentucky held that no one could obtain the property except the holder of the receipt and that the warehouseman could assert no claim or set-off against the holder unless the receipt shows such right to exist. Cochran v. Ripy, 13 Bush, 495.

It is regrettable that the loss must fall on the warehousemen who delivered the goods in good faith to the person who deposited them and to whom they issued the receipts. But the conclusion cannot be escaped that the loss was due to the violation by the warehousemen of an express provision of the statute upon the observance of which the Steamship Company as the lawful holder of the receipts had a right to rely for its protection.

Reversed.

SHUMPERT v. NATIONAL STATE BANK OF COLUMBIA et al.
In re LION FURNITURE CO.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1916.)

No. 1389.

1. CORPORATIONS ⟸477(1) — MORTGAGES — CONSIDERATION — MORTGAGES TO STOCKHOLDERS.

A corporation and its sole stockholders conveyed all of its assets to A. and W., who indorsed on the conveyance a transfer of the assets to the corporation. The stockholders also transferred the stock to A. and W., and new certificates were issued in their names and assigned to the former stockholders as security. A. and W. paid the former stockholders $7,000 in cash, and they and the corporation made notes for $22,500, to secure which a chattel mortgage was executed by the corporation. The corporation was indebted to a bank, and the former stockholders made a new note to the bank, and assigned the notes and mortgage and stock certificates as security. Payments were subsequently made on the notes and mortgage, part of which were paid to the bank, and part, with the permission of the bank, to the former stockholders. *Held*, that the transaction was in effect a sale by the stockholders of their interest in the corporation and a mortgage by the corporation of its assets to provide for payment of its debts, and payment to the former stockholders of the agreed value of their interest and the mortgage was good as security in the hands of the bank to the extent of the balance due on its debt, since, when the former stockholders took up the corporation's note, substituting their own, they became creditors of the corporation, and the mortgage to the extent of the debt was good in their hands, or the hands of their assignee.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1859, 1865–1868; Dec. Dig. ⟸477(1).]

2. CORPORATIONS ⟸478—MORTGAGES—VALIDITY—ESTOPPEL.

The consent or permission of the bank to the payment of money by the corporation to the former stockholders in no way affected the bank's rights, as it was under no duty to subsequent creditors to enforce payment of its security, and had no authority to prohibit the corporation from paying money to the former stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1871; Dec. Dig. ⟸478.]

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3. CORPORATIONS ⟸99(1) — INDEBTEDNESS — ASSUMING DEBTS OF STOCKHOLDERS.

As a general rule a corporation cannot legally bind itself to pay the purchase price of stock sold by a stockholder to a third person, and this principle is embraced in the inhibition of Const. S. C. art. 9, § 10, and Civ. Code 1912, § 2889, against the issuance of stocks or bonds save for labor, money, or property, and against all fictitious increase of stocks or indebtedness.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 444; Dec. Dig. ⟸99(1).]

4. CORPORATIONS ⟸99(1) — INDEBTEDNESS — ASSUMING DEBTS OF STOCKHOLDERS.

Other stockholders and existing creditors, unless they have waived the rule or estopped themselves from asserting it, are always entitled to the protection of the rule that a corporation cannot bind itself to pay the purchase money of stock sold by a stockholder to a third person.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 444; Dec. Dig. ⟸99(1).]

5. CORPORATIONS ⟸477(3) — INDEBTEDNESS — ASSUMING DEBTS OF STOCKHOLDERS.

As stockholders are the equitable owners of corporate property when outstanding debts have been paid, and can by merely formal legal proceedings sell the property, transfer the legal title and divide the proceeds of the sale, they may in equity bind the corporation by a sale or mortgage for their own benefit as individuals as against themselves and all others subsequently becoming creditors or stockholders, with full notice of the conveyance or mortgage and the purpose for which it was given.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1858; Dec. Dig. ⟸477(3).]

6. CORPORATIONS ⟸542(3) — INDEBTEDNESS — ASSUMING DEBTS OF STOCKHOLDERS.

Subsequent creditors of a corporation may attack a mortgage executed by a corporation to secure a stockholder for the purchase money of his stock, unless he has notice by record or otherwise, not only of the existence of the mortgage, but of the purpose for which it was given, as the law authorizes those dealing with a corporation to assume that the corporate assets are kept for corporate purposes, and that the proceeds of a corporate mortgage have been paid into the treasury of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2156; Dec. Dig. ⟸542(3).]

7. CORPORATIONS ⟸547(4) — INDEBTEDNESS — ASSUMING DEBTS OF STOCKHOLDERS.

A corporation and its sole stockholders executed a joint bill of sale of all of its assets for a recited consideration of $29,500 to W. and A., who indorsed on the conveyance a transfer of the assets to the corporation. The stockholders also transferred their stock to W. and A., and new certificates were issued in their names and assigned to the former stockholders as security. A. and W. paid $7,000 of the consideration in cash, and they and the corporation made notes for $22,500, secured by a chattel mortgage of the corporation, attached to which was evidence that its execution was authorized by A. and W. as directors and sole stockholders. The bills of sale and mortgage were duly recorded. *Held*, that subsequent creditors were put on notice that the mortgage was executed as part of the purchase by W. and A. of the stock in the corporation, and could not attack the validity of the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2181; Dec. Dig. ⟸547(4).]

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.

In the matter of the Lion Furniture Company, bankrupt. An order of the referee, denying a petition of J. C. Shumpert, trustee, to set aside notes and a mortgage in favor of the National State Bank of Columbia and others, was approved and confirmed by the District Court, and the trustee appeals. Affirmed.

Hunter A. Gibbes, of Columbia, S. C., for appellant.

W. M. Shand, of Columbia, S. C. (Shand, Benet, Shand & McGowan, of Columbia, S. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The Lion Furniture Company, a corporation of South Carolina, was adjudicated a bankrupt on a voluntary petition March 18, 1915. The following transactions took place on June 6, 1912:

E. G. Cook and H. K. Cook, sole stockholders of the company, and the company itself, through E. G. Cook and H. K. Cook, its officers, executed to Jules N. Winsten and M. B. Abrams a conveyance of all of the stock in trade and other assets of the corporation. The consideration mentioned in the conveyance was $29,500. Indorsed on this paper was a transfer or assignment, signed by Winsten and Abrams, of all the assets back to the corporation for "valuable" consideration. The Cooks transferred and assigned all of the capital stock of the corporation, of the par value of $10,000, to Winsten and Abrams. The certificates of stock were canceled and new certificates issued in the name of Jules N. Winsten and M. B. Abrams, and these new certificates were then assigned in blank to the Cooks. Abrams and Winsten paid to E. G. Cook and H. K. Cook $7,000 in cash as part consideration for the property transferred to them; and they and the corporation made notes for the remainder of the purchase price, $22,500, payable to the Cooks. A chattel mortgage was executed by the corporation through Winsten and Abrams, its officers, and Winsten and Abrams as individuals in favor of the Cooks for the purpose of securing the payment of the notes, aggregating $22,500. The mortgage recites that the $22,500 is a debt of the corporation. It purports to convey all of the assets of the corporation as security for the notes. Attached to the mortgage is evidence of the fact that the execution of it was authorized by the directors, Abrams and Winsten, and by Abrams and Winsten, the sole stockholders. Both the conveyance and the mortgage were duly recorded in the office of the clerk of court for Richland county. When these papers were executed the corporation was indebted to the National State Bank of Columbia in the sum of $9,700, which was made up of $6,700 old indebtedness of the company, and $3,000 borrowed to aid in paying off mercantile creditors at the time of the transfer to Winsten and Abrams.

Shortly after June 6, 1912, the Cooks made a new note to the bank for the $9,700 and assigned to the bank the notes and mortgage for

$22,500 and certificates for the entire capital stock as security. The corporation's notes for $9,700 were then canceled. The Cooks used the $7,000 paid them in cash in paying all the other debts of the corporation existing on June 6, 1912. The corporation continued in business under the control and management of Winsten and Abrams, the sole directors and stockholders. Between June 6, 1912, and the adjudication in bankruptcy the corporation made payments out of its assets on the notes and mortgage, aggregating $15,270.31. With the permission of the bank, part of this money was paid direct to the Cooks; the balance was paid to the bank and credited on the note of the Cooks which the bank held. The bank continued to hold as security the notes and mortgage executed by the corporation. The Cooks now claim that there is owing by the corporation on the notes and mortgage the sum of $9,856. The amount due the bank on the note of the Cooks secured by the assignment of the notes and mortgage of the corporation is $5,774.82. The assets of the corporation arising from a sale made under the order of the court amount to a little over $8,304. This money is held by the trustee pending the determination of the question as to the validity of the mortgage and notes.

[1] The transaction was in effect a sale by the stockholders of their interest in the corporation, represented by their stock, and a mortgage by the corporation of its assets to provide for (1) the payment of the corporate debts, and (2) the payment to the outgoing stockholders of the agreed value of their interest in the corporate assets after the payment of the debts. It seems clear that the mortgage of the corporation was valid in the hands of the Cooks and in the hands of the bank, their assignee, to the extent of the balance due on the debt to the bank. That debt was admittedly a debt of the corporation; and when the Cooks took it up by substituting their own notes in consideration of the note and mortgage given to them by the Furniture Company, they became creditors of the corporation and were entitled to hold the mortgage executed to them at least to the extent of the debt of the corporation which they had settled with the bank. This being so, it is evident that the mortgage was good as a security in the hands of the bank, the assignee of the Cooks, to the extent of the balance due on its debt, which the Cooks had settled by a substitution of their own notes with the Furniture Company's mortgage as security.

[2] We do not see that the consent or permission of the bank to the payment of money by the corporation to the Cooks, who claimed the corporate notes subject to the security of the bank's debt, could affect the bank's rights. The bank was not in control of the Furniture Company; and it was under no duty to subsequent creditors to enforce the payment of its security. It had no authority to prohibit the corporation from paying money to the Cooks. No legal detriment can be allowed to result to the bank from not objecting to that which it had no power to prevent. It had a right to hold its security without enforcement as long as it saw fit. The mortgage therefore is good in the hands of the bank as security for its debt.

After the payment of the balance due the bank, there will be a surplus in the hands of the trustee; and the question of difficulty is

whether this should be paid to the Cooks, as holders of the remainder of the mortgage debt, or be distributed among the creditors generally.

[3-5] The Constitution of South Carolina provides:

"Stock or bonds shall not be issued by any corporation save for labor done, or money or property actually received or subscribed; and all fictitious increase of stock or indebtedness shall be void." Section 10, article 9.

The statute law of the state contains the same provision with slight verbal variances. Code of 1912, § 2889.

It is elementary that the legal title to corporate property is in the corporation, and not its stockholders, and that as a general rule a corporation cannot legally bind itself to pay the purchase money of stock sold by a stockholder to a third person. This principle is embraced in the Constitution and statutory inhibition above quoted. The application of the principle depends, however, upon the position of those who invoke it. Other stockholders and existing creditors are always entitled to the protection of the rule unless they have waived it or estopped themselves from asserting it. But when all outstanding debts have been paid, the stockholders are the equitable owners of the corporate property. They could by merely formal legal proceedings sell the property, transfer the legal title, and divide the proceeds of the sale; and it seems to follow that they may in equity bind the corporation by a sale or a mortgage for their own benefit as individuals as against themselves and all others who subsequently become creditors or stockholders with full notice of the conveyance or mortgage and the purpose for which it was given. This is the conclusion of the courts of Maryland and Alabama in well-considered opinions. Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336; First National Bank of Gadsen v. Winchester, 119 Ala. 168, 24 South. 351, 72 Am. St. Rep. 904.

[6] Nevertheless subsequent creditors may invoke the protection of the general principle that a mortgage executed by a corporation to secure a stockholder for the purchase money of his stock, unless as a subsequent creditor he has notice by record or otherwise, not only of the existence of the mortgage, but of the purpose for which it was given. Notice of a mortgage is not notice that the proceeds have been applied to other than corporate purposes. On the contrary, the law authorizes all who deal with a corporation to assume that all of the corporate assets are kept for corporate purposes; that the proceeds of a corporate mortgage have been paid into the treasury of the corporation. If the proceeds have not been paid to the corporation by the mortgagee, but diverted to other purposes, then it follows that the mortgage in the hands of the mortgagee cannot be enforced as against a subsequent creditor without notice of the diversion of the proceeds of the mortgage. In a case like this the Circuit Court of Appeals of the Seventh Circuit thus well states the principle:

"But it is said that the creditors represented by the trustee in this case had knowledge of the existence of the mortgage, and must therefore have extended their credit with notice of the facts. The contention clearly embodies a non sequitur. Knowledge of the presence on the records of the mortgage does not imply notice that out of the capital or assets of the corporation the shareholders were paying their individual debts. The mortgage on file, so far as

the creditors knew, may have been executed for corporate purposes, its avails remaining somewhere among corporate assets." In re Haas, 131 Fed. 232, 65 C. C. A. 218.

[7] The joint bill of sale of the Lion Furniture Company and the Cooks, as its only shareholders, to Abrams and Winsten for $29,500, the bill of sale of Abrams and Winsten back to the Lion Furniture Company, and the mortgage from the Lion Furniture Company and Abrams and Winsten to the Cooks to secure 52 notes, aggregating $22,500 were sufficient on their face, when taken together, to put the public on notice of the nature of the transaction. As we have endeavored to show, those who credited the company with this notice of the mortgage and the purpose for which it was given are not in a position to attack its validity.

Affirmed.

In re SOUTHERN ARIZONA SMELTING CO.*

MARTIN v. FREEMAN.

(Circuit Court of Appeals, Ninth Circuit. March 20, 1916.)

No. 2697.

1. BANKRUPTCY ⊂⊃51—ADJUDICATION—VOLUNTARY BANKRUPTCY—"BANKRUPT"—"PERSON."

Bankruptcy Act July 1, 1898, c. 541, § 1 (1), 30 Stat. 544 (Comp. St. 1913, § 9585), defines a "person" against whom a petition has been filed as including a person who has filed a voluntary petition, and declares (4) that the term "bankrupt" shall include a person against whom an involuntary petition has been filed or who has filed a voluntary petition or who has been adjudged a bankrupt, and (19) that the term "persons" shall include corporations. Section 3 (5) declares that for one to admit in writing his inability to pay his debts and willingness to be adjudged a bankrupt constitutes an act of bankruptcy. A corporation filed a voluntary petition in bankruptcy reciting its inability to pay its indebtedness and that it had exhausted its ability to borrow money to procure funds for the care and preservation of its property and declared its willingness to be adjudged a bankrupt and surrender its property for the benefit of creditors. *Held* that, as the filing of the petition constituted an act of bankruptcy, a creditor could not, though a question of jurisdiction may be always inquired into, attack an adjudication of bankruptcy on the ground that the corporation was not actually insolvent; for, unless a dismissal of the petition is sought, the averments of insolvency are not issuable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49; Dec. Dig. ⊂⊃51.

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

2. BANKRUPTCY ⊂⊃51—ADJUDICATION—TIME FOR MAKING.

Under Bankruptcy Act, § 59a (section 9643), declaring that any qualified person may file a petition to be adjudged a voluntary bankrupt, the court may, immediately upon the filing of a voluntary petition, adjudicate the petitioner a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49; Dec. Dig. ⊂⊃51.]

3. BANKRUPTCY ⊂⊃200(3)—LIENS—VOLUNTARY BANKRUPTCY.

Where, within four months after the property of a corporation was attached, it was adjudged a bankrupt on its voluntary petition, the lien of

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

* Rehearing denied May 8, 1916.

the attaching creditors is vacated; Bankruptcy Act, § 67f (section 9651), declaring that all levies, judgments, or attachments obtained against an insolvent at any time within four months prior to the filing of a petition in bankruptcy shall be null and void.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 296–300; Dec. Dig. ⊂⊃200(3).]

4. BANKRUPTCY ⊂⊃199—ACTIONS—EVIDENCE.

Where an attachment lien was rendered ineffective as an incumbrance on adjudication of bankruptcy, inquiry as to the bankrupt's insolvency at the time the attachment was levied is immaterial.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃199.]

Petition to Revise in Matter of Law an Order of the District Court of the United States for the District of Arizona; Wm. H. Sawtelle, Judge.

In the matter of the bankruptcy of the Southern Arizona Smelting Company, a corporation. Petition by M. P. Freeman, as trustee of the estate of the bankrupt, against John H. Martin, as trustee of the estate of the Imperial Copper Company, a corporation, bankrupt. There was an order in favor of petitioner, and John H. Martin petitions for revision. Order affirmed.

Francis M. Hartman and Edwin F. Jones, both of Tucson, Ariz., for petitioner.

Ellinwood & Ross, of Bisbee, Ariz., and Selim M. Franklin, of Tucson, Ariz., for respondent.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. John H. Martin, as trustee in bankruptcy of the Imperial Copper Company, a corporation, bankrupt, asks review of an order of the District Court for the District of Arizona made in the matter of the Southern Arizona Smelting Company, a corporation, bankrupt.

The Imperial Copper Company was adjudged a bankrupt upon an involuntary petition on July 25, 1911. Upon August 21, 1911, M. P., Freeman was elected trustee in bankruptcy of the Imperial Copper Company; but about July 2, 1914, he resigned, and Martin, the petitioner herein, was elected to succeed him. When the Imperial Copper Company was adjudged a bankrupt, it was a creditor of the Southern Arizona Smelting Company in the sum of $28,887.71. On January 23, 1912, Freeman, as trustee of the copper company, brought action in the territorial court in Arizona against the Southern Arizona Smelting Company to recover upon this debt. About June 17, 1914, upon application of certain creditors of the copper company, the District Court directed that the trustee should cause an attachment to issue in the action then pending before it, and that a levy should be made upon the property of the smelting company. Thereafter, on September 29, 1914, and within four months of the date of the levy of the attachment referred to, the Southern Arizona Smelting Company filed its voluntary petition in bankruptcy in the United States District Court for the District of Arizona, and upon the same day was adjudicated a bankrupt; and on October 31, 1914, M. P. Free-

man was elected as trustee in bankruptcy of the smelting company. Thereafter, about March 18, 1915, Freeman as trustee in bankruptcy of the smelting company petitioned the United States District Court for an order to show cause, directed against Martin as trustee of the Imperial Copper Company, why the attachment lien heretofore referred to should not be held to be null and void, and why injunction should not issue enjoining Martin as trustee from further prosecuting such attachment proceeding, and alleging in the petition, among other things, that at the time of the levy of the writ of attachment the Southern Arizona Smelting Company was, and at all times since had been, insolvent. Martin, as trustee in bankruptcy of the Imperial Copper Company, answered the petition of Freeman and denied that the Arizona Smelting Company was insolvent at the time of the levy of the attachment or at the time of the filing of the voluntary petition in bankruptcy by the smelting company, or at any time, and alleged, among other things, that at the time of the levy of the writ of attachment and of the filing of the voluntary petition in bankruptcy and at all times the smelting company was solvent with ample property to pay its debts; that many of the alleged debts due by the Arizona Smelting Company were not legal and could not be proved or allowed in the bankruptcy proceedings. He prayed that the court would hear evidence upon the question of the insolvency of the Arizona Smelting Company at the time of the levy of the attachment and of the filing of the petition in voluntary bankruptcy. The court ruled that the attachment was null, and that the property affected thereby should be released, and restrained Martin as trustee of the Imperial Copper Company, bankrupt, from prosecuting the action to recover the debt in the state court.

[1] The substance of the assignments of error is: That the court ought not to have held that the adjudication of bankruptcy of the Arizona Smelting Company upon the voluntary petition filed by it within four months of the levy of the writ of attachment dissolved the attachment lien without regard to the question of solvency or insolvency at the time of the levy of the attachment or at the time the adjudication in bankruptcy was made.

Petitioner, through his counsel, concedes that if an involuntary petition in bankruptcy had been filed against the Arizona Smelting Company within four months from the time of the levy of the writ of attachment, and that if the attaching creditor, the trustee of the Imperial Copper Company, had not appeared in the bankruptcy proceedings and resisted the adjudication, such adjudication would have been res adjudicata against petitioner as to the insolvency of the smelting company. But he asks the court to distinguish between the consequences of such a concession and those to follow in this case, because, here, the bankruptcy adjudication was had upon a voluntary petition, without notice to petitioner or other creditors.

Section 1 of the Bankruptcy Act of 1898 explicitly gives us the definitions of words and phrases used in the act which control. Among them are these:

"(1) 'A person against whom a petition has been filed' shall include a person who has filed a voluntary petition; * * * (4) 'bankrupt' shall include

a person against whom an involuntary petition * * * has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (19) 'persons' shall include corporations, except where otherwise specified."

Section 3, providing what shall constitute acts of bankruptcy, includes as an act having:

"(5) Admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

The act of bankruptcy upon which voluntary bankruptcy is based is the written admission contained in the petition itself that the petitioner is unable to pay its debts and is willing to be adjudged a bankrupt on that ground.

The averments of the petition establish those facts so far as a decree of bankruptcy is concerned, and the corporation has committed an act of bankruptcy in filing the petition. These facts are not issuable, nor is notice necessary unless dismissal is sought. Hanover National Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113. In that case Chief Justice Fuller quoted Judge Lowell, in Re Fowler, 1 Low. 161, Fed. Cas. No. 4,998, holding that the voluntary petitioner might be in fact fraudulent and able and unwilling to pay his debts, but that the law "takes him at his word and makes effectual provision, not only by civil but even by criminal process to effectuate his alleged intent of giving up all his property." Jurisdiction may always be inquired into, but adjudication usually follows as matter of course and brings the bankrupt's property into the custody of the court; it is only after adjudication that the law requires that notice be given by publication and by mail of the first meeting of creditors and of each of the various subsequent steps in administration.

The petition of the Arizona Smelting Company to be adjudged a bankrupt, upon which adjudication was had, sets forth in full the resolution of the board of directors reciting that their company was then largely indebted and wholly unable to pay any of its indebtedness, all of which was long overdue, that it was involved in litigation and without funds with which to pay the necessary expense thereof, that it had "exhausted its ability to borrow money to procure funds for the care and preservation of its property," and declared that it was willing to be adjudged a bankrupt under the laws of the United States, and to surrender all of its property for the benefit of its creditors.

[2, 3] We regard the averments of the petition as clearly showing commercial insolvency, and under section 59a of the Bankruptcy Act the court had authority to act upon the petition as soon as it was filed and to make the adjudication. In re Guanacevi Tunnel Co., 201 Fed. 317, 119 C. C. A. 554. This being so, what was the effect of the petition and adjudication upon the lien acquired by the attachment of the property of the smelting company within four months prior to the filing of the petition? By section 67f of the Bankruptcy Act it is provided that all levies, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt,

and the property affected by the levy, attachment, or other lien shall be wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall order that the right under such levy or attachment or other lien shall be preserved for the benefit of the estate.

The Supreme Court, in First Nat. Bank v. Staake, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967, holding that attachments were annulled by the filing of a petition in bankruptcy within four months after the attachments were levied, said that to what extent liens obtained by prior judicial proceedings should be recognized was a matter wholly within the discretion of Congress. That was not a voluntary bankruptcy, but in giving the meaning of section 67 of the act no distinctions were made between the attitude of one adjudged a bankrupt in involuntary proceedings and one who voluntarily seeks adjudication. We think there should be none when it is kept in mind that it was the intention of Congress to prevent creditors of a bankrupt from gaining preferences over other creditors through legal proceedings had within four months prior to the filing of the petition. As held by the court in Re Kenney, 105 Fed. 897, 45 C. C. A. 113, the property of the bankrupt is "safeguarded" against all such proceedings. Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. This purpose might often not be carried out if the debtor could by voluntary proceedings legalize transactions which would be nullified upon involuntary proceedings. Strong confirmation of the view that one who has filed a voluntary petition is in no better position than one who is declared a bankrupt involuntarily is found in the provisions of the first section of the act, heretofore quoted, that " 'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition." The Court of Appeals of the Seventh Circuit, in Richard's Case, 96 Fed. 935, 37 C. C. A. 634, had the question here involved under examination and construed section 67f as applicable to all cases where a voluntary petition is filed where such provisions are pertinent. Judge Brown, in Re Vaughan (D. C.) 97 Fed. 560, also ruled to like effect, and well reasoned that the relation of the execution creditor to other creditors, to the bankrupt, and to his estate, is the same where levy is made in voluntary as in involuntary proceedings, and that the preference obtained by the creditor if the levy is not annulled operates to the harm of other creditors and so violates the policy of the act just as much in the one instance as in the other.

[4] In the case of Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, — C. C. A. —, decided since the cases above cited, the Court of Appeals of the Eighth Circuit has held that as the statute 67f, supra, only avoids liens obtained against an insolvent, the insolvency of the person at the time the lien is acquired is an indispensable condition of the existence and of the exercise of the power to avoid in summary proceedings one of the liens specified. That was a case of involuntary bankruptcy. However, for reasons already indicated, under such a state of facts as is here presented there appears to be no substantial reason for construing the statute as distinguishing between voluntary and involuntary proceedings. We therefore believe that by

filing the petition and by the adjudication in bankruptcy the lien of the attachment levied within four months prior to the adjudication upon the property of the smelting company was by operation of law dissolved, and that the rule established by this court in Cook v. Robinson, 194 Fed. 785, 114 C. C. A. 505, is sound. It follows that, as was there held, the lien being ineffective as an incumbrance upon the property of the bankrupt, inquiry as to the insolvency of the bankrupt at the time the attachment was levied was wholly irrelevant and immaterial. Collier on Bankruptcy, p. 96 et seq.

The order of the District Court is affirmed.

BROWN et al. v. FLETCHER.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 229.

1. PROCESS ⊜83—MANNER OF SERVICE—NEW YORK STATUTE.
The provision of Code Civ. Proc. N. Y. § 2524, requiring the mailing of citations from the Surrogate's Court, where the person to be served is without the state, applies only where service is made by publication, and not personally.
[Ed. Note.—For other cases, see Process, Dec. Dig. ⊜83.]

2. COURTS ⊜493(2)—PRIORITY OF JURISDICTION—FEDERAL AND STATE COURTS.
A federal court cannot be deprived of jurisdiction of a suit to establish rights against a testamentary trustee by a subsequent decree of a Surrogate's Court settling the accounts of the trustee and directing him to pay the trust fund to another person, in which proceeding the complainants in the suit, while made parties, did not appear.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1347; Dec. Dig. ⊜493(2).]

3. EQUITY ⊜94—PARTIES—SUIT TO ENFORCE TRUST.
To a suit to establish a claim against a testamentary trustee, by an assignee of the beneficiary who repudiates the assignment, such beneficiary is an indispensable party.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 252; Dec. Dig. ⊜94.]

4. APPEAL AND ERROR ⊜1201(7)—REVERSAL—AMENDMENTS—BRINGING IN NEW PARTIES.
Where a District Court erroneously held on demurrer to a bill that a certain person was not a necessary party, on reversal of the final decree in the case complainant is entitled to amend the bill by making such person a party.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4677, 4680, 4683; Dec. Dig. ⊜1201(7).]

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

Suit in equity by John A. S. Brown and Frank E. Schermerhorn, trustee, against Austin B. Fletcher, as testamentary trustee of Conrad M. Braker. Decree for defendant, and complainants appeal. Reversed.

See, also, 206 Fed. 461, 124 C. C. A. 367, and 237 U. S. 583, 35 Sup. Ct. 750, 59 L. Ed. 1128.

Monroe Buckley, of Philadelphia, Pa., for appellants.
W. P. S. Melvin, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The complainants in this case seek to recover from the defendant, as substituted testamentary trustee under the will of Conrad Braker, trustee, a trust fund of $10,000 left by him to his son, C. M. Braker, which they claim by virtue of various assignments beginning with an assignment from C. M. Braker. It was heretofore considered by us in 206 Fed. 462, 124 C. C. A. 367, the bill being dismissed without prejudice on the ground that the Circuit Court had no jurisdiction because, although the complainants were citizens of Pennsylvania, several of the assignors in their line of title, as well as the defendants, were citizens of New York. The Supreme Court, upon certiorari, reversed the decree on the ground that the cause of action, being a claim to recover an interest in a trust estate, was not a chose in action within section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1913, § 991]). Brown v. Fletcher, 237 U. S. 583, 35 Sup. Ct. 750, 59 L. Ed. 1128. This decision followed a previous case in 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374, arising out of controversies between the same parties as to other interests in the same estate. The citizenship of the plaintiffs' assignors therefore became immaterial, and the cause was remanded to this court "to proceed to its duty of hearing and deciding the case conformably to law."

Notwithstanding what we heretofore said, we think the opinion of the Supreme Court requires us now to hold that the Circuit Court had jurisdiction in equity. The bill was filed October 4, 1911, in the then Circuit Court, and November 20, 1912, the defendant was allowed to amend his answer by setting up the decree of the Surrogate's Court of the County of New York settling his account as testamentary trustee and ordering him to pay over the fund in his hands to C. M. Braker. March 6, 1912, the defendant's demurrer, upon the ground, among others, that C. M. Braker was a necessary party, was overruled.

[1] The defendant thereafter began a proceeding for a settlement of his accounts as testamentary trustee in the Surrogate's Court. The order for service of the citation which was returnable May 14, 1912, was dated March 21st and personal service was made in Philadelphia on the complainant Schermerhorn April 10th and on the complainant Brown April 12th, all in conformity with the provisions of sections 2524 and 2525 of the New York Code of Civil Procedure. The complainants objected to the service as invalid on the ground that the citation should also have been mailed, but we think that the requirement of mailing only applies when the service is by publication. When it is personal, mailing is wholly unnecessary. Kennedy v. Arthur, 11 N. Y. Supp. 661; Sabin v. Kendrick, 2 App. Div. 96, 37 N. Y. Supp. 524; McCully v. Heller, 66 How. Prac. (N. Y.) 468. Nor do we

think there is any merit in the further objection that the decree was not final because the Surrogate granted a temporary stay.

[2] The District Judge dismissed the bill on the ground that the decree of the Surrogate's Court was res judicata of the question involved in the federal court. In other words, he held that, the Surrogate's Court having in a proceeding in rem, with both the complainants and the defendant before it, ordered the defendant to pay the fund to C. M. Braker, the District Court could not order him to pay it to the complainants. We did not pass upon this question in our former opinion, because we reversed the decree of the District Court without prejudice for the jurisdictional reason above pointed out.

The decree of the Surrogate's Court is certainly an adjudication between the same parties upon the same subject-matter. But the complainants say that the Surrogate's Court had no jurisdiction to dispose of the complainants' rights because they had been first submitted to the federal court. Of course, if the complainants had appeared and taken part in the proceedings in the Surrogate's Court, they could not, after the decree against them, have asked the federal court to go on and dispose of the controversy anew. Mitchell v. First National Bank, 180 U. S. 471, 21 Sup. Ct. 418, 45 L. Ed. 627. But it is the settled law of the federal courts that the court which first takes cognizance of a cause of action shall have exclusive jurisdiction until it has finally disposed of it. The defendant by going into the Surrogate's Court could not defeat or impair the jurisdiction of the federal court, which had already attached, or deprive the complainants of their right as citizens of another state to submit their interests to the federal court. Sharon v. Terry (C. C.) 36 Fed. 337, 355; Wallace v. McConnell, 13 Pet. 143, 151, 10 L. Ed. 95; Taylor v. Taintor, 16 Wall. 366, 370, 21 L. Ed. 287; Harkrader v. Wadley, 172 U. S. 148, 164, 19 Sup. Ct. 119, 43 L. Ed. 399.

In Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, the bill was not filed in the Circuit Court until after the administrator's account had been approved and confirmed by the orphans' court and only one day before the day fixed for distribution, yet the Circuit Court was held to have jurisdiction to establish the rights of citizens of other states in the fund to be distributed. It was pointed out, however, that while it is the right of citizens of other states to resort to the federal courts to establish their claims against executors, administrators, and trustees of decedents, the federal court could not go beyond this to administer the estate or disturb in any way the possession of the state court. We do not think the decree of the Surrogate's Court is res judicata, or that it in any way impairs the jurisdiction of the District Court in this case to pass upon the question of the complainants' rights, which have been submitted to it.

The defendant also set up as a defense in bar the judgment of the Supreme Court of the state of New York in a prior suit brought by C. M. Braker against Fletcher, as trustee, and Rabe, his assignee, assignor to the New York Finance Company and the New York Finance Company, asking that the assignment from him to Rabe be canceled as void for usury and that the trustee be required to pay over

the trust fund in his hands to C. M. Braker. The complainants were not parties. The moneys coming to the Finance Company from this source were assigned to them as collateral to secure the Finance Company's note for $10,000. They had a lien which by the terms of the collateral note they could realize by sale in case of default in payment of the note. The note not having been paid, they put up the collateral at auction; no one being present but a straw buyer, who bought the same in for $2,000 and at once assigned it to the complainants for $2,000, no money at all passing. It is enough to say, in answer to the defendant's criticism of this proceeding, that the New York Finance Company takes no exception to it. The state court adjudicated C. M. Braker's assignment to Rabe to be void for usury, ordered it to be canceled, and directed Fletcher as trustee to pay over the trust fund to him. The defendant contends that the complainants were purchasers pendente lite and as much bound by the judgment as if they had been parties. But they obtained their lien before the suit was brought and cannot be regarded as purchasers pendente lite. We do not think that this judgment is a defense.

[3] We remain of the opinion that C. M. Braker is a party in whose absence the court cannot adjudicate the case. Regarded merely as an assignor he would not be so because of having parted with his interest, but he claims that the assignment was void because of usury and repudiates it. The cestui as well as the trustee should be a party when the claim sought to be enforced is consistent with the validity of the trust. Rogers v. Rogers, 3 Paige (N. Y.) 379; Vetterlein v. Barnes, 124 U. S. 172, 8 Sup. Ct. 441, 31 L. Ed. 400. See, also, Williams v. Bankhead, 19 Wall. 563, 22 L. Ed. 184; Land Co. v. Elkins (C. C.) 20 Fed. 545; Hubbard v. Manhattan Co., 87 Fed. 51, 30 C. C. A. 520.

[4] As the District Court held upon demurrer that he was not a necessary party, the complainants have not heretofore had any reason to amend their bill and should now be given an opportunity to do so. House v. Mullen, 22 Wall. 42, 22 L. Ed. 838; Waterman v. Bank, 215 U. S. 33, 47, 30 Sup. Ct. 10, 54 L. Ed. 80.

The decree is reversed, and the court below directed to permit the complainants to amend their bill, so as to make C. M. Braker a party defendant, and upon their failing to bring him in to dismiss the bill without prejudice.

Order as to Mandate.

PER CURIAM. As we reversed the decree of the District Court, which was in favor of the appellees on the merits, the mandate will give the appellants costs of this court. It will also direct the court below to dismiss the bill without prejudice if the appellants do not bring in Conrad Morris Braker as a party defendant within a time to be fixed by it.

CREAL et al. v. GALLUP et al.

(Circuit Court of Appeals, Fifth Circuit. March 21, 1916. On Petition for Rehearing, April 18, 1916.)

No. 2813.

1. EVIDENCE ⟸208(4)—ADMISSIONS—PLEADING IN FORMER SUIT—SIGNATURE.
In trespass to try title, defendant's answer in a prior equity suit which was unsigned and unverified by either defendant or his attorney, was inadmissible on objection calling the court's attention to such facts.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 716; Dec. Dig. ⟸208(4).]

2. TRIAL ⟸84(4)—OBJECTION TO EVIDENCE—SUFFICIENCY.
In trespass to try title, the objection to defendant's answer in a prior equity suit, when offered evidence, that it was improper and incompetent as impeaching evidence or for any other purpose was sufficient to call the court's attention to the fact that the answer was unsigned and unsworn to by defendant or his counsel.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 217; Dec. Dig. ⟸84(4).]

3. TRIAL ⟸139(1)—WEIGHT OF EVIDENCE—QUESTION FOR JURY.
In trespass to try title, defendant's answer in a prior equity suit, admitted in evidence against him, could not support a peremptory charge for the plaintiffs, since the weight of evidence is for the jury.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341; Dec. Dig. ⟸139(1).]

Pardee, Circuit Judge, dissenting.

On Petition for Rehearing.

4. TRIAL ⟸143—CONFLICTING EVIDENCE—QUESTION FOR JURY.
An issue as to which the evidence is conflicting is for the jury.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. ⟸143.]

5. ESTOPPEL ⟸119—DEFENSE—PRIOR INCONSISTENT CLAIM—QUESTION FOR JURY.
In trespass to try title, whether defendant had previously made a claim inconsistent with his defense *held* for the jury under proper instructions.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 309; Dec. Dig. ⟸119.]

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

Trespass to try title by D. L. Gallup and others against Griffin Creal and others. To review a judgment for plaintiffs, defendants bring error. Reversed, with directions to grant new trial.

Oliver J. Todd, of Beaumont, Tex., for plaintiffs in error.

Ballinger Mills, of Galveston, Tex., for defendants in error.

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

NEWMAN, District Judge. This case was "trespass to try title" under the laws of Texas and the contest was over 160 acres of land in Tyler county, in the Eastern judicial district of Texas.

The plaintiffs brought suit against the defendants for 640 acres of land, and the defendants disclaimed all the survey of land described in plaintiffs' petition except 160 acres, which was claimed by the defendant Monroe Reese, and held by his tenant, Griffin Creal, under the 10-year statute of limitation of the state of Texas. The plaintiffs' reply to this claim of defendants of 160 acres under the 10-year statute of limitation was that the defendant Reese had claimed to have acquired title by possession and the 10-year statute of limitation to 160 other acres of land adjoining the land in question. The 160 acres of land now in dispute is part of section 21, while the land as to which plaintiffs set up that defendants had made an additional and prior claim was in section 6.

To show that the defendant in error Monroe Reese had made a claim to 160 acres of land in section 6, the plaintiffs offered in evidence an answer alleged to have been made by the defendant Reese in an intervention by the Houston Oil Company, against Monroe Reese, in the case of Maryland Trust Company v. Kirby Lumber Co. et al. (no opinion). In this alleged answer of Monroe Reese he asserted a claim, under the statute of limitation of 10 years, to 160 acres of land in section 6, but the same was not signed by him or by his attorney, nor was the affidavit appended to the answer signed by him or by his counsel, or sworn to by him, though the blanks for such signatures and attestation appear in the instrument.

Counsel for the plaintiffs, in offering in evidence in this case the answer of the defendant in the former case, made this statement:

"The purpose of the evidence is to show that the defendant in this case has been claiming 160 acres of land off of section No. 6, which adjoins the land sued for in this case, and the improvement on which he is suing to base his claim of limitation in this case was partly on section 6 and partly on section 21, involved in this case, and it is our contention under the authorities that he, having asserted claim to the land out of section 6, is precluded from asserting a claim to land out of section 21."

The court, having considered this evidence and the objections thereto, then and there overruled such objections, and received the instrument in evidence over the objection of the defendants, to which action of the court the defendants then and there excepted, and tendered their bill of exceptions thereto, which was made a part of the record.

Counsel for plaintiffs in error in their brief referring to this answer of Reese in the equity case say:

"It does appear, however, that it was duly filed as his answer to the intervention filed against him, that he based his defense thereon, and that it was considered by the master and the court in passing upon such defense to the intervention. It will also be noted that no objection was raised by the plaintiffs in error to the admission of the answer on the ground that it was unsigned or unsworn to; and, having been admitted without such an objection being raised to it, it is in the case for all purposes as fully as if it had been signed and sworn to."

In addition to the fact that the record states, as above, that this pleading was objected to and the objection overruled, it appears that it was specifically objected to on the ground that it was improper and incompetent as impeaching evidence or for any other purpose.

There was other evidence in the case, part of which was the testimony of Monroe Reese, the defendant, and much of Reese's testimony was contradictory of the statements made in the paper which purports to be his answer in the other case. Part of Reese's testimony, as stated in the record, is as follows:

"That with reference to the land sued for on section 6, he never did claim anything on section 6 until he bought the title; that he thinks he bought it about 1894; that he never claimed any limitation of section 6 through his own possession; that he claimed under the ones he bought from; that he did not claim in said suit that he had been on section 6 after he bought it long enough to mature a title; that he does not know how long the parties he bought from had been in possession; that they were there when he moved to the country.

"On cross-examination the witness testifies that he did not claim title to section 6 under his own possession; that there might have been a judgment rendered against him in 1898; that he thinks he bought the land on section 6 in 1894; that he bought it whenever the deed shows; that he don't know where the deed is; that he is not sure whether it was in 1894 or not, and don't think it was; that he bought the place before the judgment was rendered against him on section 6; that Texas & Louisiana Lumber Company got a judgment against him, but he don't remember when it was; that he never bought the land on section 6 until he got that title; that he thinks it was bought in 1900; that the people he bought the claim of this land from were not defendants to the suit in 1908, that he knows of; that when he was sued in 1908, they got judgment against him, but he had never bought it at that time; that he claimed in the Houston Oil Company suit, in which judgment was rendered against him in 1909, under the possession of his vendors, that he could not tell how long his vendors had been living there, but that they were living there when he came there, and that he moved there in 1892; that in the Houston Oil Company suit in 1909 he set up that he had bought the title from his vendors; that he claimed the title through the possession of his vendors; that he claimed it through their possession; that he set up in his answer that he claimed under their possession; that is, under the possession of the parties he bought it from."

The court directed a verdict in favor of the plaintiffs, and such verdict was returned and judgment entered thereon against the defendants and in favor of the plaintiffs for the 160 acres of land in section 21. In the court's instructions to the jury, after discussing the law somewhat with reference to the 10-year statute of limitation in Texas, he proceeded in this way:

"It is in evidence in this case that on the 11th day of January, 1909, in a suit pending in the United States Circuit Court for the Southern District of Texas, at Houston, the defendant being a defendant in the litigation to which I refer, appeared before that court by counsel and filed an answer, in which he alleged, among other things, the following facts:

" 'The defendants show to the court: That they have never asserted any claim or title in any manner, nor have they trespassed upon any other lands described in said pleadings except the land alleged, set out, and fully described, which land is described as follows: Part of the E. F. Jones survey in Tyler county, Tex., being 150 acres of said Jones survey surveyed for Eliza Oglesby, and about 16 miles south, 30 degrees west, from Woodville; beginning at the S. W. corner of said Jones survey, a stake, a pine bears 38 degrees E. 3 varas; thence W. 950 varas to Jones S. W. corner, a stake, pine bears 38 degrees E. 3 varas; thence N. 950 varas to Jones N. W. corner, a pine bears 35 degrees west 8 varas; thence E. 950 varas, Jones N. E. corner, a stake; thence S. 950 varas to the place of beginning. That the defendants and those under whom they claim have resided on said land continuously for more than 30 years, asserting an open, exclusive, and adverse possession thereof, occupying, using, and enjoying the same and claiming the same adversely to all others, and they here now plead under the statute of 10 years' limitation, and pray

judgment for said land, and for costs, and that this complaint be dismissed and for general relief.' "

"In other words, gentlemen, that answer shows that the defendant in this case, at the time the answer was filed, asserted that he had adverse and peaceable possession of 160 acres on what is here called 'section No. 6,' so that the real question, as the court views it, is as to whether, under the terms of the law, he can hold peaceable and adverse possession so as to mature his title under the 10-year statute of limitation, and at the same time be asserting a peaceable and adverse possession of 160 acres on section No. 21. I believe the solution of the proposition is found in section 5676 of the Revised Statutes of the state of Texas, in which the language I have already quoted occurs, and in this connection I will read it again: 'The peaceable and adverse possession contemplated in the preceding article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements on the number of acres actually inclosed should the same exceed one hundred and sixty acres.'

"Now, the preceding article is the article which permits a citizen of this state to establish his claim against the owner of the record title to 160 acres of land by mere occupancy of it in such manner as to make his occupancy peaceable and adverse possession for the full period of 10 years, so that the facts in this case would show that at the time this answer was filed the defendant was asserting his peaceable and adverse possession under the 10-year statute of limitation to 160 acres of land on section No. 6, and, if so in the view which the court has of the law, he could not, at the same time, hold peaceable and adverse possession of section No. 21, because the law itself provides in its terms that the peaceable and adverse possession which can and will mature a title under the 10-year statute of limitations cannot embrace more than 160 acres; and, having asserted the peaceable and adverse possession to 160 acres on section No. 6, he would be forbidden by the terms of the statute from asserting peaceable and adverse possession to 160 acres on section No. 21. The court, having this view of the matter, feels constrained, under the facts in the case, to instruct a verdict in favor of the plaintiffs."

It is perfectly evident from this that the peremptory instruction of the court in favor of the plaintiffs was based on this purported answer of Reese in the matter of the intervention of the Houston Oil Company, in the case of Maryland Trust Company v. Kirby Lumber Company.

[1-3] We think this peremptory instruction of the court was erroneous for two reasons: First, we think that so far as it was based upon the statements made in what purported to be Reese's answer in the equity case, it was based upon a paper which was inadmissible in evidence if objected to, and that the record shows such a character of objection to the paper as must have called the court's attention to the fact that it was unsigned and unsworn to by Reese or by his counsel; and, second, even assuming that it was admissible in evidence, it could only go to the jury to have such weight as they saw proper to give it, in view of its character and all the other evidence in the case. As shown above, Reese was claiming all along that the rights he had to the land in section 6 were obtained by purchase, from persons who had themselves perfected a title by 10 years' possession under the Texas law. He swore that he never undertook to establish any right to those lands in section 6 by virtue of his own possession, but his rights were those obtained by others prior to his purchase of the land. We think that in any view of this case, the defendant was entitled to have it submitted to the jury under proper instruc-

tions, and that the case made, when same was submitted to the jury, was not such as to justify peremptory instructions for the plaintiffs.

The case must be reversed, with direction to grant a new trial.

PARDEE, Circuit Judge (dissenting). In my opinion this case was properly ruled and decided in the trial court, and I concur with the trial judge in his ruling and disposition of the same. His conclusions are fully supported by the Supreme Court of Texas in Snow v. Starr, 75 Tex. 411–420, 12 S. W. 673, and by the Civil Court of Appeals in Titel v. Garland, 85 S. W. 466.

The proceedings of the United States Circuit Court for the Southern District of Texas in Maryland Trust Company v. Kirby Lumber Company et al., where Reese was made a party, were properly admitted in evidence, and the judgment there rendered is conclusive between the parties as to the matters therein decided. As Reese was a party defendant and entered no disclaimer, and the answer he filed in that case was evidently received by the court as sufficient and was passed upon in the decision, it is wholly immaterial, in my judgment, as to whether the said answer was signed by counsel or sworn to by any party.

In that case on an occupancy and possession which was partly on section 21 and section 6 adjoining he did claim a title to 160 acres on section 6 under the 10-year statute of limitations, and now in this case on the same occupancy and possession he is claiming 160 acres under the 10-year statute on section 21. This is indisputable, and under the authorities above quoted he can have no right to recover in his present action.

On Petition for Rehearing.

PER CURIAM. The argument submitted in support of a petition for rehearing in this case indicates such a misapprehension of what was said in the foregoing opinion that we supplement what was there said with this statement:

[4, 5] The unsigned and unverified instrument, showing on its face that it was prepared for use as a plea in a former suit for the recovery of land other than that now sued for, brought by one not a party to this suit against a defendant in this suit, was not, in and by itself, evidence that such defendant in the former suit made a claim which is inconsistent with the defense which he set up in this suit, as there is nothing on the face of that instrument to show that it was the act of the defendant, or was adopted, acquiesced in, or ratified by him. Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674; Charlie's Transfer Co. v. W. B. Leedy & Co., 9 Ala. App. 652, 64 South. 205; Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138; 1 Greenleaf on Evidence, § 186. It is only in connection with other evidence which was offered and admitted that that instrument acquired any tendency to prove that the defendant previously made such inconsistent claim. The evidence on the issue as to his having made such claim was not free from conflict, with the result that the issue was one for the jury to pass on. As shown by the charge given, the court ruled as a matter of law to the effect that the un-

sworn and unsigned instrument, standing by itself, and without regard to other evidence adduced, conclusively established that the defendant made a defense in the former suit which was inconsistent with the one which he sets up in this suit. We were, and are, of the opinion that this ruling was erroneous, and that the evidence on the issue as to the previous making by the defendant of a claim which was inconsistent with the defense he sets up in this suit should have been submitted to the jury under proper instructions.

The petition for a rehearing is denied.

THE BYLANDS.

(Circuit Court of Appeals, Fifth Circuit. March 3, 1916. Rehearing denied April 19, 1916.)

No. 2827.

ADMIRALTY ⇐106—APPEAL—PARTIES.

Where joint and several decrees were entered against the claimant of a libeled vessel and the surety on its bond for release, an appeal cannot be maintained by the claimant without the joinder of the surety or a summons and severance.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 721–724; Dec. Dig. ⇐106.]

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suits in admiralty by Busch & Jolles, Incorporated, and other libelants, against the steamship Bylands (Joseph F. Wilson & Co., claimants) and others. From the decrees in the consolidated cause, claimants appeal. Appeal dismissed.

William R. Leaken, of Savannah, Ga., and George Denegre, Victor Leovy, and Henry H. Chaffe, all of New Orleans, La., for appellants.

Samuel Adams and A. Pratt Adams, both of Savannah, Ga., for appellee.

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

PER CURIAM. In the months of July and August, 1914, the steamship Bylands, under charter from Jacksonville, Fla., to carry general cargo to Antwerp, Rotterdam, Bremen, or Hamburg, one or two ports, proceeded to Jacksonville, where, under the directions of charterers, she loaded 1,575 tons of phosphate destined for Hamburg, and from there according to orders proceeded to Savannah, Ga., where she completed her cargo with naval stores, logs, etc., also destined to Hamburg, completing her loading August 6th. On August 14th, by reason of declaration of war between Great Britain and Germany, the master, under instructions from owners, canceled the voyage, notifying shippers and charterers. Thereupon Busch & Jolles, incorporated under the laws of the state of New York, filed

its libel in rem against the steamship Bylands and the South Atlantic Steamship Line, agent and charterer, in personam, to recover for goods shipped, damages, and prepaid freight. The ship was seized and monition published, and on the same day the Standard Naval Stores Company, instead of intervening, also filed an independent libel in rem against the steamship Bylands and against the South Atlantic Steamship Line in personam, also to recover prepaid freight and damages, and thereon admiralty warrant was issued and monition published, and the South Atlantic Steamship Line, charterer and ship agent, filed its independent libel against the steamship Bylands practically for an accounting.

The steamship Bylands was claimed by Spink, master, under the libel of Busch & Jolles, and again under the libel of the Standard Naval Stores Company, and again under the libel of the South Atlantic Steamship Line, for Joseph F. Wilson & Co., owners, and on giving deposit bonds in favor of each libelant, with the National Surety Company of New York as surety on each bond, the ship was released.

Thereafter the several libels and cross-libels, etc., were put at issue. Whereupon the court, on the 18th day of February, 1915, necessarily consolidated the several causes, to wit, the Standard Naval Stores Company against the steamship Bylands, and the South Atlantic Steamship Line against the steamship Bylands, with the cause of Busch & Jolles against the steamship Bylands, and ordered the case to proceed as a consolidated cause under the title thereafter of Busch & Jolles v. The Steamship Bylands. Afterwards the case came to trial, and on hearing the evidence the court, on March 4, 1915, rendered the following decree:

"The above causes having been consolidated under decree of this court and having been heard together, and after considering the testimony offered in the said cause, and the pleadings of the parties: It is therefore considered, ordered, and decreed as follows:

"1. That Busch & Jolles, Incorporated, libelant, do recover jointly and severally from the South Atlantic Steamship Line in personam, and in rem against the steamship Bylands, her tackle, apparel, engines, boilers, and furniture, and against Jos. F. Wilson & Co., owners and claimants, as principals, and National Surety Company of New York, surety, on the bond of the said owners of the said steamship Bylands, claimants in said case, the sum of twenty-five hundred and forty-nine dollars and nine cents ($2,549.09) with interest at seven per cent. (7%) per annum from August 1, 1914, until payment thereof, together with the costs, in said case of Busch & Jolles, Incorporated, against the said South Atlantic Steamship Line and steamship Bylands, her tackle, apparel, engines, etc., and the further sum of eighteen dollars against the said steamship Bylands, her engines, boilers, tackle, etc., and against the said owners, Jos. F. Wilson & Co., of said steamship, claimants in said case, and against the said surety on the bond of the said claimants and owners, Jos. F. Wilson & Co., in said case.

"2. It is further ordered and decreed that the Standard Naval Stores Company do recover jointly and severally from the South Atlantic Steamship Line in personam, and in rem against the said steamship Bylands, her engines, boilers, etc., and against Jos. F. Wilson & Co., owners and claimants, as principals, and against the National Surety Company of New York, surety on the bond of said owners and claimants in said case of Standard Naval Stores Company, libelants, against the South Atlantic Steamship Line and the steamship Bylands, her engines, etc., the sum of sixteen hundred and twenty-five

dollars and fifty-nine cents ($1,625.59), with interest at seven per cent. (7%) per annum from July 27, 1914, until payment thereof, together with costs of court in said case of Standard Naval Stores Company, Libelant, v. South Atlantic Steamship Line and steamship Bylands.

"3. It is further decreed, as between the South Atlantic Steamship Line, libelants, and the steamship Bylands, her engines, boilers, etc., that the said South Atlantic Steamship Line shall recover of the said steamship Bylands, her tackle, etc., and the owners and claimants, Jos. F. Wilson & Co., principals, and the National Surety Company of New York, surety, the sum of one thousand one hundred and three dollars and sixty-eight cents ($1,103.68), with interest at seven per cent. (7%) per annum from August 1, 1914, until paid, together with costs in said case of South Atlantic Steamship Co. v. Steamship Bylands, etc., said sum representing the balance due said South Atlantic Steamship Line on account of disbursements and earnings, after deducting certain prepaid freight money received by the said South Atlantic Steamship Line on account of the said steamship Bylands.

"4. It is further decreed that, should the said South Atlantic Steamship Line, being a joint and several respondent in the decrees given in paragraphs 1 and 2 of this decree, within twenty days from this date pay over to the libelant, Busch & Jolles, the amount decreed in the first paragraph of this decree, and to the Standard Naval Stores Company, libelant, the amount decreed to it in the second paragraph of this decree, such amounts paid shall be added to the amount decreed to the South Atlantic Steamship Line in paragraph 3 of this decree, and shall be recovered as against the steamship Bylands, her tackle, etc., and Joseph F. Wilson & Co., principals, and National Surety Company of New York, surety, on her bond, so that in the event of such payment by the South Atlantic Steamship Line to the said libelants Busch & Jolles, Incorporated, and Standard Naval Stores Company, as set forth in this paragraph 4, the said South Atlantic Steamship Line shall recover of the said steamship Bylands, as above set out, the amount of five thousand two hundred and seventy-eight dollars and thirty-six cents ($5,278.36), together with the interest to be calculated as herein set forth.

"5. It is further decreed that, should the said steamship Bylands, her tackle, etc., against whom judgments have been rendered in paragraphs 1 and 2 of this decree jointly and severally with the South Atlantic Steamship Company, or their owners and claimants, Jos. F. Wilson & Co., principals, or the National Surety Company of New York, surety, on said bond, pay to the said Busch & Jolles, Incorporated, and to the said Standard Naval Stores Company, libelants, the amounts so decreed to them in paragraphs 1 and 2 of this decree, within twenty days from this date, then in that event the said steamship Bylands, her tackle, etc., or the said Jos. F. Wilson & Co., principals, and the National Surety Company of New York, surety, shall be liable to the said South Atlantic Steamship Line only for the amount decreed to said South Atlantic Steamship Line in paragraph 3 of this decree, namely, the sum of $1,103.68, together with interest thereon to be calculated as set forth in said paragraph of this decree.

"6. Upon the expiration of such period of twenty days, let execution issue upon application.

"This 4th day of March, 1915. Emory Speer, United States Judge."

On May 21st the following petition for an appeal and order rendered thereon were filed, to wit:

"And now come Jos. F. Wilson & Co., respondents, claimants and owners of the steamship Bylands, her tackle, etc., in the above-entitled cause, by their proctor, William R. Leaken, and having filed with the clerk of said District Court a notice of appeal and assignment of errors, prays this honorable court:

"First. To allow an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the final decree of the court entered the fourth day of March, 1915, which said decree provided for its finality under certain conditions therein stated within twenty days from the said date of said decree, and

from the whole thereof, and that the record in said case may be duly transcribed and certified to said United States Circuit Court of Appeals, to be heard upon the pleadings and proofs as shown by said record.

"Second. That the court will fix the amount of additional and sufficient bond to secure the costs and interest on appeal and just damages for any delay therein.

"Third. That citation issue, if necessary. William R. Leaken,
"Proctor for Respondent, etc., and Appellant.

"Appeal approved, bond for damages and all costs fixed at one thousand dollars, with sufficient surety, without question of supersedeas being pressed [passed] upon.

"Citation waived.

"In open court, this May 28, 1915. W. W. Lambdin, U. S. Judge."

On May 29th an appeal bond was given as follows:

"Know all men by these presents, that we, Jos. F. Wilson & Co., respondents and claimants in the above-stated consolidated causes, by their proctor of record, William R. Leaken, and William F. McCauley, of Savannah, Georgia, surety, are held and firmly bound unto the South Atlantic Steamship Line, libelant, its successors and assigns, in the sum of one thousand dollars, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, successors, and assigns, jointly and severally by these presents.

"Sealed with our seals and dated the 29th day of May, 1915.

"Whereas, Jos. F. Wilson & Co., as appellant, has prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from a decree of the District Court of the United States, bearing date the fourth day of March, 1915, which said decree provided for its finality under certain conditions therein stated within twenty days from the said date of said decree, in the above-stated consolidated causes wherein the South Atlantic Steamship Line is libelant against the steamship Bylands, her tackle, etc.

"Now, therefore, the condition of this obligation is such that if the above-named appellant, Jos. F. Wilson & Co., shall prosecute said appeal with effect, and pay any damages and all costs which may be awarded against them as such appellant if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

"Jos. F. Wilson & Co.,
"By William R. Leaken, Proctor of Record.
"William F. McCauley, Surety.

"Sealed and delivered, and taken and acknowledged this 29th day of May, 1915, before me. J. C. Morcock, Deputy Clerk.

"Approved this 29th day of May, 1915. W. W. Lambdin, U. S. Judge."

Indorsement:

"Filed in office this May 27, 1915. J. C. Morcock, Deputy Clerk."

The record does not show any return day for the appeal, nor that any citation was issued. The transcript was filed in this court September 8, 1915, whereupon the South Atlantic Steamship Line, through its proctors, filed a motion to dismiss the appeal for numerous reasons, but mainly for the reason that the necessary parties to give this court jurisdiction were not made parties to the appeal. The transcript shows that neither Busch & Jolles, Incorporated, nor the Standard Naval Stores Company, in whose favor judgment was rendered jointly and severally against the appellant and the National Surety Company of New York and the South Atlantic Steamship Line, were made parties. Nor was the National Surety Company of New York, which was jointly and severally bound with the appellant, made a party. It does not appear that the Surety Company was

asked to join in the appeal, nor was there any summons and severance.

It is contended for the appellant that Busch & Jolles, Incorporated, and the Standard Naval Stores Company were not necessary parties to this appeal, on the ground that the decree as to them is separable as to the issues between the appellant and appellee, and because of certain matters alleged to have occurred after the appeal was taken they have no further interest in the decree. It is not necessary for us to pass upon this phase of the appellant's contention, because certainly the National Surety Company of New York was a necessary party, not to be dispensed with unless there was a summons and severance.

The case seems to be entirely covered and controlled by Estis v. Trabue, 128 U. S. 225, 229, 9 Sup. Ct. 58, 59 [32 L. Ed. 437]. We quote as follows:

"But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under section 1005. The judgment is distinctly one against 'the claimants, and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond,' jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties, payable and enforceable only on a failure to recover the amount from the claimants, and execution is awarded against all of the parties jointly. In such a case the sureties have the right to a writ of error. Ex parte Sawyer, 21 Wall. 235, 240 [22 L. Ed. 617].

"It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ, or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered. Williams v. Bank of the United States, 11 Wheat. 414 [6 L. Ed. 508]; Owings v. Kincannon, 7 Pet. 399 [8 L. Ed. 727]; Heirs of Wilson v. Life & Fire Ins. Co., 12 Pet. 140 [9 L. Ed. 1032]; Todd v. Daniel, 16 Pet. 521 [10 L. Ed. 1054]; Smyth v. Strader, 12 How. 327 [13 L. Ed. 1008]; Davenport v. Fletcher, 16 How. 142 [14 L. Ed. 879]; Mussina v. Cavazos, 20 How. 280 [15 L. Ed. 878]; Sheldon v. Clifton, 23 How. 481, 484 [16 L. Ed. 429]; Masterson v. Herndon, 10 Wall. 416 [19 L. Ed. 953]; Hampton v. Rouse, 13 Wall. 187 [20 L. Ed. 593]; Simpson v. Greeley, 20 Wall. 152 [22 L. Ed. 338]; Feibelman v. Packard, 108 U. S. 14 [1 Sup. Ct. 138, 27 L. Ed. 984]. Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. Heirs of Wilson v. Life and Fire Ins. Co., 12 Pet. [supra.] It will then, of its own motion, dismiss the case, without awaiting the action of a party. Hilton v. Dickinson, 108 U. S. 165, 168 [2 Sup. Ct. 424, 27 L. Ed. 688]."

The appeal is dismissed.

HAYS v. UNITED STATES.

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

No. 4419.

1. CRIMINAL LAW ⟸741(1)—TRIAL—JURY QUESTION.
Where there is substantial evidence to establish all the elements of the offense charged, verdict for accused cannot be directed on the theory that the evidence is insufficient to convince the jury of accused's guilt beyond a reasonable doubt.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1705, 1713, 1727, 1728; Dec. Dig. ⟸741(1).]

2. PROSTITUTION ⟸1—WHITE SLAVES—APPLICABILITY OF ACT.
The White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1913, §§ 8812–8819]) applies to a prostitute who voluntarily consents to acts of illicit relation, as well as to a "white slave" in the restricted meaning of those words.
[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. ⟸1.]

3. CRIMINAL LAW ⟸422(6)—TRIAL—EVIDENCE—INSTRUCTIONS.
In a prosecution against two for violating the White Slave Act, a statement in writing, made by one of those accused, was properly received, though made out of the presence of the other, where the jury were charged not to consider the statement as against that accused not making it, for it must be presumed that they followed the directions of the court.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 984; Dec. Dig. ⟸422(6).]

4. CRIMINAL LAW ⟸507(1)—WHITE SLAVES—"ACCOMPLICE."
In a prosecution for violating the White Slave Act, the woman transported is not an "accomplice."
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082, 1084, 1087, 1091, 1095; Dec. Dig. ⟸507(1).
For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

5. CRIMINAL LAW ⟸780(3)—TRIAL—INSTRUCTIONS—ACCOMPLICES.
In a prosecution for violating the White Slave Act, where the court charged that in considering the testimony of the woman the jury should take into consideration that she was implicated in the improper transaction, that is sufficient admonition as to her testimony, there being no precise formula which must be followed in the federal courts; the state statutes as to such matters not governing.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1861; Dec. Dig. ⟸780(3).]

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

L. T. Hays was convicted of violating the White Slave Traffic Act, and he brings error. Affirmed.

Harry O. Glasser, of Enid, Okl., for plaintiff in error.

Isaac D. Taylor, Asst. U. S. Atty., of Guthrie, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., and W. B. Herod, Asst. U. S. Atty., of Guthrie, Okl., on the brief), for the United States.

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

AMIDON, District Judge. Plaintiff in error, Hays, was jointly indicted with one Lessie Jones, for violating the White Slave Traffic Act. The indictment contained two counts. The first charges the furnishing of transportation to a 17 year old girl to make a journey from Oklahoma City, Okl., to Wichita, Kan., for the purpose of illicit sexual relations with Hays. The second charges the persuading, inducing, and enticing of the girl to make the same journey for the same purpose. The defendants were convicted upon both counts. Hays alone brings error.

Lessie Jones is a mature woman and a confirmed prostitute. She and the girl in question were living together at the Regal Hotel in Oklahoma City, leading an illicit life. Miller, a business associate of Hays, was a "friend" of Lessie Jones, and had been visiting the hotel for two or three days in the early part of March, 1914. He stated to the girl that he had a friend whom he would like to have her meet. On Sunday Mr. Hays called at the hotel, and Miller introduced him to the girl. At this meeting it was proposed that the defendant Jones and the girl should come to Wichita, where Miller and Hays resided, the men to pay the expense of the journey, and to support the women, in consideration of illicit sexual life. The girl at first declined, but was finally persuaded to go. The men returned to Wichita, and a day or two later were followed by Lessie Jones, who promised the girl that she would get money from Hays to pay the expense of her coming. A few days thereafter she called the girl up on the long-distance phone, and stated that Hays refused to send her money, but was willing to supply her with a ticket, and directed her to call for it at the Santa Fé office, and come on a certain train. A telegram was also sent by Lessie Jones to the girl, as follows: "Go to Santa Fé for ticket. Come on seven-twenty sure." The ticket was paid for by Lessie Jones at the Santa Fé office in Wichita. The agent there wired the agent at Oklahoma City to furnish the girl, giving her name, the ticket. The girl, acting upon the telegraph and telephone messages, called at the Santa Fé office, received and receipted for the ticket, and traveled upon it to Wichita. All this documentary evidence from the railroad, telegraph, and telephone offices was introduced at the trial in support of the oral testimony. At Wichita Hays and Miller were waiting in the Santa Fé Station when the girl arrived. They kept a little in the background. Lessie Jones was also there, and met the girl, and took her to a restaurant for supper. She then conducted her to a hotel, where two rooms had been engaged previously. There they found Hays and Miller awaiting them. Hays occupied one room with the girl, and Miller the other with the defendant Jones. The next morning it was arranged between the four that the women should either engage a house or other rooms during the day, and that all four should meet at the post office at 6 o'clock in the evening, where the women were to notify the men of the location of the quarters selected. Rooms were engaged at a rooming house. The girl registered herself and Hays under the name of Mr. and Mrs. O. C. Russell, Kansas City. The defendant Jones registered herself and Miller under the name of Mr. Miller and wife, Kansas City. At 6 o'clock the women went to

the post office, and were soon met by the two men. The four took a short ride in an automobile, and then separated, the women going to their rooms. Later in the evening the two men came to the rooms for the night, Hays occupying one room with the girl, and Miller the other with the defendant Jones. During the next 10 days the parties spent four or five nights together in the same rooms. The men then stated that their wives were getting "wise," and that they could not come to the rooms any more. Evidence of the keeper of the rooming house and of the hotel was also introduced in corroboration of the testimony of the girl, who was the chief witness on behalf of the government. During the period of their illicit relations Hays paid the girl $2 on two different occasions, and $1 on another. The bills for the rooms were paid by the defendant Jones.

The only evidence that Hays paid for the ticket upon which the girl rode was the testimony of the girl as to the original agreement made at the Regal Hotel, and her statement as to the declarations of defendant Jones, in the conversation over the long-distance phone, that Hays furnished the money for the ticket. So far as there was direct evidence on the subject, the money was actually paid to the Santa Fé agent at Wichita, by the defendant Jones, and she carried on the communications with the girl which resulted in her making the trip to Wichita. The only other evidence on the subject is the illicit life of Hays with the girl which is so clearly established as not to be controverted in the argument in this court. No evidence was introduced by the defendants.

[1] At the conclusion of plaintiff's case a motion was made for a directed verdict, and its denial is one of the principal errors now relied on. While it is conceded that there is substantial evidence to establish all the elements of the offenses charged in the indictment, it is urged that such evidence is insufficient to convince the jury beyond a reasonable doubt. This assignment of error is without merit. Where there is substantial evidence tending to prove each element of the offense charged, the verdict of the jury is final. Whether the evidence is of sufficient probative force to convince the mind beyond a reasonable doubt is addressed solely to the judgment of the jury. The court can do no more than accurately state the rule of law. There is no way by which the doctrines of reasonable doubt and presumption of innocence can be properly used to create a new zone of error, or devolve upon appellate courts the duty to examine evidence and determine its probative force. Matthews v. United States, 192 Fed. 490, 113 C. C. A. 96; Stout v. United States, 227 Fed. 799, — C. C. A. —; Humes v. United States, 170 U. S. 210;[1] Burton v. United States, 202 U. S. 344, 373, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Matthews v. United States, 192 Fed. 490, 113 C. C. A. 96; Tapack v. United States, 220 Fed. 445, 137 C. C. A. 39; Ward v. State, 58 Neb. 719, 79 N. W. 725; People v. Cummings, 123 Cal. 269, 55 Pac. 898; People v. Houff, 120 Cal. 538, 52 Pac. 846, 65 Am. St. Rep. 201. There is nothing in the opinions in Vernon v. United States, 146 Fed. 123, 76 C. C. A. 547, and Union Pacific Coal Co. v. United States, 173 Fed. 737, 97 C. C. A. 578, to the contrary. The

[1] 18 Sup. Ct. 602, 42 L. Ed. 1011.

opinions in those cases expressly state that there is a lack of substantial evidence to support the material averments of the indictment. That was the basis of those decisions.

[2] It is next urged, but in a rather hesitating way, that the White Slave Act is confined to cases of white slavery. The Ninth Circuit in Diggs v. United States, 220 Fed. 545, 136 C. C. A. 147, held to the contrary. The implication of a similar holding is so strong in the recent decisions of the Supreme Court as to amount to a direct decision of the point. Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; Athanasaw v. United States, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911; United States v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543. See, also, United States v. Flaspoller (D. C.) 205 Fed. 1006; Johnson v. United States, 215 Fed. 679, 131 C. C. A. 613, L. R. A. 1915A, 862. The only basis for such a construction of the act is the title given to it in the last section, and some language contained in the debates and reports. It is elementary, however, that the plain language of a statute cannot be controlled by such considerations, and, in our judgment, the language of the White Slave Act is so plain as to make the interpretation suggested seem purely fanciful.

[3] The defendant Lessie Jones made a statement in writing which tends to implicate the defendant Hays as well as herself. When this statement was offered in evidence, counsel representing Mr. Hays objected to its receipt upon the ground that he was not present, and could not be bound by it. The court promptly instructed the jury that the statement could not be considered as against the defendant Hays, and that it was received solely as bearing upon the question of the guilt of the defendant Jones. This matter was again fully explained to the jury in the charge. Counsel for Hays now urges that the statement must have been prejudicial to their client, and that the jury disregarded the plain and emphatic direction of the trial judge. We must assume, however, that the jury obeyed those instructions. Any other holding would make the practical administration of justice by means of a jury, impossible.

[4, 5] At the conclusion of the court's charge counsel for Mr. Hays made the following oral request:

"The defendant requests the court to instruct the jury that the girl, under the facts and circumstances, is an accomplice, and that it is a rule of law that before the jury can take the testimony of an accomplice, it must be corroborated by other testimony of other witnesses, or by facts and circumstances which will convince the jury beyond a reasonable doubt."

To that request the court responded as follows:

"That instruction is refused, I think it is entirely proper, however, for the court to say to the jury where a witness goes on the stand who is implicated in an improper transaction, and admits it, that that fact ought to be taken into consideration in passing on her testimony, and the jury should carefully scrutinize it with that in view, and give due consideration and weight to that occurrence in the evidence."

An exception was saved to this action of the court, and is now assigned as error.

The ruling was clearly right. The request as framed by counsel was improper upon two grounds: First, the girl was not an accomplice (United States v. Holte, 236 U. S. 140, 145, 35 Sup. Ct. 271, 59 L. Ed. 504, L. R. A. 1915D, 281; Diggs v. United States, 220 Fed. 545, 553, 136 C. C. A. 147); second, even if she were an accomplice, the request as framed states the requirements of corroboration much too strongly. The admonition given by the court adequately safeguarded defendant's rights. There is no precise formula which must be observed in the federal courts. They are not bound by state statutes on the subject. The admonition to be given is a matter of caution, and not a hard and fast rule of law. Hanley v. U. S., 123 Fed. 849, 59 C. C. A. 153. The language used may properly be varied to some extent according to the degree of criminality of the accomplice and the circumstances under which he testifies. Wigmore on Evidence, § 2057.

The judgment is affirmed.

EDWARDS v. KEITH.

(Circuit Court of Appeals, Second Circuit. January 31, 1916.)

No. 129.

1. INTERNAL REVENUE ⟸7—INCOME TAX—PROPERTY TAXABLE—"NET INCOME."

Under Act Oct. 3, 1913, c. 16, § II, div. B, 38 Stat. 167 (Comp. St. 1913, § 6321), providing that the "net income" of a taxable person shall include gains, profits, and income derived from salaries or compensation for personal services, of whatever kind and in whatever form paid, or from businesses, commerce, gains, profits, and income derived from any source whatever, a life insurance agent, whose contract entitled him to commissions of a specified percentage of the first premium of each policy and of a different percentage on subsequent renewal premiums when the same should be paid, is liable to pay the income tax on commissions on renewals of policies issued before the act was adopted, which were not paid until thereafter.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.

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

2. INTERNAL REVENUE ⟸7—INCOME TAX—TREASURY REGULATIONS.

The instruction of the Treasury Department requiring return to be made of fees or emoluments for services charged for, but not collected, if good and collectible, cannot change the requirement of the statute that the income tax shall be based on the income arising or accruing during the calendar year.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.]

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

Action by Charles Jerome Edwards against Henry P. Keith, as collector, to recover part of the income tax paid by plaintiff. From a

judgment sustaining a demurrer to the amended complaint and dismissing the complaint on its merits, plaintiff appeals. Affirmed.

This cause comes here upon appeal from a judgment sustaining a demurrer to the amended complaint and dismissing said complaint on the merits. The opinion of Judge Chatfield will be found in 224 Fed. 585.

Jones, McKinny & Steinbrink, of Brooklyn, N. Y. (George W. Wickersham, of New York City, Chas. A. Woods, of Long Island City, N. Y., and Meier Steinbrink, of Brooklyn, N. Y., of counsel), for plaintiff in error.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] The action is brought to recover part of the income tax for 1913 paid by plaintiff. The statute (Act Oct. 3, 1913, 38 Stat. 114, 166) provides for the levying an individual tax on those liable to pay "upon the entire net income arising or accruing from all sources in the preceding calendar year." For the year 1913 the period is 10 months only, the statute taking effect March 1, 1913. The act thus defines net income:

"That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent." Division B of section II.

Plaintiff is a life insurance agent, employed by an insurance company under written contracts to procure applications for assurance on the lives of individuals. As compensation for his services the insurance company is obligated to pay him a certain commission on the first premium paid by the assured when the policy is issued. It is further obligated, as the assured pays subsequent renewal premiums for a certain number of years, to pay to plaintiff a stated commission on each of such renewal premiums. It is with these renewal premiums, or rather with the commissions paid thereon that this cause is concerned. Plaintiff's brief thus states the controversy.

"A single question is presented by the appeal, namely: whether or not the commissions payable to complainant under the contracts with the Assurance Society annexed to the complaint, upon renewal premiums paid on policies obtained through the instrumentality of appellant prior to March 1, 1913, but which commissions were not actually paid to and received by complainant until after March 1, 1913, and between that date and December 31, 1913, constitute a part of 'the entire net income' of complainant 'arising or accruing from all sources' between those dates."

An elaborate argument is presented on behalf of the plaintiff in error, based in part upon provisions in the contracts whereby the com-

pany agrees to loan money to the agent to the amount of certain expected commissions on renewals, and the agent agrees to render assistance in the collection of renewal premiums; but the question seems to us a very simple one and one absolutely determined by the provision in all the contracts that "commissions shall accrue only as the premiums are paid in cash." That the work for which the compensation is paid was done in some prior year seems to us unimportant.

If, as counsel retained for the purpose, a lawyer argues a cause for a client before the Court of Appeals in October, 1915, having received a retainer in August and his work being completed with the argument, and the cause is decided in December and his client pays him in February, 1916, we cannot see why he should not include his retainer in his income return for 1915 and the money paid him for argument in his return for 1916, although in that year (1916) he did nothing—did not even send in a bill, having done that in December, 1915.

If as a reward for long and faithful service an industrial corporation votes to one of its employés, who retires from active work, an annual pension, we do not see why all instalments of that pension paid in each calendar year are not, under the statute, income for that year.

If an agent for a life insurance company does a particular job, e. g., persuades John Doe to insure in the company on July 1st, 1915, and receives as part compensation for that work a certain sum when Doe pays his first premium in July, 1915, surely he includes that in his income return for 1915. That certainly is income. If under this arrangement with the company he receives a further sum of money as compensation for the same job in July, 1916, when John Doe pays his second premium, we cannot see why that is not income for 1916—in the ordinary sense of the word. Why it is not within the language of the act "income arising or accruing in the calendar year 1916" and "derived from personal services" we are entirely at a loss to understand. The statute does not provide that the "personal services," compensation for which is to be considered income, must be rendered in the same year in which the compensation is received.

It may be noted that, although fully earned by work already done, there is no certainty that the sum conditionally promised for an ensuing year will ever be paid or will accrue or come due; John Doe may die within the first year, or at its expiration may refuse to renew his policy in which event the company is not obligated to pay its agent anything beyond the amount already paid him; the obligation to pay does not arise until John Doe actually pays his renewal premium in cash.

There is nothing in the opinion in the Matter of Wright (D. C.) 151 Fed. 361, which we affirmed in 157 Fed. 544, 85 C. C. A. 206, 18 L. R. A. (N. S.) 193, which at all conflicts with the views above expressed.

[2] Reference is also made to certain instructions of the Treasury Department:

"A person receiving fees or emoluments for professional or other services, as in the case of physicians, or lawyers, should include all actual receipts for services rendered in the year for which return is made, together with all unpaid accounts, charges for services or contingent income due for that year, if good and collectible." Form 1040, instruction 14; form 1041, instruction 12.

This form may be appropriate enough to give the department full information about an individual's earnings in any particular year so as to enable its officers to check up with accuracy some return of a future year, when his hope of being paid what he has earned finds fruition. But no instructions of the Treasury Department can enlarge the scope of this statute so as to impose the income tax upon unpaid charges for services rendered and which, for aught any one can tell, may never be paid. To take the illustration given above, the charge for the argument in the Court of Appeals, unpaid on December 31, 1915, could not be included as taxpaying income for 1915, because it was not paid in that year and the client might die insolvent on January 1, 1916; but as soon as it is paid it becomes taxpaying income of the year in which such payment is made, although it was made for services performed in a prior year. The phraseology of form 1040 is somewhat obscure; perhaps it means that there shall be included actual receipts (a) for services rendered in the year for which return is made and (b) for unpaid accounts, or charges for services rendered in former years, and paid in the year for which return is made. But it matters little what it does mean; the statute and the statute alone determines what is income to be taxed. It taxes only income "derived" from many different specified sources; one does not "derive income" by rendering services and charging for them.

The judgment is affirmed.

CRANE CREEK IRR. DIST. et al. v. PORTLAND WOOD PIPE CO. et al.

(Circuit Court of Appeals, Ninth Circuit. March 20, 1916.)

No. 2645.

MECHANICS' LIENS ⊂=13—SUBJECT-MATTER—PUBLIC PROPERTY.

Where a mechanic's lien on an irrigation system, constructed by a private corporation under a contract with two irrigation districts to which the system was to be conveyed, was perfected before the conveyance to the districts, it was not defeated by the conveyance, even though the general lien laws do not apply to public corporations, such as irrigation districts.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 14, 15; Dec. Dig. ⊂=13.]

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

Mechanic's lien suit by the Portland Wood Pipe Company and others against the Crane Creek Irrigation District and another. Decree for the complainants, and defendants appeal. Affirmed.

C. S. Varian, of Salt Lake City, Utah, and E. R. Coulter, of Weiser, Idaho, for appellants.

Richards & Haga and McKeen F. Morrow, all of Boise, Idaho, for appellee Portland Wood Pipe Co.

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

RUDKIN, District Judge. This is an appeal from the decree of the court below in so far as it decrees the foreclosure of a lien against the property of certain irrigation districts in the state of Idaho. The facts material to a proper understanding of the question presented by the appeal are as follows:

The Crane Creek Irrigation, Land & Power Company is a private corporation organized and existing under the laws of the state of Idaho, and the Crane Creek irrigation district and the Sunnyside irrigation district are public corporations organized and existing under the laws of that state. On the 22d day of August, 1910, the Irrigation & Power Company entered into two separate contracts with the two irrigation districts in question, under the terms of which it agreed to construct and complete an irrigation system according to certain plans and specifications agreed upon, and upon completion to convey to each of the irrigation districts a certain specified undivided interest therein. These contracts recited that the Irrigation & Power Company was the owner of certain water rights, reservoir sites, and rights of way upon which some construction work had been performed, and it was thereupon agreed that the reservoir, dams, pipe lines, flumes, laterals, and other structures should be constructed and completed by the 1st day of May, 1912, and that when so constructed and completed the undivided interest should be conveyed to each of the irrigation districts as therein provided. It was further agreed that partial conveyances should be made from time to time on monthly estimates as the work progressed, and that upon the completion of the work these partial conveyances should be followed by a final conveyance. The Irrigation & Power Company entered into a contract for the construction and completion of this irrigation system, first with Maney Bros. & Co. and later with the Slick Bros. Construction Company. The appellee, the Portland Wood Pipe Company, under contract with the Slick Bros. Construction Company, furnished certain piping and other material to be used in the construction work, and for the purchase price of the material so furnished it filed and perfected its lien claim under the laws of the state of Idaho. At the time the materials were so furnished the Irrigation & Power Company was in charge of the construction work as owner; none of the conveyances or partial conveyances to the irrigation districts had been recorded, and so far as the record discloses the present lien claimant had no notice of the claims of the irrigation districts. Under these facts the irrigation districts contend that they are public corporations, organized and existing under the laws of the state of Idaho for public purposes, and that their property cannot be subjected to liens under the mechanic's lien laws of that state. This is the sole question presented by the appeal.

The court below did not find it necessary to determine whether the property of an irrigation district is subject to the lien laws of the state of Idaho, nor do we. For, conceding that an irrigation district is a public corporation, and that its property cannot be subjected to a lien for material furnished to the district direct or to a contractor with the district, yet when an irrigation district or other

public corporation acquires property from another it acquires it subject to all liens and burdens lawfully imposed upon it by the former owner, just the same as any other purchaser. In the present case the Irrigation & Power Company was in possession of the irrigation system as owner, and was holding itself out to the world as such. It contracted for the construction of an irrigation system on its own property, and material was furnished to be used in that system, for which a lien was given by the laws of the state. That lien attached before the irrigation district acquired the property and was not displaced by the conveyance to the district. Thus, in Salem v. Lane & Bodley Co., 189 Ill. 593, 60 N. E. 37, 82 Am. St. Rep. 481, Reed and Van Kirk submitted a written proposition to the city of Salem to furnish the city a complete electric light plant, in accordance with certain specifications set out in the proposition, for the sum of $9,000, payable in bonds, or partly in bonds and partly in notes, as the city might elect. This proposition was accepted by the city, and the plant was constructed by Reed and Van Kirk. Lane & Bodley Company furnished an engine wherewith to operate the plant, and filed and perfected a lien therefor under the laws of the state of Illinois. Thereafter the plant was completed and duly conveyed to the city. In a suit to foreclose the Lane & Bodley Company lien the city contended that its property was not subject to the lien laws of the state, and the court so conceded; but it was nevertheless held that the city acquired the property subject to the lien. In the course of its opinion the court said:

"The decree was not awarded on the theory the property thus held by the municipality for the use of the public—to enable the city to discharge its public functions—is within the purview of the mechanic's lien law and subject to be sold to discharge an indebtedness contracted by the city for material or labor used in the construction of the plant, but that the lien attached to the electric light plant before it became the property of the city, for the debt of the then owners, T. C. Reed and William Van Kirk, and that the city acquired the property subject to the lien. Reed and Van Kirk were parties defendant to the bill, and a personal money decree was entered against them and a decree in rem against the electric light plant. The appeal was prosecuted on behalf of the city only. If the defendant in error corporation had perfected a lien against the plant while it was the property of an individual owner, the subsequent purchase of the plant by the city could not operate to deprive the lienor of the benefit of the statutory provisions for the enforcement of the lien by a forced sale of the property. The decree is a personal money decree against Reed and Van Kirk, and for the sale of the electric light plant in default of payment of the decree debt. There is no decree against the city for the payment of any sum. The city cannot be required, by mandamus or any order or process of the court, to pay the decree debt. It is not a decree debtor, but the owner of real property upon which the lien of the decree may operate if it does not pay the sum specified in the decree. It may voluntarily pay the amount necessary to remove the lien from the property, but there is no process or authority of law that may be invoked to coerce it to make payment. The lien is created by the statute, and the statute provides, as the mode of enforcement of the lien, the sale of the land on which the lien has attached. To deny to the plaintiff in error corporation the benefit of this mode of enforcing the decree is, in this case, to nullify the lien."

Again the court said:

"The substance of the entire transaction was that Reed & Co. proffered to procure, construct, and tender to the city a complete electric light plant (grounds, building, and machinery), constructed in accordance with given specifications and plans, for a specified sum of money, and the city contracted to ac-

cept the said plant (grounds, building, and machinery), if constructed and tendered in accordance with the terms of the proposition of said Reed & Co., and under the contract Reed & Co. tendered, and the city accepted, a plant which was incumbered by a legally subsisting lien in favor of the defendant in error company. Such a lien would not be displaced by the conveyance to the city, but the lien remained as fully effective against the property after the conveyance to the city as before."

While on grounds of public policy the property of municipal corporations held for public purposes may be exempt from the operation of the general lien laws of the state, yet such municipalities may not enter into contracts with third persons for the construction of plants or other improvements on the property of such third persons to be thereafter conveyed to the municipality, and then claim the statutory exemption from liens for labor performed upon or materials used in the construction of the contemplated improvements.

Such were the views of the court below, and its decree is affirmed.

CUOMO v. UNITED STATES.

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

No. 176.

1. RECEIVING STOLEN GOODS ⟸9(1)—QUESTIONS FOR JURY.

On a trial for receiving and having possession of stolen goods in violation of Act Cong. Feb. 13, 1913, c. 50, 37 Stat. 670 (Comp. St. 1913, §§ 8603, 8604), relative to the larceny of goods in interstate commerce, defendant's guilt *held* a question for the jury.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 19; Dec. Dig. ⟸9(1).]

2. CRIMINAL LAW ⟸1159(4)—APPEAL—REVIEW—CREDIBILITY OF WITNESSES.

That the jury believed the testimony of the government's witnesses rather than that told by defendant is a result which an appellate court will not disturb.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3077; Dec. Dig. ⟸1159(4).]

3. WITNESSES ⟸393(4)—IMPEACHMENT—ADMISSIBILITY OF EVIDENCE.

It was not error to exclude a deposition of a witness for the government at variance in some respects with the witness' testimony, where defendant's counsel had cross-examined the witness as to the questions and answers contained in the deposition and admitted, in offering the deposition in evidence, that he had cross-examined the witness regarding everything material.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1255; Dec. Dig. ⟸393(4).]

4. RECEIVING STOLEN GOODS ⟸8(2)—ADMISSIBILITY OF EVIDENCE.

On a trial for receiving stolen goods, after a police officer had testified that he saw a person pushing a case in the door of defendant's store, and that, after watching a while for him to come out, he entered the store, he was asked what reason he had for watching the place, whether he had orders to watch it, and whether he knew what kind of a place it was, and testified that he was directed by the captain to watch such place, and that he saw women go in there and disappear, and that that was what he was going in there to prevent. On defendant's motion this last statement was stricken out, and the court told the jury to disregard everything that was stricken from the evidence. When the witness was first asked what reason he had for watching the place, defendant objected "to

this line of questioning." *Held*, that evidence that the officer was there in the discharge of his duty, and not by chance, was proper evidence.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. § 15; Dec. Dig. ⟸8(2).]

5. CRIMINAL LAW ⟸1169(5)—APPEAL—HARMLESS ERROR.

As it was the answers of the witness rather than the questions which were objectionable, and as the court struck out the statements volunteered by the witness, and instructed the jury to disregard them, there was no reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. ⟸1169(5).]

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

Andrea Cuomo was convicted of receiving and having in his possession stolen goods, in violation of Act Feb. 13, 1913, c. 50, 37 Stat. 670 (Comp. St. 1913, §§ 8603, 8604), and the cause comes here upon writ of error to review the judgment. Affirmed.

George W. Martin, of Brooklyn, N. Y., and S. H. Kesselman, for plaintiff in error.

Melville J. France, U. S. Atty., of Brooklyn, N. Y.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1, 2] It is contended that the court at the close of the testimony should have directed a verdict of acquittal, but we are satisfied that upon the testimony it would have been error so to do; the question of guilt or innocence was fairly for the jury. The principal witness for the government was the truck driver who stole the goods. He testified to a former conversation with defendant in which, as witness stated, defendant said to him:

"Any time you get anything that you can bring here, anything at all, I will buy anything that you bring, anything from a needle to an anchor."

Also that defendant, when witness arrived with the stolen package, helped to carry it in and said:

"Have to do this quick; my place is watched; you have to get out the back way;" also, "I know all about it; your brother telephoned; thirty dollars."

The jury were fully and correctly instructed as to the careful scrutiny which should be given to the testimony of such a witness, also as to the presumption of innocence to which defendant was entitled and as to reasonable doubt. That they believed the story told by the government's witnesses rather than that told by the defendant is a result which an appellate court will not disturb.

[3] Error is assigned to the exclusion of a deposition which defendant offered in evidence. The truckman, Mathan, who stole the package and brought it to defendant had given testimony upon an examination by the United States commissioner. This testimony was reduced to writing and constituted the deposition referred to; it contained statements differing in some respects from the statements made by the same witness in court. Upon cross-examination of Mathan, defendant's counsel called his attention to some of the questions and answers found

in the record of his prior examination and the witness admitted that such questions had been asked and such answers given. Subsequently, after several of defendant's witnesses had been examined, his counsel offered the entire deposition of Mathan in evidence. The following colloquy ensued:

"The Court: Presumably you have cross-examined him on everything that you regarded as at variance with the testimony.

"Mr. Russell: I did, sir.

"The Court: I do not see any use of putting it in evidence."

Thereupon counsel to the government objected to "having the jury confused with a lot of extra testimony." The objection was sustained and exception reserved. We find no error in this ruling; defendant had full opportunity to use so much of the testimony as was material and admitted that he had used all that was material.

[4, 5] A further exception, which is here relied upon will be found in the following excerpt from the record. The witness on the stand was a police officer, who had been examined on direct and cross, and had testified that he was at a nearby corner, that he saw Mathan pushing the case in the door; that after watching a while for him to come out he entered the store. Upon redirect he testified that there was a rear door leading into the yard. Then ensued:

"Q. What reason had you for watching this place? A. I was ordered by the captain to inspect that place every hour. He said it was a fence. He had been arrested for maintaining and keeping a disorderly house—

"Mr. Russell: I object to this line of questioning.

"The Court: I will take it until the district attorney is through with it. I will overrule your objection now. I don't know what the question is.

"Mr. Russell: Exception.

"Q. Why were you watching this place, Officer? A. The captain told me to watch it.

"Mr. Russell: I object to what the captain told him; that is what I objected to before.

"Q. Did you receive orders to watch this place? A. I did. To inspect it every hour; to walk through there. This fellow was arrested for keeping and maintaining—

"The Court: Never mind that.

"Q. Do you know what kind of a place, other than a macaroni place, it is? A. I know.

"The Court: You are testifying to what you know yourself, Officer?

"The Witness: Well, I saw women going in there, and disappear in there; that is what I was going in there to prevent.

"Mr. Russell: I object to that and move to strike it out as not responsive to this question and not binding on this defendant.

"The Court: Go on; strike it out.

"Mr. Russell: Will your honor instruct the jury to disregard that statement of the witness?

"The Court: Yes; disregard everything that is stricken from the evidence."

It will be seen that the objection was "to this line of questioning"; what was objectionable, however, was not so much the question as the answers. That the officer was there in the discharge of his duty, and not by chance, was proper evidence enough; but, as often happens with a too willing witness, he volunteered statements which were not admissible. We think that, since the court struck out the testimony and instructed the jury to disregard it, there is no reversible error.

The judgment is affirmed.

MARYLAND RAIL CO. et al. v. TAYLOR et al.

BALTIMORE TRUST & GUARANTY CO. v. OAKLAND COAL & COKE CO.

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

No. 1312.

1. CORPORATIONS ⟸232(1)—STOCK—SUBSCRIPTIONS—LIABILITY.
Under Acts W. Va. 1882, c. 96, § 24, a sale of corporate stock for property cannot be questioned in the absence of fraud; therefore corporate creditors in such case cannot hold subscribers liable on the theory that their subscriptions were unpaid, because the property was received at a valuation fixed between them and the corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 987; Dec. Dig. ⟸232(1).]

2. CORPORATIONS ⟸544(2)—STOCK—TRUST FUND.
Unpaid balances due on stock subscriptions constitute a trust fund for corporate creditors.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2162; Dec. Dig. ⟸544(2).]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Benjamin F. Keller and Alston G. Dayton, Judges.

Suit by the Baltimore Trust & Guaranty Company against the Oakland Coal & Coke Company, in which the Maryland Rail Company and others sought to recover against Charles J. Taylor and others on alleged unpaid subscriptions. From a decree for defendants, intervening petitioners appeal. Affirmed.

T. F. Cadwalader and Horace S. Whitman, both of Baltimore, Md. (Willis R. Jones, of Baltimore, Md., and P. J. Crogan, of Kingwood, W. Va., on the brief), for appellants.

Osborne I. Yellott, Frank Gosnell, and Alexander Preston, all of Baltimore, Md. (Marbury, Gosnell & Williams, of Baltimore, Md., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

PER CURIAM. The Oakland Coal & Coke Company, a West Virginia corporation, duly organized and doing business under the laws of that state, for some years conducted extensively its coal mining business, issued a large amount of capital stock, and also gave a mortgage upon its property to the Baltimore Trust & Guaranty Company to secure a considerable bonded indebtedness.

Upon failure to meet its obligations, including interest on bonds, a bill in equity was filed by the trust company to foreclose the mortgage, wind up the affairs of the company, and subject its property to the payment of its debts. In this original cause, pending in the District Court of West Virginia, entitled Baltimore Trust & Guaranty Company v. Oakland Coal & Coke Company, proceedings were duly had looking to the payment of alleged unpaid stock

subscriptions, in which latter effort the controversy between the appellants and appellees herein arose. The general creditors of the Oakland Coal & Coke Company, being the appellants herein, especially seek to enforce the payment of the alleged stockholders' liability for unpaid stock subscriptions for a large amount, it being the only source from which they can hope to realize anything on account of their indebtedness, the mining company's failure being a heavy one.

The lower court, after giving much consideration to the subject (Judge Dayton of the Northern district and Judge Keller of the Southern district of West Virginia having passed upon different features involved in the alleged liability), reached the conclusion that the claim was without merit, and that all stock issued by the company, the unpaid subscription of which was involved in the litigation, had been fully paid up, as authorized and recognized by the laws of West Virginia, at a time long antedating the incurring of the appellants' debts. The correctness of the conclusion thus reached is the real question in controversy on this appeal.

[1] This court has maturely considered the subject, and is entirely satisfied with the conclusions reached by the lower court. The manner in which stockholders may settle for their subscriptions, in the absence of fraud (and none is shown in this case), is controlled by statute, and the court has no right to substitute its judgment for that of the law-making power, because in the light of after events a hardship on creditors may result and they may not be able to secure payment of their indebtedness from the corporation. Acts Gen. Assem. W. Va. 1882, c. 96, § 24; Merchants' & Mechanics' Savings Bank of Grafton v. Belington Coal & Coke Company, 51 W. Va. 60, 41 S. E. 390. In the case cited, the Supreme Court of West Virginia said:

"Our statute throws the gate wide open for the sale of stock and purchase of property in payment therefor at such price and on such terms and conditions as the contracting parties may agree upon."

And in the absence of fraud no action against a stockholder for unpaid subscriptions can be maintained for stock issued under that section. The lower court was of opinion that the stock in question was subscribed and settled for pursuant to the section of the statute referred to, and that under the interpretation placed on said statute by the case cited no recovery could be had therefor, and in these views we fully concur.

[2] The appellants cite many authorities to support their contention that the unpaid balance due on stock subscriptions constitute a trust fund out of which creditors of the corporation should be paid. With this position, and these authorities, we are in accord, but here the subscriptions to the stock have been paid in the manner authorized by the statute of the state, as interpreted by its highest court, which precludes the right of recovery.

The decree of the lower court will be affirmed at the cost of appellants.

Affirmed.

WERK et al. v. PARKER et al. *

(Circuit Court of Appeals, Third Circuit. March 29, 1916.)

No. 1990.

PATENTS ⊂=328—NOVELTY—OIL-PRESS MAT.

The Werk patents, No. 758,574 and No. 758,575, for an oil-press mat, granted on divisional applications, cover mats which, while not differing essentially in the manner of weaving, are made from long hair, such as that derived from the manes and tails of horses, instead of from camel's hair, as were those previously in common use in the cotton seed oil industry. The horse hair mats are superior to those made from camel's hair in durability, facility of use, and in that they save a larger percentage of the oil; but, as appears from a large number of standard works on the arts, of which the court may take judicial notice, horse hair mats had long been known and used in the art of expressing oil from seeds, and the patents are therefore apparently void for lack of novelty.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by Robert F. Werk and Mrs. John Lewis Kennedy, copartners as Robert F. Werk & Co., against F. Thomas Parker and J. Thomas Robey, copartners as the F. T. Parker Company. Decree for defendants, and complainants appeal. Decree deferred.

For opinion below, see 221 Fed. 644.

Munn & Munn and T. Hart Anderson, all of New York City, and E. H. Fairbanks, of Philadelphia, Pa., for appellants.

Weaver & Drake, of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Robert F. Werk & Co., the owners of two divisional patents, Nos. 758,574 and 758,575, granted April 26, 1904, to Robert F. Werk for an oil-press mat, filed a bill charging the F. T. Parker Company with infringement thereof. The claim of 758,574 in issue is for:

"An oil-press mat or cloth made entirely of long animal hair and consisting of warp and weft threads, said weft threads being composed exclusively of soft, pliable hair and the warp threads greatly exceeding the weft threads in number per square inch."

That of 758,575 in issue is for:

"An oil-press mat or cloth consisting of warp threads and weft threads, each composed exclusively of long hair derived from animals' tails and manes, which hair is soft and pliable; the warp threads exceeding the weft threads in number per square inch, and the weft threads being thicker than the warp threads."

On final hearing the court below entered a decree dismissing the bill on the ground of noninfringement. Thereupon the plaintiff took this appeal.

The case has given us some concern. It relates to the great field of cotton-seed oil extraction—an industry with which we are not familiar

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

* Rehearing denied May 23, 1916.

in this circuit. The testimony is meager and throws little, if any, light on the decisive questions involved. As the tonnage of cotton seed is double that of the cotton crop itself, as the value of by-product possibilities is now being recognized, and as the device here involved made possible, inter alia, the recovery of more than 1½ per cent. of oil and a reduction of 8 cents per ton in operative cost, it will be apparent that the case is one that challenges the attention of the federal courts to which is intrusted that most responsible commercial duty of decreeing the reward of a limited monopoly to a patentee who contributes something novel, useful, and inventive to a great industry, or, on the other hand, of protecting such an industry from the unwarranted burden of a monopoly by one who has really not given it anything of that character. In view of these facts we have felt constrained to give to this case a range of somewhat broader examination and discussion than its meager proofs suggest.[1]

As we have said, the case concerns the extraction of oil from cotton seed. The ordinary method of such extraction consists in chopping up, heating, and otherwise treating the cotton seed preparatory to pressing. This mash is next spread on a part of a mat of camel's hair. The other end of the mat is then doubled over the mash and the whole subjected to a pressure of several thousand pounds. This pressed the oil from the mash and strained it through the mat. For these camel's hair mats the patentee, Werk, substituted mats woven of horse hair, and on the two divisional applications as above he was granted the two claims quoted.

It is apparent the essence of his invention, if such it be, consists, not in any new method of weaving mats, but in weaving them from the hair of other animals than camels. In other words, his device is an article of commerce, viz., an oil-press mat, woven it is true in a particular way, but in one claim limited to being "made entirely of long animal hair," and in the other to being "composed exclusively of long hair derived from animals' tails and manes."

The proofs show that the horse hair mats of complainant have certain substantial advantages over those made of camel's hair, in that they last 20 days, as compared with the 5 days' life of a camel's hair mat. In the seed cake pressed on horse hair mats there remains an average of 5.92 per cent. of oil, while in that pressed on camel's hair 7.50 per cent. of oil is retained. The cost of camel's hair mats is 18 cents per ton of seed pressed, while with horse hair but 10. In addition to this, the seed cake is imbedded in the camel's hair mat by pressure, and has to be separated by a special machine. It does not so imbed in the horse hair mats, and can be readily stripped off. It

[1] Encyclopedia Americana, vol. 5, article Cotton-Seed Oil Industry, by Thomas R. Chaney, 1903 (cited by the University of Pennsylvania Library), shows the importance of the cotton-seed oil industry: "When it is considered that the seed of the cotton plant more than pays the entire expense of ginning, baling and tying the crop, the economy it effects is plainly seen. * * * In fact, the whole agricultural life of the South has been benefited by this formerly despised gift (the seed) of old King Cotton, and it is only just to say that the people are becoming appreciative of that fact."

will thus be seen that Werk's mat forms an important and valuable economical feature in the industry. Recognizing its value as a hair mat, the defendants wove their mats from the long hair of Chinamen's cues, which hair, it seems, is an article of commerce. The proofs satisfy us that such human hair mats have the same functional qualities in oil-pressing as horse hair mats.

The value of Werk's device being shown by the proofs, the case resolved itself into two questions—the validity of his patents and the infringement of their claims.

On the part of the defendants it is contended that the change from camel's hair to horse hair is a mere obvious substitution, and therefore does not involve invention. Moreover, it is alleged that, if there be invention in such change, the substitution of human hair for horse hair involves more invention, and for that reason, and because Werk's patent claims must be restricted to horse or animal hair, they are not infringed by defendants' use of human hair. The term "camel's hair" is somewhat misleading, for the covering of a camel is for the most part wool, which wool shades off into the few straggling long hairs which give it the name of camel's hair. But when woven into these oil mats it is the wool which makes it act differently from a horse hair mat, which has no wool in it. Without entering into a detail comparison of wool and hair, it suffices to say that the essential difference is the capacity of one, and the incapacity of the other, to mat, or "felt," as it is technically called. Felting is caused by the tiny hooks or scales on wool, which grip and mat on pressure and contact with other strands. A true hair has no such hooks, and therefore will not mat. It is this felting capacity that makes a camel's hair mat become so tight as to prevent, to a degree, the passage of oil, which a horse hair mat will pass. And it is the absence of this felting in a horse hair mat which makes it possible to strip off the seed cake, while it has to be mechanically torn from the felted camel's hair one. Felting, as its characteristic distinction from hair, is well known in the textile industries. Thus in Dooley's Book of Textiles it is said:

"The chief characteristic of wool is its felting or shrinking power. This felting property, from which wool derives much of its value, and which is its special distinction from hair, depends in part upon the kinks in the fiber, but mainly upon the scales with which the fiber is covered. These scales or points are exceedingly minute, ranging from about 1,100 to the inch to nearly 3,000. The stem of the fiber itself is extremely slender, being less than one thousandth of an inch in diameter. In good felting wools the scales are more perfect and numerous, while inferior wools possess fewer serrations, and are less perfect in structure. In the process of felting the fibers become entangled with one another, and the little projecting scales hook into one another and hold the fibers closely interlocked. The deeper these scales fit into one another the closer becomes the structure of the thread."

This nonfelting of hair the patentee has taken advantage of in his device, and points out in one specification, where he says:

"* * * Hair strands afford good drainage for the oil, and impart a glossy surface to the fabric, that enables the cake to be introduced with facility and the article to be stripped with ease from the compressed material."

And in the other:

"The highest grade of mat now in general use is made from camel's hair; but camel's hair is objectionable, because it packs and felts together when in use to such an extent as to hinder the free flow of the oil, and the yield per ton of seed is greatly reduced by reason of this felting of the camel's hair. The oil is compelled to seek an outlet on the sides, where there is no cloth to hold the seed or meats from being washed out into the receiving tanks, which deteriorates the quality of the oil. Camel's hair also stretches from one-fifth to one-third of its original length, which is objectionable, as this requires the cloth to be cut too short to start with, and before it is worn out it has stretched too long for convenient handling. All these objections are overcome by the use of horse hair, and, the horse hair being soft, it retains all the good features of camel's hair."

It has therefore seemed to us that the change from camel to horse hair mats was sufficient to constitute invention in this art, if such use of horse hair mats was first disclosed to the oil-pressing art by Werk. But just here Werk's patents meet a fatal obstacle, for a cursory examination of standard works shows that at most Werk's use of horse hair mats in the present practice of cotton-seed oil extraction was but a revival of an old and well-recognized use of the horse hair appliances in the general art of oil extraction.

Turning to the 1895 edition of the Standard Dictionary, under the word "hair" we find: "Hair cloth; specif.: mats woven from horse hair used in expressing oils," etc. The nature of this practice, thus briefly outlined in the dictionary, will be found by reference to the ninth edition of the British Encyclopedia, published in 1884, where under the head of "Oils," it is said:

"The sequence of operations in treating oil seeds for the separation of their contained oils is ordinarily as follows: (1) The crushing or grinding of the seed or other substance; (2) heating the oleaginous meal so prepared; and (3) expression of the oil by mechanical power."

Under the head of "Pressing," the article then says:

"With the least possible delay the meal is transferred from the heating kettles, so that the oil may be pressed out while the material still retains its heat—measured quantities, say 10 or 12 pounds of meal, are filled into woolen bags of strong, thick texture, sufficiently open and porous to allow free flow of the expressed oil, yet having consistency enough to resist rupture by the enormous pressure to which it is subjected. Each bag is further placed *within 'hairs,' thick mats of horse hairs bound with leather.* In some methods of working press-cloths—not bags—are used; and the construction of recent presses is such as to dispense with the use of bags or other coverings."

Samuelson on Oil Well Machinery, 1858 (in Proceedings of the Institution of Mechanical Engineers) vol. 9, pp. 27–42, says:

"The bags after being filled are placed separately between what are called *the hairs, which are bags made of horse hair with an external covering of leather.* The same description of bags and hair are used, whether the oil be expressed by means of the stamper, screw, or *hydraulic press.*" Page 31.

Spon's Dictionary of Engineering, 1874, vol. 3, in discussing Samuelson's article says:

"The bags into which the seed is measured from the kettles hold 10 pounds of seed each, *the horse hair wrappers* into which they are deposited being 2½ feet long."

The use of horse hair in oil extraction is referred to in British patent 2,645 of 1877, to H. C. Newburn, for improvements in apparatus for pressing and filtering beet root juice, oils, and other substances, as follows:

"The apparatus * * * acts both as a press and as a filter. * * * These filter cloths are composed of three thicknesses—the first consisting of perforated bands or straps, * * * the second of *coarse fabric of horse or other hair* which forms the supple and elastic part of the filter, and the last of a fine and uniform fabric, such as merino, cashmere, or alpaca, which constitutes the filter properly so called."

Brannt's Animal and Vegetable Fats and Oils, 1888:

"The material used in the manufacture of press-cloths and bags should be capable of great resistance, and while close enough to prevent any meal from penetrating, allow the oil to run out as freely as possible; properties not readily found combined in any one material. The most suitable materials are cotton, sheep's wool, and *horse hair.*" [2]

With such practices existing in the general art of seed-oil extraction, practices of which the court takes judicial notice, it follows that Werk's patents did not disclose any such novel information to the cotton-seed art as warranted a grant to him of patent monopoly therefor based on the use of horse hair. This conclusion renders it unnecessary to discuss the question of infringement which the court below decided in favor of the defendant. In view of the fact that the references quoted were not given in evidence we will defer sending the mandate to the court below until such time has elapsed as will enable counsel to determine whether any such reasonable ground exists as warrants a motion for reargument or other form of relief to meet such references.

[2] The references above quoted were furnished by the Technical Department of the Carnegie Library of Pittsburgh on request for publications showing the use of horse hair, prior to Werk's patents, in the extraction of vegetable oil. As the court took judicial notice of the information thus disclosed by a highly specialized technical library, it was deemed fair to ascertain whether inquiry at libraries in other sections of the country would also disclose the prior use of horse hair mats in vegetable oil extraction. With that end in view inquiry was made by letter of large public libraries of the leading Universities in the East and several in the South and West, and from colleges both East and West. The result, so far as pertinent citation goes, is given alphabetically below, such libraries not being listed where no books were cited.

Amherst College, Amherst, Mass., cites as follows:

Engineering Magazine—Sept., 1892—an article entitled "The Cotton-Seed Oil Industry" by Irwin W. Thompson. On page 826 occurs the following:

"The earliest form of hydraulic press used in oil mills was vertical, containing five bags or compartments about nine by twenty inches for receiving the prepared kernels, which were in bags and inclosed still further in *horse hair* 'mats' or books."

Popular Science Monthly—May, 1894. On page 107 is the following:

"The kernels are then pressed in woolen bags packed between *horse hair mats* backed with leather and having a fluted surface inside to allow the oil to escape more freely."

Brown University, Providence, Rhode Island, cites:

United States Department of Commerce, Bureau of Foreign and Domestic Commerce, Special Agents Series, No. 84, part 1, 1914, p. 69, as follows:

"The Netherlands; oil mill methods. Most of the Dutch oil mills were built for linseed, and the original plan for linseed is followed for such other crushing as is done. * * * They [the cakes] were made by pouring the hot meats into woolen bags, and *press-*

ing between horse hair mats just as cotton-seed cake was made in the United States at one time."

Bowdoin College, Brunswick, Maine, cites:

British Encyclopedia, vol. 11, page 376, 1880, which states:
"*Horse hair* is woven into bags for oil and cider presses."

Public Library, Boston, Massachusetts, refers to Brannt's and Andes' works which are quoted at length (see Congressional Library).

The Department of Agriculture Library, Washington, D. C., refers to and cites:

"A Practical Treatise on Animal and Vegetable Fats and Oils," 1888, W. T. Brannt, which says:

"The bags of strong woolen stuff, when full, are pressed flat between *horse hair mats* and then brought into the press." (Page 102.)

"Before placing the heated seed meal in the press it is put in woolen cloths or *horse hair bags*." (Page 107.)

"After the oil is expressed * * * the *horse hair mats* are taken out and the press cake removed from the bag." (Page 116.)

For press-cloths "the most suitable materials are cotton, sheep's wool, *and horse hair*." (Page 147.)

With one type of machine described the seed meal is wrapped in woolen cloths and pressed without mats.

"The advantages of this machine are as follows: 1. The expensive hairs are done away with. 2. Each press, instead of four cakes, * * * can now accommodate eighteen, on account of the slight thickness of the cakes themselves * * * and the absence of *the hairs*." (Page 120.)

Spon's Encyclopedia of the Industrial Arts, Manufactures and Raw Commercial Products, 1882, which in referring to methods of extraction of oils and fatty substances, says:

"In all these presses *the hair wrappers*, weighing some 26 pounds, used in the old process, are dispensed with." (Page 1453.)

The Congressional Library, Washington, D. C., cites:

Andes' Vegetable Fats and Oils, London, 1897:

"These presses are arranged as follows: Four, six, eight, or ten wrought iron or steel rings are erected one above another in the press, each of them having a movable bottom of steel pierced with fine holes, and between every two rings a cast iron or cast steel plate is laid, the upper side of which is grooved, but the under side smooth. To these plates, which are inserted between the columns of the press, are attached iron rails in which the press rings are suspended, and serve as guides for the insertion and withdrawal of the latter. In addition to this, each plate is surrounded by a channel for catching the expressed oil. The filling of the press is a simple operation. On the perforated bottom of each ring is laid a cover of *plaited horse hair*, wool or felt, on which the meal is spread and covered with a *horse hair* cloth. When the rings are all filled pressure is applied, forcing the grooved upper surface of each plate into the ring above, and thereby causing the oil to flow out *through the horse hair cloth*, the perforated steel plate and the grooves of the press plate, into the oil channel." (Page 71.) "The cleaned seeds are passed into a rotary cylinder containing 24 circular fixed knives and an equal number of cutters, which divide the seed into very small pieces. The hulls are thus separated from the kernels, and form a valued food for cattle. The kernels are pressed between rollers like those in a cane sugar mill, and the oil runs out. The mass is then put into woolen press bags, laid between *horse hair cloths* covered with ruffled leather to enable the oil to flow more freely, and submitted to hydraulic pressure. The bags are exposed to warm pressing for 17 minutes, a time sufficient to force out all the oil, which collects in a channel, leaving only the dry kernels behind. These constitute the oil cake of commerce." (Page 112.)

It also cites Brannt's "A Practical Treatise on Animal and Vegetable Fats and Oils," Philadelphia, 1896, vol. 1, chapter X, Manner of Obtaining Fixed Oils (quoted in opinion and cited by Carnegie Library, Pittsburgh).

Columbia University Library, New York, cites:

The two foregoing authorities.

Spon's Encyclopædia of the Industrial Arts, etc., Ed. Lock, London, 1882, p. 1453:

"In all these presses, the *hair* wrappers weighing some 26 pounds, used in the old process, are dispensed with."

Ure's Dictionary of Arts, Manufactures and Mines, Ed. Hunt, Lond. 1872, p. 280, s. v. Linseed:

"The triturated seed was put into woolen bags which were wrapped up in *hair cloths*." Id. p. 282. in Fig. 1342:

"*h.* The *horse hair bags* (called hairs) containing the flannel bag, charged with seed."
Other references pp. 283, 284, 285, etc.
Knight's American Mechanical Dict. N. Y. 1875, s. v. "Oil-Press," vol. 2, 1554.

The General Library, Chicago, cites:

Cotton Seed and its Products, No. 36, U. S. Department of Agriculture, 1896, which, after describing the process of extracting cotton-seed oil, says:
"The cakes as they come from the [cake] former are wrapped *in hair cloth* and removed by hand to the press, where they are arranged in a series of boxes, one above the other, between the plates of the press and subjected to a pressure of 3,000 to 4,000 pounds to the square inch by hydraulic power."

Harvard Library, Cambridge, Mass., cites:

Scientific American Supplement, No. 830, Nov. 28, 1891, which gives a comprehensive résumé of cotton seed extraction by D. A. Tompkins, in which he describes the early English mills which were used shortly after the Civil War, and says:
"The process of working them was very simple. They are first crushed under old-fashioned milling stones, then put in steam-jacketed kettles with mechanism stirrers and cooked. The product was dumped from the kettles or heater into a wooden bin, and from the bin it was dumped into small cloth sacks, these being in turn inclosed *in a hair mat.* The whole was put into a hydraulic press containing about five boxes, and put under about two or three thousand pounds pressure to the square inch, ten to twelve inches in diameter."

Hobart College, Geneva, New York, cites:

The Encylopedia Britannica, 9th Edition, 1894, vol. 17, page 742, article on "Oils," as follows:
"Measured quantities of the meal are filled into woolen bags, * * * each bag is placed *within 'hairs' thick mats of horse hair* bound with leather. In some methods of working, press-cloths—not bags—are used; and the construction of recent presses is such as to dispense altogether with the use of bags or other coverings."

It also cites the Popular Science Monthly, cited by Kenyon College, Gambier, Ohio, viz.:

An article on Waste Products, Cotton Seed Oil, vol. 45, Popular Science Monthly, page 107 (March, 1894), as follows:
"The kernels are conveyed to rollers where they are crushed very fine. They are thence removed to the heaters, * * * then placed in woolen bags, packed between *horse hair mats* backed with leather and having a fluted surface inside to allow the oil to escape more freely."

Knox College, Galesburg, Ill., cites:

Encyclopedia of Chemistry, J. B. Lippincott & Co., 1879, as follows:
"The bags, after being filled, are placed separately between what are called the 'hairs,' which are *bags made of horse hair* with an external covering of leather. The same description of bags and hairs are used, whether the oil be expressed by means of the stamper, screw, or hydraulic press. Several different kinds of presses are used in the extraction of oils, as the screw press, the wedge press, and the hydraulic press."
Also Ure's Dictionary of Arts, etc., Longman, Green & Co., 1881, showing the use of *"horse hair envelopes"* in hydraulic oil presses, and also stating that, as the oil leaves the seed, "it passes through the woolen bags and *horse hair mats.*"
Also reference given by the Department of Agriculture Library in Spon's Encyclopedia, etc., herein quoted.
Also Ure's Dictionary of Arts, etc., D. Appleton, 1866, showing in seed-oil extraction the use of *horse hair bags* (called hairs) and *hair cloths,* lined with leather; and also the 1847 edition of Ure's Dictionary, and the 1862 edition of Charles Tomkinson"s Encyclopedia of Useful Arts, showing the use of *hair cloth* and *hair bags* in oil extraction. There is also cited the Techno-Chemical Receipt Book, Henry Carey Baird & Co., 1866, where in describing seed-oil extraction it is said:
"The hot meal is then placed between the sides of wrappers formed of thickly woven *horse hair backed* with corrugated leather to facilitate the escape of the oil, which are called 'hairs' or 'books,' the hair and its continued bag or seed and then placed in the hydraulic press."

Lafayette College Library, Easton, Pa., also gives the reference to Popular Science Monthly cited by Amherst and Kenyon. It also cites:

An article in the Engineering Magazine, vol. 3 (1892) p. 826, where, in referring to a method of cotton-seed oil extraction, it is said:

"The earliest form of hydraulic press used in oil mills was vertical, containing five boxes or compartments about 9x20 inches, for receiving the prepared kernels which were in bags and enclosed still further in *horse hair mats* or 'books.' * * * The next step was in substituting steel for *horse hair mats* whereby the space occupied was so reduced in thickness that two bags might be placed in one box, doubling the capacity of each press."

Lehigh University Library, South Bethlehem, cites the 1867 edition of Ure's Dictionary of Arts, vol. III, page 280, showing in oil-seed extraction the general use of woolen bags wrapped in hair cloths, and the same thing in Muspratt's Chemistry as Applied to Arts, London, vol. II, page 607, prior to 1878, and Sadtler's Organic Chemistry, 1891, pp. 52, 53.

The University of Minnesota, Minneapolis, cites Lamborn's Cotton Products, which, while published in 1904, refers to the use of horse hair mats in oil extraction as having been used in old-style presses, as follows:

"The modern plate-press * * * has almost entirely superseded the old-style box-press, owing to its greater capacity * * * both in operation and use of mats and bags. With the box-press the cooked meats were placed in woolen bags and these spread out and equalized in thickness on 'mats.' These mats were closely *woven from horse hair* and covered." etc.

The New York Public Library, New York City, shows the general use of horse hair in the oil-extracting art in these citations:

Andes E. A.: Vegetabilische Fette und Oele, Wien, A. Hartleben, 1896, pp. 65, 66:

"Eigentlich ist es ganz unmöglich beide geforderte Eigenschaften in aller Vollkommenheit in einem und demselben Gewebe vereinigt zu haben; am besten erfüllt noch ein sehr dicht gewebter Baumwollstoff diesen Zweck, und legt man, um das Platzen der Press-Säcke zu verhindern, um dieselben während des Pressens ein dichtes, *aus Pferdehaar angefertigtes Gewebe.*" (It is really impossible to have the two demanded qualities perfectly united in one and the same texture; a very closely woven cotton material answers this purpose the best, and therefore, in order to prevent the bursting of the pressed bags, one places around these during the process of pressing *a close texture woven out of horse hair.*)

Brannt's Treatise, from which we have already quoted, is also cited by this Library.

Dammer, Otto: Handbuch der chemischen Technologie, Bd. 3, 1896, p. 22:

"Vor dem Pressen wird der zerkleinerte Samen in Beutel gefüllt oder in wollene Tücher gepackt, die dem grossen Druck wiederstehen müssen, ohne dabei viel Oel aufzusaugen. Man schlägt sie dann noch *in aus Pferdehaar gewebten Stoff ein.*" (Before pressing, the shredded seed is put into bags or packed in woolen cloths, which must resist the great pressure without soaking in much oil. *Later you wrap them into a material woven from horse hair.*)

Fontenelle, J. S. E.: Theoretisch-Practisches Handbuch der Oelfabrication und Oelreinigung, Weimar, Voigt, 1853, pp. 46, 47:

"Bei der deutschen Verpackungsart gebraucht man Tücher aus Schnüren von fünf- bis *sechsfachen Pferdehaaren*, nach Art der von den Seiten geflochtenen Gurten." (In the German way of packing they use cloths of five or six ply horse hair similar to a girth.)

Hurst, George H.: Soaps, London, Scott, Greenwood & Co., 1898, p. 84:

"The bags are next inclosed in woolen covers, and are then wrapped again in what are called 'hairs,' which are strong cloths made of *horse hair.*"

Vincent, C. W., editor: Chemistry, vol. 2, London (1882) pp. 456, 457:

"The crushed cake is inclosed in a press cloth or bag previous to its introduction into the case. The bags and cloths used for this purpose are made of different materials, the object being to have them sufficiently strong to bear the force exerted, while at the same time they are not so thick or porous as to retain any great quantity of liquid. Woollen cloth and canvas are especially manufactured with a view to its application to this process of expression. The bags, after being filled, are placed separately between what are called the 'hairs,' which are bags made of *horse hair*, with an external covering of leather. The same description of bags and hairs are used, whether the oil be expressed by means of the stamper, screw, or hydraulic press."

Wright, C. R. A.: Animal and Vegetable Fixed Oils, Fats, Butters and Waxes (2d Ed.) London, Charles Griffin & Company, 1903, p. 262:

"In some of the Marseilles oil factories an arrangement is in use known as the 'Estrayer Cylinder,' the action of which is somewhat akin to that of the wedge press. The apparatus consists of two cylinders, one inside the other, of which the outer acts upon the inner by means of a series of inclined planes, the inner cylinder being composed of eight segments, which either close up tightly or separate according as pressure is exercised or removed by the position of the outer cylinder. Screens made of esparto grass and *horse hair* are employed instead of oil-bags of the same material (scourtins) such as are employed in other forms of press."

(The Estrayer apparatus is described in the Journal of the Society of Chemical Industry, London, vol. 13, 1893, p. 49; also in United States Consular Reports, No. 142, July, 1892, pp. 485-495.)

Princeton University, Princeton, N. J., cites:

The Ure's Dictionary of Arts, vol. 2, p. 286, Appleton & Co., 1863, as follows:

"Linseed, rapeseed, poppy seed, and other oleiferous seeds were formerly treated for the extraction of their oil, by pounding in hard wooden mortars with pestles shod with iron, set in motion by cams driven by a shaft turned with horse or water power, then the triturated seed was put into woollen bags which were wrapped up in *hair cloths* and squeezed between upright wedges in press-boxes by the impulsion of vertical rams driven also by a cam mechanism. In the best mills upon the old construction, the cakes obtained by this first wedge pressure were thrown upon the bed of an edge-mill, ground anew and subjected to a second pressure, aided by heat now, as in the first case. These mortars and press-boxes constitute what are called Dutch mills. They are still in very general use both in this country and on the Continent, and are by many persons supposed to be preferable to the hydraulic presses."

Rutgers College, New Brunswick, N. J., cites:

Farmers' Bulletin No. 36, page 7, where under the title "Methods of Manufacturing Cotton-Seed Products" it is said:

"After this crushing the meats drop into a conveyor, which delivers them to the heaters. * * * The object of the cooking is to expand the oil in the meats and render it more fluid, and to drive off the water, which not only reduces the quality of the oil but is liable to work serious injury to the expensive cloths used to envelope the cakes in the press. * * * Close to the heaters stands the 'former,' which shapes the meats into cakes for the press. The cakes as they come from the former are wrapped in *hair cloth* and removed by hand to the press."

And also call attention to the use of hair cloths in various seed extractions shown in Appleton's Dictionary of Mechanics, vol. 11, pp. 448, 449, Edition 1866.

Trinity College, Hartford, Conn., cites in chronological order, as follows:

Traité Complet de Mecanique Appliquee aux Arts, etc., par. Borgnis, vol. 5, page 268, Des Machines d'Agriculture, Paris, 1819:

"a. Indique la pile de cabas, ou sacs de jonc marin ou de crin, remplis des matières qui douvent subir le pressurge." (Select baskets or sacks of seaweed or of hair, fill with material which is to undergo the pressing.)

Page 278: "Pour faire ces sacs, on peut se servir de tissus de crin, de treilles fabriques avec de petites ficelles de chanvre, de coutil, de toute grosse toile forts, d'etoffe de laine, de tissus de jonc ou spart: *le crin est preferable parcequ'il n'absorbe point d'huile parce que les mailles de son tissu ne se touchent pas aisement par sa dures sa résistance â la force de pression; enfin par la facilité que l'on* a le nettoyer." (In order to make these sacks, one can use *weaves of hair*, sackcloth made of hemp twine, ticking of heavy strong cloth, linen materials, weaves of seaweed (bass) or an earthly mineral of a shining luster; *the hair is preferable because it does not absorb the oil, because the meshes of its tissues do not touch each other easily, through its lastingness, its resistance to the force of pressure, finally through the ease with which one can clean it.*)

Ree's Cyclopædia of Arts, London, 1819, where, under the head of "Oil Mills," it is said:

"Olive and other vegetable oils, the products of the south of Europe, are also expressed by a machine, but it is not called a mill, being simply a strong screw-press, provided with a windlass or capstan, to give it a greater power; in short, it is the same machine as the Cider Press (see that article). The olives are first pounded, or bruised, either in a large mortar, or by a running stone, in the same manner as the apples for making cider. The pulp thus produced is put up *in bags made of horse hair*, and a pile of these, being made up under the press, the screw is forced down by men working a long lever, and the oil expressed."

Ure's Dictionary (3d London Edition, 1833) page 900, where it is said:

"The pressed cake is again thrown under the edge stones, and after being ground the second time should be exposed to a heat of 212 degrees Fahrenheit, in a proper pan, called the steam kettle, before being subjected to the second and final pressure in the woollen bags and *hair cloths*."

The English Encyclopædia by Knight, vol. 6, page 26, London, 1861, says:

"In the wedge-press, of which there are many varieties, the crushed seeds are put into *bags of hair cloth*, or some similar material, and these bags are then placed between boards or blocks of wood within a very strong and massive framework. The small end of a wedge is then introduced in such a way between the plates or the boards that, when it is driven down by the blows of a ram or pestle, it may compress the bags with enormous force. * * * Some of these act horizontally, the bags being, as in the wedge-

press, placed vertically and separated from one another by cast-iron plates; but in others, the bags are piled upon one another in cast-iron cases, and placed in a vertical press. The seed is put into bags of flannel or of *horse hair.* Among other advantages it is stated that the hydraulic or hydrostatic press requires less space than a stamping mill which could do the same work, and that *the hairs and bags are found to last longer* with it than with the old machine."

Attention is also called to Meyer's Konversations, Lexikon, Leipsig, 1906, vol. 15, page 53, which, while post-dating Werk's patents, refers in an article on oil to common existing practice as follows:

"Beim Pressen schlägt man das Samenmehl in starke wollene Tücher oder füllt es in Säcke und umgibt diese noch mit einem Gewebe aus *Pferdehaar.*" (In pressing (squeezing) one wraps the seed flour in heavy woollen cloths or puts it in bags and covers these with *a layer (fabric) of horse hair.*)

Attached to these citations the librarian adds:

"From various indications I am of the opinion that the use of horse hair goes back to classical times. I have not yet been able to find a passage to confirm the conjecture. However, I find a passage in Pliny in which horse hair sieves are mentioned: Plini Secundi, book XVIII, chap. 28: 'Cribrorum genera Galliæ *sætis equorum* invenere, Hispanias lino excussoria et pollinaria, Ægyptus papyro atque junco.' (The Gauls have invented a kind of sieves made out of *horse hair,* the Spaniards bolting cloths and meal sieves made out of flax, Egypt made out of papyrus and rushes.)"

Tulane University, New Orleans, Louisiana, cites:

The Techno-Chemical Receipt Book, by Brannt and Hall (1886), hereinbefore quoted in the references by Knox College Library.

Also, Pitman's Common Commodities of Commerce, Oil, by Mitchell, which says:

"The kernels, technically known as the 'meats,' are now ready for crushing between iron rollers, after which process they are heated in steam jacketed kettles and shaped into cakes in a press termed the 'former.' These cakes are wrapped *in hair cloths* and subjected in hydraulic presses to a pressure of 3,000 to 4,000 pounds to the square inch."

From Yale University, New Haven, Conn., the librarian cites Lamborn's Cotton-Seed Products (Van Nostrand, 1904), also cited by the University of Minnesota, which postdates the patents, and adds "We have here no references to the use of horse hair mats."

From the foregoing summaries it will be seen that the court was fully justified in taking judicial notice of the use of horse hair in the extraction of vegetable oils prior to Werk's patents, and that inquiry at the libraries listed would, with a very few exceptions, have disclosed the use of horse hair mats or bags as a common agency in vegetable oil extraction.

MITCHELL v. CONNELLSVILLE CENTRAL COKE CO.

(Circuit Court of Appeals, Third Circuit. February 14, 1916. Rehearing Denied March 17, 1916.)

No. 2059.

1. PATENTS ⊂⊃328—INVENTION—COKE OVEN.
The Mitchell patent, No. 899,886, for a coke oven of rectangular shape with open ends, substantially parallel sides, and the end walls inclined or curved upward to form a peaked roof, is for an aggregation of structural features taken from pre-existing ovens, attaining no better or different results, and not involving patentable invention.

2. WORDS AND PHRASES—"COKE."
"Coke" is partially consumed bituminous coal, from which the volatile constituents have been burned away. It may be described as a partly graphitized carbon, whose fiber has been affected by escaping and burning gases, so that it is lighter than coal, although its substance is hard and dense.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by Thomas J. Mitchell against the Connellsville Central Coke Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Orr, District Judge, on final hearing:

The bill in this patent suit was filed on April 21, 1910. The evidence was taken under the former equity rules. By the bill plaintiff avers title as inventor to United States patent No. 899,886, issued to him on September 29, 1908, for a coke oven, charges the defendant with the infringement of the rights of the plaintiff, in that the defendant has erected and is using coke ovens covered by the letters patent, and prays for the usual relief. The answer denies the validity of the patent upon the grounds of prior publication and prior use, and upon other grounds, some of which will hereafter appear.

In the manufacture of coke a great variety of ovens has been used since the industry began. Such variety was occasioned, not only by variance in the opinions of scientific men and by variance in the experiences of practical coke burners, but by the diversity of purposes for which coke is used and by reason of the differences in qualities of the different coals available for the manufacture of coke. Such various ovens are well classified as being with few exceptions either beehive ovens or longitudinal ovens. The name of the former is more descriptive than the name of the latter. The old fashioned dome-shaped beehive apparently suggested the form of the ovens of the first class. They are used in great number throughout those portions of the United States where coke is manufactured. They are made of brick and the circular floor is surrounded by a circular brick wall, perpendicular for a greater or less distance from the floor and surmounted by a dome, in the center of which is what is called the trunnel hole, whereby the oven may be charged with coal, and whereby the gases may escape during the coking process. In the beehive oven there is but one door, which is closed during the coking process, except for small, thin openings, which admit air so as not to prevent sufficient combustion, and from which the coke is removed after the process has been completed. Because of the relation between the size of the door and the floor of the oven the hard mass of coke was required to be broken, and in addition was slowly and with difficulty removed.

The problem had long been presented to coke manufacturers as to how the coke could be removed from the coke oven without its fracture into unneces-

sary small pieces, and without the delay and expense which were incident to the removal of the coke from the beehive oven. It became apparent that the coke could be more easily removed from an oven by the use of machinery which would push the body out from the floor of the oven, or pull it out by mechanical means, rather than by means of workmen using hand tools. It became apparent, also, that if there were opposite doors a pusher or drag could be better introduced at the one door and force the coke out of the other, and it became apparent that such pusher or drag would not reach into the arches which would exist in the circular beehive oven between the opposite doors in such oven, if opposite doors were introduced therein.

This problem had presented itself to Richard Thomas, of Carbondale, Ill., in the year 1881. It presented itself to the plaintiff in this case in the year 1905, when he first began his experiments. Richard Thomas procured from the United States two patents, each for a coke furnace and apparatus connected therewith, numbered and dated, respectively 249,694, November 15, 1881, and 276,504, April 24, 1883. In neither of the said patents, however, is there a description of the coke furnace, except as it may be drawn from the drawings attached thereto, in which is shown a longitudinal furnace, with doors at either end; but each patent elaborately describes and claims apparatus for the withdrawing of coke from the furnace. There was subsequently built at Coalburg, in Alabama, 64 of the Thomas ovens arranged in "one single continuous battery." The construction of coke ovens in what has been thus termed a "battery" is an old arrangement, due to the fact that the ovens may be filled with coal more readily, for across the top of the ovens extends the track upon which the larrie, or hopper, or measure, from which the coal is discharged into the ovens, is moved. It is convenient, also, because the masonry of one oven tends to support the masonry of an adjoining oven. This feature of construction was common, and is to-day common, in the erection of beehive ovens.

These Thomas ovens at Coalburg were equipped with apparatus for withdrawing the coke, and were used with such apparatus for many years. Other Thomas ovens were built at other places as well, but the ovens at Coalburg are the Thomas ovens which are the subject of special consideration in the record of this case. That the plaintiff had seen these Thomas ovens prior to the construction by him of any of the ovens with which he was experimenting appears from his testimony, not only as given in the case at bar, but as given in the interference proceedings in the Patent Office, in which certain claims made by him were involved. It is doubtful, however, that the plaintiff in the case had ever studied the published and printed descriptions of the Thomas oven. Prior to 1895 Richard Thomas published and widely distributed a printed circular describing "the Thomas coke oven and direct loading apparatus." The circular opens with a description of which the following is a material portion, one sentence of which we have italicized:

"This oven is one of the class in which the coking of the coal is done by the internal heat of the oven. This is the old beehive principle, the gas being consumed above the charge. The Thomas oven is an elongation of the beehive, the change in shape being made to facilitate the withdrawal of the charges by machinery. The ovens are built side by side to any desired number, and are 9 feet 6 inches wide from center to center, 7 feet 9 inches wide in the clear in the front end, and 7 feet 3 inches at the back end in the clear, and 8 feet high from the platform. They are 5 feet high under the main arch and 36 feet long for coal yielding less than 60 per cent. coke, and 32 feet long when the yield is over 60 per cent. This difference in the length is to keep the weight of the charge within the limit of 7 or 8 tons, as it is found more economical to limit the draw to that amount. The bottoms are made in the usual way for beehives, the only difference being in the shape of the foundation. In the beehives it is circular while in the Thomas it is lengthwise of the oven. The side walls are 21 inches thick at the front end and 27 inches at the back end, and are 2 feet 6 inches high from floor to skew back. The front arches have a rise of 18 inches, and are 2 feet 6 inches long. A space of 3 inches is left between the main and front arches. This is to prevent the expansion of the main arch from disturbing the front walls. The main arch has a rise of 2 feet 6 inches and is turned with one course of

brick 9 inches deep, which usually are made 4 inches and 4½ inches x 9 inches x 12 inches. There is a rise in the oven of 9 inches towards the chimney from the front end. The ovens are built some with three charging holes and a chimney at the back and some with two charging holes and a chimney. Where coal is brought direct from the mines to the ovens to be coked it would be advisable to have three charging places. Where the coal is brought in larries two charging places will do. If the oven is only 32 feet long with two tracks and charging holes, with the chimney in the middle, the bottom of the oven is on a level. *The main arch has a rise of 6 inches from both ends towards the chimney or the center of the oven.* All other particulars are the same in both ovens except the length of the oven and the position of the chimney."

While the ovens erected at Coalburg and owned by the Sloss Iron & Steel Company were the subject of attention, as appears by the publication of the Proceedings of the Alabama Industrial and Scientific Society, vol. 1, 1891, and by a publication by John Fulton of a treatise on the Manufacture of Coke, published at Scranton in 1895, yet interest in them was chiefly because of the apparatus for the withdrawal of the coke from the ovens. Likewise in 1905 and 1906, when the plaintiff was experimenting at Mt. Braddock in the state of Pennsylvania, and had built his first oven without any rise, and afterwards a second with such rise "from both ends towards the chimney or the center of the oven," great interest was shown by newspaper representatives in what the plaintiff was doing, with the result that there were a number of news accounts in Pittsburgh, Connellsville, and perhaps other papers, giving more or less exact descriptions of improvements which the plaintiff was supposed to have invented. These publications showed their chief interest in the features of economy and ingenuity displayed in the method of withdrawing the coke from the ovens. The plaintiff, so far as it appears, made no claim to invention for the apparatus for the removal of coke from the ovens, but on November 27, 1906, filed an application for a patent which resulted in the grant of the patent in suit.

Before taking up the patent for particular consideration, it is well to notice that nowhere in the patent is a single measurement or dimension stated. In the specifications the patentee states the object of his patent as follows: "This invention relates to coke ovens, and has for its principal object to provide an oven of simple construction which may be built, maintained in working order, and operated at a much smaller cost than an ordinary beehive and other types of ovens now in use. A further object of the invention is to provide an oven open at both ends for the insertion of a coke pusher at one end, and the discharge of the coke at the opposite end, the top or crown of the oven being inclined or curved upward from a point near each end to a point about the middle of the length of the oven wall, and at this point is a top opening through which the oven may be charged. A still further object of the invention is to provide an oven of this type in which the top or crown is inclined or curved upward from points near the opposite ends toward the center to form a combustion chamber for the more perfect combustion of the gases distilled from the coking coal and by which combustion the crown or roof of the oven becomes intensely heated, thereby increasing the efficiency of the oven by reflecting the heat downward on the coking coal, and result in a superior quality of coke, and will, furthermore, permit the consumption of the gases without material waste of the carbon of the coal."

The description in the specifications is as follows: "The floor *10* of the oven is flat and slightly inclined toward one end and extends between two walls *11* formed of brick or stone, the oven opening at both ends, so that a pusher may be inserted at one end and forced through the oven to discharge the coke. The side walls *15* are vertical and are substantially parallel with each other throughout their entire length, while the crown *16* is arched from side wall to side wall. From each end of the oven the arch extends inward for about the thickness of the retaining walls, and thence slopes or curves upward at each end toward a point about midway of the length of the oven, and at this point is an opening *17* through which the coal may be inserted to form the charge."

Passing by the patentee's description of the advantages of his oven, the

language of the last paragraph of the specifications, a portion of which we have italicized, should be noticed: "It will, of course, be understood that the shape of the roof of the oven may be altered in many ways without departing from the invention, and it may be sloped on straight lines, as indicated in Fig. 1, or on curved and straight lines, shown in Fig. 4, or the roof may be curved throughout, or otherwise so shaped *that the vertical distance between the floor and the roof gradually increases from the doors inward.*" It is apparent that the roof of the Thomas oven, as described in the circular, is of a form which the patentee in the patent in suit recognizes as a form within the description of his patent.

And here it is proper to call attention to what appears to be an error in the plaintiff's brief. It is there stated that "this Thomas oven figures in the history of the Mitchell invention, and its bearing on the issues herein is made clear, not only by the application record of the Mitchell patent, which is printed in defendant's record, volume 2, page 551, but also by the Mitchell interference testimony, also printed in defendant's record, volume 2, commencing on page 343." It does not appear that the Thomas oven, as described in the circular published by him, was the subject of consideration in any way in the history of the Mitchell patent. The evidence of Mitchell in the interference proceedings was to the effect that he had seen the ovens at Coalburg, and those ovens were constructed without a rise in the main arch from both ends toward the chimney or the center of the oven. The reference in the application record of the patent is to a French patent issued to a Mr. Thomas of Paris in 1855. There is no evidence in the case that the Richard Thomas of Carbondale, Ill., in 1881, is the same person as the Mr. Thomas, of Paris, in 1855.

The claims of the patent in suit are as follows:

"1. A coke oven having a substantially level floor and parallel side walls higher in the middle than at the ends, said oven being open at both ends from wall to wall to provide an unobstructed, free passage from end to end, and a crown sloping upward from the ends toward a point about midway of the length of the oven and there provided with a charging opening.

"2. A coke oven having a substantially level floor, end retaining walls each with an opening of the same size as the opening in the other wall, a crown sloping continuously upward from the end retaining walls to an approximately central point and there provided with a charging opening, said crown being arched in a direction at right angles to the length of the oven, and parallel side walls extending through and from one opening to and through the other opening and approximately to the top of the crown adjacent to the charging opening therein.

"3. A coke oven having a central trunnel hole in its roof, the length of the oven chamber and the height of the roof being so proportioned that when the top of a charge of coal deposited by gravity through the trunnel hole reaches said trunnel hole, the charge when levelled off will fill the oven substantially to the level of the draft openings.

"4. A coke oven having a substantially level floor and provided with parallel side walls, higher at the middle than at the ends, said oven being open at both ends from wall to wall to provide an unobstructed, free passage from end to end, and a crown rising from the ends and provided about midway of its length with a trunnel hole."

The first, second, and fourth claims are met by the Richard Thomas circular in every respect, except as to the charging opening midway in the roof of the oven. There were two charging openings and also a chimney for the escape of gases in the Thomas ovens as erected at Coalburg and other places. But according to the testimony of the plaintiff, who saw such ovens, the charging openings were closed during the process of making coke, leaving therefore only the chimney for the escape of the gases. The location of the trunnel hole, which is a chimney as well as a charging hole, in the center of the oven at the highest point of the arch of the roof, was in no way invention, because it was so located in the beehive oven, with which all persons connected with the industry were familiar.

The floor of the Thomas oven was substantially level. It had parallel side walls, which were higher in the middle than at the ends, or the equivalent thereof, to wit, a higher arch in the middle than at the end. The oven was

open at both ends from wall to wall to provide an unobstructed free passage from end to end, and, as clearly shown in the circular, a crown, sloping upwards from the ends towards a point about midway of the length of the oven. Indeed, every element of those three claims was found in the prior art, but not always together.

The third claim of the patent, as appears by the file wrapper, was introduced at the suggestion of the examiner of patents. It claims a construction in which there shall be an uncertain proportion between the length of the oven chamber and the height of the roof. The proportion required by the claim is that, when the top of a charge of coal reaches the trunnel hole, the charge when leveled off will fill the oven substantially to the level of the draft openings. It will be noticed that in this claim 3 there is a claim to an invention without regard to the shape of the roof.

The evidence discloses that there is an established practice in the industry which has apparently arisen to leave Sunday a day free of work in emptying and filling ovens. Each coke oven has at times charges of coal in such amounts as will produce coke in 48 hours, and again has such charges of coal as will produce coke in 72 hours. The 72-hour charge burns during Sunday. The charge, therefore, is different for the time intended to be taken in its reduction to coke. The plaintiff on cross-examination was asked: "If it should happen that a 72-hour charge dumped in without spreading should reach the trunnel, it would necessarily be true, would it not, that a 48-hour charge dumped in without spreading would not reach the trunnel, and further, if a 48-hour charge dumped in without spreading should reach the trunnel, a 72-hour charge would more than fill the oven, or rather the oven would not accommodate it unless spreading were begun before dumping in were completed." His answer is significant: "That is true, and I will further add that I do not think an oven could be built to measure every charge it was intended to receive, as they must necessarily vary."

As already appears, the description of the oven of the patent is meager; but the oven which the plaintiff built in 1906, after his first experiment with an oven which was in form like the Coalburg ovens, was 8½ feet high. It was in pursuance of operations with that oven that application was made for a patent. It was not until later that he built nine additional ovens at the height of 7½ feet in the center. Without going into the details of the proportions of the plaintiff's ovens and those of the defendant's ovens, it appears that, without regard to such proportions, the defendant's oven is lower than the oven of the patent. The consideration of proportions, in passing upon a claim such as claim 3, is of considerable difficulty. The weight of the testimony, however, indicates that the proportion contemplated in the third claim of the patent in suit is met in the prior art. It appears to be unnecessary to refer in detail to such testimony because the subject of proportion, as suggested by the third claim, and even the claim itself, is not given attention in the plaintiff's brief. It is apparent that the patent is so uncertain in its disclosures that the structure of the patent could not be arrived at, except as the result of experiment.

It is urged by the defendant that, if anything, the disclosures and claims of the patent are a mere aggregation of elements found in the prior art, which produce no new result, and the weight of the testimony sustains this contention. The plaintiff replies, however, that, if that be true, why does the defendant continue to use the coke ovens complained of. Plaintiff cites authorities to the proposition that the courts have looked with disfavor upon such a defense where the defendant has made an appropriation and use of the invention covered by the patent sued upon. The facts in this case, however, take the defendant without the rule of such cases. The plant of the defendant, which consists wholly of these ovens complained of, was projected in 1906, and the first 100 ovens were built and put in operation in 1907. The additional 110 ovens, which according to the testimony were projected from the first, were built and put in operation in 1909. The relations between the plaintiff and the parties controlling the defendant company were cordial. Mitchell states in his testimony that at the time of his experiment mechanical operation was the main object. Mitchell and the representatives of the defendant had interviews with respect to the experiments that Mitchell was un-

dertaking, and the first and second ovens which Mitchell built were open to the inspection of all who chose to visit them. His first oven, built in the fall of 1905 and the following winter, had a horizontal crown straight through from end to end. His next oven, built some time in 1906, had the rising crown, and in March of 1907 he had built eleven ovens of which ten had the rising crown and one the straight crown. Mitchell knew that the defendants were about to build a battery of ovens at their new plant. He had knowledge of what the defendant's representatives were doing. He himself admits that he was informed that the defendant was going to "draw" an oven of the type complained of in the spring of 1907.

But it is an inference justified by the spirit of competition existing between manufacturers of a standard product, which implies the acquisition of information as to what competitors are doing, and by the friendly relations between the parties above referred to, that the plaintiff knew what was going on at the new plant of the defendant; yet the plaintiff was silent in all interviews with them and in every other way as to his claim to invention, and made no protest against the action of the defendant until November 12, 1908, when he gave notice charging them with infringing his patent. At that time the first 100 ovens of the defendant had been in operation for over a year. It is no excuse for Mitchell that he withheld all assertion of his claim to invention because of interference proceedings in the Patent Office with one who was associated with him in the common employment at Mt. Braddock. It is true he could not maintain an action against the defendant until after his right was established by the Patent Office; but his failure to assert his right, in order to prevent the expenditure by the defendants of large sums in the construction of ovens, in which he hoped to have a monopoly, tends to establish the good faith of the defendant and to impair the equity of the plaintiff in the present proceeding.

In view of the silence of the plaintiff, it is not to be presumed that the defendants were affected by notice of the contemporary newspaper notices of the plaintiff's tests, especially as they emphasized the novelty of the mechanical means by which the coke was intended to be withdrawn from the ovens. Further, it should be noticed that the plaintiff, after giving such notice of November 12, 1908, delayed bringing suit for perhaps a year and a half afterwards, and delayed beginning the proofs until nearly a year after the suit was brought. The whole conduct of the plaintiff indicates that he did not for a long time believe that he had a patent of any great value.

There is nothing in this case which warrants a decree in favor of the plaintiff. The patent is invalid because of the disclosure of the Richard Thomas publication, if not by reason of other prior uses. It is invalid because it is a mere aggregation of old elements, which, so far as the record shows, does not produce a new and better result. The disclosures of the patent are insufficient to enable one skilled in the art to make the apparatus of the patent without experiment.

The bill must be dismissed, at the cost of the plaintiff. Let a decree be drawn.

Thomas J. Mitchell, Melville Church, and David P. Wolhaupter, both of Washington, D. C. (E. C. Higbee, of Sterling, Higbee & Matthews, of Uniontown, Pa., and Charles M. Clarke, of Pittsburgh, Pa., of counsel), for appellant.

Bayard H. Christy and Christy & Christy, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This case turns upon the validity of patent No. 899,886 granted September 29, 1908, to the plaintiff, Thomas J. Mitchell, for "a new and useful coke oven." The record

discloses no controversy about infringement, but for several reasons that appear in the opinion below the District Court held the patent invalid. A proper understanding of the issue will be promoted by a few preliminary remarks concerning the manufacture of coke, and also concerning the state of the art at the time Mitchell entered the field.

[2] Coke is partially consumed bituminous coal, from which the volatile constituents have been burnt away. The combustion takes place in ovens or closed retorts, free contact with the atmosphere being thus prevented, while sufficient air is easily supplied. Essentially, coke consists of carbon and a residuum of such noncombustible materials as may be present in the coal. If it is made rapidly and at comparatively low heat—for example, the coke produced in making illuminating gas—it is black in color, spongy in fiber, and burns readily; if the heat has been high and more protracted, as in the case of coke intended for smelting, the color is gray, with a semimetallic lustre, the fiber is hard and dense, and it can only be burnt with the aid of a strong draft or blast. Coke may also be described as a partly graphitized carbon, whose fiber has been affected by the escaping and burning gases, so that the coke is lighter than the coal, although its substance is hard and dense. The patent applies in terms to coke ovens generally, but evidently is directed specially to an oven adapted to produce coke for smelting in a foundry or a furnace; and (unless otherwise stated) what we have to say must be understood as relating only to such a structure.

Nearly all of it being fixed carbon, coke is a well-known fuel. Owing to its hardness and density and cellular structure, it has considerable strength, and will bear a heavy load of ore and limestone in a furnace, forming at the same time a layer that affords many passageways for heat and the air of the blast. It has similar advantages in the foundry smelting of pig iron. Under like conditions bituminous coal would be so compressed as to burn with much difficulty. When the coal is sufficiently heated in the oven, the volatile matters are given off as gas, and in the end what is left of the coal is fused into a mass, and its structure is changed. Its silvery appearance is due to the fact that some of the carbon in the gas is deposited on its outer surface. The necessary heat is obtained by burning the gases that are given off during the operation, and in an oven of the open type—that is, with one or more openings in the roof—these gases are immediately burnt in contact with the coal. Such an oven is a nearly closed structure of brick or stone, banked on the outside with clay to keep the heat in, and lined throughout with refractory brick. The coal to be coked is spread in a layer on the bottom, and the rest of the inclosure is built in such a form as to leave a space or chamber above the coal where combustion may proceed. There are several varieties or types; perhaps the oldest and the oven still most widely used being the beehive, whose shape is suggested by its name. A more recent type is rectangular, long, and comparatively narrow, and to this class the Mitchell oven belongs. There are other types and shapes also, to which we shall refer hereafter.

A word may be said about the by-product oven. This is a closed

retort in which a forced draft is used, and the heat is applied indirectly through flues in the walls. This oven also produces furnace coke, but only a part of the gases is burnt, the rest being led away and converted into other useful products.

An important step in the process of coking it to make the walls and roof of the oven hot enough to ignite the coal without the aid of flame or combustible material; after the initial heating and the initial charge, the walls should become very hot and should retain so much of their heat after the charge has been withdrawn that the oven can be recharged almost at once, and ignition will automatically and speedily take place, thus carrying on the process continuously. During the operation the gases are driven off into the combustion chamber above the coal and are there ignited, so that burning begins at the top and extends downward to the bottom of the layer. After the volatile matters have been burnt, the coke lies on the floor of the oven in a coherent and glowing mass, and may be cooled either in place or outside. If the water is applied inside, care is taken to introduce no more than enough, in order to keep the lining as hot as possible. The coke is then ready to be withdrawn, but as it has now become a coherent mass it was for many years necessary to break it up before it could be taken out. This is still necessary in the beehive oven, where the breaking is done by hand, and the coke is pulled out in comparatively small pieces. For several reasons this process is wasteful. It is slow, and therefore costly in time and labor, and it also wastes material, because too large a percentage of the coke is broken into sizes that are not satisfactory for use in a furnace or a foundry. The refuse (which usually goes to the waste pile) is often called "braize" or "breeze"; it includes, not only the small pieces of coke just referred to, but also the ash produced during combustion.

From an early period, therefore, the art had to deal with several important problems, such as the best shape of oven, the best way of applying the heat, the best way of utilizing the products of combustion, and the best way of removing the coke. And this brings us to consider the stage that had been reached when the Mitchell oven was devised. Fulton's treatise on Coke, published in Scranton in 1895, is a mine of information on this subject, and for many of the facts stated in this opinion we are indebted to this useful volume. Just when the beehive oven began to supersede coking in the open air—the "mound" method, resembling the method of making charcoal—we do not accurately know, but it was certainly many years ago. At first these ovens were open-top and rectangular, the top sloping up from each side in the shape of a truncated pyramid to the trunnel or opening, but afterwards the shape was changed to the present form—the round top now rising as an inverted hollow hemisphere, thus affording a very satisfactory combustion chamber. There is no doubt at all that the beehive makes excellent coke, but of course all the products of combustion escape into the air through the trunnel hole, and, as there is only one opening in the side (and that a comparatively small opening), the coke must be broken up before it can be withdrawn. In other respects the beehive

does its work admirably, and has thus far held a largely predominant place in the art.

The Welsh oven is also an old type, and is thus described by Fulton, page 121:

"The main effort in reducing cost was directed to a new plan of coke oven, retaining the principles of the beehive, but planning the new oven, so as to draw the coke by mechanical appliances.

"The Welsh oven consisted of an arched chamber 12 feet long, 7 feet broad, and about 6 feet high.

"One end of this oven is walled up; the other end or front has doors or luted walls. A flue chimney at the closed end of the oven affords egress to the gases.

"The coke is drawn out by a 'drag.' This drag is composed of a main iron bar running the length of the oven and having a crosspiece at the inner end. The whole drag is placed in bottom of oven before the charge of coal is placed in it.

"It remains under this charge of coal until it is coked and ready for drawing out, when a chain is attached to an eye in the drag at front of oven, pulling out the coke, in mass, by windlass or engine power.

"The coke is usually quenched or cooled outside the oven.

"With skill this method of coke manufacture possesses some advantages in the economy of the work in drawing the coke out of oven, without injuriously affecting the physical condition of the coke.

"The cooling outside the oven, by watering, is the chief objectionable feature in this section of the work of coking, as coke watered in this way, if done in a clumsy manner, would contain from 8 to 15 per cent. of water, neutralizing the advantage secured in the rapid drawing of the coke by mechanical means."

These British ovens were used to some extent in the United States.

The Belgian oven (also many years old), which leads the products of combustion under the hearth through flues, is long and rectangular, and is thus described by Fulton (page 139):

"The Belgian coke oven was evidently designed to satisfy three principal requirements:

"First. To meet the condition of coking coals of inferior quality, requiring the economy of heat from the gases by returning them under and around the coking chamber of the oven, through passages and flues, and to retain the oven heat by the rapid discharge of the coke, cooling it outside the oven.

"Second. In the economy of the work of drawing or discharging the coke from the oven by mechanical appliances, in place of the rather slow and expensive methods of performing this work by manual labor.

"Third. Excluding the air in coking the coal as much as practical, so as to save the waste of fixed carbon usually made in ovens admitting the admixture of air in the coking chamber, and in affording an increased percentage of coke from the coal charged in oven.

"The inferior dry coals of continental Europe could only be coked to best advantage in closed ovens.

"It involves, however, the necessity of cooling the coke outside the oven, leaving in this coke 4 to 8 per cent. of moisture, under ordinary conditions.

"Whether the increased product of coke, from the coal charged in these ovens, will compensate for the augmented moisture in the coke, from the necessity of watering it outside the oven, will be considered hereafter in detail.

"On the other side, by this rapid discharge of coke, the oven heat is retained and acts quickly on the newly charged coal, utilizing the small volume of fusing matters in the dry coals. * * *

"Its general design consisted in the economy of heat, in coking the inferior dry coals.

"The width and height of this oven chamber were usually proportioned to meet the requirements of the coals to be coked. The dryer the quality of the coal, the narrower the chamber of the oven. And conversely, the oven was

made wider when the coals inheriting more hydrogenous matters were to be used in coke making."

These Belgian ovens also were used to a limited extent in the United States.

Other ovens may be briefly noticed. In certain respects the French patent of 1855 to Thomas (not the Thomas hereafter referred to) deserves consideration. This oven may be used singly, although ordinarily it would be employed in a group or battery varying in number; if used singly, it would be rectangular, with an arched crown or roof, a door at each end, one door being narrower than the other, the roof sloping upward from the front to the rear and having two charging openings. The Perate French patent of 1854 is also a longitudinal oven with a mechanical pusher to discharge the coke, and only one charging opening in the roof. The American patent to Knab of 1858 is a by-product or retort oven; it is longitudinal, has an arched roof, which slopes upward a short distance from each end (although for the most part the roof is horizontal), and the coke is pushed out mechanically. The Aitken German patent of 1883 is also a retort oven; it is longitudinal, has an arched roof sloping upward at the ends, although the slope is not continuous to the center, and is discharged by mechanical means. The Rive de Gier oven antedates 1850. It is oval in ground plan with doors at each end, the roof is arched lengthwise as well as transversely, and it has one trunnel hole in the center of the roof. The coke is not discharged mechanically. The Wedding device goes back to 1890, and shows an elongated hexagonal oven having doors at each end and three openings in the roof (of which, however, one or two may be closed); and the roof slopes upward from each end for about one-fourth of its total length, while the central half of the roof is horizontal. There are no mechanical means for discharging the coke.

We now come to an item of evidence on which the defendant lays much stress, the Thomas leaflet or advertising circular, whose date of issue precedes January, 1891. It is signed by "Richard Thomas, Patentee, Birmingham, Ala.," and describes the Thomas coke oven and direct loading apparatus. Its publication is satisfactorily proved, and indeed is scarcely contested. The patents were granted in 1881 and 1883, and the oven described in the circular is longitudinal and rectangular, having three openings for charging and the escape of combustion products, with an arched or vaulted roof, and an opening at each end as wide as the oven. The coal is charged from larries or wagons in the usual manner, and is then raked level, the charging openings are closed, and coking goes on. This being finished, the coke may be "quenched" in the oven or outside. Then follows its mechanical removal by a scraper previously set, which draws the coke out in a mass. Further quenching may then be done, if necessary, after which a conveying device carries the coke directly to the railroad car. The circular is illustrated, and the following quotation (which has some omissions not now important) applies to Fig. 4:

"The ovens are built side by side to any desired number, and are * * * 7 feet 9 inches wide in the clear in the front end, and 7 feet 3 inches at the

back end in the clear. * * * They are 5 feet high under the main arch and 36 feet long for coal yielding less than 60 per cent. coke, and 32 feet long when the yield is over 60 per cent. * * * The bottoms are made in the usual way for beehives, the only difference being in the shape of the foundation. In the beehives it is circular, while in the Thomas it is lengthwise of the oven. The side walls * * * are 2 feet 6 inches high from floor to skew back [i. e., the spring of the arch of the vault]. The front arches have a rise of 18 inches, and are 2 feet 6 inches long. A space of three inches is left between the main and front arches. This is to prevent the expansion of the main arch from disturbing the front walls. The main arch has a rise of 2 feet 6 inches and is turned with one course of brick 9 inches deep. * * * The ovens are built some with three charging holes and a chimney at the back, and some with two charging holes and a chimney. * * * If the oven is only 32 feet long with two tracks and charging holes, with the chimney in the middle, the bottom of the oven is on a level. The main arch has a rise of 6 inches from both ends towards the chimney or the center of the oven."

In brief, Fig. 4 shows a rectangular oven, 32 feet long, 7½ feet wide, the front being 6 inches wider than the rear to make discharging easier. The side walls are vertical, but the vault is arched. The doorways are 4 feet high and 2½ feet deep. Just inside, the vault steps up one foot and then slopes upward to the center from either end, rising 6 inches in 13¼ feet, thus increasing considerably the capacity of the combustion chamber. The arched roof has 3 holes, a chimney in the middle, and on either side a charging hole, which is to be covered while coking is going on. The rise in the roof from the end to the center is about 2 per cent., while the Mitchell oven (we may note in passing) has a rise of about 20 per cent. and the defendant's oven a rise of about 14 per cent. The Mitchell patent gives no specific direction on this subject, merely stating that the crown should slope "continuously upward."

Another important structure in evidence is the Coalburg ovens, the property of the Sloss-Sheffield Steel & Iron Company, near Birmingham, Ala. There were 64 of these ovens, built after the Thomas design, except that the crown of the roof was horizontal. Each oven was a rectangular tunnel having parallel sides, an arched or vaulted roof, and end doors as wide as the oven. Each had a short chimney, and two charging holes. There was also apparatus for mechanically discharging, and for loading the coke into cars. Each oven was 37 feet long, 7 feet wide, and a little more than 4 feet high to the crown of the vault. The charging holes were about 12 feet from the respective ends, and the chimney was at the rear. Originally there were ports or flues for the admission of air through the walls, but these were soon abandoned (as Mitchell also abandoned them when he experimented with the Thomas oven in 1906–07). The charge of coal was measured in the larries, and dumped through the charging holes into the chamber, where it was leveled by hand to a uniform bed or layer of proper depth. The operation then proceeded in the usual fashion for 48 or 72 hours, depending on the size of the charge, after which the mass was pulled out as a whole by a drag or scraper, and passed under a sprinkler, where it was cooled before loading in the cars. These ovens were built before 1890, and continued in regular service from that time for more than 20 years; the coke being used in the Steel & Iron Company's blast furnaces.

It will thus be seen that the prior art contains several examples of long, narrow, rectangular ovens, having open ends, rising vaults, or roofs, one or more charging openings, either central or at other points in the roof, and devices for discharging the coke mechanically. Only a limited field seems left for an inventor, and in point of fact Mitchell does not claim to have added anything to the art except a peaked roof. He has other patents covering mechanical appliances in aid of the process, but these are not in issue. Let us see what the patent before us describes and claims. The specification states:

"This invention relates to coke ovens, and has for its principal object to provide an oven of simple construction which may be built, maintained in working order, and operated at a much smaller cost than an ordinary beehive and other types of ovens now in use.

"A further object of the invention is to provide an oven open at both ends for the insertion of a coke pusher at one end, and the discharge of the coke at the opposite end, the top or crown of the oven being inclined or curved upward from a point near each end to a point about the middle of the length of the oven wall, and at this point is a top opening through which the oven may be charged.

"A still further object of the invention is to provide an oven of this type in which the top or crown is inclined or curved upward from points near the opposite ends toward the center to form a combustion chamber for the more perfect combustion of the gases distilled from the coking coal and by which combustion the crown or roof of the oven becomes intensely heated, thereby increasing the efficiency of the oven by reflecting the heat downward on the coking coal, and result in a superior quality of coke, and will, furthermore, permit the consumption of the gases without material waste of the carbon of the coal.

"With these and other objects in view, as will more fully hereinafter appear, the invention consists in certain novel features of construction and arrangement of parts, hereinafter fully described, illustrated in the accompanying drawings, and particularly pointed out in the appended claims, it being understood that various changes in the form, proportions, size and minor details of the structure may be made without departing from the spirit or sacrificing any of the advantages of the invention. * * *

"The shape of the crown is such that the entire charge may be dumped in; the inclination being sufficient to accommodate the angle of pile of the charge of coal to some extent, and after the insertion of the charge the central or highest point is trimmed in order to render the thickness of the layer of the charge approximately equal throughout. The construction of the sloping crown of the oven affords a combustion chamber for the burning of the gases which are distilled from the coking coal, thereby producing the requisite heat for rapid and perfect coking, and the heat is reflected downward on the coking coal, producing a superior quality of silvery coke. The air necessary to support combustion is admitted through both ends of the oven, so that the heat is practically uniform throughout, and the quantity of air admitted may be governed in the usual manner by closing the end openings to a greater or less extent. The charge opening is not closed during the entire coking process, and the gases distilled from the quantity of coal are consumed as rapidly as they are formed, thus maintaining the necessary heat without consuming any of the solid carbon of the coal. After the coking operation is complete, the brickwork at the ends of the oven is knocked down and streams of water are turned into the oven to extinguish the flame and cool down to the proper temperature for discharging the finished product. A suitable pusher is then introduced through one of the openings at one end of the oven and the body of coke as a whole is forced out, thereby producing very large blocks of coke.

"It is, of course, well known that coke in large blocks commands a much higher price than fine or small coke, and is practically essential in foundry work, and it is always the aim of the coke manufacturer to avoid crushing or breaking the coke into small particles. With an oven constructed in accord-

ance with the present invention, the entire body of coke may be discharged practically as one block, and afterwards broken into fragments of suitable size for handling.

"One of the most important features of the invention is the departure from the ordinary beehive type of oven now in common use, where there is difficulty in withdrawing the product and difficulty in controlling even and perfect combustion. The oven forming the subject of the present invention is so arranged that the charge of coal may be dumped in and leveled off within a very short time, while the necessary amount of air to support combustion is allowed to enter at both ends and the heat reflected from the sloped crown is sufficient to insure the quick generation of gases when the operation of coking begins. In the ordinary beehive type of oven, it requires from three to five hours work of one man to withdraw the charge, and a large portion of the coke is broken into comparatively small fragments, while in an oven constructed in accordance with the present invention the entire mass of coke may be forced out in practically a single block, and in less than a minute, thus not only saving time, but also saving considerable expense by preventing the loss of heat, the oven being retained at a very high temperature, so that the coking process may recommence immediately after the dumping of another charge into the oven.

"It will, of course, be understood that the shape of the roof of the oven may be altered in many ways without departing from the invention, and it may be sloped on straight lines, as indicated in Fig. 1, or on curved and straight lines, shown in Fig. 4, or the roof may be curved throughout, or otherwise so shaped that the vertical distance between the floor and the roof gradually increases from the doors inward."

The claims of the patent are as follows:

"1. A coke oven having a substantially level floor and parallel side walls higher in the middle than at the ends, said oven being open at both ends from wall to wall to provide an unobstructed, free passage from end to end, and a crown sloping upward from the ends toward a point about midway of the length of the oven and there provided with a charging opening.

"2. A coke oven having a substantially level floor, end retaining walls each with an opening of the same size as the opening in the other wall, a crown sloping continuously upward from the end retaining walls to an approximately central point and there provided with a charging opening, said crown being arched in a direction at right angles to the length of the oven, and parallel side walls extending through and from one opening to and through the other opening and approximately to the top of the crown adjacent to the charging opening therein.

"3. A coke oven having a central trunnel hole in its roof, the length of the oven chamber and the height of the roof being so proportioned that, when the top of a charge of coal deposited by gravity through the trunnel hole reaches said trunnel hole, the charge when leveled off will fill the oven substantially to the level of the draft openings.

"4. A coke oven having a substantially level floor and provided with parallel side walls, higher at the middle than at the ends, said oven being open at both ends from wall to wall to provide an unobstructed, free passage from end to end and a crown rising from the ends and provided about midway of its length with a trunnel hole."

The following is the substance of the testimony given by the plaintiff's expert on the important points:

The Mitchell oven is long and narrow; its sides are parallel, and both ends are open. It is a tunnel, the top being arched in the usual fashion, but the roof slopes upward from each end to the center, where a trunnel opens into the air, through which the coal is charged and the products of combustion escape. At each end the usual doors are found. These are sealed during the operation, except for holes ad-

mitting the necessary air, which circulates through the oven from each end toward the trunnel opening. The oven is banked and lined in the usual manner. It has only one opening, and through this the whole charge may be dumped down at one time, the peaked roof being intended to afford a combustion chamber above the coal that will be more spacious than if the roof were flat, and whose shape will also be better adapted to promote uniform coking throughout the whole of the tunnel. The shape of the interior is also intended to afford space enough under the trunnel to receive a conical pile of coal, which can be leveled down to a layer of proper depth for one operation of the oven. Leveling the pile to a horizontal layer is the first step, and this is most conveniently done by a machine inserted at one end, which pushes and pulls the pile of coal into the desired position along the hearth. The doors are then sealed with clay, but air openings are left, and the trunnel remains open.

As in other ovens, much heat remains in the walls from the operation just finished, and when the oven is closed, and the air draws in from the openings at each end, combustion begins almost at once. The gases are evolved all along the layer of coal, and the draft tends to carry them toward the center, combustion of course going on all the time. The volume of burning gas increases (as it does in the beehive oven also) as the center is approached. The slanting roof reflects the heat downward, thus helping to produce and maintain a nearly uniform degree of heat along the layer of coal. To quote the language of the expert:

"In other words, the Mitchell oven may be considered as a pair of vertically expanding tubes or tunnels placed end to end and meeting in the center an arrangement which provides for the balanced suction of the central outlet opening drawing from both ends of the tunnel and also gives a progressively increasing capacity from the ends toward the center to provide for the proper combustion of the progressively increasing volume of gas, which requires to be thoroughly associated with the air, in order that the combustion may be complete. It will also be observed that the introduction of the air supply from both ends of the oven subdivides, so to speak, the burning operation into two parts, each having an individual air supply and an individual supply of gas, which tends to promote a more perfect combustion.

"The progressive expansion of the tunnel takes place in a vertical direction, and not in a lateral direction, so that the gradual increase of the size of the oven from the ends toward the center is secured without any lateral expansion in its dimensions. Consequently, the sides of the tunnel remain substantially parallel. This permits, as I have heretofore explained, the leveling of the coal by means of a machine, instead of manually, and it likewise permits the use of a pusher applied to one end of the tunnel to force the coke out at the other end after the coking operation is completed."

He goes on to describe the rest of the operation, but there is nothing peculiar to Mitchell in the following paragraphs:

"Under the conditions just described the combustion of the gases in immediate contact with the upper surface of the line or layer of coal precedes until all of the gas has been expelled from the coal and burned up, such combustion giving a substantial uniform heating of the coal along the entire length of the oven, so that the coking operation is finished at substantially the same time at all points of the oven. In practice this coking operation occupies several days, according to the amount of coal provided in each charge. I believe it is the custom to charge the oven each Monday and Wednesday with coal

sufficient for 48 hours coking, and on Friday with a large amount sufficient for 72 hours coking.

"After all the gas has been expelled from the charge of coal the combustion should cease, leaving the resulting coke in an incandescent condition and of the structure characteristic of coke in distinction from coal, which has been brought about by the fusing of the coal. When the coking operation has thus been completed the doors are opened and streams of water introduced through the open doors to quench the incandescent coke. This is a somewhat important feature of the operation, it being desired to apply just enough water to quench the coke without soaking it, and after it has been quenched it is allowed to remain a sufficient time for the evaporation of any surplus water by the heat retained in the oven walls. It is also important that this quenching operation should not abstract an undue amount of heat stored in the walls of the oven, so that the ignition of the next succeeding charge of coal can take place without a long delay.

"The coke being now quenched and dried, a mechanical pusher is applied to one end of the line of coke and the entire mass thereby forced toward the opposite end and out of the door at that end, where it is caught by a conveyor that delivers it into railway cars for transportation. At some point in its travel from the oven to the car it passes over a screen and the pulverized portions thereof eliminated. It should be mentioned that the side walls of the oven are not exactly parallel, being some two or three inches further apart at the end toward which the coke is pushed, while there is also a slight inclination of the oven floor toward that end. This prevents the line of coke from binding as it is pushed out.

"The oven, as I have heretofore stated, is banked externally with clay, which serves to retain the heat therein, so that, in spite of the exposure of the interior of the oven during the quenching, drying, pushing, and refilling operations, and also in spite of the amount of water thrown into the oven to quench it, sufficient heat is retained in the oven walls, so that when it is refilled with a charge of coal, and the end doors closed, the combustion starts up in a short time and the described operation is repeated."

We have set forth with sufficient fullness, we think, what are claimed to be the peculiar merits of the Mitchell oven; but we are unable to see in it anything except an aggregation of well-known elements. The defendant's brief (page 65) seems to us to state the situation accurately:

"The question then presents itself: The longitudinal oven is old; it is old with a vault built on horizontal lines, and also with a vault built on rising lines, from the ends inward; it is old with wide doors for free discharge, and with narrower doors which necessitate removal of the coke piecemeal. It so happens that the wide-doored ovens shown in the prior patents and literature on the subject have horizontal vaults, and that the ovens with rising vaults have narrower end doors and require to be emptied slowly. There is, however, no structural difficulty in combining a rising vault and a wide end door. It had been done at one end of an oven; it had been done at both ends. What, then, is to hinder any builder of a longitudinal oven from putting in one and the same structure wide doors (at both ends) and the rising vault of Rive de Gier, or that of Wedding? Is this a patentable invention to Mitchell, or mere aggregation? The question must be answered according to the results attained. * * *

"The result must be, first, a better result than the horizontal roofed oven afforded; and, second, a different result from that afforded by the rising vault as it had previously existed in Rive de Gier and in Wedding. Unless these things be true; or, rather, if these things be proved to be untrue, then Mitchell has attained no new result and his oven is merely an aggregation of structural features taken from pre-existing ovens, and is not a patentable achievement.

" 'Merely bringing old devices into juxtaposition, and there allowing each to

work out its own effect without the production of something novel, is not invention.' Hailes v. Van Wormer, 20 Wall. 353, 368."

Essentially the dome of the beehive, somewhat changed in shape, has been placed on the vertical, parallel walls of the old longitudinal oven, and in our opinion the changed shape of the dome has not changed its function or added to its efficiency in a sensible degree. It is also pertinent to observe that the patent gives no instruction as to the angle of the peaked roof, apparently leaving that to be discovered by experiment. Certainly, if the angle of the Mitchell roof were only 2 per cent. it would at once encounter the Thomas circular, and it is very difficult indeed to decide from the Mitchell patent at what angle above 2 per cent. the Thomas oven would cease to anticipate. Where is the dividing line to be drawn between Thomas and Mitchell?

But is it a fact that the Mitchell oven shows marked superiority over others? Without reproducing the details of tests and experiments made with other ovens—notably with the Thomas oven—we may say that the whole record has been examined with care, and that we are unable to reach the conclusion that coke made in the Mitchell oven is so much better than coke made in an oven with a horizontal vaulted roof as to point distinctly to the peaked roof as the source of superiority. And we do not understand it to be denied that beehive coke is in every respect as good as the coke from the Mitchell oven. It is mechanical aids to the process that have been needed, and as these can only be used conveniently with the long narrow oven, this fact may in the end dethrone the beehive; but, so far as the actual burning of the coal is concerned, nothing has yet been discovered or invented that is superior. In the effective language of one of the witnesses:

"The open-end oven of whatever type is not a method of making better coke, but is a better method of making coke. Its value and utility lie in the fact that it can be mechanically operated, thereby eliminating the inefficient and incompetent laborer."

But the open-end oven is free to the world, while, of course, its mechanical additions may be susceptible of many patentable improvements.

There are many minor matters that cannot be discussed without unduly prolonging this opinion. We shall therefore only add that we agree with the District Court that the Mitchell oven does not disclose invention, and accordingly direct the affirmance of the decree.

BUFFINGTON, Circuit Judge, took no part in the consideration and decision of this case.

GRAPHIC ARTS CO. v. PHOTO-CHROMOTYPE ENGRAVING CO.

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

No. 2005.

1. PATENTS ⇐328—INFRINGEMENT—PROCESS AND APPARATUS FOR ETCHING METAL PLATES.

The Levy patent, No. 627,430, for a process of and apparatus for etching metal plates, claims 2, 5, and 7 relating to the process, and claim 20 re-

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

lating to apparatus, as limited by the prior art and the proceedings in the Patent Office, *held* not infringed.

2. WORDS AND PHRASES—"ATOMIZED."
The word "atomized" means, in common usage, the form that liquids assume when projected by a blast of air, gas, or steam, breaking them up into very small particles.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by the Graphic Arts Company against the Photo-Chromotype Engraving Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 221 Fed. 648.

Robert M. Barr, of Philadelphia, Pa. (Otto Munk and Livingston Gifford, both of New York City, of counsel), for appellant.

Howson & Howson, of Philadelphia, Pa. (Charles Howson and Charles H. Howson, both of Philadelphia, Pa., of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The Graphic Arts Company is now the owner of patent No. 627,430, which was applied for in January, 1899, and was issued on June 20 of the same year to the assignee of Louis F. Levy, the inventor. The patent is for improvements in the art of etching metal plates, and, although part of the specification has been influenced by the fact that the inventor had especially in mind the photographic method of transferring the design to the plate, much of the specification and all the claims apply also to any plate that is to be etched by the use of a mordant, or liquid erodent, whether or not photography has been one step in the process. The specification begins by saying:

"This invention relates to a process of and apparatus for producing etched metal plates, more particularly such metal plates as are used in photomechanical engraving or such branches of the art, where metal plates are etched by acid or other liquid erodent to form in the plates lines, furrows, indentations, or striations for the production of printing-surfaces.

"The object is, by the employment of a mordant, to produce a printing-surface upon metal in which the indentations or lines produced as the result of the process are of a more perfect character than those produced by the means ordinarily used; also, to reduce the cost of production and obviate many of the objections incident to the processes and means heretofore employed."

There are 30 claims, divided into two groups, one for a process and the other for an apparatus; and the defendant is charged with infringing three claims of the first group and one claim of the second.

"2. The process of etching metal plates, consisting in projecting a mordant, in atomized form, upon a plate having thereon a design, which plate is maintained within an inclosed space, the surface to be etched being substantially at right angles to the direction of projection of the mordant, substantially as set forth."

"5. The process of etching metal plates by a mordant, which consists in atomizing or spraying the mordant upon the surface of a prepared plate, moving the plate while it is being etched to change its position with respect to the atomizer, for the purpose set forth."

"7. The process of etching metal plates having thereon a design in resist,

which consists in projecting an atomized erodent against such prepared metal surface to at the same time that the etching proceeds absorb the heat which arises from chemical reaction, whereby heating of the resist is obviated."

"20. In an apparatus for the production of designs in metal plates by etching, the combination with an etching-box having means for sustaining therein a plate, a tank for the mordant, an air-chamber within the etching-box, and means for projecting the mordant against the plate."

The District Court dismissed the bill on the ground of non-infringement. 221 Fed. 648.

[1] We do not agree with the argument that the invention in question is primary, and should therefore be allowed a wide range of equivalents. On the contrary, we think the scope of the patent, efficient as it no doubt is, has been much restricted, both by the prior art and by the proceedings before the Examiner. It is well known that the art of etching, strictly so called—the use of acid to bite a design on metal—is very old; we need only recall the fame of Rembrandt, who is still one of the foremost names in the history of engraving, although he died nearly 250 years ago. From the beginning, the essence of the process has been to protect part of the plate by some substance that can successfully "resist" the attack of the acid, and to leave exposed so much of the metal as will outline the design after the biting has taken place. Under the date of 1767 Diderot's Encyclopedia contains an illustrated article showing unmistakably that before the middle of the eighteenth century it was old to prop the plate up or suspend it, and to flow or pour the acid upon it until the operation was finished. The same article shows that it was also old to collect the acid in a receptacle for repeated use, and to turn the plate now and then for the purpose of avoiding "undercutting" of the raised surfaces and of promoting uniformity in the biting effect. One of the plates illustrates how to apply the acid by confining the plate in a closed box, or portable chamber, that is held on the knees of the operator and is rocked to and fro by hand, the double object being to protect the workmen from fumes and to keep the acid moving so as to promote uniformity in biting. This is the "tub" method, which has never been completely superseded, and indeed is probably used by a majority of etchers to-day, in spite of the fact that for a good many years more than one machine has been devised and has done efficient work. There are mechanical devices for rocking the plate, but otherwise the tub method has persisted with little, if any, change, and has been used in etching half tones and other varieties of photographic plates, as well as plates of the older methods. Indeed, the record contains little evidence to show that the patent in suit has met a long and acutely felt want, or is anything else than a device of rather narrow range.

Without going into the details of other publications or of earlier patents, it is enough to say briefly that before 1899 it was old to use a box or a closed chamber, with or without ventilating means, mainly in order to protect the workmen; and it was also old to spray or rain the acid by low pressure upon the plate—which might be placed either vertically or horizontally—instead of using the tub method of immersion. But we may quote Anthony's Photographic Bulletin of June, 1896, as sufficiently describing how the acid might be applied:

"In the January number of the bulletin, page 29, was this paragraph:

"'I have tried electric and various other means to hasten the operation of etching plates in relief, and am convinced that the quickest method will result from letting the etching solution fall like rain from a height on the plate or plates to be etched. Now, who will devise a means of pumping the etching fluid to a height, so that it can be used over and over again, and also separate the solution while falling into drops?'"

And the Bulletin then goes on to repeat the following comment by a London publication:

"Anent the note from Anthony's Bulletin by Mr. Horgan, evidently he has taken the idea from the old French method of etching, yclept, 'eau forte à couler,' where the plate was placed at an angle of 45 degrees, and the etching fluid dashed upon it. Amateurs say that etchings done by that method have something superior about them to the ordinary plates, where the fluid is left on the plate. Most likely the raison d'etre of this is that the metal, coming in contact with the air during the time that the biting is carried on, is attacked more vigorously and cleaner. I would suggest that plates to be etched are put in a bath, which is stood at an angle of 45 degrees, or thereabouts, and at the lower corner place a vessel like a watering can, but, of course, acid proof. Now the etching fluid, contained in a similar receptacle, is poured over the plate, and, running down, is caught in the first vessel. As soon as the whole of the mordant has been used, the empty receptacle is placed underneath, and the mordant is poured over from the other one, and vice versa ad lib."

The writer in the Bulletin then describes a process of dropping which he himself had devised, prefacing it by the following paragraph:

"The idea of dropping the acid mordant on the plate to be etched would naturally come to one who has rocked an etching bath and watched the acid flow back and forth over the plate, the etching solution operating with the greatest energy on the tops of the lines, and least in the hollows between the lines. Then, when one thinks of the powerful abrading action of sand when dropped from a slight height on hard substances, the idea of dropping the acid is suggested. I, however, remember seeing, when a boy, how the raindrops from the shingles of our roof had bored holes in the stones on which they had fallen for years. So I felt that dropping acidulated water on a metal plate from a height would dissolve the metal away quicker than by simply letting it flow over it."

During the last 30 or 40 years the word "etching" has been expanded to include the sand-blast process, which uses no acid, but relies on abrasion by sand, emery, or a like substance. By driving a stream of these hard particles, either by steam, air, water, or other gaseous or liquid medium, or by the propelling force of a rapidly revolving fan or drum, a design may be outlined on metal or other substances. The degree of force required to operate the blast successfully will vary as the object or the other circumstances of the operation vary. It seems to be agreed that the sand-blast art begins with the Tilghman patent of 1870, but we shall confine our attention to the later and more significant Truchelut patent. This was first issued in France in May, 1895; and after reciting as follows:

"For the engraving or grooving of metals, marble, stone, horn, ivory, etc., three processes are now known. The first consists in removing by means of a scoop, etching tool, or blunt body, the part to be engraved; for the second, chemical products such as acids are used, the dissolving action of which produces a result less beautiful but more economical; the third, an object already of several brevets, consists in projecting, mechanically, a hard powder against a friable body, such as glass and marble, which stipples the latter and produces by its multitude of microscopic points, the deepest engraving in a

few moments. Unfortunately this last process, the most advantageous, is useful, as we have just said, only for friable objects, but is not practicable for malleable bodies such as metals"

—the patentee proposed to combine abrasion and chemical action. He stated the principle to be:

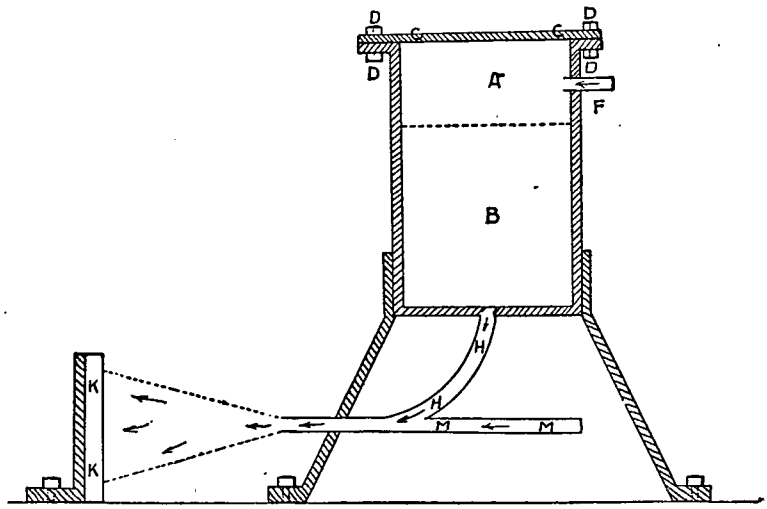
"We have thought, in order to arrive at a good result, and it is this which is the object of the present invention, to combine this scraping action with a solid or liquid ingredient capable of producing upon the body to be engraved a chemical dissolving action of the kind of engraving termed 'acid' engraving, which we have above indicated. It follows that by these two combined actions the chemical body produces its effect more easily, the part to be engraved being continually cleaned (scraped) by the sand."

And he then proceeded as follows:

"Given the principle which we have just described of this discovery, the form and the size of apparatus can be infinitely varied; it operates simply by projecting a powder and a body chemically attacking the object to be engraved. This powder can equally produce the two effects. To give an example, we will cite the perchloride of iron which, projected with force against copper, produces a very rapid action. Every chemist will understand that we can use a variety of powder and materials which, slightly damp, have a chemical action upon the body to be operated on. These powders and these materials vary infinitely and are known to every chemist. As to the employment of a liquid, and an inert material, such as sand, emery, etc., we can utilize the same liquids which are used in present engraving upon similar substances. Thus, giving still another example, we can take azotic acid for zinc and copper; aqua regia for steel, gold, silver, platinum; hydrochloric acid for aluminum, horn, ivory, marble, and potassium for wood; hydrofluoric acid for glass, slate, granite. We repeat, the first chemist met will indicate the sort of liquids which will best suit for the material to be engraved.

"We can use as a resist in all processes, such as albuminous or charcoal, bitumen of Judea, or simple litho- or typo-graphic resist, all processes actually in use among engravers."

His apparatus was very simple, as will be seen from the accompanying cut and the description of the patent:



"This apparatus consists of a vessel, *A B*, arranged like an autoclave; raising the cover, *C*, we introduce the previously described substances, and close the cover by screwing it firmly upon the vessel by means of the bolts, *D*. By the pipe, *F*, compressed air arrives which serves to facilitate a humid or aqueous mixture of sand and chemical product. This leaves the vessel by the tube, *H*, at the lower part of the apparatus, and is projected violently against the object to be engraved placed at *K*, by means of a current of compressed air arriving by the tube, *M*. Under these conditions the sand and the acid are constantly renewed. It is certain that the jet can be produced in all directions, in order to engrave an object placed vertically, horizantally, below or above."

In January, 1896, a provisional specification was filed in England (completed later in the year) substantially to the same effect; and in the same month the inventor took out a German patent, with the following claim:

"A process of etching characterized by the fact that a hard powdered substance in combination with a solvent acting chemical liquid is projected with great force against the surface to be etched to simultaneously produce an etching action in mechanical and chemical manner."

In May, 1896, he filed the following certificate of addition to his French patent:

"Since the brevet I have made numerous experiments with my general process of engraving. I have employed the most varied materials in order to arrive at the best results; that is to say, I have sought active products which, projected violently against the surface to be engraved, exert there simultaneously a mechanical and scraping action, and a chemical and dissolving action. So much for the moist mixture described in details in the brevet.

"But I have discovered during my work that in certain cases I can dispense with the hard bodies reduced to powder which I mix with the liquids. Under very high pressures, in fact, the liquid alone projected against a body to be engraved acts in a mechanical manner and removes the molecules, while chemically dissolving the surface. Consequently I can engrave, according to my new process, without mixing hard powder in the dissolving liquid."

And in June of that year the following addition was made to the German patent:

"Further experiments have shown that in certain cases the employment, in etching, of a mixture of liquid and finely powdered substances can be entirely dispensed with. Furthermore, it will suffice to direct the liquid alone, under great pressure, against the surface to be etched, whereby it will act in similar manner, and, indeed, by the great pressure, in a mechanical manner, and chemically by dissolution. According to the foregoing process one is in a position to etch a desired surface, by projecting the desired liquid, finely divided, and under great pressure, against the outer surface without having to mix the liquid with a hard powder.

"Patent Claim.

"A variation of the process described in patent, No. 89,146, characterized by projecting, under great pressure, a chemical liquid alone which will have a dissolving action for the purpose of etching and without the addition of solid substances, against the surface to be etched."

In our opinion this patent—to say nothing of others—occupies a good deal of the ground claimed by Levy. How far Truchelut was justified in believing that these finely divided particles would have an important mechanical effect during the few minutes required for the acid to act we are not prepared to say. But at all events, it is

evident that his "violent" action and "very high pressures" are phrases that must be allowed some elasticity. He specifies no pressures (and neither does the patent in suit), not even a range between maximum and minimum, and says nothing about the best or preferred distance between the plate and the nozzle; but we think it plain that a skillful etcher could not fail to see that the degree of force, like the distance of the plate or the strength of the acid, should be adapted to the kind of work to be done. Of course, the resist must be preserved, and the acid should also be properly distributed. And we regard it as entitled to weight that during the course of this litigation a crude machine for experimental use has been built after the instruction of the Truchelut patent, and has done excellent work, even on photographic plates, at pressures ranging between 2 and 15 pounds, and at distances varying from 18 inches to 4 feet between the plate and the nozzle.

The Patent Office held a similar opinion concerning the limiting effect of the Truchelut invention. The Levy patent was preceded by three applications—probably to be regarded as continuous, although two of them were abandoned—running in time from November 5, 1897, to June 20, 1899, the date of issue; and the file wrappers show that Truchelut was continually cited against the applicant, and that Levy made frequent attempts to escape the reference. But in several particulars he acquiesced in the position of the examiner, and was in the end obliged to confine his patent to the use of an atomizer in a closed space, the inclosure having a particular and defined object. When the application finally emerged from the Patent Office, the specification contained the following statements, inter alia:

"The present invention includes an essentially new process of applying the mordant to a prepared plate, which mordant is projected and atomized upon the plate to form therein, where not protected by the resist and, after a certain depth is etched out, cupped or concave indentations or lines. The carrying out of the process embodies the use of compressed air and ejector-nozzles for projecting the mordant in the form of atomized spray upon a prepared metal surface, so that the mordant which is projected thereon will drop therefrom without flowing, the plate and atomizers being within a chamber or etching-box, so that the compressed air used to protect the acid or mordant will be permitted to expand in the chamber to reduce the temperature thereof and absorb the heat which is given off by the chemical action of the erodent on the exposed portions of the plate. The chemical combination of the mordant with the metal is accelerated by the dynamic force of the impact, which causes each atomized particle of the mordant to become practically saturated with the metal base instantly upon contact. This results in eroding or cutting away the metal in the direction of the impact faster than the same action proceeds laterally, so that much or all of the required vertical depth may be etched before the lateral action of the mordant can materially affect the work. Moreover, the forcible impact of the atomized spray, besides accelerating the chemical combination of the mordant and the metallic base, prevents adhesion to the plate of bubbles of the hydrogen gas and scum of metallic oxide, which are developed by the chemical action and which in ordinary practice are removed by the workmen with a brush; also, by the use of compressed air for projecting the mordant, the heat evolved by the chemical action of the mordant on the plate is absorbed by expansion of the air in the chamber, thus keeping the chamber and the plate cool, so that a stronger mordant than is usually employed can be used without detriment to the resist. * * *

"In some character of work the plate may be etched to a sufficient depth without applying other than the original resist thereto, and in such work the

position of the plate in the etching-box with respect to the distance from the atomizing-nozzles may be varied as the etching proceeds.

"In practice the etching fluid is impinged upon the plate in the form of a spray of minute particles, which do not affect that portion of the plate which is covered by the resist; but where the design on the metal is more or less broadly exposed, the mordant or etching fluid collects and adheres, depending therefrom in the form of spherical drops, which are constantly being added to by fresh accretions. The mordant which thus adheres to the plate is kept in motion by the impact of new particles of the spray, and the particles of metal which are removed by the mordant fall to the lower portion of the depending globules, so that the particles which are removed from the plate fall immediately therefrom. The tendency of a drop of etching fluid or mordant, depending from a plate maintained in a horizontal position, is to assume a spherical form, and this of itself, after the plate has been eroded to such depth as to give effect to the drops, tends to cut a concave or cupped depression, while avoiding lateral erosion or undercutting. Etching by projecting the mordant in the form of spray upon the metal effects a great gain in rapidity of operation over the methods usually practiced, as a much stronger etching fluid may be used. The chemical action of the mordant proceeds faster vertically or in direction of the impact than otherwise. The impact of the minute particles of the mordant does not disturb the resist which forms the design, and the heat generated by the chemical action of the mordant upon the plate is absorbed by the compressed air as it expands, which keeps the mordant, the resist, and the plate cool. With the apparatus shown the air which has been previously compressed is allowed to expand and circulate in the etching-box so that the etching fluid which drops from the plate passes through a body of cooled air into the tank from which it was taken, and the fumes which are given off by the process of etching are carried away by the ventilating-pipe.

"In practice the minute particles of the acid or mordant impinging against the plate have their normal force or chemical affinity enhanced by the force of their impact, which results in each particle of the acid or mordant becoming saturated with the metallic base immediately on contact with the latter, and the mordant thus loses the power of further dissolving the metal. Each succeeding particle impinges in the direction in which the etching is desired to proceed, and the process may be safely continued to a depth beyond which the finer and closer lines of the design would become too frail to stand the strain of printing were the metal undercut.

"The rapid decomposition of the metal by the acid develops an amount of heat which would soon warm the plate to a degree where the resinous resist would soften and give way; but this is prevented by the absorption of the heat evolved by the expansion of the compressed air in the chamber, the expansion being sufficient to absorb even more heat than is developed on the plate, so that the plate and etching liquid is kept quite cool. A further advantage resulting from the use of a chamber or etching-box is that the gases and fumes which are so abundantly generated by the rapid chemical composition of the metal are carried off by the air which escapes through the ventilating-pipe, which pipe may lead to a chimney, and in this way the workroom is kept free from these deleterious vapors. * * *

"In the preparation of a zinc plate for etching the design is produced on the plate in some fatty ink by the usual photographic process. The plate is then further prepared by first meting into combination with the ink image some resinous powder to strengthen the image or design against the action of the acid, the open parts of the design or where the plate is to be etched being left exposed, such steps in the process being such as are usually practiced. My process has to do principally with etching such a prepared plate to produce therein indentations, adjacent to which are the printing-surfaces from which an impression similar to the design can be made, and it is obvious that the design which has been produced on the plate may be readily destroyed, either by abrasion, which would remove the resist, or by heat, which would soften or melt the resist. When a plate is etched by the usual means, the depression or lines are not only cut into the plate vertically, but also sidewise,

which results in undercutting and in the production of depressions in the plate, the surfaces adjacent thereto being serrated, or, as it is technically called, "rotten."

"The apparatus which I have shown is one which may be used for commercially carrying out the process, and it may be varied in many particulars. For instance, where water under sufficient pressure can be had, the water-tank and connections therefrom may be dispensed with. Other means may be used to supply compressed air to the nozzles of the atomizers, and any suitable form of atomizer may be used for projecting the mordant upon the plate."

Without taking up the file wrappers in detail, we think the chief modification made by the applicant to avoid the Truchelut reference may be fairly stated as follows:

He first tried to patent a process covering broadly the projection of an atomized mordant upon a plate that stood substantially at right angles to the stream of particles. Truchelut was cited against him, and he sought to differentiate by amending the claim so as to include maintaining the plate within a closed space, and by amending the specification so as to define the function of the space, namely to allow the compressed air or similar fluid to expand, in order to absorb the heat caused by chemical action, thus cooling the plate, lessening the risk of overheating the resist, and permitting the use of a stronger acid. After these amendments the patent was granted, and (when we recall that applying the acid in a closed space was very old) Levy is hardly in a position to complain that the old inclosure is being used for the old purpose, and not for the purpose described in his specification. Westinghouse v. Boyden Co., 170 U. S. 558–560, 18 Sup. Ct. 707, 42 L. Ed. 1136; Krupp v. Midvale Co. (C. C. A. 3d) 191 Fed. 610, 112 C. C. A. 194.

It is perhaps not unlikely that Levy may have overestimated what he calls "the dynamic force of the impact (of) each atomized particle." These particles must be almost, or quite, microscopic, and we incline to believe that they are carried along and enveloped rather than projected. In the striking phrase of Prof. Chandler, the defendant's expert:

"They acquire no velocity of their own. They are not like little bullets shot out of a gun, which plough their way through the air. They are like passengers in a railroad train, or in a ship."

It would seem to follow that when the plate is reached, the enveloping air continually moving and being deflected interferes with such mechanical force as might otherwise be exerted by these minute particles. But the fact appears probable that in any event such particles would exert very little force during the short time required for the process. A body must have momentum, both weight and velocity, before its impact can have much effect. The blow of such particles can apparently be little more efficient mechanically than the blow of a feather. Indeed, if the impact were really forcible, the resist would be much more likely to give way than the metal. And Levy may also have gone somewhat astray about the cooling effect produced by the expansion of his compressed air. We merely note these matters in passing, for upon both the subjects just referred to we are not helped by the evidence as to facts, and the opinion evidence is not fully in

harmony. But in any case, these were the patentee's theories, and his process was devised in reliance upon their soundness. He could not have obtained his patent without using the closed space to expand his compressed air for the objects stated, and upon familiar principles he cannot now treat this element as of slight or no importance on the subject of infringement.

[2] On that subject little more need be said. The defendant's apparatus is constructed under the Holmstrom patent, No. 721,445, issued in February 1903. This machine also produces excellent results, but it does not use compressed air at all, or any other propelling or carrying vapor; and, while it divides the acid into a spray, the liquid is not "atomized" in the definite sense borne by that word in the plaintiff's patent. And of course there is no cooling of the plate by expanding air. We agree with Prof. Chandler that in ordinary use "atomized" has a special and well-known meaning, and expresses "the form that liquids assume when they are projected by a blast of air or gas or steam." What happens appears to be this: The air, gas, or steam, breaks up the liquid into very small particles, and carries them along to their destination. A well-known example is the throat-spraying device to be found in the shop of any druggist. And that Levy had these facts in mind is clearly shown by the means he adopts to secure his spray, namely—

"by blast of air through the central tubes of the nozzles, so situated with regard to the surrounding tubes, the lower ends of which are immersed in the mordant, that the blast of compressed air operates to draw the mordant up out of the mordant tank and produce a blast of minute particles supported and carried along by the air-blast."

The defendant's machine does not "atomize" the mordant at all, and does not use air or gas or steam to project the acid against the plate. It throws, or dashes, or splashes, the mordant against the plate by employing a rapidly turning winged shaft or spreader, this being made of stoneware, extending across the chamber, and revolved from the outside. At rest the edge of the wing dips slightly below the surface of the acid and the plate faces the shaft in a slightly inclined and almost vertical position. In motion the spreader acts as a scoop to pick up and hold a certain quantity of the acid, throwing it by centrifugal force across the chamber and splashing it over the whole of the opposite side. When the acid leaves the spreader, its form is a thin sheet as wide as the spreader itself, probably 2 feet or thereabouts. As this sheet is thrown off into the chamber, it breaks up into streams and drops varying in size and shape that are dashed against the surface of the plate. The acid is not "atomized," but is rained, and this rain leaves the edge of the spreader at different angles, and is projected against and over the surface of the plate as well as the rest of the side or wall, flowing back into the tank after subjecting the plate to a fairly uniform treatment. This is not the same operation as the process of the patent, for the defendant's spray is not the minute, uniform spray of the patent, and it does not carry with it expanding compressed air for the purpose of keeping the plate cool.

With regard to the infringement of apparatus claim 20, we also agree with Prof. Chandler, whose testimony is as follows:

"The etching-box or chamber, *B* (of the patent), is another separate vessel open on one side permanently, and with a cover on the other side, which is presumably movable. This box, *B*, is inverted so that the open side of it goes down into the tank which contains the mordant, its edges resting on the bottom of the tank. Also, resting on the bottom of the tank but within the sides of the box, *B*, is the air-chamber. This air-chamber is not an empty space, as would appear from the diagrams. On the contrary, whenever the apparatus is in use, this air-chamber is filled with compressed air. It is a reservoir for compressed air, and, more than that, it is a distributor for compressed air to the 36 nozzles shown in the diagram, which constitute the means for projecting the mordant against the plate. The air-chamber, therefore, of the patent is not merely an empty space in the corner of a box or a room, in which an operation proceeds, nor is it the whole space in the box or the whole space in the room in which an operation takes place. The air-chamber of the patent and of claim 20 is a special device of comparatively small dimensions immersed beneath the surface of the mordant, covered by the mordant, where it sustains as well as feeds the nozzles. There is no such device in the apparatus of defendant. It has no use for such a device; it has no compressed air to put into it, nor has it any use for compressed air. It appears, therefore, that the defendant's apparatus is not the apparatus of claim 20, because it has no tank and it has no air chamber such as the claim calls for."

As the defendant does not infringe the claims in suit, the decree is affirmed.

LION TRACTOR CO. v. BULL TRACTOR CO.

(Circuit Court of Appeals, Eighth Circuit. February 12, 1916.)

No. 4481.

1. EQUITY ⟸94—PARTIES—RULE OF FEDERAL COURTS—"INDISPENSABLE PARTY."

It is the established rule in the federal courts that a suit in equity may proceed without the presence of all proper, or even necessary, parties, and that only "indispensable parties" must be joined, who have such an interest in the subject-matter of the controversy that a final decree cannot be rendered in the suit without injuriously affecting their interests, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 252; Dec. Dig. ⟸94.

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

2. EQUITY ⟸94—PARTIES—NECESSARY AND INDISPENSABLE PARTIES.

Persons who have disposed of all their interest in the subject-matter of a suit in equity, and who cannot be affected by the decree, are neither indispensable nor necessary parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 252; Dec. Dig. ⟸94.]

3. PATENTS ⟸195—ASSIGNMENTS—CONTRACT TO ASSIGN—PATENTS FOR IMPROVEMENTS.

A patentee, who has sold and assigned his patent for a valuable consideration, a part of which is his employment by the purchaser for the

purpose of making improvements on the invention, may bind himself to assign any patents for such improvements to his employer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 272–274; Dec. Dig. ⊂⊃195.]

4. INJUNCTION ⊂⊃161—PRELIMINARY INJUNCTION—DISCRETION OF COURT.

The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and its action may not be reversed by an appellate court without clear proof that it abused its discretion.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 347; Dec. Dig. ⊂⊃161.]

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Suit in equity by the Bull Tractor Company against the Lion Tractor Company. From an order granting a preliminary injunction, defendant appeals. Affirmed.

This is an appeal from an order of the District Court for the District of Minnesota, granting a preliminary injunction enjoining the appellant from manufacturing, using, or selling the gasoline engine or tractor known as the "Lion tractor," embodying the construction and combinations set forth and claimed in the application for letters patent of the United States No. 865,463, filed by D. M. Hartsough, on October 7, 1914, or any traction engine or tractors embodying any of the constructions, or any of the distinguishing features of the so-called "Lion tractor," designed and invented by D. M. Hartsough, while in the employ of the plaintiff, from January 12, 1914, to November 13, 1914. The material allegations in the complaint, so far as they are necessary for a full understanding of the issues involved on this appeal, are:

That P. J. Lyons, the president of the plaintiff corporation, the Bull Tractor Company, had before the organization of that corporation been president of the Gas Traction Company, which was engaged in the manufacture and sale of a gasoline engine, known as the "Big 4," and has for a number of years been, actively and constantly, engaged in the manufacture and sale of gasoline traction engines, and thereby became personally well known in connection with the manufacture and sale of the latest and best types of such engines, so that the use of his name in connection with the manufacture and sale by plaintiff of such engines has become a valuable asset to the plaintiff.

That one D. M. Hartsough was the inventor of the gasoline tractor known as the "Big 4," and was one of the promoters of the company which first manufactured it. He was also the inventor of another traction engine, the one known as the "Bull tractor," also manufactured by the plaintiff. That on August 20, 1913, P. J. Lyons and one P. H. Knoll were copartners under the style of Lyons-Knoll Investment Company, and on that day they entered into a contract with Hartsough, whereby he agreed to convey to them the exclusive right to manufacture and sell in the United States the traction engine described as the "Little National tractor," and this contract was on January 6, 1914, assigned for a valuable consideration by Lyons and Knoll, together with all rights conveyed to them by Hartsough, to the plaintiff, a corporation formed for the purpose of engaging in the manufacture and sale of these tractors.

That many changes and improvements were made in the traction engine referred to in the contract with Hartsough, which was put upon the market on January 6, 1914, under the trade-mark of "Bull tractor," and this tractor was extensively advertised. That the uniform retail price for which this tractor is sold is $395, which was much less than tractors of that kind had theretofore been sold. The contract provided that, if the complainant complies with certain conditions, mentioned in the contract, for six months, then the contract shall remain in force as long as the parties comply with the terms of the

contract, and Hartsough bound himself that "he will not, during the life of the agreement, connect himself directly or indirectly with the manufacture or sale of any similar competing machine, or which is an infringement on that machine."

That P. J. Lyons, one of the parties to the original contract, is president of the plaintiff company, and has been since it was incorporated, and before that time had been president of the Gas Traction Company, which had manufactured the gasoline traction engine known as the "Big 4." That said Lyons had, by reason of his connection with these companies, become well and favorably known, personally and by reputation, throughout the United States, to those contemplating the purchase of gasoline traction engines, to a greater extent than any other person engaged in the manufacture and sale of such engines, and that this reputation is a valuable asset belonging to the plaintiff now, so much so that the use of the name "Lion tractor," or any name of the same or a similar sound, would lead many purchasers to believe that it is manufactured by the company with which he was connected. That, before the plaintiff company was organized, Lyons and Hartsough had terminated their connection with the Gas Traction Company. That certain individuals, mentioned in the complaint, organized a company called the "Hartsough Tractor Company," which name was afterwards changed to "Lion Tractor Company," which was done for the purpose of misleading the public into the belief that the tractors which they were selling were those made by the plaintiff and Mr. Lyons.

That on January 12, 1914, Hartsough entered into a written contract with the plaintiff, by which he became associated with it in the capacity of mechanical adviser, his work to consist in giving assistance in the construction of plaintiff's tractor and to improve, simplify, cheapen, and accurate said tractor, and that he would commence the erection of an improved Bull tractor, to be built outside of plaintiff's factory, the expense of the experiments and building of such tractor to be paid by the plaintiff. It was further provided, that this contract was in no wise to alter, change, or amend the prior contract with Lyons & Knoll, or the plaintiff. Royalties were to be paid on both designs at the same rate as agreed upon in the first contract of August 20, 1913. There was also a provision in that last contract that the plaintiff could cancel the same if it desired to do so, the cancellation to take effect 30 days after notice thereof. On October 13, 1914, the plaintiff gave notice of cancellation of the second contract to Hartsough, and paid him in full for his services and expenditures up to November 13, 1914, the expiration of the 30 days.

That, soon after the second contract had been made with Hartsough, Hartsough informed plaintiff that he had begun work of completing an improved tractor, and presented his bills, which amounted to $2,434.36, to the plaintiff, all of which was paid by the plaintiff, who also paid him his salary for the entire time. That thereafter Hartsough exhibited to the plaintiff an incomplete two-wheel gasoline traction engine, upon which he was then working under the contract of January 12, 1914, stating that he would have the said engine completed, to be tested in a short time. That in September, 1914, Hartsough informed the plaintiff that he was building for it under the contract of January 12, 1914, a gasoline traction engine, that could be manufactured at an expense of $30 to $35 less than the Bull tractor, and was more effective. That about a week later he showed them that engine, and it is the same identical engine now designated by the defendant as the "Lion tractor," and on November 12, 1914, Hartsough made a test of this new engine in the presence of the officers of the plaintiff.

That by reason of the last contract, and the fact that all the expenses thereof, as well as the salary of Hartsough, were paid by the plaintiff, it is the owner thereof; but the defendant claims it as its property, designating it as the "Lion tractor," and that on October 25, 1914, the defendant advertised this tractor in a number of newspapers. In that advertisement it was stated that the defendant, then doing business as the "Hartsough Tractor Company," had been formed to manufacture and sell the tractor or engine invented by Hartsough, known as the "Lion tractor," and continued to advertise the same in a large number of newspapers. It also offered to sell this

"Lion tractor" for $50 less than the price at which the plaintiff sells its "Bull tractor."

That this was the first notice the plaintiff had that Hartsough had violated his agreement with it, and thereupon they immediately notified Hartsough, as well as all the parties composing the Hartsough Company, that the Bull Tractor Company had the exclusive right to manufacture and sell this machine in the United States, and called upon Mr. Hartsough to carry out the terms of his contract with them, and that, unless the defendant immediately abandoned the attempt to put this machine on the market, an action would be instituted to enjoin them.

That on October 7, 1914, Hartsough applied for letters patent upon the gasoline traction engine called the "Lion tractor." That before that time Hartsough had, without the knowledge or consent of the plaintiff, and in violation of his covenants contained in his contract with plaintiff, entered into negotiation with the said parties, comprising the defendant corporation, for the sale, assignment, and transfer to them of a half interest in the so-called "Lion tractor," for the use and benefit of the defendant.

In the contract made by Hartsough with these parties it was expressly provided: "The parties hereto, previous to the signing of this contract, have examined the application for letters patent, also the applications for letters patent on former tractors designed by Hartsough, and examined the contracts conveying the said rights to Lyons-Knoll Investment Company and the Bull Tractor Company, and agree that all expenses necessary to defend our joint rights in and to the above tractor, patents, and improvements, its manufacture and sale, shall be borne at the sole charge and expense of said corporation as above organized." This contract was made with one W. B. Ewing, who was to hold it for the use and benefit of the defendant corporation, to be formed, and which was formed, later.

That Hartsough and the defendant had a disagreement, which resulted in Hartsough instituting an action in one of the state courts of the state of Minnesota, for the purpose of canceling his contract with Ewing and the defendant.

That the purpose of the defendant in adopting the name of "Lion tractor" was with the intention of causing confusion between the business of plaintiff and its business, and it has caused such confusion, to the great detriment of the plaintiff. That the defendant has no right to the said so-called "Lion tractor," or to any invention embodying, or to any application for a patent, or to any patent that has and may hereafter be issued thereon, or therefor, or to manufacture and sell, or offer for sale, the so-called "Lion tractor"; its rights being based entirely upon its contract with Hartsough, as hereinbefore set out.

That the complainant has suffered great damage by reason of these acts. That on December 10, 1914, plaintiff and Hartsough entered into an agreement whereby they settled their former differences, wherein Hartsough acknowledged that the improvements and devices which resulted in these later tractors were conceived and invented by him while the contract of January 12, 1914, between him and the plaintiff was in full force. He thereupon again conveyed all of his right, title, and interest in all of these improvements and inventions to the plaintiff.

It is further charged that, notwithstanding the notices to the defendant, it continues to manufacture and offer for sale the so-called "Lion tractor," that it has little or no property with which to respond in damages for the loss the plaintiff will inevitably sustain by its acts, and therefore prays for an injunction.

The answer denies most of the allegations of the complaint, although it admits some. It denies that it had notice of the plaintiff's contract with Hartsough, but alleges that Ewing purchased Hartsough's rights in good faith and for a valuable consideration. It admits that Hartsough claims the right to repudiate this contract, and has instituted proceedings, as alleged by the complaint, and that these proceedings are still pending and undetermined.

It also alleges that, after it had acquired the rights of Ewing, under his contract with Hartsough, it proceeded at its own expense to plan and design

the tractor advertised, manufactured, and sold by it, and that the tractor they manufacture is planned, designed, made, and prepared for it, by its own agents and employés, and at its own expense; that it has adopted the name of "Lion tractor," as it had a right to do, and that said name is exclusively identified with the tractor of defendant's exclusive design, and that the purchasers have become and are thoroughly familiarized therewith, and know that this tractor is its machine, and in no wise connected with those manufactured by the plaintiff company; that the machine as designed and planned by Hartsough, and the right therein acquired from Hartsough, was never in fact completed or perfected by Hartsough or by this defendant, and that the "Lion tractor" manufactured by it is different entirely from the machine of the plaintiff and that designed by Hartsough; that no other person or association has any right to the trade-mark of the "Lion tractor," except the defendant, the same having been registered by it according to the laws of the United States.

The motion for an interlocutory injunction was heard on affidavits, and the interlocutory injunction granted as prayed. From the order granting the interlocutory injunction the defendant prosecutes this appeal.

Charles B. Elliott, of Minneapolis, Minn. (M. H. Boutelle, Arthur M. Higgins, and F. A. Whiteley, all of Minneapolis, Minn., on the brief), for appellant.

A. C. Paul, of Minneapolis, Minn. (Richard Paul and Frank C. Brooks, both of Minneapolis, Minn., on the brief), for appellee.

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

TRIEBER, District Judge (after stating the facts as above). Counsel for appellant insist that the bill ought to have been dismissed for the failure to make W. B. Ewing and D. M. Hartsough parties to this action.

[1] It is a well-established rule in the courts of the United States that a suit in equity may proceed without the presence of all proper, or even necessary, parties; only indispensable parties must be joined. "An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered in the suit, without injuriously affecting the absent party, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience." Cella v. Brown (C. C.) 136 Fed. 439, affirmed 144 Fed. 742, 75 C. C. A. 608; Rogers v. Penobscot Mining Co., 154 Fed. 606, 616, 83 C. C. A. 380, 390; O'Neill v. Wolcott Mining Co., 174 Fed. 527, 536, 98 C. C. A. 309, 318, 27 L. R. A. (N. S.) 200; Silver King, etc., Mines Co. v. Silver King C. M. Co., 204 Fed. 166, 122 C. C. A. 402.

[2] It appears from the complaint, and it is also alleged in the answer and the affidavits presented by the defendant at the hearing, that Mr. Ewing had parted with all his right, title, and interest under Mr. Hartsough's contract to the defendant, and has no further interest in the result of this litigation, except such as he may have as a stockholder of the defendant corporation. Mr. Hartsough has also parted with his interest to the plaintiff. We see no necessity for making them parties, nor can we conceive of any right, title, or interest of these parties that can be affected by a decree in this cause. They are neither indispensable nor necessary parties.

[3] It is next claimed that, conceding that Hartsough bound himself to assign to the plaintiff all his later inventions improving the original invention, which he had assigned to the plaintiff, it would be unenforceable, as there was nothing then in existence to convey, and it would be in the nature of a mortgage on his future skill and ingenuity. But, as was held by Mr. Justice Bradley in Aspinwall Mfg. Co. v. Gill (C. C.) 32 Fed. 697, such a contention is not tenable; that a patentee has the right, when he sells or assigns his patent for a valuable consideration, to bind himself to assign to his vendee any patents that he may obtain for improvements of the patented article, which he sold. See also Reece Folding Machine Co. v. Fenwick, 140 Fed. 287, 72 C. C. A. 39, 2 L. R. A. (N. S.) 1094. And this is certainly the law, when a part of the consideration for the assignment is his employment for that purpose by the vendee, and the improvements are invented while thus employed.

It is also claimed that the evidence did not justify the granting of the interlocutory injunction. The contract between Mr. Ewing and Mr. Hartsough, under which the defendant now claims, shows that Ewing had "examined the contracts conveying said rights to the Lyons-Knoll Investment Company and the Bull Tractor Company, and agreed that all expenses necessary to defend our joint rights in and to the above tractor, patents, and improvements, its manufacture and sale, shall be borne at the sole charge and expense of said corporation as above organized," meaning the corporation to be organized by Ewing. The defendant is therefore chargeable with notice of the contents of the contract between Hartsough and Lyons-Knoll, the plaintiff's grantors.

[4] As to the other matters put in issue by the answer the evidence is conflicting. When this is the case "the granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and, when that court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion. * * * It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction." American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 206, 120 C. C. A. 644; Magruder v. Belle Fourche Valley Water Users Association, 219 Fed. 72, 135 C. C. A. 644; Kansas City v. Sanitary Street Flushing Machine Co., 224 Fed. 964, 140 C. C. A. 456. A careful reading of the testimony fails to show any departure from this well-established rule, and clearly no such abuse of discretion as would justify this court to set aside its findings upon this appeal.

It is also assigned as error that the order for the temporary injunction does not state specifically, and does not describe in a reasonable detail, what the defendant is enjoined from doing. The order enjoins the defendant from "manufacturing, using, selling, or offering for sale any gasoline traction engines or tractors embodying the construction and combinations set forth and claimed in the application for let-

ters patent of the United States No. 865,463, filed by D. M. Hartsough on the 7th day of October, 1914." And this, it is claimed, is not a compliance with section 19 of the Clayton Act of October 15, 1914 (38 Stat. 730, 738, c. 323).

Whether the order complies strictly with the requirements of that act we deem it unnecessary to determine, as this objection was not made in the court below, but was raised for the first time in this court. Had the attention of the trial judge been called to that fact, we have no doubt that he would have considered it, and, if necessary, followed the statute literally. Besides, this is an interlocutory injunction, and, when the case is returned to the court below, that court can amend its order, if deemed necessary.

The decree granting the interlocutory injunction is affirmed.

TERRY STEAM TURBINE CO. v. B. F. STURTEVANT CO.

B. F. STURTEVANT CO. v. TERRY STEAM TURBINE CO.

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

Nos. 1130, 1131.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—STEAM TURBINES.

The Terry patent, No. 741,385, for a steam turbine of the single impulse helical flow type, was not anticipated, discloses invention, and is valid. Claims 1 and 5 also *held* infringed, and claim 3 not infringed.

Appeals from the District Court of the United States for the District of Massachusetts; Geo. H. Bingham, Judge.

Suit in equity by the Terry Steam Turbine Company against the B. F Sturtevant Company. From the decree, both parties appeal. Affirmed.

For opinion below, see 222 Fed. 297.

William K. Richardson, of Boston, Mass. (Henry B. Brownell and John P. Bartlett, both of New York City, on the brief), for complainant.

Benjamin Phillips, of Boston, Mass. (George E. Stebbins, of Boston, Mass., on the brief), for defendant.

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

PUTNAM, Circuit Judge. This case involves, in one way or another, the entire art of what is called steam turbine engines, though for present practical purposes, it relates not to all classes of turbine engines, but only to an engine in which a revolving motion is produced by a steam jet playing upon the vanes set on an axle, and thus converting the direct effect of the steam into a revolving motion.

What are called turbine engines are now classified into two distinct larger classes, each producing mechanical effects like the water turbine—one produced by the power of expansive steam restrained, with which we have no further relations. The other is produced by the

high velocity of a steam jet playing upon movable vanes revolving on an axle. This is the class with which we have to do, first commercially known as the Curtis turbine, in 1896 or about then. Until one learns of the velocity of the steam jet, it is not conceivable that such a revolving engine would be efficient. The art in this respect is very fully explained in the opinion of Judge Buffington in International Curtis Marine Turbine Co. v. William Cramp & Sons Co., 202 Fed. 932, 121 C. C. A. 290, and in his later one, passed down on February 10, 1914, and reported in 211 Fed. 124, 127 C. C. A. 522. These contain a very complete discussion, but fail to cover the Terry patents. They begin with the state of the art in 1896, and show developments resulting from the ingenuity of Curtis' and De Laval's invention, or discovery, as explained in 211 Fed. 132, 127 C. C. A. 522. These inventors produced jet impulses, showing a velocity previously inconceivable to the laity. De Laval's invention, it appears, was in making the outlet of the steam jet flaring, and thus producing the same analogous result as is produced by allowing the outlet of other fluids under pressure to flare, increasing the velocity of the jet. Efforts seem to have been to find some practical and efficient way of reducing the velocity. Various devices were suggested for this, especially by Curtis, whose efforts were to a certain extent successful, but cumbersome. Judge Buffington's opinion rested with Parsons', Curtis' and De Laval's methods; and there the art rested until Terry's devices in 1902, when his first application was filed, supplemented with that of his patent of 1905. Terry interposed what is described ordinarily as the helical method, which succeeded in producing a practical and merchantable machine, no doubt extensively adopted.

The substance of the present invention rests, according to Terry's brief, at page 27, with the addition of the helical method and its use in a single wheel. They cover invention, and were successful; and the allegations of infringement have been satisfactorily disposed of by the District Court.

Other incidental topics have been developed in the process of litigation, but they were purely incidental, and have been satisfactorily disposed of by the learned judge who sat in the District Court, and need no further comments from us. Indeed, any comments we might make in reference thereto would be so incidental and technical that it would be better for us to allow the case in reference thereto to stand on the opinion of the District Court.

The decree of the District Court is affirmed, and each appellee recovers costs of appeal.

ALDRICH, District Judge (concurring). I concur in the conclusions of the learned judge, as set forth in the foregoing opinion, and while I shall not attempt a critical analysis of all the patents which relate to the steam turbine art in its developing and advancing stages, I desire to state briefly some of the reasons which lead me to concur in the conclusions reached by Judge PUTNAM.

It is sufficiently pointed out both by Judge Buffington (International Co. v. Cramp Co., 211 Fed. 124, 127 C. C. A. 522), and by Judge Bing-

ham in his opinion below, that while the idea is very old that steam could be used as a propulsive rotary force operating upon wheels, it is also sufficiently demonstrated by testimony of experts and judicial opinions, as well as by the arguments of counsel in this case, that those investigating and dealing with the steam turbine art were for a long time searching for a solution of the problem as to how its tremendous force and velocity could be efficiently controlled in practical use upon a wheel.

There are two Terry patents in the record, one dated October 13, 1903, and the other July 4, 1905, but neither the question of the validity nor any question of the infringement of the second patent was considered below, and the bill was dismissed as to that patent without prejudice, and there was no appeal, and so there is no question about that patent here.

Judge Buffington's opinion in the case, to which reference has been made, contains a very comprehensive and an exceedingly illuminating presentation of the whole field of steam turbine art down to and including the Curtis device of 1896. His analyses and his theories are strongly approved by Judge PUTNAM, and apparently by Judge Bingham in his opinion below. It is quite true, as stated by Judge PUTNAM, that after his explanation of the steam turbine art, Judge Buffington was chiefly concerned with the De Laval, the Parsons, and the Curtis devices, with the result, after giving Parsons due credit as a pioneer in his particular field, that his device was dismissed as not having any substantial bearing upon the questions involved in the Curtis device, and this was because the Parsons device was deemed to concern reaction pressure only, and therefore of a different type from those of De Laval and Curtis, which involved the steam impulse turbine type. The Parsons device, therefore, being of a substantially different kind from the one now in question, may be dismissed from consideration here.

Now, as to the steam impulse pressure type of turbines, in which field, unquestionably, the De Laval, the Curtis, and the Terry devices are.

It is probably quite true, as said by Judge PUTNAM, that De Laval's sole invention was in making the steam outlet flaring through adopting an expanding nozzle. It is certain, at least, that that was the substantial feature of his original discovery.

If I correctly appreciate the opinion of Judge Bingham, it is constructed upon the theory, speaking very generally, that De Laval made a discovery which amounted to invention; that Curtis improved upon De Laval, and that Terry improved upon both through further advancing the art. Judge Buffington speaks of the De Laval discovery as a simple one, attended with results of a phenomenal character. Judge Bingham, apparently adopting such appreciation as sound and as having reference to something which advanced the art, deals with De Laval's original patentable discovery as one which greatly increased velocity, and so much so as to become practically excessive unless restrained or controlled, and with De Laval's subsequent means for reducing speed as accomplishing that result at the expense of a loss

of power, and as involving certain other impracticabilities. He deals with the Curtis device as an improvement reducing speed, and conserving energy through the agencies of various wheels through which the energy was to pass, and with the Terry scheme as one for improvements in the direction of simplicity and economy in construction, and of efficiency in use, and as one which accomplished such results through the instrumentality of described mechanism, or apparatus, arranged within or upon a single wheel.

To sustain the Terry device it is not necessary to find that Terry was the first to employ the principle of helical flow in the steam turbine art. That principle was doubtless employed before Terry, but not in the same way, with the same apparatus, and with the same effect. Manifestly, Judge Bingham's opinion does not proceed at all upon the idea that Terry was first in the employment of that principle, but plainly upon the theory that he was the first to describe means for employing that principle in a single wheel with the result of economy and efficiency not before obtained, and with the result of practical success.

Assuming, as all apparently do, that De Laval made a prime, though simple discovery, if, in the field of mystery, as to steam energy and its practical control, and proper conservation, Terry succeeded in discovering and describing practical means to be embodied in a single-wheel mechanism—means adequate for conserving and using the highly forceful but wasted steam energy of De Laval—means which would make it practical to discard the expensive and cumbersome compounding of Curtis, whereby he provided for the use of several wheels for the purposes of proper control and conservation, it must follow, without much insistence, that Terry did something of practical utility, and something which advanced the art.

In fact, that is just what Terry did do. He reduced speed without any substantial loss of power; he did it in an economical way, because he provided means for doing it through the instrumentality of one wheel, rather than through the instrumentality of several wheels or several chambers. His device is of the single impulse, helical flow turbine type. He says in his specification that he has invented certain new and useful improvements in steam turbines, and he describes his improvements as something leading to simplicity, economy and efficiency in use.

It is observed by Judge Bingham (222 Fed. 297, 307), that "the object in an impulse steam turbine, as in any other steam engine, is the transformation of the steam into mechanical power without loss of energy." That is a proposition which probably no one would question. It is followed by the further observation that this was accomplished by Terry in a field where prior inventors, in endeavoring to accomplish the same purpose, had failed, and support is found for this reasoning in the position which the Terry turbine immediately took in the commercial world.

Terry's means for doing the things, which he claimed, were fully and carefully considered in the decision below, and any attempt to enlarge upon Judge Bingham's analysis of the particular elements of

the Terry device would seem unnecessary. Terry's improvements consist in his novel arrangement of buckets and reversing chambers mouth to mouth in one wheel, his novel location of the steam-admitting nozzle relatively to them, and the novel method he provided for escape of the "dead" steam.

In stating the view that these features were the more substantial ones, it is not intended to convey the idea that they were the only elements which contributed to the results accomplished by Terry.

The Lilienthal and the Wolke devices were differentiated from the Terry device through a course of reasoning in the court below which is apparently sound.

The foregoing suggest some of the reasons for my concurring in Judge PUTNAM'S conclusion upon the question of invention.

The court below found infringement of claims 1 and 5 of Terry's 1903 patent, and noninfringement of claim 3. These results were reached upon lines of reasoning which seem to be acceptable to Judge PUTNAM, and seeing no reason for doubting their soundness, I concur in Judge PUTNAM'S conclusions in respect to infringement.

LOUISVILLE TRUST CO. v. VAN KANNEL REVOLVING DOOR CO.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1916.)

No. 2708.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—REVOLVING DOOR.
The Van Kannel patent, No. 656,062, for a revolving door, the essential feature of which is a device which causes the wings to automatically collapse when subjected to abnormal pressure, was not anticipated, and discloses patentable invention. Claims 2 and 8 also *held* infringed, and claim 7 not infringed.

2. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—REVOLVING DOOR.
The Van Kannel patent, No. 836,843, for a revolving door, claims 1 and 2 *held* void for lack of invention over the prior patent to the same patentee, No. 656,062, and claim 13, if valid, *held* not infringed.

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Suit in equity by the Van Kannel Revolving Door Company against the Louisville Trust Company. Decree for complainant, and defendant appeals. Reversed in part.

Helm & Helm, of Louisville, Ky., for appellant.

Titian W. Johnson, of Washington, D. C. (Trabue, Doolan & Cox, of Louisville, Ky., of counsel), for appellee.

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

KNAPPEN, Circuit Judge. Suit for infringement of patents Nos. 656,062 (1900) and 836,843 (1906) both granted to Van Kannel for improvements in revolving doors.

The district court found both patents valid and infringed, and entered the usual decree for injunction. Defendant being admittedly a good-faith user, plaintiff waived recovery of damages and profits, and so no accounting was ordered. Defendant has appealed.

[1] The specification of the 1900 patent states that it relates to "that class of revolving doors which have a series of radiating wings rotating in a casing." The stated object of the invention is to "so construct the wings and casings of such a door that they will yield to the rush of a panic-stricken crowd, the end members of the casing swinging outward and the wings of the door all being pushed to the front, so as to provide a wide and unobstructed passage on each side of the center of the door structure." To accomplish this purpose the wings of the door are held normally in radial position by a series of spring-bolts or lugs, carried respectively by the arms of a "spider" attached to the revolving ceiling, each lug engaging the upper end of one of the wings. The wings are of two parts (separated by a longitudinal connection), the inner part being hinged to a central standard, the outer part being both-way-hinged to the inner part. The construction is such that the application of abnormal pressure to the wings causes them to bend or buckle at the line of hinged connection, their consequent shortening automatically releasing the lugs engaging the upper ends of the wings, causing them to collapse. The claims in suit are Nos. 2, 7 and 8, which we print in the margin.[1] The prominent defenses are that the claims are invalid for want of invention in view of the prior art, and that defendant does not infringe.

Revolving doors were not new at the time of Van Kannel's 1900 patent. Indeed, Van Kannel himself had in 1888 been granted a patent (No. 387,571) upon a revolving door having a series of radiating wings rotating in a casing, the wings fitting snugly therein so as to exclude at all times wind, rain, snow or dust. The door revolved in but one direction, and was in fact always closed. The 1888 patent provided for so hinging one or more of the wings at or near the central post as to permit their being thrown back against the fixed wing, thus creating an opening for carrying through articles longer than the normal space between the radiating wings, and for the circulation of air; but it contained no feature by which the wings could be automatically collapsed or released from radial position in case of

[1] "2. The combination in a revolving door, of a structure mounted so as to rotate about a central axis, a series of wings mounted so as to swing independently of their joint rotating movement, about said axis, and *self-releasing locking devices, whereby said* wings are normally retained in fixed radial relation to said central axis.

"7. The combination in a revolving door, of a structure mounted so as to rotate about a central axis, radiating wings each mounted so as to swing independently of their joint rotation about the central axis, means for locking said wings to the rotating structure, and means whereby lateral pressure exerted upon the inner portion of either wing will automatically unlock the same.

"8. The combination in a revolving door, of a center post, with radiating wings normally locked to said center post but mounted so that they will be automatically unlocked therefrom, and swung forwardly to project side by side when pressure is exerted upon them in other than a normal direction."

great pressure from opposite directions, as might happen with an excited crowd. According to the 1888 patent, the entire door structure was to be mounted on a base secured to the doorway by "hooks, catches or other fastenings," so as to be capable of being moved out of the way to permit free exit when "the audience or congregation is leaving the building"; and as an added and specific protection against panic, the fastenings referred to were to be made so frail as to "be readily broken or torn from their places" in case of a sudden rush from the inside, thus causing the entire door-structure, including casing, to be thrown out.

Ife, in 1897 (No. 596,029), disclosed a modification of Van Kannel's idea to the extent of mounting the center post which carried the wings so that the entire revolving portion could be unshipped and removed from the doorway, in the event of a panic. These two inventions comprise the prior art relating to the panic features of revolving door structures. Neither involved the idea of automatically collapsible wings. Both were crude; neither of them was practicable or valuable. Van Kannel's invention of 1900 was both practicable and valuable, and made the inventor a pioneer as respects practicable panic features of revolving doors. He first disclosed the broad conception of making the wings automatically collapsible, without otherwise interfering with the door structure.

The references outside the revolving door art have little bearing upon the question of invention in that particular art. Emergency doors (not revolving) belong to a non-analogous art, and the other references pertain to arts unrelated to revolving doors. Van Kannel's patent of 1900 discloses a valuable invention, which has been very favorably received by the public. We have no doubt that it involved patentable invention. The same conclusion as to claims 2 and 8 (as well as other claims not here involved) was reached by the Circuit Court of Appeals for the Second Circuit. Van Kannel Revolving Door Co. v. Revolving Door & Fixture Co., 219 Fed. 741, 135 C. C. A. 439.

The defense that this patent merely amounts to a double patenting of Van Kannel's invention of 1888 is sufficiently disposed of by what has already been said. We see no merit in the suggestion of double use.

As to infringment: Defendant's structure differs from the structure of the Van Kannel patent, so far as here material, in that instead of having a series of lugs engaging the upper ends of the respective wings, it has two fixed wings, to each of which is hinged another wing, each connected to the fixed wing by a brace consisting of a rigid bar carrying a spring whose lip fits into a socket attached to the adjacent wing—the giving way of this fastening under abnormal pressure makes the wings collapse.

In our opinion, defendant's structure infringes claims 2 and 8 of the 1900 patent, for we think that, in view of the breadth of Van Kannel's invention, the joined inner ends of the two fixed wings with their bolts connecting with the floor are the equivalent of the central axis of claim 2 and the center post of claim 8; and that infringement is

not avoided by the fact that defendant's construction is such that all four of the wings cannot be projected forwardly so as to extend parallel with each other in the same direction. It is enough that two of the wings have that capacity and function. Claim 7, however, provides that the lateral pressure which automatically releases the locking mechanism is to be exerted "upon the inner portion" of the wing. Strictly speaking, defendant's wings, being integral (not in hinged section), have no well-defined "inner portion" as distinguished from the outer portion. Taking into account the characteristic feature of plaintiff's wings, as sectionally hinged, shown by the language of the specification and certain of the other claims, we are disposed to think claim 7 should be construed as relating to a door of the sectionally-hinged type, which has distinctively an "inner portion" and an "outer portion." For this reason, if for no other, we do not feel justified in holding claim 7 infringed.

[2] The 1906 patent in suit is in several respects an improvement upon the 1900 patent. So far, however, as concerns "panic" features, it differs from the former patent in dispensing with the spider and lugs engaging individually the tops of the wings, and uses merely a fixture attached to the adjacent sides of the wings, secured by fastenings so constructed as normally to hold the wings in radial position, but when subjected to abnormal pressure to release the wings, permitting them to collapse. Claims 1, 2 and 13 are involved. We print claims 1 and 13 in the margin.[2] Claim 2 differs from claim 1 principally in substituting the words "and ties attached to the adjacent sides of the wings" for the words "and fixtures connecting the adjacent sides of the wings," found in the first claim.

We are unable to agree with the contention that the broad claims 1 and 2 cover a new structure or new mode of operation in a patentable sense. On the other hand, we agree with the Court of Appeals for the Second Circuit (in the revolving door case already cited) that claims 1 and 2 involve merely a change of location of the holding devices, not rising to the dignity of invention. We think it clear that the substitution of a self-releasing locking device between the adjacent faces of the wings, for devices for the same purpose engaging the tops of the wings, involves merely the skill of the mechanic familiar with the revolving door art; and even if invention could be found (which we do not intimate) in placing the locking mechanism in the longitudinal center of the wings where the pressure comes, it is enough to say that the claims in suit cover no such feature.

Claim 13, however, limits the releasing device to a "*strap or cord* fastened upon one wing, of a fastening device upon the adjacent wing

[2] "1. In a revolving door, a central spindle, a series of wings pivoted thereto, and fixtures connecting the adjacent sides of the wings, and provided with automatically-detachable fastenings adjusted to permit the automatic collapsing of the wings under abnormal pressure."

"13. In a revolving door having collapsible wings, the combination, with a strap or cord fastened upon one wing, of a fastening device upon the adjacent wing arranged and operated to grasp the end of such strap detachably and to resist the normal pressure upon the wings, and adjusted to release the strap under abnormal pressure, whereby the wings are automatically collapsed under such pressure."

arranged and operated to grasp the end of such strap detachably," etc. It is the flexibility of this "strap or cord" which alone gives to the structure of the 1906 patent a feature so much dwelt upon in argument, viz.: That the release of one tie enables the remaining wings of the door to collapse without releasing the individual ties between them; in other words, the release of one tie practically effects a direct and immediate collapse of *all the wings*. This condition cannot result from the use of defendant's rigid bar. So whether or not we agree with the Circuit Court of Appeals for the Second Circuit, that claim 13 discloses only a combination of elements which would be evident to an ordinary mechanic (as we have no doubt would certainly be the case unless the claim is limited to a flexible tie), the result is the same here; for defendant does not have the flexible tie which distinguishes that claim, and so does not infringe it.

The decree of the district court is accordingly affirmed as to claims 2 and 8 of the 1900 patent, and reversed as to the 1906 patent, as well as to claim 7 of the 1900 patent; and the record is remanded to the district court with directions to enter decree in accordance with the views expressed in this opinion.

Appellant will recover one-half its costs of this court.

TUBULAR RIVET & STUD CO. v. STANDARD FINDING CO., Inc.

(Circuit Court of Appeals, First Circuit. February 29, 1916.)

No. 1153.

PATENTS ⊂⊃328—VALIDITY—DESIGNS—INVENTION.

The Bray design patent, No. 39,201, for a design for a lacing hook, differing from the prior art only in that it is oval in shape, *held* void for lack of invention.

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

Suit in equity by the Tubular Rivet & Stud Company against the Standard Finding Company, Inc. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Dodge, Circuit Judge, on pleadings and proofs:

This bill charges the defendant company with infringing design patent No. 39,201, issued March 17, 1908, to Mellen N. Bray, for "a new, original and ornamental design for lacing hooks." Bray assigned the patent to the plaintiff company March 21, 1908, which now owns it. The plaintiff has made and sold lacing hooks claimed to be in accordance with the patent since 1905, Bray's application having been filed August 10, 1904. The plaintiff's sale of such hooks has been considerable and has increased year by year. It has sold them under the name of "Ovaloid," and they have come to be known by that name in the trade. They have largely superseded hooks of other shapes in the market.

It is stipulated that the defendant company have made and sold lacing hooks of a form represented by Exhibit A annexed to the stipulation, in

Massachusetts, and within six years before this bill was filed on January 15, 1915; said hooks being imported from Germany.

The defendant denies the validity of the patent, and also relying upon the limitation of the patented design which it asserts, denies infringement even if the patent be valid.

(1) The patentee's specification is extremely brief, as follows: "Figures 1 and 2 of the drawing are a perspective view and plan view respectively of a lacing hook embodying my design." The claim is: "The ornamental design for a lacing hook as shown."

From Fig. 1 it appears that there is nothing new, original or ornamental about the lower rivet or portion of the lacing hook shown, whereby it is held in position on the shoe. It is in the upper or hook portion, extending upwardly from the upper edge of the rivet and then bent over to form the hook under which the lacing is to be clasped, that the alleged novelty, originality and ornamental character of the design resides, if anywhere. In Fig. 2, the plan view, the upper surface of this hook only is shown, viewed from above. As there shown, the surface is a regular oval in outline.

The patent has no drawing disclosing the outline of the hook as it would appear in vertical section. There are a few shading marks both in the "perspective view" and in the "plan view"; but these are not enough to indicate clearly that any portion of the upper surface of the hook, or how much, if any, is intended to be left flat. Specimens of these "Ovaloid" hooks, introduced by the plaintiff (Plaintiff's Exhibit 2), show no portion of their upper surfaces distinctly flat, and the evidence shows that the plaintiff has never made hooks having such distinctly flat portion. The defendant's hooks (Exhibit A) have none. The defendant contends that, although not clearly shown by the drawings, such flat portion is an essential part of the patented design. This contention perhaps find some support in the Patent Office proceedings on Bray's application. The drawing first submitted was like the present Fig. 1, except that he filled in the entire outline of the head with a uniform black, thereby conveying even less definite information on the point than is found in Fig. 1. The amendment he first offered stated that, "as shown in this drawing, the lacing hook is provided with a flat oval-shaped head, the upper edges of the head being rounded," and the accompanying letter, dated August 19, 1905, stated, in an attempt to distinguish the design from prior lacing hooks cited against it, that "the head presents a flat symmetrical appearance." These statements were, however, withdrawn or abandoned in the subsequent proceedings, wherein nothing more is said about the head being flat.

It does not seem to me that there is enough in all this to limit the patentee to a head having part of its upper surface distinctly flat. The plaintiff says that "the important point as contrasted with the prior art is * * * the oval shape, with corresponding curvatures at the front and rear of the head," and for the purposes of the question of validity this construction of the design will be adopted.

The evidence shows that lacing hooks in use before the plaintiff introduced its "Ovaloid" hooks differed in design from the latter only in the fact that their outline, supposing it shown in a "plan view" like Fig. 2 of the patent, was not an oval. The plaintiff itself had previously been making hooks whose outline, shown as above, would have been round; and this seems to have been the shape generally used. The plaintiff had also been making what is called "Agatine" hooks, which, instead of being round, were oval except that the oval was incomplete at one end; where the outline had an inward curve across the longer axis of the oval, instead of completing the oval at that end to correspond with the other end.

That there had been any adoption of the plaintiff's oval shape as above for lacing hooks prior to the application for the patent does not seem to me sufficiently proved. The defendant has introduced a number of prior patents for improvements in lacing hooks, but none of them are design patents; all, therefore, relate to utility and not to appearance; none, therefore, could amount to an anticipation of the patent; nor do I find sufficient indications in any of them that the adoption of an oval shape was contemplated by the patentee. The defendant relies principally on No. 419,982, issued January 21,

1890, to F. R. Welton, for "improvements in lacing hooks and method of making the same," and undertakes to show by a drawing said to correspond accurately with the representation of the "Welton" hook in the drawings of his patent that it would have an oval outline substantially as shown by the drawings of the design patent. Welton's specification states that his object is to produce a hook from a sheet-metal shell having double walls throughout, "the shape of said hook being substantially the same as that of the hooks now generally in use," etc. It is not clear to me from Welton's drawings that he had an oval as distinguished from a round shape in mind, or that his hook must necessarily have been of the oval shape. Whether or not any lacing hooks made under his patent were ever made, sold or used, does not appear. Patent No. 303,601, issued August 12, 1884, to Victoria A. Burr, for an improvement in glove fasteners, has drawings representing the wrist of a glove "with the fastening now in use." The metallic hooks therein represented are distinctly oval in outline, but neither this patent nor Welton's can be regarded as sufficient proof that lacing hooks like those here in question, of the oval shape, were known and used at their respective dates, and there is no other proof to that effect.

Besides superseding hooks of the shapes previously prevailing, there is evidence that the "Ovaloid" hooks have held the market against attempts to introduce hooks of still other shapes subsequently contrived in competition with them; such as squares with beveled corners or octagons. Customers have continued to "prefer the looks" of the "Ovaloids." If in view of this evidence the patented design may be called "ornamental" within the meaning of Rev. St. § 4929, as amended in 1902 (32 Stats. 193, c. 783 [Comp. St. 1913, § 9475]), the question still remains whether it can be called "new and original" in the statutory sense. It is not contended that lacing hooks, affecting as they do the appearance of articles of personal wear, are things incapable of being made the subject of a design patent. See Foster, etc., Co. v. Tilden-Thurber Co., 200 Fed. 54, 56, 118 C. C. A. 282. The oval shape is, of course, too simple and familiar a modification of the circular shape to permit anybody now to claim that it is "new and original" with him, considered by itself. It can be called "new and original" with Bray, at the utmost, only in the sense that no one had applied it to lacing hooks before him. With regard to design patents, the Supreme Court has said in Smith v. Whitman, etc., Co., 148 U. S. 674, 679, 13 Sup. Ct. 768, 770 (37 L. Ed. 606):

"The exercise of the inventive or originative faculty is required, and a person cannot be permitted to select an existing form and simply put it to a new use any more than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty and the result is in effect a new creation, the design may be patentable."

I am, therefore, required to find, in order to sustain the patent, that in adopting the oval shape or outline for a lacing hook instead of the circular shape previously in use, or in adopting a completely oval shape or outline in place of a shape or outline oval only in part (as in the "Agatine" hooks), more than the imitative faculty was exercised, inventive thought was displayed, and the result was in effect a new creation. I am unable to believe that such a finding can justly be made. It certainly cannot be said that there was anything new or original in Bray's plain oval, regarded by itself, as a design. The shape selected was altogether too obvious and too long familiar as applied to other articles of manufacture. The unpatented "Agatine" shape might with much more reason, as it seems to me, have been called "new and original" from this point of view. Bray's resort to the oval shape was therefore only a resort to a resource which was common property and incapable of being monopolized. I find no reason whatever for believing that his adaptation of the oval shape to the head of a lacing hook involved anything beyond the most ordinary mechanical skill, such as had already produced the round and the "Agatine" hooks. A design patent of which all this is true cannot be sustained. In Phœnix Knitting Works v. Hygenic, etc., Co., 194 Fed. 696, 699, 700, 703, 115 C. C. A. 118, the court found no invention sufficient to support a design patent in the adaptation of an old ornamental weaving pattern for a

neck scarf whose configuration differed from any wherein the same pattern had before been used. In Baker, etc., Co. v. N. B. Cass Co., 220 Fed. 918, 136 C. C. A. 484, the court found no invention sufficient to support a design pattern in the adaptation of block letters of old ornamental design to a set of character blocks for children.

The Patent Office proceedings upon Bray's application show that a patent was granted for his design only with extreme reluctance. His application as originally made was rejected, and four other rejections followed as many amendments. Its final allowance appears to have been procured by urging the favor with which the design had met in the trade, and the extent to which it had displaced lacing hooks of earlier shapes. To this commercial success, as shown at the present hearing, reference has already been made. It might well be sufficient under some circumstances to resolve doubt as to the existence of patentable invention in the patentee's favor, but I am unable to regard it as sufficient for that purpose in the present instance. There was similar proof of marked commercial success in the case last above cited. The public fancy may often be caught by something requiring only ordinary skill to devise. The evidence before me indicates, moreover, that the plaintiff company makes and leases machines for setting lacing hooks, that these are adapted to set its "Ovaloid" hooks only, and that these machines have been far superior in productive capacity to those available for setting hooks of the other shapes.

2. The defendant's hooks (Exhibit A) do not differ in shape from the hook shown in the patent, and if the patent, taken as above without the limitation contended for by the defendant, is valid, they undoubtedly infringe. Being unable, however, for the above reasons, to sustain the patent, I must dismiss the bill; and there may be a decree accordingly.

William K. Richardson, of Boston, Mass. (Harrison F. Lyman, of Boston, Mass., on the brief), for appellant.

Abraham K. Cohen, of Boston, Mass., for appellee.

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

PUTNAM, Circuit Judge. This case arises under a patent for an ornamental design, issued to Mellen N. Bray, No. 39,201, on March 27, 1908. The patent is very brief, but as far as that is concerned, it is sufficient. It is said to be for a new, original and ornamental design for lacing hooks. The claim is given as follows: "The ornamental design for lacing hooks, as shown." Aside from the drawings showing the lacing hook with an oval head, there is no intimation given of the originality or the ornamental features of the lacing hook.

The learned judge of the District Court before whom the case was tried gave a careful opinion covering the state of the particular art in question, including a description of the lacing hook covered by the plaintiff's design. So far as we can see, the plaintiff's design contained nothing new except a slight change in the shape of the neck of the hook and the substitution of an oval head in the place of the usual circular head, which is so common in men's, women's and children's shoes, and while these ideas have a considerable measure of novelty, we do not think that they involved such a full measure of novelty as to amount to invention. As the result of the investigation by the District Court, the bill was dismissed, with costs, and there can be no possible doubt that the conclusions reached by that court should be affirmed.

The appellant relies particularly on the opinion of this court in Foster v. Tilden-Thurber Co., decided on November 13, 1912, 200 Fed. 54, 118 C. C. A. 282, which was for a design for a clothes brush; but it is possible to see that the patentability of this clothes brush might have been sustained, where the patent now before us should not be accepted, particularly in view of the fact that in the clothes brush case the respondent relied especially upon the general propositions that the configuration of the clothes brush constituted a proper subject for a design patent, and that the patented design was not anticipated. However, there is as much reason for holding that the case decided was improperly decided as there is for making it a precedent for an indefinite number of judgments in favor of other patents. Every patent of this character must depend upon its own merits.

The judgment of the District Court is affirmed, with costs of appeal for the appellee.

HINMAN et al. v. VISIBLE MILKER CO., Inc.

(District Court, N. D. New York. February 19, 1916.)

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—COW-MILKING APPARATUS.
The Hinman & Hinman reissue patent, No. 13,876 (original No. 1,097,803), for a cow-milking machine, claims 11 to 21, inclusive, are within the specification and drawings of the original patent, were not anticipated, and disclose a marked and patentable improvement on the prior art; also, *held* infringed.

2. PATENTS ⊂=167(1)—VALIDITY—CORRECTION OF DRAWINGS.
The correction by the Patent Office of the drawings in a patent application to correctly show the invention described in the specification does not invalidate the patent granted thereon.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. ⊂=167(1).]

3. PATENTS ⊂=235—INFRINGEMENT—INFERIOR STRUCTURE.
A patent cannot be evaded or infringement avoided by a construction, which is substantially the same, and which operates on the same principle, but which is inferior in its operation and produces an inferior result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. ⊂=235.]

In Equity. Suit by Arthur V. Hinman, Ralph L. Hinman, and the Hinman Milking Machine Company, against the Visible Milker Company, Incorporated, for infringement of reissued letters patent No. 13,876 for a cow-milking machine, issued to complainants Hinman February 9, 1915. On final hearing. Decree for complainants.

R. H. Woolver, of Oneida, N. Y., and Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., for complainants.

John Conboy, of Watertown, N. Y., and Fred Gerlach, of Chicago, Ill., for defendant.

RAY, District Judge. [1] The patent in suit dated February 9, 1915, for a cow-milking machine, is a reissue of United States letters

patent No. 1,097,803, dated May 26, 1914, on application filed July 26, 1912. The application for the reissue was filed December 11, 1914. The original patent contained 11 claims. The reissue contains 22 claims. The defendant contends, among other things, that the reissued letters patent are greatly and unduly enlarged so as to constitute a patent for an alleged invention neither described nor claimed in the original letters patent. At the trial the plaintiffs elected to rely upon and limit the charge of infringement to claims 11 to 21, inclusive, of the reissue. The claims read as follows:

"11. In a cow-milking apparatus, a milk chamber having a valveless inlet, means for exhausting air from the chamber and a substantially air-tight valved outlet closed by gravity and the exhaust of air from said chamber.

"12. In a cow-milking apparatus, a milk chamber having a valveless milk inlet, an air exhaust connection, a milk outlet and an outlet valve positioned outside said chamber and closed by gravity and the exhaust of air from said chamber.

"13. In a cow-milking apparatus, a milk chamber having a valveless milk inlet, an air exhaust connection, a milk outlet, a valve for said outlet, and means located outside the milk chamber for supporting said valve.

"14. In a cow-milking apparatus, a milk chamber having a valveless milk inlet, an air exhaust connection, a milk outlet, a valve for said outlet, said valve positioned outside the milk chamber, and means located outside the milk chamber for supporting said valve.

"15. In a cow-milking apparatus, a milk chamber having a valveless milk inlet, an air exhaust connection, a milk outlet, a valve for said outlet, said valve positioned outside the milk chamber, and means located outside the milk chamber for supporting said valve in position to be brought into air-tight relation with the milk outlet by the exhaust of air from said chamber.

"16. In a cow-milking apparatus, a milk chamber having a milk inlet in substantially continuous communication with said chamber during the milking operation, a milk outlet and a valve for said outlet, said valve supported by means located entirely outside the milk chamber.

"17. In a cow-milking apparatus, a milk chamber having a milk inlet, an air exhaust connection, a milk outlet, a valve for said outlet, said valve supported by means located outside the milk chamber and adapted to discharge milk into a receptacle at substantially normal atmospheric pressure.

"18. In a cow-milking apparatus, a tubular member constituting a milk chamber and formed of two separate parts removably connected together, said parts having their adjacent edge portions adapted to be spaced apart, milk inlet and air exhaust connections with said chamber, and a valved outlet for said chamber.

"19. In a cow-milking apparatus, a milk chamber comprising two separate removably connected members having parts adapted to be normally spaced for receiving between them the cover of a milk receptacle, a milk inlet, an air exhaust connection, and a valved outlet.

"20. In a cow-milking apparatus, a milk chamber formed of a tubular body section and a cap removably connected thereto, a milk inlet and an air exhaust in connection with the cap, a milk outlet in connection with the body portion, a valve for said outlet, said valve located outside said chamber and adapted to be brought into substantially air-tight relation with said outlet by the exhaust of air from said chamber.

"21. In a cow-milking apparatus, a milk chamber having a valveless milk inlet, a valveless unobstructed air exit, and a valved outlet for the milk."

Claims 12 to 21 are new claims not found in the original patent, and claim 11 differs somewhat from claim 11 of the original patent. The patent was issued to Arthur V. Hinman and Ralph L. Hinman, complainants herein. The complainant Hinman Milking Machine Company is a licensee of the patentees. The defenses are:

"First. The claims are either wholly or substantially anticipated by the prior art patents.

"Second. Inasmuch as the relied-upon claims define nothing more than old and well-known details, shown to have been old and well known by many prior patents, applied to the device shown in plaintiff's prior patent No. 907,236 (Ex. 2), several thousand of which went into successful use, said claims do not define a patentable invention.

"Third. The relied-upon claims added by reissue are for a different invention from that intended to be claimed by the original patent, and therefore void under the law.

"Fourth. The original patent was not inoperative or invalid, and there being no lawful ground for reissue, the reissue is void.

"Fifth. Defendant's device does not infringe."

The patentees say in their specifications:

"This invention relates to improvements in vacuum cow-milking machines of the valved milk chamber type, its object being to improve and simplify their construction and to provide an exceedingly simple, readily operated, easily cleaned, noiseless and highly efficient apparatus of that class for milking one cow, or a number of cows simultaneously.

"At present in machines of this type there is no way of automatically controlling the vacuum, so that with each pulsation of the piston of the air pump the entire contents of the milk chamber are emptied; and there is no way to prevent the milk from entering at some point the center of the milk chamber during the milking stroke of the pump; and no way of preventing a portion of the milk being drawn from the milk chamber into the flexible tube connected with the pump, and even into the pump itself.

"Our invention is mainly designed to overcome these defects by providing an improved and simpler apparatus and accessories. * * *

"More especially the invention resides in the provision of a cow-milking apparatus, in which the hose leading from the suction pump is connected by means of a nipple to a milk chamber capable of being closed air-tight, and opened by an automatic valve at its lower end, which valve is closed by gravity and atmospheric pressure during the out stroke of the pump piston, and which is opened during the in stroke of the pump piston by the weight and pressure of the milk against it as it is discharged from the milk chamber, the milk having previously been drawn thereinto upon the out stroke of said pump piston; thus permitting the apparatus to be attached to the cover and used in connection with any receptacle of ordinary construction, without the necessity of providing a special air-tight covering for the same.

"The milk chamber may consist of two parts, a head or perpendicular part, and a body or curved part, easily joined together so as to form a unitary chamber, and easily separated for the purpose of cleaning, said parts having laterally projecting spaced flanges adapted to receive between them a portion of a milk pail cover. The body of the milk chamber may consist of two or more curved tubular parts, with a common upper part capable of being attached to the lower part of the head, and with two or more lower openings closed by automatic valves, instead of consisting of one curved part with one valve, the several valves being opened by the pressure and weight of the out-flowing milk, and closed by their own weight and by atmospheric pressure."

This invention relates to that class of milking machines spoken of as the "valve chamber type." It has a small tubular valved milk chamber adapted to be associated with an ordinary pail and to remain in a stationary condition while the milking operation goes on. In this chamber the vacuum is created for drawing the milk from the cow, and thus rendering unnecessary the use of a specially constructed vacuum pail and a specially pulsating apparatus such as was found in the milking machines commercially known before the Hinman invention and in which the vacuum is created in the milk pail itself.

The Hinmans sought to produce, and did produce, a device in which the milk is drawn into a stationary chamber from which the milk is discharged into an ordinary pail at atmospheric pressure and the pulsations are produced by an ordinary small reciprocating pump. The milk is not, at any time, drawn into the pump chamber and cannot come in contact with the vacuum producing piston or bellows. When that occurs, the milk is either contaminated or destroyed. The Hinmans sought to produce, and did produce, a device in which the suction upon the teats of the cow are realized at alternate strokes of the pump piston, and they produced a device easily cleaned and sanitary, in which the milk chamber is unobstructed by moving parts or otherwise, and which is easily and quickly kept clean. The vacuum is gradually produced upon the out stroke of the pump piston and is gradually applied to the milk chamber, to the teat cups, and teats of the cow. This is a great advantage, as the abrupt application of the vacuum makes a milking machine practically useless. This device is highly efficient and is adapted to be readily associated with a special milk pail cover so that the pail may be closed while the milking of the cow proceeds, and the air exhaust and milk inlet may be disposed outside the pail for operative connection with the pump teat cups, while the valved milk outlet is within the pail and in actual operation and the milk is or may be discharged through the cover of the pail. This device and structure is simple as compared with the prior art, and there is an absence of complicated mechanism.

The milk chamber comprises a tubular structure closed at its upper end and open at its lower end to permit the discharge of the milk therefrom. This lower open end is provided with a normally closed valve positioned outside the milk chamber and is supported by means outside the milk chamber, and as a result the milk chamber is in no way obstructed and all this tends to a sanitary condition. This valve closing the lower end of the milk chamber is closed normally by gravity. The upper closed end of this milk chamber has a tubular air exhaust nipple for connection with a suitable air exhausting pump which is at all times in connection with the chamber as the nipple is unobstructed by valves or other parts. The upper portion of the chamber is provided, also, with a tubular milk inlet nipple adapted to be connected by means of a flexible hose to teat cups, which are at all times in continuous communication with the milk chamber, as the milk inlet nipple is entirely unobstructed by valves or moving parts, and in effect the pump is at all times in continuous communication with the teat cups. This milk chamber is adapted to be placed in position in a stationary manner upon a receptacle for receiving the milk. The outlet valve automatically operates, and the construction and arrangement is such that the movement of the cow will not throw the milk into the air exhaust connection as the pump had done in prior devices.

In the reissued letters patent, there is a new sheet of drawings, viz., sheet 1, and this was inserted for the purpose of showing the apparatus set up and ready for use, and is illustrative merely, and shows the valve chamber assembled in operative position with a pump supported upon stanchions and with suitable hose and teat cups. This

disclosure is clearly enough described in the original specifications, where the nipples are described as connected to a hose leading to the pump and another hose leading to the teat cups, and the valve chamber is described as being a development and improvement of the invention shown in the specifications of a prior Hinman patent, No. 907,236. The teat cups, the pump, the stanchions, and the pump operating means are not included in the claims of the patent and are illustrative merely. The addition of this sheet of drawings in no way affects the validity of the reissue or of the claims in issue.

In the specifications of the reissued letters patent will be found the following, viz.:

"The upper end of *C* is provided with a laterally and circumferentially extending flange *c* spaced in the assembled structure a sufficient distance from the flange *d* to receive between them a portion of a milk pail cover *f*. In the operation of assembling the device, the upper end of the part *C* is thrust through an opening in the pail cover until the flange *e* contacts with the cover. The cap *B* is then screwed upon the body *C* until the flange *d* comes in contact with the pail cover, at which point the parts *B* and *C* are brought into such relative position as to form a smooth interior milk spreading surface."

This language is not found in the specifications of the original letters patent, but in the file wrapper of the original patent we do find the following:

"The lower end of the head provided with a thread and outside shoulder to engage the upper end of the body, the upper end of the body provided with a thread and outside shoulder to engage the lower end of the head, so that, when joined, the interior surface of the head and body form one continuous interior surface. * * *

"In a cow-milking apparatus, the combination of an air pump, a series of teat cups, a curved elbow shaped cylinder *A* composed of two parts, a cylindrical head *B* and a curved cylindrical body *C* easily joined together by screw threads."

This part of the device or structure is therefore made more specific and definite, and I think was allowable in view of the fact that there are no intervening rights. There was put in evidence a rough outline drawing of the device made by Mr. E. J. Brown, of Oneida, at the request of the patentees. Mr. Brown was unskilled in patent drawings or specifications, and he also prepared a specification describing the drawing which he had made. The drawings did not coincide with the specification, but they were forwarded to the Patent Office and received June 24, 1912. The Patent Office declined to file the application, inasmuch as the drawing was informal and irregular. The Patent Office made a drawing from the specification and drawing prepared by Mr. Brown as it was understood at the Patent Office, and this drawing remained in the application for nearly a year and a half, when it was discovered by the applicants for the patent that the drawing was not complete and not an exact disclosure of their invention, whereupon they called upon the Patent Office to correct the drawing to agree with their original specification and claims. The applicants forwarded to the Patent Office a photograph of what is known as Exhibit 35, which was prepared by the applicants themselves and given to or shown to Mr. Brown. The Patent Office then proceeded to correct the drawing in accordance with the original specification and claims

as shown by Exhibit 35, and that drawing was incorporated in the application and forms a part of the patent as issued, and, so far as this court can see, it discloses nothing additional to the structure of Exhibit 35 as described in the original specification and claims. Certain specifications and claims as originally filed were somewhat changed, and some of the claims were canceled at the suggestion of the Patent Office, for the reason they did not conform to the drawing which the Patent Office made in the first instance. At a later time when the correct drawing was made by the Patent Office and filed with the application, certain claims which had been erased to conform to the incorrect drawing were not restored or reincorporated in the patent as originally issued, and as a result, and for the purpose of correcting this confusion, the reissue application was filed and the specifications were amended.

It seems to this court clear that the reissue application was filed for the purpose of obtaining the actual invention made by the Hinmans and disclosed in Exhibit 35, and does not go beyond it or beyond the drawings of the original patent. Clearly, there was no unreasonable delay on the part of the patentees in their effort to bring order out of this confusion and make the application, specifications, and drawings conform to the actual invention and disclosure made. It was no fault of the patentees that Mr. Brown was not skilled in making patent drawings or framing specifications and claims, and they ought not to be deprived of the benefit of their actual invention fairly disclosed and presented to the Patent Office as long as there are no intervening rights demanding protection. It is, of course, true and settled law that the reissued letters patent must be for the same invention disclosed in the original application. This does not mean that the specifications must read the same, or that the claims must be identical. If this were true, there would be no object in procuring a reissue.

[2] The defendant insists that there was a fatal mistake or omission in the drawing as originally filed, and that this makes the claims 18 and 19 of the patent invalid, for the reason that the Patent Office thereafter corrected the drawing, and that this was not allowable. It seems to this court clear that the Patent Office had the right, and that it was its duty, under the circumstances, to correct the drawing and make it accord with the actual invention of the applicants as shown by the photograph of the original device, and that when this was finally done it had the right to allow the claims for the original and actual invention.

I am led to the conclusion that the reissued letters patent have not been unduly expanded, and that same are valid.

On the question of infringement, it seems clear that the defendant's device infringes. It embodies a valveless inlet and a valveless unobstructed air exit, and, in fact, is a substantial copy or reproduction of the complainants' device. It differs in the exhaust valve, in that there is substituted a counterweighted valve which in the judgment of this court is the equivalent of that of complainants' device. There is nothing in the specifications or claims of the reissued letters patent which confines the complainants to the specific valve shown. In both

cases, the milk flows out when the suction combined with air pressure is removed which holds the valve closed. In complainants' structure, this valve drops down or closes of its own weight, being hinged to the exterior of the chamber. In defendant's device this chamber is not curved, but it is open at the lower end and closed by a valve hinged to the exterior of the chamber, and this is closed by a counterweight or long arm, which, operating on its hinge, also closes of its own weight taken as a whole. The one is the equivalent of the other, and in all other respects except the shape of the chamber the one is a substantial duplicate of the other. There are some minor but immaterial differences in the location of parts, but it is clear that they operate on the same principle in obedience to the same laws and to produce the same result. The complainants' device has been commercially successful, and it is noteworthy that, if we take the cap portion of defendant's device from the milk chamber, we may attach it to the milk chamber of complainants' device, and they will operate the same and may be attached to the pail in the same mode and manner. Both devices are designed to be attached to a milk pail and to be used in a rigid upright position, and in both it is intended and designed that the outlet valve shall automatically operate to alternately render the valve chamber air-tight and to discharge milk into a pail at normal atmospheric pressure. It may be well to note that in both cases the discharge valve of the milk chamber is tightly closed by the suction or exhaust of air from the milk chamber. This is done by the pump. When the suction is released, the milk opens the valve and is discharged.

Much has been said regarding claim 11 of the original patent and claim 11 of the reissue. Claim 11 of the original patent reads as follows:

"In a milking apparatus a milk chamber having a valveless inlet and a substantially air-tight valved outlet closed by gravity, and means for exhausting the air from said chamber."

The claim will mean the same and be for the same combination if we make it read:

"In a milking apparatus a milk chamber having a valveless inlet and means for exhausting the air from said chamber and a substantially air-tight valved outlet closed by gravity."

Claim 11 of the reissue reads as follows:

"In a cow-milking apparatus, a milk chamber having a valveless inlet, means for exhausting air from the chamber and a substantially air-tight valved outlet closed by gravity and the exhaust of air from said chamber."

It is contended, on the one hand, that this is an undue expansion of the claim, while, on the other hand, it is contended that this change is a narrowing in the reissue. In the original claim we have "a substantially air-tight valved outlet closed by gravity," while in the reissue we have in the same claim and combination "a substantially air-tight valved outlet closed by gravity and the exhaust of air from said chamber." In both, this air or valved outlet is closed by gravity; that is, the valve closes and remains closed by gravity. It is held

closed by gravity and the exhaust of air from the chamber causing a vacuum to a degree and an air pressure from the outside. The outlet is closed by the valve which closes by gravity and is held closed by gravity and exhaust of air from the chamber. This court cannot see any difference in the two claims when read in connection with the drawings and specifications, and fails to discover any undue expansion or broadening of the claim. If there be any difference, the reissue narrows the claim.

This court has some doubt of the validity of claim 19 of the reissue, which calls for:

"In a cow-milking apparatus, a milk chamber comprising two separate removably connected members having parts adapted to be normally spaced for receiving between them the cover of a milk receptacle, a milk inlet, an air exhaust connection, and a valved outlet."

The original patent has no claim which calls for a combination of connected members "having parts adapted to be normally spaced for receiving between them the cover of a milk receptacle." But I think that the original drawings and specifications show this feature, and that, even if omitted in the claims of the original patent, it was perfectly competent and proper to embrace this feature in the added and amended claims of the reissue.

[3] The claims in issue here and relied upon by the complainants are not limited at all to the tangential feature of the original or reissued patent, and no discussion on that subject is necessary or proper. It is plain, however, that defendant's structure is so arranged and constructed purposely as to secure all the benefits of this tangential construction or feature. There is a mere change of construction, and in this regard the one is the equivalent of the other. It is a mere change of form. On the trial the defendant claimed that its structure did not embody this beneficial feature. It is clear, of course, that in defendant's structure the milk is not discharged into the milk chamber tangentially as it is in complainants' device; but, even if defendant's is not as good as complainants' in this particular respect, it is an equivalent or substantial equivalent by change of form, and the object of this change is to bring about the same result. A patent cannot be evaded or infringement avoided by a construction which is substantially the same, and which operates on the same principle, but which is inferior in its operation and produces an inferior result.

As to the defense that the claims of the reissued letters patent are wholly or substantially anticipated by the prior art patents and define nothing more than old and well-known details shown by many prior patents to have been old and well-known, it is proper to say: This court has been over the prior art with great care and interest. Nothing is found which anticipates or shows want of patentable invention. The commercial success of the complainants' device shows its superiority. The infringement by defendant, that is, the copy, close imitation, shows merit and is evidence of patentable novelty. Why is it that the defendant so closely imitates and copies the complainants' device? But this is not conclusive. Both complainants and defendant had the right to follow and copy and use and improve upon the prior

art. Either has the right to copy or follow the prior art without infringing upon the rights of the other. The patent in suit assumes to be an improvement and in some respects a pioneer. In the specific improvements claimed, this court is of the opinion that the reissued letters patent in suit are a patentable advance and improvement upon the prior art, and that the Hinmans were first in the field, and that their patent discloses patentable invention and is valid as to each and all the claims relied upon. The defendant's expert states, in substance, that the patent to Condrom, No. 655,200, is in his opinion the best reference as showing anticipation, etc. By no possibility can this Condrom patent anticipate any claim in issue here, unless it be claims 20 and 21. The Condrom patent differs essentially from the patent in suit in several respects, and is a different combination and operates in a different way, and clearly does not produce the same or substantially the same results. True, it has a milk chamber and valveless milk inlets and a milk outlet provided with a suction closed valve. But this valve is not normally closed. It is normally open. The Condrom patent also has a suction connection leading to a pump. However, the teat cups form a part of the receiver, and because of the construction only partially described suction is not applied to the teats of the cow gradually as the vacuum is created and each cup separately communicates with the receiver. The valve for the discharge of the milk remains in the aperture and in a pipe leading therefrom which makes the structure unsanitary and I think inoperative. There are many defects in this Condrom patent which forbid its being considered as an anticipation of the patent in suit.

I do not regard it necessary to go through and describe the Colvin patent, No. 28,455 or the Shiels patent, No. 513,625, or the Weber patent, No. 680,952, or the Jacques patent, No. 870,785, or the Peik & Lehman patent, No. 995,804, or the Delaney & Holtzbauer patent, No. 1,021,570, or the Roberts patent, No. 1,074,206, or the Uevler patent, No. 1,112,949, or the Hinman patent, No. 907,236, as neither is an anticipation, and, take them altogether with others as showing the prior art, I do not think the ordinary mechanic skilled in the art with those devices before him would have constructed the device shown in complainants' patent sued upon. This is the neatest, most operative, and most sanitary of all, and shows a marked and patentable improvement on the prior art. It is to be regretted, of course, that errors were made and crude drawings and specifications submitted in the first instance; but it is apparent that the Patent Office recognized the merit of the Hinmans' invention and did what it reasonably could to aid in giving to the patentees the benefit of the invention. In my judgment justice requires that this court should refuse to deny relief to the complainants on mere technical grounds which do not go to the real merits of the controversy and which are not fatal as matter of law. Clearly, there was no laches in applying for the reissue, and I therefore hold that the reissued letters patent sued upon were applied for in due time and duly reissued; that it contains no "new matter" within the meaning of the statute and decisions not disclosed in the original patent or application upon which it issued;

that there are no intervening rights which defeat the complainants; that patentable invention is disclosed; that the claims are not anticipated; and that infringement is clearly shown.

The complainants are entitled to a decree accordingly, with costs.

MACBETH EVANS GLASS CO. v. GENERAL ELECTRIC CO.

(District Court, N. D. Ohio, E. D. January 27, 1916.)

No. 303.

1. PATENTS ⟸75, 83—VALIDITY—"ABANDONMENT"—"PRIOR PUBLIC USE."
The primary purpose of the patent laws is to promote the progress of science and the useful arts by bringing into general use discoveries which may be made from time to time by inventors; and where the discoverer of a formula and process relating to the manufacture of glass held the same as a secret for nearly 10 years before applying for a patent therefor, during which time they were used by a corporation of which he was president and a stockholder, were known to some of its employés, and their product was sold in the market, a patent thereafter granted is void under Rev. St. § 4886 (Comp. St. 1913, § 9430), upon the ground of abandonment of the right to the same and also upon the ground of prior public use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92–97, 108, 109; Dec. Dig. ⟸75, 83.

For other definitions, see Words and Phrases, First and Second Series, Abandonment; Prior Public Use.]

2. PATENTS ⟸328—VALIDITY—PROCESS FOR MAKING GLASS.
The Macbeth reissue patent, No. 13,766 (original No. 1,097,600), for a formula and process for making glass, *held* void for abandonment and prior public use.

Suit in equity by the Macbeth Evans Glass Company against the General Electric Company. On final hearing. Decree for defendant.

Tolles, Hogsett, Ginn & Morley, of Cleveland, Ohio, for plaintiff.
Squire, Sanders & Dempsey, of Cleveland, Ohio, for defendant.

CLARKE, District Judge. In this cause infringement is claimed of United States reissued letters patent No. 13,766 dated July 7, 1914, and issued to the plaintiff as assignee of the inventor, George A. Macbeth. The original patent, No. 1,097,600, is dated May 19, 1914. This hearing was had upon the defense stated in paragraph 14 of the defendant's answer under an order of court entered pursuant to Supreme Court Equity rule No. 29 (33 Sup. Ct. xxvi).

[1, 2] The parties to the suit for the purpose of the hearing stipulated the relevant facts, which may be succinctly stated as follows, viz.:

(1) That prior to the fall of 1903 the patentee, Macbeth, "discovered and perfected" the formula and process which is the subject-matter of the patent relied upon.

(2) That about the fall of 1903 the plaintiff company, of which Macbeth was president and a stockholder, commenced the use of the formula and process for the manufacture of glass, and continued to

so use them until the application for original letters patent was filed on May 9, 1913; that large quantities of the glass were sold during those years in the open market for profit; but that the formula and process were treated as secret inventions.

(3) Harry A. Schnelbach, a trusted superintendent, and C. H. Blumenauer, a salesman of the plaintiff, with knowledge of the secret formula and process in May of the year 1910, left the employ of the plaintiff, and, entering the employ of the Jefferson Glass Company, disclosed the formula and process to their employer; that that company proceeded to use them in the manufacture of glass which prior to December 17, 1910, it placed upon the open market; and that it continued to so use the formula and process and to manufacture and sell the glass until after the application for the original letters patent on May 9, 1913.

(4) That on December 17, 1910, the plaintiff commenced suit to enjoin the Jefferson Glass Company and Schnelbach and Blumenauer from disclosing said secret formula and process to others, and from further manufacture of glass by use of them. During the prosecution of this suit, the formula by agreement of counsel was kept secret, being disclosed to the court by the use of a code. A preliminary injunction was allowed, and on May 12, 1913, a decree was entered by the court of common pleas of Allegheny county, Pa., enjoining the defendants in that suit from disclosing the secret formula and process, and from manufacturing glass by use of them. On January 6, 1913, the Supreme Court of Pennsylvania on appeal affirmed this decision. The application for the letters patent in suit was filed on May 9, 1913.

Upon these facts substantially alleged in paragraph 14 of the answer, the defendant claims that, by the course of action described and admitted, the plaintiff and Macbeth forfeited any right to a patent which the latter may have had as an inventor of the formula and process, and any right which they or either of them had to obtain the patent protection declared on in this suit.

This state of facts presents two questions which are now before the court for decision, viz.:

(1) Does the manner in which the inventor dealt with his invention, as shown in the stipulation quoted, constitute an abandonment of it within the meaning of U. S. R. S. § 4886 (Comp. St. 1913, § 9430)?

(2) Does the manner in which the inventor permitted the plaintiff to use his formula and process, and to sell the resulting product or composition of matter in the open market for almost ten years, constitute a public use, or show that it was on sale for more than two years prior to the filing of his application for a patent on May 9, 1913, within the meaning of said section No. 4886 (section 9430).

The industry of counsel and of the court has failed to discover any decision of these questions by any court, and therefore they must be decided upon principle unaided by direct authority.

Letters patent are issued pursuant to statutory provisions, which, so far as the decision of this case is concerned, have not been greatly modified since the patent act of 1793 (Act Feb. 21, 1793, c. 11, 1 Stat. 318).

Fortunately, so early as 1829 the fundamental purpose and principles of our patent laws were fully discussed by Justice Story in Pennock v. Dialogue, 2 Pet. 1, 7 L. Ed. 327, in his usually illuminating and thorough manner, which leaves so little to be desired.

Our patent statutes have all been enacted under the power granted to Congress by the Constitution of the United States, art. 1, § 8, cl. 8:

"To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

And Justice Story, in the case cited, declares that:

While one object of such laws is to encourage inventors and to stimulate genius, yet their main object is "to promote the progress of science and the useful arts; and this can be done best by giving the public at large a right to make, construct, use, and vend the thing invented, at as early a period as possible, having due regard to the rights of the inventor. If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention; if he should for a long period of years retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying upon his superior skill and knowledge of the structure; and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what should be derived under it, during his fourteen (now seventeen) years—it would materially retard the progress of science and the useful arts and give a premium to those who would be least prompt to communicate their discoveries."

Thirty years later, the Supreme Court, in Kendall v. Winsor, 21 How. 322, 16 L. Ed. 165, quotes with approval this language of Justice Story, and adds:

"It is undeniably true that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage. The benefit of the public or community at large was another and doubtless the primary object in granting and securing that monopoly."

After discussing the subject at some length, the decision continues:

"By correct induction from these truths, it follows that the inventor who designedly, and with the view of applying it indefinitely and exclusively for his own profit, withholds his invention from the public, comes not within the policy or objects of the Constitution or acts of Congress. He does not promote, and if aided in his design would impede, the progress of science and the useful arts. And with a very bad grace could he appeal for favor or protection to that society which, if he had not injured, he certainly had neither benefited nor intended to benefit."

Whether or not these conclusions, as to what are the principles upon which our patent laws are founded, were strictly necessary to the decision of the cases in which they were expressed, commending themselves as they do to sound thinking, they must be accepted as a correct statement of the principles and policy of that law which should guide us in the application of it to this cause.

It is palpably clear, from the admissions upon which this hearing proceeds, that Macbeth and the plaintiff decided in 1903 that they would rely upon their ability to keep the discovery of Macbeth a secret as long as they could without the aid of the patent laws. They made no application for a patent for nearly ten years, and when after seven

years, through the exposure by trusted employés, the formula and process became known and came into use by others, still neither Macbeth nor the plaintiff applied for the protection of the patent laws, but, on the contrary, elected to still depend upon their common-law right to maintain the discovery as a trade secret.

They continued in this attitude of mind through two years of litigation, until their right to the trade secret was established by the Supreme Court of Pennsylvania on January 6, 1913, and, even when this right was thus seemingly established at least for the state of Pennsylvania, they did not elect to apply for a patent until four months later, on May 9, 1913.

What occurred in the interval between January 3 and May 9, 1913, to change the purpose of Macbeth and the plaintiff, does not appear; but their actions show that it was not until the latter date that they decided to abandon the monopoly of a trade secret for an indefinite length of time, and to make application for the patent monopoly for seventeen years.

Thus do the facts stipulated make it entirely clear to this court that the settled purpose of Macbeth, the inventor, and of the plaintiff from the very beginning, was to avoid compliance with the patent laws as long as they could maintain a monopoly without their aid, and that, when that was no longer possible, their purpose was then to apply for, and if possible obtain, a patent monopoly for seventeen years longer.

An inventor guilty of such conduct "comes not within the policy or object of the Constitution or acts of Congress" with respect to patents and to approve it by permitting a valid patent to be issued to such a one would not promote, but would impede, the progress of science and the useful arts.

The patent law in effect during the time under consideration in this case provided that any person who invented or discovered any new and useful manufacture or composition of matter not known or used by others in this country, unless the same is proved to have been abandoned, may obtain a patent therefor.

We do not have here the case of mere delay on the part of an inventor to apply for a patent, nor the case so frequently discussed in the books of delay upon the part of an inventor because of poverty or sickness, or other insurmountable obstacle, or for purposes of experiment while perfecting his invention; but, upon the contrary, we have many years of delay, after the invention was perfected, coupled with a continued, extensive use by the public for commercial purposes of the product of the invention.

While it is true that abandonment is a question of intention, yet proof of that intention may be derived from the acts of the parties just as certainly as from their declarations, and it is difficult to imagine more satisfactory evidence of it than we have in this case.

To decide and to act on that decision for many years, not to accept the benefit of the patent laws, but to rely upon the trade secret law for protection of an inventor, is as clear an abandonment by him of the privileges and obligations of the patent law as the abandonment of its advantages in any other manner would be. For these reasons, it

seems clear that the plaintiff and Macbeth were not entitled to the patent in suit when their conduct is judged by either the letter or the spirit of our patent laws.

As we have said, there seems to be no decision sufficiently in point to rule the questions presented by this cause; but such decisions as there are upon analogous states of fact are all confirmatory of the conclusion we are reaching. The chief of these cases are: Spear v. Belson, 1 McArthur Pat. Cas. 699, Fed. Cas. No. 13,223; Lovering v. Dutcher, 2 Hayw. & H. 367, Fed. Cas. No. 8,553; In re Appeal of Mower, 15 App. D. C. 144; and Walker on Patents (4th Ed.) § 91.

The very absence of controlling decision on a state of facts such as we have in this case, and which must have frequently arisen in the past, strongly suggests that the profession has been slow to advise applying for a patent under such conditions, and that the government has been yet slower in granting patents where such conditions were disclosed. The absence of authority supporting such patents is of itself an important authority against them.

We must come to the same conclusion as that at which we have arrived if we consider the claim of the defendant, that the plaintiff made public use of the invention of Macbeth more than two years prior to the application for the patent in suit on May 9, 1913.

It appears from the stipulation, that as early as 1903, under a permission from Macbeth, the precise character of which does not appear, the plaintiff began the manufacture and sale of glass according to the formula and process subsequently patented, and that two men at least, Schnelbach and Blumenauer, knew of and used the invention. The implication is imperative that many others must have known of it during the long use of it by the plaintiff, a corporation.

Such a use as this is certainly a public use within the meaning of the decisions of the courts, unless it is saved from being such, as the plaintiff claims it is saved, by the fact that the formula and process were maintained "as secret inventions." It is to be noted that the use made of the invention was after it was perfected and without any pretense of the use being one for experimentation.

The plaintiff, in support of this claim that the use of the formula and process, being under cover of attempted secrecy, were therefore not a public use within the meaning of the law, cites many decisions from which expressions such as these are culled, viz.:

Kendall v. Winsor, 21 How. 323, 16 L. Ed. 165:

> But "he kept the machines from the view of the public, allowed none of the hands employed [by him] to introduce persons to view them, and the hands pledged themselves not to divulge the invention."

Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755:

> "If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, even though the use and knowledge of the use may be confined to one person."

Jenner v. Bowen, 139 Fed. 556, 71 C. C. A. 540 (C. C. A. 6th Circuit) decided by Judge Lurton:

"We have examined the evidence upon this subject with a good deal of care, being inclined to save this patent, if it could be done under the law, but only to find that neither the inventor nor Bowen used any of the precautions usual when it is desired to keep an invention secret."

This court cannot agree with the claim that these decisions are authority to the point that a use designed to be kept secret may not be a public use of a patented formula, process, or product, convinced as it is that these references by the various courts to the fact that the prior use of a subsequently patented invention was secret in character were intended to go no further than to point out that such secret use is evidence tending to show that the inventor did not intend or actually did not abandon his invention. But this is very far from saying that it is conclusive evidence that the right to a patent was not abandoned, or that the use made of it was not a public one.

No case has been cited to the court where a patent has been held valid after a long commercial but secret use of it, upon the ground that such a use was not a public one within the meaning of the patent statutes.

In Egbert v. Lippman, 104 U. S. 333, 26 L. Ed. 755, it is decided that a use of an invention may be public, "although but a single machine or device for which the letters were subsequently granted was used only by one person."

And in Hall v. MacNeale, 107 U. S. 90, 2 Sup. Ct. 73, 27 L. Ed. 367, the use of certain specially constructed bolts in two safes where they were hidden from view after the safes were completed, and where it required the destruction of the safes to bring them into view, was decided to be a public use for the reason that the use of such bolts in the safes was necessarily known to the workmen who put them in.

In this case, as we have said, the knowledge of the formula and process as distinguished from the product was communicated to a number of persons, and was by them as employés of the plaintiff used to produce the product which was largely sold on the open market. Precisely the same use was made of the formula and process as would have been made of them if they had been published, and shall the fact that the limited number of persons allowed to know the details of the invention were enjoined to secrecy convert what was clearly a much more public use than that in either Egbert v. Lippmann, or in Hall v. MacNeale, supra, into one that is not public? A private injunction should not be given any such authority, especially when given for the purpose of defeating the policy of our patent laws.

I cannot bring myself to conclude that he who deliberately offends against the chief purpose of our patent laws, by withholding from the public generally the knowledge of an invention for nearly ten years, can nevertheless enjoy the benefits of the monopoly granted by such laws, because he has by special injunction kept his invention secret from more than a limited number of persons to the end that his monopoly without the protection of the patent laws might be continued longer than the period prescribed by those laws.

The plaintiff also makes the claim that an inventor may keep secret his invention as long as he chooses, and nevertheless obtain a patent,

because the patent statutes do not prescribe any time within which an application for a patent must be filed after an invention is perfected.

The cases chiefly relied upon as authority for this claim are Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68, and Parks v. Booth, 102 U. S. 96, 26 L. Ed. 54. The opinion in each of these cases was written by Justice Clifford. Of the former of them, it is sufficient to say that the justice writing the opinion says that the subject he is discussing when he uses the language quoted was not in issue in the case, and in Andrews v. Hovey, 124 U. S. 694, 8 Sup. Ct. 676, 31 L. Ed. 557, the Supreme Court says of a passage immediately following that quoted from Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68, and, while discussing the same point, that this "was an observation made in regard to a point not in issue or in judgment."

As to the expression relied upon in Parks v. Booth, it is found in a discussion of the proper practice in patent cases under the pleading prescribed by statute which concludes as follows:

"Subject to this explanation, it is clear that there is no proof in this case that the complainant was guilty of any laches in applying for a patent, or that his improvement ever went into public use or was on sale in this country before he applied for his patent."

Upon this claim other cases are cited by the plaintiff which it is not necessary to discuss, for the reason that in not one of them was the question we are discussing in issue.

It is also argued by the plaintiff that while it must be admitted that, if another discovers the invention while it is being kept secret, the first inventor cannot patent it, yet, so long as no person does make a second discovery of it, the right to a patent remains with the first discoverer. No decision of any court is cited in support of this claim, but various decisions are called to the attention of the court wherein expressions like this are found:

"It was not until after the several patents above specified had been obtained by others * * * that Mason, nine years after his alleged invention, comes forward to claim the exclusive right to make such jars. If he originally might have claimed it, he had slept too long." Consolidated Fruit Jar Co. v. Wright, 12 Blatch. 149, Fed. Cas. No. 3,135.

Bates v. Coe and Kendall v. Winsor are also cited in support of this claim.

Upon expressions culled from these more or less applicable decisions is based this claim that while, if rights of third parties making the same discovery intervene, the first discoverer may not secure a patent, yet, if such private rights do not arise, the right for the patent continues indefinitely.

To grant this conclusion would be to go much beyond the scope of any of the decisions cited to this court, and would do violence to the conclusion reached, as we have seen, by the Supreme Court in the cases cited, that the primary and dominant purpose of the patent laws is the public one of promoting the useful arts and sciences by bringing into general use discoveries which may be made from time to time by inventors. That private rights have not intervened during the delay in taking out a patent cannot therefore be conclusive on this point, be-

cause the right of the public, the dominant right created by the patent law, springs into existence as soon as the discovery is made, and does not wait upon a second discovery by another person. This public right, being the ruling one of the law, is more potent to defeat the right to a patent on account of delay in applying for it, than any private right can possibly be.

For these reasons, the decisions cited are not persuasive to the point that the right of an inventor continues perfect as against the public until private rights intervene to imperil it.

It results from this discussion that the defense stated in paragraph 14 of the defendant's answer will be sustained. The patent described in the bill will be decreed to be void because the discovery was used in the manner stated in the stipulation for almost ten years before the patent in suit was applied for, and was therefore abandoned, and also because the invention described in the patent was in public use more than two years prior to the application of the patent.

The bill will be dismissed, at the plaintiff's cost.

KELLOGG SWITCHBOARD & SUPPLY CO. v. DEAN ELECTRIC CO. et al.

(District Court, N. D. Ohio, E. D. September 21, 1915.)

No. 9.

PATENTS ⊂=328—VALIDITY OF—INFRINGEMENT—TELEPHONE TRANSMITTER.

The Dean patent, No. 687,499, for an improved telephone transmitter, as to the claims describing the granule chamber as carried on the diaphragm, is void for want of novelty in view of the prior art. The remaining claims must be limited to the precise construction described in the specifications, drawings, and claims, and, as so construed, *held* not infringed.

In Equity. Suit by the Kellogg Switchboard & Supply Company against the Dean Electric Company and others. On final hearing. Decree for defendants.

Curtis B. Camp and Jones, Addington, Ames & Seibold, all of Chicago, Ill., for plaintiff.

F. O. Richey, of Elyria, Ohio, M. B. & H. H. Johnson, of Cleveland, Ohio, and Charles A. Brown, of Chicago, Ill., for defendants.

CLARKE, District Judge. In this suit, the bill in which was filed March 4, 1905, infringement is claimed of claims numbered 1, 2, 8, 9, 10, 11, 15, 16, and 17 of letters patent No. 687,499, issued to William W. Dean, dated November 26, 1901, for a claimed improvement of a telephone transmitter. The usual injunction and accounting are prayed for. The defendants deny the validity of the plaintiff's patent, deny infringement, plead that it is manufacturing a transmitter under letters patent No. 793,928, issued to W. E. Harkness, dated July 4, 1905, and further plead public use and sale more than two years prior to the application for the patent in suit.

That Dean came late into the transmitter field of invention, when

it was approaching, if it had not entirely reached, exhaustion, the record abundantly shows, and it also appears that he sought, not so much to produce an improved transmitter, as to construct one which would avoid infringement of satisfactory transmitters already in use, notably the White and Stromberg-Carlson. The patent in suit is a combination patent, confessedly all of the elements used in complainant's transmitter had been long in use when the patent was applied for, and the only claim made in the case in which there is any real substance is described best in claim No. 7 of the patent in suit as:

"The combination with a diaphragm comprising a sheet of material having a portion deflected to form a recess or chamber of an electrode within the chamber and moving with the diaphragm, a stationary support, a second electrode mounted on said support and extending into said recess or chamber, and comminuted material in said recess or chamber between said electrodes, substantially as described."

The inventor declares in his specification that:

The object of his invention is to "provide a telephone which will be simple and compact in structure, and which will effectively prevent packing of the carbon granules, thereby overcoming an objection which is incident to most of the granular telephones as commonly constructed heretofore."

Transmitters using granules of carbon in various forms between the electrodes of the transmitter had been in use for many years before Dean applied for his patent. But it is claimed that the carbon granules tended to adhere together or "pack," with a resulting defective transmission of sound waves, and that Dean's problem was to prevent this or reduce it to a minimum. That he produced a combination of well-known elements which gives good results is admitted, but that it is superior to several which went before is by no means proved. The most that can be claimed for the patent in suit, therefore, is that by a new combination of old elements it produces what is claimed as an improved result. There is much evidence in the record tending to prove that whatever improvement the plaintiff's transmitter possesses is due not more to the adjustment of the granule chamber on the main diaphragm than to improved preparation of the carbon granules and minor refinements in construction.

The 19 claims of the patent in suit may broadly be divided into two classes:

First. Those which describe the chamber containing the granules as integral with the main diaphragm of the transmitter by making use of it as a part of the chamber. The drawings all relate to this form of construction in which the main diaphragm forms one side of the granule chamber.

Second. The claims which describe the granule chamber as "carried" on the diaphragm. Several of these claims describe the "supplemental diaphragm as peripherally connected" with the main diaphragm; but this it seems clear enough was common in earlier transmitters, and as the connection is made in the patent in suit, it can serve no new purpose, since the construction obviously involves also securing this supplementary diaphragm and the rear electrode, its stem and block, to the main diaphragm. That this can give a flexible connection to the supplementary diaphragm, which will contribute to the vibrat-

ing of the entire granule chamber, and so to the preventing of packing, as claimed by one of the plaintiff's experts, seems entirely fanciful.

The complainant clearly recognizes the line of demarcation which we have pointed out between the two sets of claims, and in this suit relies wholly upon the claims which describe the granule chamber as "carried on" the main diaphragm. The expression, "carrying the granule chamber upon the diaphragm," as distinguished from making it a part of the diaphragm when applied to the subject-matter of this suit, must mean, in the opinion of this court, that the granule chamber rests upon or against, or is in a measure supported by, the diaphragm, and not, as defined by plaintiff's expert, Jackson, "in the double sense of supported in position by, or through and of caused to move with," whatever that may mean.

Adopting the meaning which we have given to "carrying the granule chamber upon the diaphragm," it is very clear that the construction described in the second group of claims of the patent in suit was anticipated in substance and form in White, No. 485,311, dated November 1, 1892, Colvin, No. 513,305, and Stromberg-Carlson, No. 580,434. It is very significant in this connection that an expert so resourceful as Mr. Jackson could not be induced to describe a construction of a transmitter within the claims declared on in this suit, though often pressed by counsel to do so. The suggestion is vehement that he at least thought it was not possible to do so without clearly infringing on earlier patents.

As we have said, Dean, the inventor of the patent in suit, came late into the transmitter field of invention, and the advancement, if there was any advancement, made by him upon what had gone before, was meager, and consisted solely in a slight new arrangement of parts—indeed, it is pointed out in the record with a good deal of plausibility that the Dean patent consists in a mere reversal of the parts of the White patent. Both the Stromberg-Carlson and the White patent had been highly successful commercially before Dean entered the field, and the record shows that the White construction is now much more largely used than the plaintiff's, or any other construction; it being the standard of the Bell Telephone Company.

Under these conditions it seems clear enough that the plaintiff should be limited to the precise construction described in its patent, and by this is meant the construction described in the specification and drawings, as well as in the claims, all read in the light of the state of the art to which the invention belongs. Card v. Colby, 64 Fed. 594, 12 C. C. A. 319. This principle, so clearly stated by the Circuit Court of Appeals of this Circuit in D'Arcy v. Staples & Hanford Co., 161 Fed. 733, 88 C. C. A. 606, seems sharply applicable. I cannot bring myself to think that there is sufficient substance in any of the claims to merit attention or discussion, except possibly those which make the diaphragm an integral part of the chamber in which are inclosed the carbon granules between the electrodes, and these are not involved in this suit.

So far as the other claims are concerned (and they are the ones which it is claimed are infringed in this case), I am of the opinion that they are void for want of novelty upon the references already given,

to which may be added Hunnings, 1878, Charollois, and Cousens; No. 609,877. Because these claims are void, of course the claim of infringement cannot be sustained in this case; but it may be said also that, restraining the other claims of the patent to the precise construction described in the specification, drawings, and claims, the transmitter manufactured by the defendant cannot successfully be claimed to infringe the plaintiff's patent, as counsel for the plaintiff insist that it does.

It is not necessary for the court to go further into this case, but I feel that I should express my opinion to the effect that the testimony with respect to the telephones and transmitters found in use at Greeleyville, S. C., manufactured and sold by Mason and introduced as exhibits in this case, show a public sale and use of a transmitter with a granule chamber carried upon the main diaphragm more than two years prior to the application for the Dean patent, even when the most rigid rules as to the burden of proof with respect to such questions are applied. There is no doubt in the mind of this court that the men who described the purchase and use of the three or four telephones at Greeleyville told the truth, and there is every reason to believe the testimony of Mason and Manning, supported as it is by the correspondence and invoices which are in evidence. The impression which the testimony of all of the witnesses named makes upon this court is unqualifiedly that they are honest men, telling the plain truth, and it will be a sad day for the administration of justice when the testimony of witnesses is rejected as untruthful simply because they may have been served with notice that a claim will be made that some article they are manufacturing infringes another's patent; and this is all that is urged to cast suspicion upon men of certainly high standing in business and in the communities in which they live. It is not necessary to a disposition of this case to find that there was a sale and use of the invention as it is described in the claims relied upon in this proceeding, but, if it were necessary, this court would not hesitate to so hold upon the evidence in the record.

The construction covered by the patent under discussion in this case is very simple, and comprises but few elements, yet the case has been permitted by counsel to hang about the courts undecided for 10 full years, and the record has been burdened with more than 1,000 pages by two experts called by the plaintiff. In these 1,000 pages there is scarcely an indication that either witness for a moment looked upon himself as called to candidly enlighten the court as to the few questions really up for decision. Their testimony would have delighted a dialectician of the Middle Ages with its exhibitions of skill in evading giving direct answers, but most of it is of no value at all to a court in seeking to discover where the truth lies between the conflicting claims of the parties. The time this case has been in court and the character of the record suggest very strongly that its purpose was not to secure a speedy settlement of a genuine controversy, but that it was intended rather as a menace, to be held in terrorem over the defendant and others who might have the temerity to enter this all but exhausted field of invention.

A more appropriate ending to this opinion cannot be made than by quoting from American Stove Company v. Cleveland Foundry Company et al., 158 Fed. 978, 86 C. C. A. 182, in which the Circuit Court of Appeals of this Circuit impressively says:

"We note that more than two-thirds of the nearly 1,000 pages in this record are taken up by the testimony of expert witnesses. * * * As a contest between gentlemen learned in the science of the subject, it might be interesting if one had leisure, though it seems sometimes to run into very attenuated points. * * * It is not the province of witnesses to advocate the cause of the party who calls them, nor to pass upon the questions of law and facts presented by the controversy. Frequently an expert witness may be of much aid to the court in explaining matters which can only be appreciated and understood by learning higher than the ordinary; but his province is to instruct, and not to decide, and even the instruction is of uncertain value when it is colored from standing in the place of a partisan for one of the parties. Usually the testimony of one competent witness on each side is enough to insure a full and fair elucidation of what is recondite in the case. The voice of a single teacher is worth more than a confusion of many tongues. And the expense is worse than useless."

It results from this discussion of the evidence and the authorities that the bill of the complainant will be dismissed, and that the defendant will recover its costs.

KELLOGG SWITCHBOARD & SUPPLY CO. v. DEAN ELECTRIC CO. et al.

(District Court, N. D. Ohio, E. D. October 6, 1915.)

No. 10.

1. EVIDENCE ⟸596(1)—MEASURE OF PROOF—EFFECT OF DELAY IN PROSECUTION.

That a case has been permitted to drag without trial for 10 years requires the party asserting rights to establish them by clearer testimony than would be the case if he had diligently pressed his claim to a decision.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2446; Dec. Dig. ⟸596(1).]

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—TELEPHONE SWITCHBOARD RELAY.

The Manson patent, No. 784,872, for a telephone switchboard relay, claims 1, 2, 3, 5, 6, and 8, *held* void for anticipation in the prior art, and also not infringed, if conceded validity.

In Equity. Suit by the Kellogg Switchboard & Supply Company against the Dean Electric Company and others. On final hearing. Decree for defendants.

Curtis B. Camp and Jones, Addington, Ames & Seibold, all of Chicago, Ill., for plaintiff.

F. O. Richey, of Elyria, Ohio, M. B. & H. H. Johnson, of Cleveland, Ohio, and Charles A. Brown, of Chicago, Ill., for defendants.

CLARKE, District Judge. This is a suit in which the plaintiff claims infringement of United States letters patent No. 784,872, issued on the 14th day of March, 1905, to Ray H. Manson on an application filed on August 3, 1903, for an improvement in a telephone switchboard relay.

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

The bill was filed in July, 1905. The first testimony was taken in May, 1906, and the last was taken in March, 1915. There were years together in which no action whatever was taken in the case, and it is not surprising, therefore, to find that a record made up in this manner should be so confused and contradictory that it is difficult, if not impossible, for a court to derive from it a result satisfactory even to itself.

[1] The fact that the case has been permitted thus to hang about the courts for 10 years without trial, while witnesses have died and the memories of the living as to important facts have failed, must inevitably require that the party asserting shall establish his rights by clearer testimony than would be the case if he had diligently pressed his claim to a decision. Pending suits, more dead than alive, should not be permitted to extend statutes of limitation. After as well as before suit is instituted, equity aids the vigilant, not those who slumber on their rights.

[2] Relays for various purposes, including that for which the one in suit was devised, were old in the art of telegraphy and telephony before Manson came into the field, and the changes which his patent makes in the constructions which had gone before are so slight that, unless they are of that rare class which, though seemingly slight, by their important results prove their originality and value, they should be looked upon as mere changes of form, suggested by experience, rather than as springing from inventive genius.

'That the patent in suit does not cover slight changes which produce great results is for this court conclusively proved by the fact that the plaintiff, though it has owned this Manson patent since the date of its issue in March, 1905, has manufactured and sold as its standard relay for telephone purposes the form which it was using before the date of the Manson patent, known as the Kaisling relay, manufactured under a patent applied for on October 17, 1901, and issued on March 7, 1905—only seven days prior to the date of the issue of the patent in suit.

The changes of construction covered by the claims in issue in this case, viz., claims No. 1, No. 2, No. 3, No. 5, No. 6, and No. 8 of the patent, consist in extending the contact carrying ends of the switch springs forward to near the end of the magnet, and in extending the horizontal arm of the elbow lever rearwardly, so that it will engage the springs which it operates at a point to the rear of the contact points, thus making these points more accessible and easier of inspection than in the older form of construction.

Other claims of the patent, not in issue in this suit, claim invention in a change in the form of the horizontal arm of the elbow lever, which consists in the cutting away of a considerable part of it, leaving only narrow strips or arms near the sides or edges of it. The ends of these rearwardly extending arms are connected by a pin properly insulated and so placed as to engage the spring which it is desired to move. The merits claimed for this construction are two:

First: That the extending forward of the switch springs and the

extending rearwardly of the horizontal arm of the elbow lever gives an unobstructed view of the contact points and easy access to them to an observer placed immediately in front of the instrument. This it is claimed is of value in searching for the cause of defective working when the relays are installed for use in the customary manner, side by side, and very close together. It is claimed that older constructions with the horizontal arm of the armature solid in a measure concealed some of the contact points, if there were more than one, and if the observer stood immediately in front of the instrument.

Second. That it permits placing the vertical elbow of the armature closer to the end of the magnet than in earlier constructions and thus reduces the air space between the magnet and the elbow, thereby increasing the efficiency of the instrument. The evidence in this case shows that the armature is an instrument which rarely gets out of order. Convincing testimony to this effect appears in the advertisement of the plaintiff in Telephony of September 23, 1911, in which it makes a conspicuous feature in its advertisement of the Kaisling relay that no finger marks are to be seen in the dust accumulated upon the operating relay cases of exchanges in which the Kaisling relay is mounted, so seldom do they need inspection and repair.

The claim of superior efficiency made by the plaintiff for the Manson relay, because it permits of bringing the vertical arm of the armature elbow closer to the end of the magnet than other constructions permitted, and so requires lighter current for operation, is stoutly affirmed by the experts for the plaintiff, and just as confidently denied by experts for the defendant. In this state of the record, the fact that the plaintiff has now for ten years continued to manufacture, use, and sell the Kaisling relay, placing upon the market, as the records show, several hundred thousand of them, while all the time owning what it now claims is this superior Manson relay, of which it has manufactured in all those years not to exceed 10,000, and those (a former chief engineer of the company testifies) were manufactured for the purposes of this suit, is evidence clearly sufficient to satisfy this court at least that the claim is not well founded and must be rejected.

That the Manson construction brings the contact points of the relay into a position more readily accessible for inspection and repair than are the contact points of the Kaisling relay would seem to be clear from inspection of the instruments; but here again the conduct of the plaintiff through all these years in not using the Manson relay and in continuing to use the Kaisling is of itself very strong evidence that the claimed advantage of the position of the contact points has been exaggerated, or that the claimed change of position of the contact points is not of any considerable importance in the art, either because inspections of relays are not frequently necessary, or because tests of them are made, not by looking at them, but by electrical tests, such that a view of the contact points is not necessary.

The contribution of the Manson construction to the art at most consisted in lengthening the switch springs in one direction and in ex-

tending the horizontal arm of the elbow lever in the other; and for the purposes of this suit that is all, for there is no claim made in this case that the special form given the horizontal arm of the armature is infringed by the defendant's construction. As we have said, relays in various forms were in use long prior to Manson's claimed invention, and whatever of merit there may have been in carrying the contact points forward, and in moving the point of engagement of the lever with the switch springs backward, seems to have been fully anticipated by the Burns relay, which it is stipulated is a part of the prior art, and by the McBerty patent, No. 592,432, issued on October 26, 1897.

These references seem to make it unnecessary to go into an analysis of the conflicting evidence as to the relative dates of invention of the Manson relay, and of what is known in this record as the American Electric relay, and without doing so we conclude that the construction of the Manson patent was anticipated by Burns and McBerty, and therefore is without novelty and invention, and since the plaintiff has held the patent unused for now 10 years, while manufacturing and selling a type of relay which it is claimed in this suit the Manson is a great improvement upon, we are constrained to conclude that the actions of the plaintiff are to be relied upon rather than its witnesses, and that the construction is wanting in any special utility.

It may be added, we think with entire propriety, that one coming into the field of invention as Manson came into this field, when it had approached, if, indeed, it had not reached, exhaustion, must be confined to the precise construction which he sets forth in his patent, and that for this reason, since the construction of the defendant differs quite as essentially from Manson's as Manson's does from Kaisling's, even if the Manson patent were not void, it must be held that the defendant's construction does not infringe it.

It results that the bill will be dismissed, at the costs of the plaintiff.

KELLOGG SWITCHBOARD & SUPPLY CO. v. DEAN ELECTRIC CO. et al.

(District Court, N. D. Ohio, E. D. November 2, 1915.)

No. 12.

PATENTS ⊂=328—INFRINGEMENT—HARMONIC SELECTIVE SIGNALING SYSTEM—SUIT FOR INFRINGEMENT—LACHES.

The Dean patent, No. 779,533, for a harmonic selective signaling system, for use in the operating of party line telephones, *held* not infringed. Complainant also *held* barred from the right to relief by laches in failing to diligently prosecute the suit.

In Equity. Suit by the Kellogg Switchboard & Supply Company against the Dean Electric Company and others. On final hearing. Decree for defendants.

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

Curtis B. Camp and Jones, Addington, Ames & Seibold, all of Chicago, Ill., for plaintiff.

F. O. Richey, of Elyria, Ohio, M. B. & H. H. Johnson, of Cleveland, Ohio, and Charles A. Brown, of Chicago, Ill., for defendants.

CLARKE, District Judge. This is a suit in which infringement is claimed of United States letters patent No. 779,533, applied for June 14, 1903, and issued to the plaintiff, as assignee of William W. Dean, on January 10, 1905. A preliminary and final injunction and an accounting are prayed for.

The bill in this suit was filed on March 23, 1906. The answer was filed on June 5, 1906, and then there was nothing filed in the case until May 11, 1907—almost a year. Again nothing was done in the case from October 1, 1907, to March 15, 1909, a period of almost one year and six months. Depositions were filed in March, 1909, and in rebuttal in April, 1909, and then nothing more was filed until December 18, 1912. The case has hung along, more dead than alive, ever since.

It is obvious that a chancellor should not weigh in golden scales the claims of a plaintiff who has thus slept upon such rights as it may have had. Equity aids the vigilant, but it leaves the slothful where it finds them—where they have voluntarily placed themselves. The Supreme Court has said:

"It has been frequently held that the mere institution of a suit does not of itself relieve a person * * * of laches, and that, if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun." Johnston v. Standard Mining Co., 148 U. S. 370, 13 Sup. Ct. 589, 37 L. Ed. 480, approved in terms Willard v. Wood, 164 U. S. 525, 17 Sup. Ct. 176, 41 L. Ed. 531.

And laches is a defense which can be made without any pleading to support it. The Supreme Court, in a case often cited with approval, says:

"If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive, and refuse relief. * * * Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." Sullivan v. Portland, etc., R. R. Co., 94 U. S. 806, 24 L. Ed. 324.

If it were necessary to reach a just decision of this case, this court would not hesitate to decide that the plaintiff has shown such utter lack of diligence in the prosecution of its claims in this suit that it deserves in a court of equity neither the remedy of an injunction nor of an accounting. It is significant that the preliminary injunction prayed for in the bill was never applied for. But it is not necessary to place the decision of the court on this ground alone.

The patent in suit is an elaborately detailed one, making 19 separate claims of invention, 6 of which, viz., claims No. 1, No. 3, No. 5, No. 17, No. 18, and No. 19 are claimed to be infringed by the defendant. The patent is for a combination of well-known elements, and relates

to claimed improvements in a harmonic selective signaling system, which finds its most important use in the operation of party line telephones. It is not necessary in this opinion to go at length into the theory upon which harmonic selective ringing of bells proceeds; it is all elaborately worked out and clearly stated in the Currier and Lighthipe patents, hereinafter referred to, and all issued long prior to the filing of the application for the patent in suit.

All of the elements of the combination claimed in the patent in suit were, as we have said, well known and fully understood when the application for the patent was filed, and all of them had been used in the same combination to produce the same result, though perhaps not so successfully as the plaintiff accomplished it. Clear proof of this is to be found in letters patent No. 246,374, dated August 30, 1881, in letters patent No. 251,097, dated December 20, 1881, and in letters patent No. 425,594, dated April 15, 1890, all issued to J. B. Currier; in letters patent No. 451,414, dated April 28, 1891, issued to A. Storer; and in letters patent No. 550,982, dated December 10, 1895, issued to J. A. Lighthipe. To these should be added letters patent No. 449,106, dated March 31, 1891, issued to the American Bell Telephone Company, assignee of John J. Carty.

A detailed discussion of the state of the art prior to the application for the patent in suit would involve an opinion of very great length, and we shall therefore not attempt any such discussion. It is enough to say that a reading of the Currier and Lighthipe patents, hereinbefore referred to, makes it convincingly clear that both of these men understood the theory and principle upon which Dean proceeded in working out the harmonic selective signaling system which he sought to cover by the patent in suit. That the Currier and Lighthipe systems were extensively used in actual practice for a long time there can be no doubt. It seems, however, that they were not as satisfactory in the actual working as the Dean system, covered by the patent in suit, proved to be, and that at the time Dean's patent was granted, for one reason or another, they had substantially fallen into disuse.

Counsel for the plaintiff argue this case as if the patent in suit were a patent on an improved form of reed or bell ringer, used in combination with an improved form of polarized bell, in such manner that the reed is constantly under the control of the ringing currents, thereby producing new and useful results. However, the claims relied on in the patent make no claim to any special construction of a reed tongue or bell ringer, or of a polarized bell, but, on the contrary, the feature of novelty which is alleged in each of these claims seems to consist in a reed tongue so tuned that the operative rates of actuation of the bells shall be "the natural rates of vibration of the reed tongues, as modified by the action of the gongs of the bells in being struck."

The language just quoted is from the first claim of the patent, but it is repeated in terms in the third, fifth, and seventh claims, and in substance in the seventeenth, eighteenth, and nineteenth claims, and the claim to novelty seems to lie wholly in the supposed discovery that the natural rate of vibration of the reed tongue differs from the operative rate, and that successful operation of the system depends

upon giving to the reed tongues, not their natural rate of vibration, but the higher rate which results from the modification of the natural rate due to striking upon the signal bell or gong. That this was what Dean thought he had discovered seems clear from the declaration of his specification that:

"It is practically impossible to operate a tuned bell * * * by means of an alternating current of a frequency or pitch corresponding to the pitch or natural rate of vibration of the tuned reed forming the tongue of the bell."

That this "operative or resultant" rate of vibration of the reed is higher than the unmodified natural rate was declared by Currier and Lighthipe, who both recognized that the striking of the tongue on the bell tended to accelerate the speed of its vibration, and this is stated as a fact by Dean in claims No. 2 and No. 4 of the patent in suit, saying that:

The "operative rates of actuation of the bells is [being] higher than the natural rates of vibration of the reed tongues."

Assuming that the tuning of the reeds to the operative rate of vibration was the essence of what Dean thought he had discovered, it is sufficient for the decision of this case to say that the system manufactured by the defendant does not depend for its successful operation upon the tuning of the reed tongues of the bells to an operative rate higher than their natural rate of vibration, but that, on the contrary, the operative rate of actuation of the bell in the defendant's system is proved to be the natural rate of vibration of the reed tongues, unmodified by the action of the signal bell when it is struck. That in the defendant's system the reed tongues are actually operated in practice at their natural rate of vibration seems clearly enough established by the testimony in this record.

It was perfectly understood by both Currier and Lighthipe that one of the chief difficulties in securing a practical harmonic selective signaling system consisted in the adjusting of the rate of vibration of the reed tongue so that it would vibrate in synchronism with the actuating current, and since the rate of vibration could be modified at will by using movable weights on the reed, as was sometimes done, or by varying the weight of the hammer, or by varying the flexibility of the tongues, it would seem that the solution of the problem of arriving at a construction of the reed tongues, which would eliminate that difficulty, was to be found in the course of very simple experiments, not rising to the dignity of invention.

The testimony in this case, while conflicting, as is usual in such cases, seems to establish clearly enough that in the patent in suit a rate of vibration of the reed was found which in practice worked more satisfactorily than what had gone before, and that in the system used by the defendant a different rate, namely, the natural rate of vibration of the reed, was found equally practicable when used in the combination of elements adopted by the defendant. It should be said, also, that it is open to very serious doubt whether the superiority in the operation of the system of the patent in suit over the Currier and Lighthipe systems was not due to improvements in the current generating and other appliances used in operating the system, which had

gradually developed during the 24 years which elapsed between the issuing of the Currier patents and the patent in suit, and during the 10 years which elapsed between the issuing of the Lighthipe patent and the patent in suit, rather than to any improvement springing from the combination described in that patent. Those were years of great advance and refinement in the development of electrical appliances of all kinds, and especially of such as it was necessary to use in the operation of such a system of signaling as is under discussion in this case.

The long years that this case has been hanging about the courts have resulted in the accumulation of a mass of conflicting testimony and theories, especially of expert testimony and theories (for the plaintiff, 447 pages, Smythe in 1907, 110 pages, and Dunbar in 1911, 337 pages; and for the defendant, Miller and Slough, 216 pages, in 1908), respecting what seems to be a very simple matter, when the development of the art shown in the patents of Currier and Lighthipe had once been attained. The advance which the patent in suit made, if it made any advance, on what had gone before, seems to this court of such character that the work of Dean with respect to the patent in suit consisted rather "in inventing a patent than in patenting an invention," and therefore, if the patent is allowed to stand at all, it should not be given a scope beyond the precise letter of its claims.

The result of this discussion of the case is that because of the laches of the plaintiff, and also for the reason that the construction of the defendant does not infringe the patent in suit, the bill will be dismissed, and the defendant will recover its costs.

LANDE v. STERNBERG.

(District Court, E. D. New York. March 4, 1916.)

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—SASH LOCK.

The Lande patent, No. 1,102,519, for a sash lock, claims 1 and 2, *held* valid and infringed by the device of the Sternberg patent, No. 1,103,629. The latter patent, if valid as covering an improvement over the Lande device, *held* not infringed.

In Equity. Suit by Max Lande against Moses J. Sternberg, with cross-bill. Decree for complainant.

Samuel Silbiger, of Brooklyn, for plaintiff.

Goldstein & Goldstein, of New York City (Abraham Lipton, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. This action presents a peculiar disagreement between two men whose business relations arose from plans by which the defendant was to advance money and to receive an interest in a business or corporation, to put upon the market a device which the plaintiff had invented and for which he had already applied to the United States government for a patent. His application was

filed upon the 11th day of October, 1913, and the patent was not issued until the 7th of July, 1914, under No. 1,102,519.

In January or February of 1914, the plaintiff and defendant met together while attending services at a synagogue in Brooklyn, and the plaintiff, Lande, then communicated to the defendant the proposition that the defendant make an investment in putting upon the market the device for which Lande had made the patent application. The defendant was interested, and it appears that certain models or samples were prepared and inquiry started as to the possibilities of sale and manufacture.

The device of this patent is a post or bolt, intended to pass above the lower sash of a window into a socket or keeper fastened to the upper sash of the window. It is held in place by a bracket attached to the window jamb. Lande's application and the patent as issued contained a spring in the head of the bolt, which would normally maintain the bolt in the locked position, unless held back by means of a pin sliding in a rectangular-shaped slot. The presence of this spring insured the necessity of drawing the knob away from the window or out into the room before this pin could be turned into the crosswise portion of the slot.

It soon became evident to the men attempting to manufacture and sell the device that the cost of production was greatly increased by the complexity of the parts containing the spring, and that the spring was unnecessary. The protection afforded by the slot and pin could be obtained, even if the additional force necessary to withdraw the bolt against the spring were not required, and if the slot was placed only in the keeper or socket, instead of also in the outer shell or casing of the bolt itself.

The evidence indicates that a suggestion to this effect came from one of the mechanics, who was interrogated about making the device. In the meantime a meeting of other men connected with the plaintiff and defendant in their church and business associations was held, to form a corporation to manufacture and sell the device, but a dispute arose as to the amount of stock which the plaintiff and defendant, respectively, were to have as individuals, and the defendant seems to have conceived the idea of putting upon the market for himself the sash lock in the simplified form, which was the natural development of the suggestion to omit the spring and to change the position of the slot.

After difficulties had arisen between the plaintiff and the defendant, and while the defendant had in his possession many of the articles which had been made up for the intended joint use of both men, the defendant made an application to the Patent Office, upon the 29th of May, 1914, and a patent was allowed him upon the 14th day of July, 1914, for the simplified form of window lock, which had grown out of the attempt to manufacture the device as invented by Lande, but with one new feature.

This change was to construct the bracket in two parts, pivoted together so that the weight of the bolt would cause the outer part of the bracket to rotate with the weight of the bolt when not locked, and

thus to allow the bolt to hang down straight (instead of sticking out into the room from the window jamb) when the window was not locked.

Claims 1 and 2 of the Lande patent, which was issued seven days earlier, are as follows:

"1. A sash lock, comprising a window bearing, a bolt slidable therein, and having a bit, a sash, a keeper on the sash having a bit-slot and adapted to be engaged by the bolt, and means for closing said slot.

"2. A sash lock, comprising a window bearing, a bolt slidable therein, and having a bit, a latch having a plug, and a keeper adapted to receive the bolt and having a bit-slot adapted to be closed by the plug."

(The other claims include the spring knob or head.)

Claims 1 and 2 of the Sternberg patent, issued on the 14th day of July, 1914, are as follows:

"1. A window fastener, comprising a socket in a sash, a bolt adapted to engage therewith, and a pivoted bracket in which said bolt is carried and adapted to slide, for the purpose set forth.

"2. A window fastener, comprising a bolt, a bracket pivoted to a window frame and in which said bolt slides, and a plurality of sockets in the upper sash, the bolt passing freely over the top of the lower sash and engaging the sockets in the upper sash."

It will thus be seen that Sternberg claimed the pivoted bracket as a feature of his invention, and that Lande was allowed a patent for the other features of the sash lock (but without describing the spring), which had proved to be the mechanical or financial objection to placing a cheap and simple device upon the market. In the meantime, however, and according to the testimony with the knowledge of both Lande and Sternberg, plans had been made to apply for another (Canadian) patent, and upon the 21st day of May, 1914, Lande signed the application. This was filed in the Dominion of Canada, and a patent was issued on October 13, 1914, in which Lande describes the sash lock in substantially the form of the Sternberg device, without the pivoted bracket. Claim 1 of the Canadian patent is as follows:

"1. A sash lock, comprising a window bearing, a bolt slidable and rotatable therein, and having a bit, a sash, a keeper on the sash having a bayonet slot adapted to be engaged by the bit, and means for checking the rotation of the bolt while in engagement with the keeper."

No expert testimony has been presented. None of the filed wrappers are before the court, and the witnesses have testified entirely from the standpoint of laymen, leaving the interpretation of the patents and of the inventions to the court.

It must be assumed, therefore, in the absence of anything to the contrary, that the parties understood what the language of their applications and claims purports to mean. It is evident that the patent issued to Sternberg for a window lock, with the rotatable or swivel form of bracket, in combination with the slot arrangement of the bolt and keeper, might be held a patentable invention or improvement even over the Lande patent, if otherwise allowable.

As has been said in the case of Garrison v. Eagle Wagon Works, 229 Fed. 159, — C. C. A. —, the mere allowance of a patent does not show that none of the earlier patents could be cited as anticipa-

tions. Nor is the fact that the Patent Office is not shown to have suggested an interference between Lande and Sternberg conclusive proof as to the amount of originality in the Sternberg patent, which was evidently later in conception than that of the original device, as shown by the Lande applications for the United States patent and the Canadian patent as well.

As between Lande and Sternberg, Lande was certainly the prior inventor of everything which he can claim before January, 1914, when he first brought the matter of a sash lock to Sternberg's attention.

The plaintiff charges infringement by the defendant through the use of devices made in accordance with the Sternberg patent, in the form in which those ideas have been and are commercially placed upon the market, and in the form in which elimination has simplified the device. The defendant, on the other hand, not only denies this charge of infringement, but has claimed as original invention on his part, the simplification of the Lande device, and the improvement by the rotatable or swivel bracket. He in turn charges infringement by Lande in adopting the use of the solid bolt which is the simplified device of his own (that is, Lande's) patent. The defendant mentions in claim 2 a "plurality of keepers." This is shown by Lande, but the defendant connects the keepers by a metal plate, which does not involve invention.

As between Lande and Sternberg, the Lande patent seems to be sufficient in conception and disclosure to cover the form of device with the spring omitted. The simplified structure is merely the equivalent, in all of the patentable elements, of the structure which Lande in effect complicated by adding the spring.

It further is apparent that Lande appreciated the fact that the patentable elements of his structure could be comprised in a device in which the spring or an equivalent therefor might take a different form; and, as is shown in the claims cited, he did not limit himself to the spring construction. In this sense of the Lande patent, Sternberg is evidently an infringer, and is entitled only to the rights of an inventor of an improvement over the Lande patent. On the other hand, the idea of the swivel is original in combination with the other parts of a device of this sort, and is patentable if it involves invention. No prior art has been presented to indicate whether the conception was a mere mechanical change from earlier patents, except the Lande patents.

As between Lande and Sternberg, Sternberg would not seem to be entitled to charge infringement of his patent by the present form of the Lande device. The claim in the Sternberg patent for the combination of the Lande lock with a pivoted or swivel bracket is clearly not infringed, and Sternberg does not show any right, as inventor, to the lock without the spring.

The testimony of the defendant and his lack of understanding of the mechanical principles involved made it evident that any invention by him must have been entirely a mental concept, which he could not illustrate or explain other than by model, and he has shown no ability to distinguish the elements of a patentable claim, or to differentiate between the claims of the patents which he actually received from the

claims of the patent which was issued to Lande. His application, drawn by the attorney from a device or model, may not even be valid as a patentable combination, if the only concept in the mind of the inventor was the rotation or bending down by hinge or pivot of a post jutting out into the room when not in use. But that question is not before the court. Through the presentation of the model to his patent attorney, Sternberg was enabled to file an application for a combination, which has been allowed, and considered an improvement over the Lande patent in the simplified form without the spring.

Under these circumstances, the only decree which can be entered in this case is to hold the Lande patent valid and infringed by Sternberg, inasmuch as Sternberg had no rights to use his improvement upon the Lande device, unless he obtains Lande's consent to the use of the original Lande patent.

The counterclaim should be dismissed for noninfringement of the Sternberg patent, even presuming that to be valid as an improvement.

TITUS et al. v. UNITED STATES SMELTING, REFINING & MINING EXPLORATION CO. et al.

(District Court, S. D. New York. January 24, 1916.)

1. CORPORATIONS ⟸574—REORGANIZATION—CONTRACTS BY BONDHOLDERS' COMMITTEE—VALIDITY.

A majority of the bondholders of a corporation whose assets consisted of the capital stock of certain mining companies deposited their bonds with a committee to be used in carrying out any reorganization plan they might approve. The committee entered into a contract with defendant corporation by which the latter agreed to advance money for reorganization purposes and also to expend not exceeding $200,000, in exploration of the mining property. It was to be the sole judge of the manner and extent of such exploration with the right to abandon the work at any time in its discretion, and was to be secured by a pledge of all the property of the first corporation which the committee agreed to buy in at foreclosure sale. Without notifying the bondholders of this contract, the committee submitted to them a plan of reorganization, which was approved, by which the committee was to organize a new corporation to own the property bought in, but which authorized the committee to create prior liens not to exceed $300,000, for any purpose which the committee in its "uncontrolled discretion" should deem wise or necessary for the protection or development of the property. The agreement with defendant was carried out, and to secure it the committee pledged all the property it purchased at the foreclosure sale. Defendant abandoned the exploration work and sold and bought in the stocks so pledged. *Held*, that such contract and the pledge and sale of the stocks thereunder were void because the committee had no authority originally to make the contract, and under the approved plan and agreement its authority to create indebtedness extended only to such as in its "uncontrolled discretion" was necessary for the protection or development of the property, whereas by the contract it had deprived itself of all discretion as to the amount to be expended or the manner of its use; that the pledge was valid only to the extent that it secured advances made for purposes of the reorganization which was within the committee's authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2297-2303; Dec. Dig. ⟸574.]

2. CORPORATIONS ⊂=574—REORGANIZATION—"PRIOR LIENS."
The words "prior lien," as used in a proposed plan for reorganization of a corporation providing that the property of the old company should vest in a new one free and clear except for a prior lien to be created by the committee, mean a first or superior lien, and not one necessarily antecedent in time.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2297–2303; Dec. Dig. ⊂=574.]

In Equity. Suit by Edward H. Titus and others, as executors, etc., and others, against the United States Smelting, Refining & Mining Exploration Company and others. Decree for complainants.

Otto C. Wierum, Jr., of New York City, for complainants Titus and others.

Fredric W. Frost, of New York City, for complainants Deckand and others.

Thomas Mills Day, of New York City, for complainants Denison and others.

Wing & Russell, of New York City (Philip W. Russell and Burt D. Whedon, both of New York City, of counsel), for defendants.

MAYER, District Judge. [1] This suit is brought by various bondholders of the Alaska-Ebner Gold Mines Company (hereinafter called "Alaska-Ebner"), on behalf of themselves and all other certificate holders under a deposit agreement and reorganization plan of bondholders of Alaska-Ebner dated September 11, 1913, who shall make themselves parties to the suit and contribute to its expenses. The relief asked for, briefly stated, is: (1) That a certain agreement dated June 30, 1913, and a supplemental agreement dated December 30, 1913, between the defendants, be adjudged usurious and void and canceled; (2) that it be decreed that the defendant company (hereinafter called "Exploration Company") surrender 100,000 shares of stock of Ebner Gold Mining Company (hereinafter called "Ebner"), and 1,000 shares of stock of Humboldt Mining Company (hereinafter called "Humboldt"), to a receiver to be appointed for the benefit of plaintiffs and such others similarly situated as may come in; (3) that Exploration Company be enjoined from selling or offering to sell, or otherwise disposing of, these shares of stock; and (4) that the plaintiffs may have such other relief as may be in accordance with justice and equity.

Alaska-Ebner Gold Mines Company was a Maine corporation which owned the entire capital stock of Ebner and of Humboldt and 55 per cent. of the capital stock of Bristol Consolidated Mines & Smelting Company (hereinafter called "Bristol Company"), and these stocks constituted practically its only assets of any value. On December 19, 1912, the situation of the company was that receivers in equity had been appointed by the District Court of the United States for the Southern District of New York; that there were outstanding a large bond issue and current liabilities to a substantial amount in addition to those secured by collateral. On that day, a bondholders' protective and reorganization committee issued what is known as circular No. 1,

in which the committee set forth the history of the company, a brief description of properties in which it was interested, a general statement of securities outstanding and current liabilities, and various conclusions and recommendations of the committee. The circular stated that for several months negotiations had been carried on with representatives of the United States Smelting, Refining & Mining Company, with a view of interesting that company in the Alaska-Ebner enterprise. The company just mentioned is a different company from Exploration Company, but is substantially the same concern so far as affects the questions in this suit. Exploration Company is in the business, as its name implies, of investigating and exploring mines, and apparently the other company, among other things, takes up projects approved or recommended by Exploration Company. It was pointed out in this circular that the only security for the outstanding bonds consisted of (1) an abandoned copper mining property in California; (2) 55 per cent. of the stock of Bristol Company; (3) $159,600 par value out of a total of $500,000 par value of the stock of the Ebner. It was also stated that the water power of Ebner was of considerable value but liable to be lost by nonuser, and that a resumption of operations requiring the use of this water must take place within a reasonable time in order to retain the right to it.

The committee pointed out that to save the situation it was necessary (1) to secure the balance of the stock of Ebner of which the trustee then controlled only about 31 per cent.; (2) to secure certain shares of stock then held as collateral security for a loan to Alaska-Ebner; (3) to settle loans amounting to about $115,000 made by various parties to the Alaska-Ebner for which they held about $662,000 of bonds as collateral security; (4) to expend a sum not to exceed $200,000 in extending the tunnel on Ebner property and thoroughly exploring the ore deposits; (5) if ore deposits were found in quantity and of quality to warrant a large operation, to secure capital to develop the mines. The committee further stated that, in view of the complicated condition of the company's affairs and the uncertainty as to the possibilities of the future, it seemed impracticable to suggest a complete plan of reorganization at that time. It expressed the hope that a development company might be organized with Winslow and Rice of the Smelting Company controlling it, and stated that if a plan of organization could be prepared, to which the stockholders of the company would assent, money might be obtained to put the company on its feet, but, if not, then that it was apparent that the interests of the bondholders could only be protected by a foreclosure of the existing mortgage and the purchase of the property for account of the bondholders. The circular ended with the usual request for a deposit of bonds.

From the foregoing, it will be seen that this was, in substance, the customary form of address by a committee of bondholders, merely tentative in character and leaving the whole subject of future action in any definite way to future events and developments.

On June 28, 1913, an order was made by the District Court approving a contract between the receivers and one H. W. Martin, dated

May 27, 1913. That contract provided that Martin should proceed to do all such work upon the properties of Ebner and Humboldt as should be designated by the engineer of the receivers, with the approval of Martin, and that Martin should furnish all the materials and appliances necessary for that purpose; that Martin should not be required to expend any sum in excess of $200,000, should complete the work within 12 months; and that the receivers should issue their certificates in the requisite sums in an amount not to exceed $300,000, bearing interest at 6 per cent. and payable 18 months from the date of the first issue thereof, or upon any earlier date at the option of the receivers, and upon any sale pursuant to a decree of foreclosure of the property covered by the mortgage of the Alaska-Ebner. The contract further provided that the receivers were to deliver to Martin their certificates in various amounts mentioned, and for such further sums as had been advanced by Martin to purchase preferred or underlying claims against Alaska-Ebner and certain stock and securities, the amount of which advances aggregated $60,272.41 and interest, as well as certificates for the work, labor, and services to be performed by Martin. It was further provided that the receivers were to deliver and pledge to Martin, upon the surrender thereof, all of the preferred or underlying claims, stock, and securities of every kind, which he then held as security for his advances, and that these claims, stock, and securities were to be security for the receivers' certificates, pursuant to the order of court dated May 21, 1913.

It will be noted that the contract contemplated that Martin should not be required to expend more than $200,000, and that the receivers were authorized to issue their certificates in an amount not to exceed $300,000.

On June 30, 1913, as the result of negotiations between the committee now consisting of five members (hereinafter called the Chapman Committee) and the representatives of Exploration Company, an agreement was entered into between the Chapman Committee and Exploration Company. This agreement recited that Alaska-Ebner owned the entire capital stock of Ebner and Humboldt and 55 per cent. of the capital stock of Bristol Company, was without funds or credit to operate its controlled companies, had issued $1,615,000 par value of first mortgage 7 per cent. bonds, whereof about $843,000 were outstanding for value, and about $662,000 were treasury bonds pledged as collateral to loans aggregating, with interest, about $150,000, and that about $110,000 were in the treasury, all of which bonds were in default of principal and interest and were secured by the pledge of all the stocks and other assets of the company; that the value of the bonds depended chiefly on the value of Ebner, which value was unknown and could not be determined except by exploration and development work, estimated to require two years and $200,000 and, if value was proven, could not be extracted except by an expenditure of additional money estimated at upwards of $2,000,000; that the holders of the bonds were unable or unwilling to contribute sufficient money to improve the property or develop it; and that the Chapman Committee had on deposit with it upwards of 60 per cent. of bonds subject

to the right of the depositors to approve and enter into or reject and withdraw from any plan of reorganization the committee might submit. It was further recited that the committee solicited Exploration Company to undertake the exploration work upon terms proposed by the committee. Thereupon it was agreed as follows:

The committee was forthwith to submit to the depositing bondholders a plan of reorganization "pursuant to the terms hereof"; upon approval and acceptance of the plan by not less than 90 per cent. in amount of the $1,505,000 outstanding bonds, the agreement was to become effective and binding on the committee and on all of the consenting bonds. The plan of reorganization, in addition to providing for the $843,000 of bonds of Alaska-Ebner, was to include and provide for the taking over by the committee or in its behalf, the $150,000 of loans collateraled by the $662,000 par value of bonds.

On the agreement becoming effective, the committee was to procure as quickly as may be, at the hands of the trustee of the mortgage, a foreclosure sale of the collateral, and at such sale was to purchase the collateral provided the cash required over and above the distributive share of the committee's bonds, available as pro tanto payment of the bid price, did not exceed $25,000, and this amount Exploration Company agreed to advance as well as such additional cash at its option as it saw fit. The committee, if it acquired the mortgaged property at foreclosure, was to hold and manage the same until the completion of exploration work, but not later than March 31, 1915, which date, or any earlier date at which the exploration work was completed, was to be the date of organization of a new company. Exploration Company, as soon as convenient after the agreement became effective, was to begin exploration work upon Ebner, and from time to time provide such amounts, up to $200,000, as in its uncontrolled discretion it deemed necessary to ascertain the ore body and values of the property, and Exploration Company was to be the sole judge of the extent to which the exploration should be carried and the manner in which it should be done, and could discontinue and abandon the work whenever, in its uncontrolled judgment and discretion, such abandonment was justified by the facts then existing. The committee was to procure to be executed, in such manner as to constitute a valid first lien upon the assets and property purchased by the committee at foreclosure and to deliver to Exploration Company, obligations so secured either of itself or of the subsidiary companies covering all advances made by Exploration Company to acquire underlying liens and claims and any other advances Exploration Company might make in connection with the agreement. Exploration Company, in the event its exploration showed, in its sole discretion and judgment, ore values available for operation on a large scale, was to so report to the Committee and to estimate the amount of money necessary for plan, equipment, development, and working capital. The committee on the judgment of Exploration Company was to transfer all of the property acquired by the committee at foreclosure to a new company to be organized by the committee for the purpose. This new company was to have an authorized capital stock of $7,500,000 and an author-

ized issue of $4,000,000 first mortgage bonds, and the consideration from the new company to the committee for the committee's property so sold and transferred was to be $993,000 par value of the bonds and all of the capital stock of the new company. Certain other details were set forth which it is not necessary to repeat.

This agreement of June 30, 1913, was never made known to the depositing bondholders. No explanation appears in the testimony as to why this agreement was not made known. It is not suggested that either the Chapman Committee or Exploration Company had any fraudulent or improper purpose in not disclosing the contents of this agreement, and it may be that there was some good business reason for not so doing; but, whatever the reason is, it does not appear.

On June 30, 1913, there was no power whatever on the part of the Chapman Committee to make any binding contract, and the agreement recognized this situation; for one of the recitals shows that the deposit of bonds was subject to the right of the depositors to approve or reject the plan of reorganization, and it will be remembered that one of the provisions of the agreement was that the committee should submit to its depositing bondholders a plan of reorganization "pursuant to the terms hereof."

[2] Under date of September 11, 1913, a plan and agreement of reorganization (hereinafter called the "September Plan and Agreement") was put out by the Chapman Committee. A suit to foreclose the mortgage had been begun on or about April 2, 1913. The plan called attention to the fact that the mortgage was being foreclosed, and that it was the plan of the committee to purchase property at foreclosure sale, and then the plan stated:

"If such property is purchased by the committee it is proposed to organize a new company and to vest in it the ownership and control of all the property of the company which your committee may acquire at foreclosure sale or otherwise free and clear except for a prior lien of not exceeding $300,000 to be created by the committee and covering such cash as may have been expended to acquire underlying liens and for exploration work. The committee may in its absolute discretion defer the organization of the new company and the issue and distribution of the securities thereof until the completion of the exploration work now under way, and the necessary financing of the new company."

The distribution of the securities of the new company was substantially the same as that contemplated in the agreement of June 30, 1913. The agreement annexed to the plan had many provisions quite usual in such agreements, most of which it is unnecessary to set forth, but reference to some of which will be made later. The depositing bondholders thus had before them circular No. 1, the various court proceedings including the pending mortgage foreclosure and the Martin contract, and this plan of September 11, 1913.

It will be noted that the committee proposed the organization of a new company which was to own the property bought by the committee at foreclosure free and clear except for a prior lien of not exceeding $300,000. The word "prior" does not mean antecedent in time, but must receive the meaning familiar in papers of this character, namely, a first or superior lien. The sentence in question is susceptible of the interpretation that this $300,000 was to cover such

cash as, in the committee's opinion, it was likely would be expended by the time the new company was organized, in acquiring underlying liens and for exploration work, and that the new company, out of which the bondholders were to get possibly a good bond for a bad one, would not be incumbered beyond $300,000. Now, $300,000 was the amount mentioned in the Martin contract, and this may have been the gauge of the situation in the opinion of the Chapman Committee. On the other hand, an interesting computation may be made by taking the figures on defendant's Exhibit No. 4 of various amounts due down to September, 1913, and it will be found that the obligations with interest run roughly from $80,000 to $90,000. I could give the accurate figures, but I do not know whether the credits against Martin at the bottom of the page on defendant's Exhibit 4 were in 1913 or 1914.

It may be that the Chapman Committee estimated that the obligations for underlying liens and Martin's work would be $100,000 in round numbers, and as the estimate of Exploration Company under the contract of June 30, 1913, was that the exploration work would cost $200,000, the committee may have figured that the first lien would not exceed $300,000; but, whatever the basis of the estimate, the figure mentioned was "not to exceed $300,000."

It is immaterial whether the duty of the depositing bondholder ended with his reading of circular No. 1 and the September Plan and Agreement, or whether he is presumed, as matter of law, to have read the various papers on file in the District Court including, among others, the Martin contract. From none of these would he have gained an impression other than that it was the estimate and intention that the property would be incumbered to an extent of not to exceed $300,000. It would never have occurred to him that the Chapman Committee had abdicated all right of exercising its judgment and its visé over expenditures so as to confer upon Exploration Company the power to spend any money it deemed proper in its uncontrolled discretion and to further empower Exploration Company to act as the sole judge of the extent to which exploration should be carried and to authorize Exploration Company to discontinue and abandon exploration when, in the uncontrolled judgment and discretion of that company, such abandonment was justified by the facts then existing. In other words, this contract of June 30, 1913, stated colloquially, amounts to this:

"Gentlemen of the Exploration Company, explore to such an extent as you deem proper; stop when you please; we herewith estop ourselves from questioning either the amount of or necessity for your expenditures or your decision to continue or abandon. We pledge the property of the company which, in effect, is the property of the depositing bondholders, to you and if you stop exploration you may come down on us by foreclosing the pledge and we cannot and shall not have anything to say even though in our judgment you have spent too much money or you have stopped before you should."

Now, I am not to be understood as saying that this may not have been the only contract which the Chapman Committee could have made, nor that the Chapman Committee, in the circumstances, was not fortunate to get anybody to risk large sums of money on so speculative an enterprise. Likewise, I am not to be understood as saying that

Exploration Company did anything else than fair business judgment and caution would dictate. I do not regard the contract, as such, as in any manner open to criticism had it been between individuals or between Exploration Company and a committee having power to make such a contract. I recognize fully that such contracts are to be expected in a situation where the value of a mine is not known and where the speculator or intending investor feels that he should have the right, in his absolute judgment, to stop at a point where the further expenditure of his own money would be reckless waste.

But the point is that the depositing bondholders were entitled to know that the Chapman Committee had made a contract of this character whereby, at the drop of the hammer, their property could be taken away from them.

Had the contract been known, the bondholders might very well have been satisfied upon the theory that that was the best that could be done in a bad situation, and that it was lucky for them that the Chapman Committee had obtained somebody who would put up any money for exploration.

On the other hand, the bondholders may have refused to enter into a plan and agreement which contemplated terms such as are contained in the agreement of June 30, 1913. Their refusal may have been unwise, and, as a result, they might have lost their property then and there. But that was their business because it was their property and, in such respect, a man may do what he pleases with his own property.

On December 30, 1913, a supplemental agreement was signed between the Chapman Committee and Exploration Company. It was recited that the consent of 90 per cent. of the bondholders had not been obtained, and the original contract was amended by striking out therefrom the second paragraph under article 7 and substituting another paragraph in place thereof to meet that situation. A clause was added as follows:

"2. The Exploration Company agrees that upon the foreclosure sale referred to in article 2 of the original agreement, if the committee shall be the successful bidder at such sale, the Exploration Company will make available to the committee for turning in as part of the purchase-price so to be paid by the committee for the property at foreclosure sale, all of the Exploration Company's claims for advances to the extent and in the amount to which and at which the same shall have been allowed by the court as a preferred claim payable out of the proceeds of sale before any distribution is made to bondholders, provided that such turning in shall not change or prejudice or in any manner whatsoever affect the respective rights and obligations of the Exploration Company and of the committee under articles 5 and 8 of the original contract, the intent hereof being that the Exploration Company's preferred claim for such advances may be used as between the Exploration Company and the committee in lieu of cash in payment of the purchase price at the foreclosure sale."

The contract of June 30, 1913, as modified, was declared effective or, in other words, confirmed.

Everything thereafter between the Chapman Committee and Exploration Company was done upon the theory that the contract of June 30th, as modified by the supplemental contract of December 30th, expressed and controlled the relations of the parties. The various

notices and communications on behalf of Exploration Company to the Chapman Committee and the conversations between representatives on both sides, extending the Chapman Committee's time, proceeded upon the theory that the contracts of June 30th and December 30th were in full force and effect, and this is evidenced, for instance, by the letter dated December 14, 1914, of Mr. Wing, of counsel for Exploration Company, to the Chapman Committee.

The foreclosure suit went to a decree on March 23, 1914, and the committee bought in as planned. Title was closed on May 21, 1914, before the special master, and $170,072.70 was required for the liens "a" to "k" set out in the foreclosure decree which, under that decree, were ahead of the bonds; $43,879.93 were required in cash for account of the committee to make good their bid; $16,753.69 was cash in the hands of the engineer on the property for current expenses of operation for which vouchers later came down. These items aggregated $230,706.32 for which the committee was obligated to Exploration Company. The committee, under date of May 21, 1914, made its note for this amount of $230,706.32 in the usual collateral note form and, among the collateral, were the shares of Ebner and Humboldt here in controversy. The due date of the note was November 20, 1914, which Mr. Wing testified was estimated as the time required to complete the exploration work.

The work of exploration continued, and, from time to time, the committee executed its notes, all due November 20, 1914, except notes made during December, 1914, and January and February, 1915, which were made payable on demand.

Under date of December 11, 1914, Mr. Jennings, the vice president of Exploration Company, addressed a communication to his board of directors, reporting on the results of exploration up to that time, and expressing as his opinion that there would not be found sufficient ore of enough value to warrant the formation of a company on the terms contemplated with the Chapman Committee. Mr. Jennings also wrote:

"In order, therefore, to justify the carrying out of this agreement, it would have been necessary to find ore in sufficient quantity, and value, to warrant a capitalization of $15,000,000. If such ore had been found, the rewards accruing to the Exploration Company would have been brilliant."

It was provided in paragraph 6 of the agreement of June 30, 1913, that Exploration Company, in the event its exploration showed, in its sole discretion and in its own judgment, ore values available for operation on "a large scale," would so report to the committee. Nothing was said as to $15,000,000, the point here being that this is another illustration of the complete abdication by the Chapman Committee whereby it was permitted to Exploration Company solely to determine, among other things, what they meant by "a large scale." The result of the Jennings' letter and the situation generally was that Exploration Company decided to stop and insisted upon payment of the committee's obligations.

By virtue of a clause in the collateral note of May 21, 1914, the collateral became subject to the later notes given from time to time as above mentioned.

On April 7, 1915, the collateral was offered for sale at public auction to satisfy a debt which had now accumulated to $408,921.13 and interest. A representative of one of the solicitors for plaintiffs warned intending buyers, in effect, that they would buy at their peril; but, of course, Exploration Company bought in the collateral and is now the purported owner of the stock in controversy.

The agreement of December 30, 1913, was without validity because of lack of power of the Chapman Committee to enter into it unless authority therefor can be found in the September Plan and Agreement.

Undoubtedly, the plan contemplated that the exploration work, then under way, could be completed; but, in the absence of a disclosure of the agreement of June 30, 1913, it must be assumed that the committee would exercise their discretion and judgment as to the amount to be expended for exploration work.

The Martin contract was subject to the supervision of the receivers, acting through their engineer, and no man, reading the September Plan and Agreement, could be expected to know or be presumed or assumed to know that, instead of exercising their discretion and judgment, the committee had divested itself of all discretion and judgment.

If the committee had exercised its discretion and judgment, then that exercise could not be questioned, in the absence of fraud or conduct so reckless as to negative that exercise.

The concluding clause of the plan provided that money and securities might be used by the committee "for such other purposes as the said committee in its uncontrolled discretion may determine." Here again, while a large measure of discretion is conferred upon the committee, as is usual in plans of this character, yet, nevertheless, it is a discretion which must be exercised, and that clause did not authorize the committee to strip itself of all discretion.

Throughout the agreement annexed to the September Plan, the reference is constantly to powers in connection with carrying out the plan and agreement, and the instrument must be read in the light of the familiar principle that the intent and meaning of a document must be gathered from its entire contents and having in mind the relation of any particular part to the relevant context. The power to pledge securities granted in paragraph 4 was in connection with carrying out the plan, and the power to borrow money, if for any other purpose, was for such purpose as "the committee may deem necessary," and the phrase "may deem necessary" indicates the exercise of judgment. The same observations may be made in respect of paragraph 7. In paragraph 9 is found the expression that the committee may borrow and use such sums of money upon such terms and subject to such conditions as in its discretion it may deem wise or necessary, to protect the interest of the depositors and for any of the purposes of this agreement.

In the first place, it is questionable whether this clause is applicable to the case at bar, because the transaction was not the ordinary transaction of lender and borrower; but, if it is, then again the clause, by its very terms, involves the exercise of discretion.

Finally, we come to the clause in paragraph 7 as follows:

"The committee may create such liens upon any or all of the property so acquired by it as may be necessary in the discretion of the committee to carry out the plan and this agreement or any part thereof or to protect or develop the said property or any part thereof or for any purpose the committee may deem wise or necessary."

The power so given to protect or develop the property, or for any purpose the committee may deem wise or necessary, is obviously subject to the limitation that such proper or necessary acts may be done as will protect or develop the property. So far as protection of the property is concerned, the reader of this clause would assume that money could be borrowed or otherwise obtained upon some arrangement whereby the property could be kept alive, the water power safeguarded, and the mines properly manned under some agreement which might, and likely would, involve a pledge to cover such sums of money as the committee in its judgment might, from time to time, consider were or should be properly expended. The same view must be taken of the expression "develop"; but it is clear beyond peradventure that this agreement, as a whole, and these clauses to which attention has been called, cannot be considered as notifying depositing bondholders, first, that an agreement had already been entered into (which would be effective if a certain per cent. of bondholders signed it), or that an agreement would thereafter be entered into, whereby the committee would place the property in the absolute power of Exploration or any other company, so that such a company could make unreasonable expenditures and stop upon the very eve of accomplishment, foreclose its liens, and possess itself of the property covered by those liens.

I do not suggest that such was done in this case, and Exploration Company has certainly expended a very large sum of money; but that has nothing whatever to do with the question of power affecting the agreements of June 30th and December 30th, in the light of the September Plan and Agreement.

The conclusion is inevitable that the agreement of December 30th, just as in the case of the agreement of June 30, 1913, was without power and must be declared void and set aside.

It follows that the sale of the collateral was likewise null and void.

The big note of $230,706.32 was valid to the extent of $213,952.63. These obligations the committee clearly had power to incur, and these figures are accurately fixed by the special master. Had the note been for this amount of $213,952.63, and this only, then the sale of collateral to satisfy that note would have been valid, and Exploration Company would now have title to the stock in controversy. But the sale was to satisfy a debt which included not only the balance of this note over $213,952.63, but also the other obligations, and there was no power or authority to sell the collateral to satisfy a debt greater than, at the time of the sale, had been actually fixed and then was actually due. For, of course, if the committee had no power to contract these debts and give these notes in accordance with the terms of the June 30th and December 30th agreements, whereby Exploration Company fixed the amount due, then the $408,921.13 and interest, the

debt claimed to be due at the time of the sale, was an unliquidated debt except to the amount of $213,952.63, and the sale was not confined to this last-named amount.

No title having passed to Exploration Company by this sale, the title remains in the committee for the benefit of the plaintiffs and others who may come in, subject to the lien of Exploration Company. So far as concerns the $213,952.63, the amount is fixed and the lien to that extent established.

As to the remainder, the committee, by virtue of the September Plan and Agreement, had power, irrespective of the agreements of June 30th and December 30th, to contract for the expenditure of such sums as might be necessary and proper to explore, protect, or/and develop the property, but that amount must now be determined, not by the unreviewable say-so of Exploration Company, but by the court. In other words, the amount due to Exploration Company over the $213,952.63 must be proved by Exploration Company like any other unliquidated claim, and, when proved, the plaintiffs will have such reasonable time as the circumstances may warrant in equity, to pay to Exploration Company the total amount due with such interest as may be allowable—failing which, the liened property will be sold in the manner and at a time prescribed by the court.

Finally, it is probable that the foregoing disposes of the contention that the agreements of June 30th and December 30th were usurious; but, in any event, construed as a whole, the agreements of June 30th and December 30th did not contemplate a loan nor the relation of debtor and creditor. The undertaking was speculative, involving a large risk. If successful, certain financial rewards were to follow; if unsuccessful, the money expended was to be repaid with simple interest. The transaction, as evidenced by the agreements, and the practical construction of the parties, was a venture, and not a mere borrowing and lending of money.

A decree will pass with the main features as follows: (1) Adjudging the agreements of June 30th and December 30th void; (2) adjudging the title of the stock in controversy to be the property of the committee in their representative capacity, subject to the lien of Exploration Company; (3) adjudging that the stocks are subject to a valid, existing lien of $213,952.63; (4) providing for the ascertainment by the court, or a master, of the additional amount due, for which amount Exploration Company will have a lien on the stocks; (5) restraining Exploration Company from selling or, in any manner, disposing of or pledging the stocks in question until further order of court, and requiring that they be placed in the custody of the court; (6) providing for a lien to such further amount as Exploration Company may expend subject to the order of this court, to protect the physical property while the provisions of the decree are being carried out; (7) dismissing the complaint against the individual defendants, because no relief has been asked of them and no proof adduced in this suit, warranting a decree against them; (8) providing for the further details indicated in the opinion. Settle decree on five days' notice.

CITY OF MEMPHIS, TENN., v. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DIST. et al.

(District Court, E. D. Arkansas, W. D. March 6, 1916.)

No. 5757.

1. COURTS ⟨⟩366(13)—UNITED STATES COURTS—STATE LAWS AS RULES OF DECISION—STATUTES OF LIMITATION.

In the national courts the limitation of actions is governed by the lex fori and controlled by the legislation of the state in which the action is brought as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⟨⟩366(13).]

2. LIMITATION OF ACTIONS ⟨⟩180(2)—PLEADING—AVAILABILITY ON DEMURRER.

It is the rule in Arkansas that a demurrer will lie when it appears from the complaint in an action at law that sufficient time has elapsed to bar the cause of action and no ground for avoiding the bar is alleged in the complaint.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 671; Dec. Dig. ⟨⟩180(2).]

3. PLEADING ⟨⟩8(2)—FACTS OR CONCLUSIONS.

In an action for damages claimed to have been due to levees, embankments, and dikes on the west bank of the Mississippi river raising the high-water stage of the river and causing the water to back upon and over property on the east bank, an allegation that such dikes, embankments, and levees were not of a permanent character, was only a conclusion of the pleader, and the facts set out in the complaint showing that they were permanently controlled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 13; Dec. Dig. ⟨⟩8(2).]

4. LIMITATION OF ACTIONS ⟨⟩55(7)—OBSTRUCTIONS OF STREAMS—PERMANENCY OF OBSTRUCTIONS

That dikes, embankments, and levees on the west bank of the Mississippi river, which raised the high-water stage of the river and caused the water to back upon and over property on the east bank, required constant care and attention and prior to 1910 were washed away and broken annually at many times and places by high water, and that since 1910 they had been so enlarged and increased in height that the number of breaks had been lessened and they had become more effective in backing up and confining the high waters and had raised the high-water stage five feet higher than previously, and that the high waters so held back and confined by such dikes, embankments, and levees, as so constructed, enlarged, and increased in height, had washed away and broken and damaged property on the east bank, did not show that the levees and embankments were not intended to be permanent as originally constructed, and limitations therefore ran from the time of their completion.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 305; Dec. Dig. ⟨⟩55(7).]

5. NAVIGABLE WATERS ⟨⟩39(5)—INJURY FROM OBSTRUCTIONS—LIABILITY FOR DAMAGES—PROXIMATE CAUSE.

In 1891, railroad companies and a bridge company constructed a series of embankments or dikes extending in a northwesterly direction from the west bank of the Mississippi river opposite the city of Memphis. It was specifically alleged that these embankments caused no injury to the city until a levee district constructed levees and increased their height in 1909, raising the high-water stage of the river so that it backed upon and over parts of the city of Memphis, damaging its pumping plants, sewerage sys-

tems, streets, and highways. It was not claimed that the railroad companies had no right to make the embankments at the time they were constructed, or that they negligently constructed them. *Held* that, regardless of limitations, the railroad companies and the bridge company were not liable to the city, as the building of the embankments was not the proximate cause of any damages and the building of the levees could not have been foreseen by such companies, and the breach of duty upon which an action is brought must be not only the cause but the proximate cause of the damage to plaintiff, and the damage ought to have been foreseen in the light of the attending circumstances.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 82, 103, 117, 127; Dec. Dig. ⊂⊃39(5).]

At Law. Action by the City of Memphis, Tenn., against the Board of Directors of the St. Francis Levee District and others. On demurrer to the complaint. Demurrer sustained.

The plaintiff, a municipal corporation of the state of Tennessee, lying on the east bank of the Mississippi river, brings this suit against the defendants, the board of directors of the St. Francis levee district, the Kansas City & Memphis Railway & Bridge Company, the St. Louis, Iron Mountain & Southern Railway Company, and the St. Louis & San Francisco Railroad Company, to recover $2,000,000 damages, alleged to have been sustained by it by reason of the destruction and injury caused to its waterworks plant, sewer system, streets, bridges, and other property, by the building of levees, embankments, and dikes on the Arkansas side of the Mississippi river, which is the boundary line between the states of Tennessee and Arkansas.

The material allegations in the complaint, after setting out the ownership of the property by the plaintiff, are that the alluvial valley of the Mississippi river extends from Cape Girardeau, in the state of Missouri, on both banks of the Mississippi river, to the Gulf of Mexico, varying in width from 4 to 40 miles above the mouth of the Red river, and to a much greater width below; that it is topographically divided into six large basins, of which four are on the west bank and two on the east bank, and into smaller basins; that from time immemorial the waters of the Mississippi river, during the annual high-water stage, were not confined within the low-water bank of the said river, but found outlets below Cairo, Ill., into the St. Francis river, and below the highlands near Helena, Ark., into the White River, Yazoo, Tensas, Atchafalaya, and Pontchartrain basins, and through the rivers draining these basins, and these basins, in their natural condition, would disburden the Mississippi river and store temporarily the annual freshets or high waters of said river; that prior to the construction of levees and the building of dikes and embankments, and the closing of the natural basin of the St. Francis river, by the defendants, the city of Memphis, and all parts thereof, was from 3 to 15 feet above the highest natural flood heights of the Mississippi river, and was not subject to overflow from the annual floods thereof, and the use and maintenance or operation of its water and sewer systems, or of the streets, pikes, highways, bridges, and bridge approaches, were not interfered with thereby; that between the years 1893 and 1899 the defendants the directors of the St. Francis levee district, jointly and in association and co-operation with various other levee districts, for the purpose of reclaiming the lands in the St. Francis river basin, and increasing their value, constructed a continuous line of levees from Point Pleasant, Mo., at the head of the St. Francis Basin, extending along the west bank of the Mississippi river, to a point about 28 miles north of the city of Memphis; that between the years 1899 and 1903 the levee district extended the said line of levees along the west bank of the Mississippi river to a point about 25 miles south of the city of Memphis, and since the year 1903 the said line of levees has been further extended along the west bank of the river to a point within a few miles of Helena, Ark.; that, since the beginning of the said continuous line of levees, the levee district has enlarged and increased the height of the said line of levees, until it has now reached a grade equal to 50 feet in height on the gauge of the Mississippi river opposite the plaintiff; that it has enlarged the said levees and increased the height thereof annually, so that when

there is now a high-water stage of the Mississippi river the flood waters of the Mississippi river are shut out from the St. Francis River Basin, into which they naturally flowed, and are confined by the said levee line within a narrower high-water channel than heretofore.

The complaint then proceeds to charge that the other defendants, the railroads and bridge company, about the year 1891, constructed a series of embankments, or dikes, outside of the line of levees and extending from the western approach of the bridge over the Mississippi river to Memphis, owned and maintained by the bridge company, to, or nearly to, the line of levees built by the levee district, and have annually since then increased and enlarged same and added to the height thereof, the said dikes and embankments now extending more than 4 miles in a northwesterly direction from the banks of the Mississippi river, opposite the southern portion of the city of Memphis; that at the time of the construction of the line of continuous levees from Point Pleasant, Mo., to the point 28 miles above Memphis, and at the time of the continuation and extension of the said line of levees, to its present length, and at the time of the construction of the dikes and embankments by the railroad companies, the effect upon the natural and ordinary flood heights of the Mississippi river was not apparent, and could not be ascertained, nor could the injuries which resulted therefrom, and from the enlargements and increases in the heights be foreseen; that the dikes, embankments, and levees so constructed, enlarged, and increased in height by the defendants, obstructed and interfered with the natural flow of the waters of the Mississippi river in their natural high-water course, and caused the same to back up and acquire a height which would not be attained but for the obstruction of said waters by the dikes, embankments, and levees; that, when there is now a high-water stage of the river, the said waters, so held back, attain an unnatural elevation of more than 11 feet, and by reason thereof they were, during each of the years 1903, 1904, 1906, 1907, 1908, and 1909, backed upon and over a part of the northern section of the plaintiff, where are located the pumping plants of the water and sewerage systems of the plaintiff, and also over the streets, pikes, highways, bridges, and approaches thereto, in said northern section of the city of Memphis; that said dikes and embankments, and line of levees, are not of a permanent character, but they require constant care and attention, and prior to the year 1910 they were washed away and broken annually, at many times and places, by the high waters of the Mississippi river; that since the year 1910 the enlargements and increases in height have been such that the number of breaks therein have been lessened, and the said dikes and embankments and levees have become more effective in backing up and confining the said high waters of the Mississippi river, and since the year 1910 the increase in the elevation of said high waters, over the northern section of the plaintiff, has been more than 5 feet greater than in any previous height of said river; that between the years 1903 and 1909 these high waters backed upon and over the city of Memphis, and injured and interfered with the parts of said water and sewerage systems, and the streets and bridges, doing material injury thereto, the damages during these years amounting to large sums of money.

In the bill of particulars, filed by the plaintiff, no damages are set out as having been sustained prior to the year 1909.

The complaint further alleges that since the year 1909 the high waters of the river, so held back and confined by the actions of the defendants, have washed away and broken and totally destroyed parts of the pumping plants of the water and sewerage systems of the plaintiff, and parts of its streets, pikes, highways, bridges, and approaches thereto; that the value of the real and personal property so totally destroyed within the last six years, by reason of these acts, exceeds $250,000, as set out in the bill of particulars for the different years; that, in addition to this damage, the plaintiff was required to expend large sums of money, amounting to $1,488,066.88, as enumerated in the bill of particulars, all of which expenditures were necessary to prevent further and repeated injury to the property of the plaintiff; that all of these injuries were the direct and proximate result of the unnatural backing up and confinement and obstruction of the waters of the river, by the dikes, embankments, and levees, so constructed and enlarged, and increased in height, by the said defendants.

It is further alleged that, by the Constitution of the state of Tennessee, no property can be taken or applied to a public use without the consent of the owners, or without just compensation made therefor; that by the provisions of the Constitution of the state of Arkansas, no property, or right of way, shall be appropriated to the use of any corporation, until full compensation shall be first made. It is also claimed that the acts of the defendants are in violation of the Fourteenth Amendment to the Constitution of the United States. To this complaint separate demurrers have been filed by each of the defendants.

Barnette E. Moses, of Memphis, Tenn. (C. M. Bryan, of Memphis, Tenn., on the brief), for plaintiff.

L. C. Going and Allen Hughes, both of Memphis, Tenn., for Levee Dist.

B. R. Davidson, of Fayetteville, Ark., and Moore, Smith, Moore & Trieber and E. B. Kinsworthy, all of Little Rock, Ark., for defendant Railroad Companies.

TRIEBER, District Judge (after stating the facts as above). All the defendants assign as grounds of demurrer that the allegations in the complaint do not state a cause for action, and also that the complaint shows on its face that, if there ever was a cause of action, it is barred by the statute of limitations of the state of Arkansas.

The general statute of limitations of the state of Arkansas, upon which the defendant railroad companies rely, is the three-year statute. Section 5064, Kirby's Digest of the Statutes of Arkansas.

The statute of limitations which the levee district pleads is that of one year, under the provisions of section 10 of an act of the General Assembly of the state of Arkansas which became a law on February 24, 1905. Session Acts of 1905, p. 152. This act provides:

"All actions for the recovery of damages against any levee or drainage district for the appropriation of land, or the construction or maintenance of either levees or drains, shall be instituted within one year after the construction of such levees or drains, and not thereafter."

[1] That the limitation of actions is governed by the lex fori, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions, is as well settled in the national courts, as any proposition of law. Among the numerous cases sustaining that rule, we refer to the following: Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 339, 16 Sup. Ct. 810, 40 L. Ed. 986; Dibble v. Bellingham Bay Land Co., 163 U. S. 67, 73, 16 Sup. Ct. 939, 41 L. Ed. 72; Hartford Ins. Co. v. Chicago, etc., Ry. Co., 175 U. S. 91, 98, 20 Sup. Ct. 33, 44 L. Ed. 84.

The latest case on that point, which is controlling in this court, is Quinette v. Pullman Co., 229 Fed. 333, — C. C. A. —, decided by the United States Circuit Court of Appeals for the Eighth Circuit on January 5, 1916.

[2] It is the settled law of the state of Arkansas that, when it appears from the complaint in an action at law that sufficient time has elapsed to bar the cause of action, and no ground for avoiding the bar

of the statute is alleged in the complaint, a demurrer will lie. Collins v. Mack, 31 Ark. 684; Hutchinson v. Hutchinson, 34 Ark. 164; Anthony v. Railway Co., 108 Ark. 219, 157 S. W. 394; Cubbins v. Mississippi River Commission (D. C.) 204 Fed. 299, 308. The question therefore is whether the complaint shows on its face that the action is barred, and that there can be no recovery by reason thereof, regardless of the merits of the case.

That the act of 1905, limiting the time within which an action may be maintained for damages caused by a levee or drainage district, applies to such consequential damages as are charged in the complaint in the case at bar, was determined in Russell v. Board of Directors Red River Levee District, 110 Ark. 20, 160 S. W. 865. It was there held that:

"An action against a levee board for consequential damages, sustained by reason of overflowing the adjacent lands, by reason of the construction of the levee, is within the provisions of this act, and must be brought within one year."

[3, 4] But it is contended on behalf of the plaintiff that this rule only applies to permanent obstructions, and the complaint expressly charges that these levees were not of a permanent nature, until they were strengthened, and raised so as to be above the height of the flood waters of the Mississippi river. It is true that the complaint alleges "that the said dikes, embankments, and line of levees are not of a permanent character," but this is only the conclusion of the pleader, while the facts set out in the complaint show the exact reverse. The statement of facts controls. Alabama v. Burr, 115 U. S. 413, 426, 6 Sup. Ct. 81, 29 L. Ed. 435; McAlister v. St. Louis, etc., Ry. Co., 107 Ark. 65, 69, 154 S. W. 186.

"A demurrer admits only of matters of fact well pleaded, and not conclusions of law. Interstate Land Co. v. Maxwell Land Grant Co., 139 U. S. 569, 578 [11 Sup. Ct. 656, 35 L. Ed. 278]; Chicot County v. Sherwood, 148 U. S. 529, 536 [13 Sup. Ct. 695, 37 L. Ed. 546]."

The pleader undertakes to state why they are not of a permanent character, by alleging:

"That they require constant care and attention, and prior to the year 1910 they were washed away and broken annually, at many times and places, by the high water of the Mississippi river. That since the year 1910 the enlargements and increases in height have been such that the number of breaks has been lessened, and the said dikes and embankments and line of levee have become more effective in backing up and confining the said high waters of the Mississippi river; and, since the year 1910, the increases in the elevation of the said high waters, so backed up and confined, over and upon the northern section of the plaintiff city of Memphis, has been more than five feet greater than in any previous high waters of said river. * * * That since the year 1909, and within the last six years, waters of the Mississippi river, so held back and confined by the said dikes, embankments, and line of levees, so constructed, enlarged, and increased in height by the said defendants, as the direct and proximate result of such construction, enlargements, and increases in height thereof, have washed away and broken and totally destroyed, etc."

That levees and railroad embankments are intended to be permanent requires no extended argument. The fact that when they were first

constructed they were neither high nor strong enough to withstand the high water and were broken or submerged, thus overflowing the embankments and flooding the lands which the levees were intended to protect, is no proof that they were not intended to be permanent. Why were the millions spent, except for the purpose of protecting the lands behind the levees and the tracks of the railroad company from overflow? The levees were not needed when the river was below the danger line. Nor was it a wrong to raise them and strengthen them, if experience showed that unless this was done the purpose for which the money had been expended would fail. As well may it be said that warehouses and bridges, or any other structures, are not of a permanent nature, if, as necessity requires it, they are strengthened and repaired, so as to make them safe. An embankment so constructed as to let the flood waters through would not be a levee. We cannot for a moment presume that the officers of the complainant, especially its engineering department, ever entertained the idea that these structures were not intended to be permanent. Its engineers and other officials knew that the sole object of constructing these levees and embankments was to prevent the waters of the Mississippi river from flooding the lands. That such embankments and levees are permanent structures, and that the statute of limitations begins to run from the time that they are completed, has been judiciously determined by the Supreme Court of Arkansas in a number of cases. St. Francis Levee District v. Barton, 92 Ark. 406, 123 S. W. 382, 25 L. R. A. (N. S.) 645, 135 Am. St. Rep. 191; McAlister v. St. Louis, etc., Ry. Co., 107 Ark. 65, 154 S. W. 186; Chicago, Rock Island & Pacific Ry. Co. v. Humphreys, 107 Ark. 330, 335, 155 S. W. 127; Russell v. Board of Directors of Red River Levee District, supra.

Aside from these considerations, the complaint shows beyond question that ever since 1909, more than six years before the institution of this action, these levees and embankments were completed, and no reason whatever is stated why the action was not brought within the time prescribed by law.

[5] So far as the liability of the defendant railroad companies and the bridge company is concerned, there is another ground upon which the demurrer must be sustained, regardless of the statute of limitations. The allegations of the plaintiff show that the embankments complained of were constructed by these defendants in 1891; that these embankments caused no damages to the plaintiff. It is not claimed that at the time these embankments were constructed the defendants had no right to make them, or that they negligently constructed them. It is specifically alleged in the complaint that these embankments caused no injury to the plaintiff until after the board of directors of the levee district constructed their lines of levee, and raised them to the present height, which was done in 1909. These allegations clearly show that the building of the embankments by the defendant railroad companies was not the proximate cause of any damages suffered by the plaintiff, as the building of the levees was an independent and intervening cause. It is an elementary principle of law that the breach

of duty upon which the action is brought must be, not only the cause, but the proximate cause, of the damage to the plaintiff, and the damage ought to have been foreseen in the light of the attending circumstances. Of the numerous authorities on that point, we refer to the following: Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256; Scheffer v. Railroad Co., 105 U. S. 249, 26 L. Ed. 1070; Cole v. German Savings & Trust Society, 124 Fed. 115, 59 C. C. A. 593, 63 L. R. A. 416; American Bridge Co. v. Seeds, 144 Fed. 605, 608, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041; Teis v. Smuggler Mining Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893; Armour & Co. v. Harcrow, 217 Fed. 224, 227, 133 C. C. A. 218, 221; Davidson v. Nichols, 11 Allen (Mass.) 514; McDonald v. Snelling, 14 Allen (Mass.) 290, 92 Am. Dec. 768; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; Bierer v. Hurst, 155 Pa. 523, 26 Atl. 742; Siewerssen v. Harris County, 41 Tex. Civ. App. 115, 91 S. W. 333.

Was it the duty of these defendants in 1891 to foresee that in 1909 or 1910 a levee board, not then in existence, would build such levees as is alleged in the complaint? Clearly not.

The demurrer to the complaint of all the defendants is sustained.

LAURENTIDE CO., Limited, v. DUREY, Collector of Internal Revenue.

SAME v. IRWIN, Collector of Internal Revenue.

(District Court, N. D. New York. March 13, 1916.)

Nos. 13, 18.

INTERNAL REVENUE ⊂⊃9—REVENUE AND INCOME TAX—LIABILITY OF FOREIGN CORPORATION—"DOING BUSINESS"—"ENGAGED IN BUSINESS"—"TRANSACTING BUSINESS."

Under Revenue Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, § 6300), taxing the net income of foreign corporations engaged in business in the United States, and under Income Tax Law Oct. 3, 1913, c. 16, § 2, A, subd. 1, and G(a), 38 Stat. 166, 172, taxing such income of such corporations accruing from business transacted and capital invested within the United States, where a Canadian corporation, making newspaper paper, sent agents into the United States to solicit purchasers for its product, paying their expenses, hiring desk room in the United States, empowering the salesmen to make written contracts, in part in the United States, subject to the corporation's approval in Canada, and, when approved, to deliver the contracts, paying rent, storage charges on paper shipped into the United States, and also for work done by checks drawn on a bank in the United States where the company kept its funds received for goods delivered in the United States to purchasers, and then, to perform its written contracts, shipped paper consigned to itself in the United States to different points, where it hired storage rooms, and had the paper delivered to itself at such rooms, where it stored it in its own name and at its own risk pending delivery, doing so for its own convenience and to insure delivery according to contract, also shipping into the United States and storing in such manner paper to meet anticipated demands, such Canadian company "did business" in the United States, and "engaged in business"

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therein, and also "transacted business" in the United States, so that it was liable to taxation under both acts.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.

For other definitions, see Words and Phrases, First and Second Series, Doing Business; Engage; Transacting Business.]

At Law. Actions by the Laurentide Company, Limited, against Cyrus Durey and against Roscoe Irwin, as Collectors of Internal Revenue. Judgment in each case directed, dismissing the complaint on the merits.

Actions tried before the court without a jury. No. 13 is an action to recover the sum of $1,572.91, amount of special excise tax assessed against the complainant, Laurentide Company, Limited, a foreign corporation, for the year 1911, under the United States Revenue Act of August 5, 1909, and paid under protest. No. 18 is an action to recover the sums of $955.71 and $1,959.59, amount of tax assessed against said Laurentide Company, Limited, said foreign corporation, for the years 1912 and 1913, assessed under said Act August 5, 1909, and under Income Tax Law Oct. 3, 1913, § 2, and paid under protest.

Louis M. Brown, of Glens Falls, N. Y. (Frederick W. Cameron, of Albany, N. Y., of counsel), for complainant.

Dennis B. Lucey, U. S. Atty., of Ogdensburg, N. Y., and Frank J. Cregg, Asst. U. S. Atty., of Syracuse, N. Y., for defendants.

RAY, District Judge. The assessment of the taxes above referred to and their payment to the collectors above named under protest is not in question. Complainant took all preliminary steps essential to the commencement of the actions. The question is: Were such taxes legally assessed and properly paid under and on the returns made and facts shown, or, to put the question another way, was the complainant, on the returns made and facts shown, exempt from the assessment and payment of the taxes mentioned on the ground it was a foreign corporation and was not doing business in the United States within the meaning of the laws referred to?

Section 38 of the Act of 1909, "An act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes" (36 Stat. pt. 1, pp. 112, 113) provides:

"That every corporation * * * organized for profit and having a capital stock represented by shares, * * * now or hereafter organized under the laws of any foreign country and engaged in business in any state or territory of the United States, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, * * * subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its territories, Alaska, and the District of Columbia during such year, exclusive," etc.

Then follows a provision for ascertaining such net income by making deductions from the gross income for operating expenses, etc., and losses, depreciation, etc. Special provision is made for the deduction of $5,000, and for a return or report by the corporation.

February 29, 1912, the Laurentide Company, Limited, verified and filed with the collector its return of annual net income for the year 1911, giving its location, etc., and paid-up capital stock at $7,200,000, "no capital invested in United States of A.," and bonded indebtedness as $1,200,000. This return gave its "gross income" as $162,291, its net income as $162,291, made no claim to deductions except the "specific deduction from net income allowed by law, $5,000," which was deducted, leaving $157,291 as subject to the said tax. In this return no claim was made that the corporation was not doing business in the United States.

The return for 1912 showed "gross income $725,238.93," deductions for maintenance and operation of the business $605,329.30, and for losses $19,348.37, "net income $100,561.26," and specific deduction from net income allowed by law $5,000; leaving, says the return, "amount on which tax at 1 per centum is to be calculated for assessment $95,561.26," and on this sum the tax was assessed.

The return for 1913 gave gross income as $929,629.12, deductions for operating expenses $733,669.22, total deductions, same $733,669.22, and "net income on which tax at 1 per centum is calculated," and on which it was calculated $195,959.90.

These last two returns had written on the margin thereof "This company is not doing business in the United States and this return is given under protest." The collector held adversely to this clause.

Chapter 16, Laws of U. S. (Act of Oct. 3, 1913), 38 St., being an act "to reduce tariff duties and to provide revenue for the government, and for other purposes," section 2, provides (A, subd. 1, and G [a, b]):

"That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources * * * a tax of 1 per centum per annum upon such income * * * and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere."

"G (a) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation * * * organized in the United States, no matter how created or organized, not including partnerships; but if organized, authorized, or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year. * * * (b) Provided."

Here follows a provision for deductions. The question presented is: Did the Laurentide Company, Limited, have "a net income from business transacted (by it) and capital invested within the United States during such year," the year for which return was made (under protest) and the tax was imposed?

There is no claim it had capital invested in the United States, but it is insisted that during each of the years mentioned, 1911, 1912, and

1913, it transacted business in the United States and derived the net income shown by the returns.

The facts proved by abundant evidence are as follows:

(1) The plaintiff was and is a foreign corporation organized and existing under the laws of the Dominion of Canada.

(2) It was and is engaged in the manufacture and sale of paper used by printers and newspaper concerns in printing newspapers.

(3) Its manufacturing plant and home office was and is at Grandmere, Quebec, Dominion of Canada.

(4) It, for a time in 1911, had desk room in New York City occupied by a stenographer and employé of the corporation, and, in 1912, rented a room and opened up an office in the city of New York, N. Y., where it by its agent and representative did business of and for the corporation in selling paper during the rest of 1912 and during 1913.

(5) It had one, and sometimes two, traveling salesmen in the United States, headquarters in New York at such room, who traveled and solicited business and contracts for the supply and purchase of paper manufactured by it in Canada. The corporation owned the office furniture.

(6) These traveling salesmen or agents had power to solicit contracts in the United States and agree upon terms, except price of goods, and insert same in printed form contracts, ascertain from the home office in Canada by telephone the price they could fix, have such contract signed by the purchaser or contracting party in the United States, and then forward same by mail to the home office of the company in Canada for acceptance or approval and signature by one of its executive officers, and return to such salesman or agent for delivery to the customer in the United States, who then delivered same. The contract was not to be binding on the corporation "unless signed by one of its executive officers at Grandmere, P. Q."

(7) These contracts were not for the manufacture of the paper and sale and delivery of same, but simply for the sale thereof, that is, as stated in the contract:

"The paper company agrees to sell and the purchaser agrees to purchase ——— entire requirements of newspaper used in the publication of (name of newspaper designated) a newspaper published in the city of ——— ——— tons of paper per ——— during (time fixed) according to terms and conditions as set forth as follows:" (Then followed terms as to delivery, etc.).

(8) After such contracts were made, the Laurentide Company consulted its own convenience in providing for delivery according to the terms of the contract, and shipped the paper consigned to itself in such quantities as it saw fit, provided the quantity was sufficient to fulfill the contract as to delivery, from time to time as demanded, to a point in the town or city where the purchaser under the contract carried on his or its business of printing and publication, selected by itself, and to some storehouse selected by it, where the paper was kept or stored until required for actual delivery to the purchaser. The paper was shipped at the expense and risk of the said corporation and stored at its own risk, and such corporation, the seller, also paid

the warehouse or storage charges. The corporation had a standing contract with a cartage company in New York City to deliver paper stored for it when called for by customers. It had contracts with warehousemen to deliver the goods in storage when properly called for by the purchasers as customers. The corporation also kept on hand, usually in New York, paper to supply extra demands for paper. In fact, there was no delivery to the purchaser until called for by it under the contract, and then delivery was made from the storehouse or warehouse of the corporation in the town or city where the purchaser did its business. Insurance, if any, was paid by the corporation, and, in fact, the paper until actually delivered was held, stored, and owned by the said Laurentide corporation.

(9) The corporation also purchased supplies, etc., for its plant in Canada in the United States.

(10) The corporation had a bank account at a bank in Glens Falls, N. Y., where checks given in payment for paper were deposited for collection, and on which checks in payment for supplies purchased and of salesmen were drawn. Balances not required for current business were sent to the home office in Canada.

(11) Occasionally a customer from the United States would personally visit the home office and execute his contract, and occasionally a contract called for some deliveries f. o. b. on the cars at the plant in Canada. These were exceptional cases.

The question is: Was the Laurentide Company, Limited, "engaged in business in any state or territory of the United States" so as to make it liable for a special excise tax "with respect to the carrying on or doing business by such corporation"? This tax, under the act of 1909, is to be assessed and paid "upon the amount of net income over and above five thousand dollars received by it (such foreign corporation) from business transacted and capital invested within the United States * * * during such year." Under the act of October 3, 1913, as to a foreign corporation, the tax is assessed and paid "upon the amount of net income accruing from business transacted and capital invested within the United States during such year." Hence the question is: Was "business transacted" by such corporation during the year mentioned within the meaning of the law?

In the one case, we have "engaged in business" within the United States, and, in the other, "business transacted" within the United States.

When the Laurentide Company employed and sent its agents clothed with power, even though limited, into the United States to travel about and solicit customers or purchasers for its manufactured product, and paid their expenses, and hired and paid for a place of business in the United States even though but desk room, and empowered such salesmen to make written contracts in part in the United States subject to its approval in Canada and when approved deliver them and did so ratify and have such contracts delivered, paid rent, storage charges, and other expenses, and also for the work so done by checks drawn on a bank in the United States where it kept, even temporarily, its funds received for goods delivered in the United States to purchasers, and then, to carry out and perform its written

contracts so made, and which in nearly all cases were to be performed in the United States, as to delivery of goods and in part as to making payments therefor, shipped such goods consigned to itself into the United States to different points, where it hired and paid for storage or warehouse room and had them delivered to itself at such rooms where it stored them for itself in its own name and at its own risk pending delivery to the customer, and did this for its own convenience and to insure delivery according to contract, and also shipped into the United States and stored in like manner goods to meet anticipated demands, it "did business" in the United States and "engaged in business" in the United States, and also "transacted business" in the United States. These business transactions were commenced within the United States by soliciting contracts; the making of the contracts by signing was consummated in Canada in part, but the delivery thereof was made in the United States. The corporation sent its goods into the United States and stored them in its own name, retaining and having complete title. It delivered from its own rented warehouses in the United States, and, when payment was made to it by check, it collected such checks in the United States and deposited the proceeds to its own credit in its own bank account in the United States and, as stated, paid all its liabilities incurred in the business done in the United States by checks drawn on such bank account, and therefore made payments completing the various transactions in the United States. True, some of the business connected with these transactions was done in Canada; for instance, the approval of the contracts and the shipping of paper into the United States, and the receipt and indorsement of checks received prior to actual deposit for collection. All the conditions of these contracts were not to be complied with in Canada. The most of them and the more important ones were to be performed in the United States. Here delivery was to be made, and here the contract was solicited, agreed upon, and signed by the purchaser. Here the Laurentide Company had its property with which to make deliveries in storage at its own expense in its own warehouses—those hired and paid for by it.

Appropriating the idea of Mr. Justice Peckham expressed in Pennsylvania L. M. F. I. Co. v. Meyer, 197 U S. at page 415, 25 Sup. Ct. 483, 49 L. Ed. 810, I think it would be somewhat difficult for the Laurentide Company, Limited, or its able attorney, to describe what it was doing in the United States, if it was not doing, carrying on, and transacting business therein when there receiving large quantities of newspaper consigned to itself and storing it, hiring and paying for storage room therefor, delivering it to customers, purchasers thereof, soliciting contracts by agents for the purchase and supply of same, renting and paying rent for a room for doing the business, depositing and collecting the checks received in payment, and paying the expenses of the business therefrom, all done in the state of New York in the United States. It was not necessary that the contracts should have been made wholly in the United States (Pennsylvania L. Ins. Co. v. Meyer, 197 U. S. 407, 414, 25 Sup. Ct. 483, 49 L. Ed. 810), or that their execution or performance should

have been wholly in the United States (same case, cited and approved Equitable Life Society v. Pennsylvania, 238 U. S. 143, 147, 35 Sup. Ct. 829, 59 L. Ed. 1239, affirming 239 Pa. 288, 86 Atl. 787, and also by the Circuit Court of Appeals in this the second circuit, Geo. W. Bentley & Co. v. Chivers, 215 Fed. 959, 962). The mere act of sending salesmen into another state to sell sewing machines there; the orders being filled from the home office in another state and the contracts and cash collected being immediately remitted to agencies of the seller in other states, and the seller having neither office, store, nor managing salesmen in the state where such salesmen operated, has been held not to be doing business within such state so as to make the seller taxable on credits as provided by Rev. Code of Miss. 1880, § 497 (Singer Mfg. Co. v. Adams, 165 Fed. 877, 91 C. C. A. 461), although such seller was employed in trade or business within the state when it had "one or more local agencies in Mississippi in control of salesmen, selling sewing machines throughout a limited number of counties and reporting to such local agencies which in turn reported to a district agency in another state." That case is an authority in favor of the government's contention here, as the statute referred to provides:

"Every person, resident or nonresident, whether corporate or otherwise * * * employed in any kind of trade or business, shall be taxable for the same in the county where such person may reside, or have a place of business, or be temporarily located at the time of the assessment."

The local agency established in the state gave the seller a place of business or a temporary location within the state while a mere traveling salesman had neither. In the instant case, the Laurentide Company, Limited, had a place of business, several in fact, in the United States, and was temporarily located, and had and owned property which it was storing in the United States and delivering as its business contracts demanded.

In Flint v. Stone Tracy Co., 220 U. S. 107, 171, at page 172, 31 Sup. Ct. 342, at page 357, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, where section 38 above quoted from was directly under consideration by the Supreme Court of the United States, that court said:

"It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People v. Commissioners of Taxes, 23 N. Y. 242, 244. 'That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.' Bouvier's Law Dictionary, vol. 1, p. 273.

"We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law.

"Of the Motor Taximeter Cab Company Case, No. 432, the company owns and leases taxicabs, and collects rents therefrom. We think it is also doing business within the meaning of the statute."

True, "doing business within the state," or "doing or transacting business in the United States," do not include the doing of a single act

or the making of a single contract, but do include a continued series of acts by an agent or agents continuously within the state or the United States, as the case may be. 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. In that case it is held:

"The reasonable construction of a state statute relating to foreign corporations doing business within the state does not include the doing of a single act or the making of a single contract, but does include a continuous series of acts by an agent continuously within the state. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727 [5 Sup. Ct. 739, 28 L. Ed. 1137].

"A foreign corporation engaged in teaching by correspondence, and which continuously has an agent in a state securing scholars and receiving and forwarding the money obtained from them, is doing business in the state; and such a corporation does business in Kansas within the meaning of section 1283 of the General Statutes of that state of 1901."

At pages 103 and 104 of 217 U. S., at page 483 of 30 Sup. Ct., 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, the court said, as to "doing business":

"In view of the nature and extent of the business of the International Text-Book Company in Kansas, the first inquiry is whether the statutory prohibition against the maintaining of an action in a Kansas court by 'any corporation doing business in this (that) state' embraces the plaintiff corporation. It must be held, as the state court held, that it does; for it is conceded that the text-book company did not, before bringing this suit, make, deliver, and file with the secretary of state either the statement or certificate required by section 1283; and upon any reasonable interpretation of the statute that company, both at the date of the contract sued on, and when this action was brought, must be held as 'doing business' in Kansas. It had an agent in the state who was employed to secure scholars for the schools conducted by correspondence from Scranton, and to receive and forward any money obtained from such scholars. Its transactions in Kansas, by means of which it secured applications from numerous persons for scholarships, were not single or casual transactions, such as might be deemed incidental to its general business as a foreign corporation, but were parts of its regular business continuously conducted in many states for the benefit of its correspondence schools. While the Supreme Court of Kansas has distinctly held that the statute did not embrace single transactions that were only incidentally necessary to the business of a foreign corporation, it also adjudged that the business done by the text-book company in Kansas was not of that kind, but indicated a purpose to regularly transact its business from time to time in Kansas, and therefore it was to be regarded as doing business in that state within the meaning of the statute, and that it 'was the intention of the Legislature that the state should reach every continuous exercise of a foreign franchise,' and that it should apply even where the business of the foreign corporation was 'purely interstate commerce.' Deere v. Wyland, 69 Kan. 255, 257, 258 [76 Pac. 863, 2 Ann. Cas. 304]; State v. Book Co., 65 Kan. 847 [69 Pac. 563]; Commission Co. v. Haston, 68 Kan. 749 [75 Pac. 1028]. In our judgment, those rulings as to the scope of the statute were correct."

It is seen to be immaterial that in the case at bar the money collected was transmitted to the home office in Canada, or sent there in the first instance, or that the entire transactions, including the making and signing of the contracts, their execution or performance, and payment of moneys pursuant thereto, were not carried on from start to finish within the United States.

It seems to me clear that on the returns made the taxes were legally assessed, or imposed, and paid, and that the plaintiff is not entitled to recover in either case.

In Equitable Life Society v. Pennsylvania, 238 U. S. 143, 35 Sup. Ct. 829, 59 L. Ed. 1239, a Pennsylvania statute was under consideration, and the Pennsylvania court had held that the state could impose a tax on the business of a foreign insurance corporation doing business within the state, and that it was properly held that premiums on policies issued to persons in the state and paid directly to the home office measured the tax and did not amount to taxing property beyond the jurisdiction of the state. The court held that the relation of the foreign company to domestic policy holders constituted doing business within the meaning of the statute, for, as the Supreme Court said:

"It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the state in case of dispute, or making proof of death."

There will be a judgment in each case dismissing the complaint on the merits, with costs.

McMANUS v. SAWYER et al.

(District Court, S. D. New York. November 30, 1915.)

1. ACCOUNT STATED ⟸6(2)—IMPLIED ASSENT.
Where monthly accounts rendered by a factor prior to the principal's death were retained without objection, but those rendered thereafter were returned by the executor, there was an account stated as to all transactions included within the retained accounts.
[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 31–34, 36–38; Dec. Dig. ⟸6(2).]

2. ACCOUNT ⟸17(4)—EQUITABLE RELIEF—PLEA.
The only plea to a bill for an account, where the relation of the parties created the obligation to account, is a stated or settled account; the plea of "fully accounted" being bad.
[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 85–87; Dec. Dig. ⟸17(4).]

3. ACCOUNT ⟸20(1)—EQUITABLE RELIEF—REFERENCE TO MASTER.
Where defendant in a suit for an accounting annexed to his sworn answer accounts rendered by him, the court can take and settle the account itself without reference to a master.
[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 109–118; Dec. Dig. ⟸20(1).]

4. ACCOUNT ⟸17(4)—EQUITABLE RELIEF—BURDEN OF PROOF.
On exceptions to an account attached by defendant to his answer, the burden is on the plaintiff as to the items of surcharge, and on the defendant as to the items of falsification.
[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 85–87; Dec. Dig. ⟸17(4).]

5. ACCOUNT ⟸18—EVIDENCE—EXCEPTIONS.
In a suit against a factor for an accounting, evidence *held* not to sustain exceptions of surcharge and falsification to the account.
[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 89–93; Dec. Dig. ⟸18.]

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6. FACTORS ⟸24—LIABILITIES—DELAY IN SALE.
A factor is not liable to his principal for damages resulting from a delay in the sale of returned goods, which he had authority to sell only to protect his lien and was not directed by the principal to sell.
[Ed. Note.—For other cases, see Factors, Cent. Dig. § 25; Dec. Dig. ⟸24.]

7. FACTORS ⟸32—ACCOUNTING—PAYMENT FOR GOODS.
Where factors, in adjusting a fire loss, allowed the insurance company the discount given for payment within 60 days, the crediting of the principal's account with the full amount of the insurance received was equivalent to payment to the principal, whether the insurance companies had paid within that time or not.
[Ed. Note.—For other cases, see Factors, Cent. Dig. § 37; Dec. Dig. ⟸32.]

8. FACTORS ⟸32—ACCOUNTING—INTEREST—COMPOUND INTEREST.
Where it was the established course of business between a factor and his principal to charge interest on the account of each to the end of the month and then strike a balance, which would be carried forward to the next month, the fact that thereby the factor charged compound interest does not establish the falsification of his accounts, since such interest is not illegal and may be agreed on between the parties.
[Ed. Note.—For other cases, see Factors, Cent. Dig. § 37; Dec. Dig. ⟸32.]

9. ACCOUNT ⟸22—EQUITABLE RELIEF—CROSS-BILL—NECESSITY.
In a suit for accounting, a decree may be rendered in favor of the defendant for the amount shown to be due him without his having filed a cross-bill, since one who demands an accounting submits himself to the result thereof if it goes against him.
[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 133–135; Dec. Dig. ⟸22.]

In Equity. Suit for accounting by Terence McManus, as executor of the last will and testament of Arabella McManus, against Decatur M. Sawyer and another, copartners doing business as Sawyer & Blake. On exceptions to the account filed with the answer. Decree for defendants.

George B. Hayes, of New York City, for plaintiff.
Clinton H. Blake, Jr., and Leonard G. McAneny, both of New York City, for defendants.

LEARNED HAND, District Judge. The bill is for an accounting to be rendered by a factor to his principal under a contract of March 31, 1908. Concededly an accounting was due from the defendants, who were the plaintiff's intestate's factors. The defendants answer that they in fact accounted monthly, and that up to the time of the death of plaintiff's intestate the accounts were settled, but that after her death the accounts were returned. To the answer were annexed all the accounts actually rendered from April 1, 1910, to the conclusion of the transactions between the parties.

[1-3] Upon the trial it appeared that the plaintiff, who was the plaintiff's intestate's general agent, had returned all the accounts rendered after April 1, 1910, and that therefore there was no account stated after that time. Before then, however, the accounts had been

retained without complaint and constituted accounts stated. Moreover, the plaintiff did not seek to challenge any of the accounts rendered before that time. In equity the only plea in such case as this to a bill for an account, when the relation between the parties created the obligation to account, was a stated or settled account. Daniell, Ch. vol. 1, p. 666 et seq. The plea of "fully accounted" was bad. Bailey v. Westcott, 6 Phil. 525. Therefore this cause at common law would have gone to a master upon so much of the account as was rendered after April 1, 1910, as soon as it appeared that there had been no stated account between the parties. However, it was always possible, and not an error, for the court to take and state the account itself; and as the defendants have annexed to their answer full accounts under oath from April 1, 1910, onwards, it has been possible to treat the case in that form.

[4] The plaintiff, it is true, has assumed that the burden was upon him, though he disproved the allegation of the answer that the account was stated, to go further and show that there were enough errors in it either to require a new account altogether or to open it for surcharge and falsification. In that he was in error, but his rights may be none the less preserved by taking the account as now rendered in the answer and giving him the same rights that he would have before a master. Those rights would be to surcharge and falsify the account when rendered, which he would be obliged to do by excepting to its several items. As to items of surcharge he would have the burden; as to items of falsification the defendants would have the burden. In this latter respect the plaintiff's rights differ from what they would have been had an account been once stated, but the cause may nevertheless proceed, though a little informally, as the plaintiff has never formally excepted. Upon the trial, nevertheless, he did in fact object to a number of items, and these objections will be taken as though he had formally excepted before a master.

As to items of surcharge, some suggestion was made at the trial that there were some 3,000 yards of goods which ought to have appeared upon the accounts; but this entirely broke down in proof and was abandoned.

Another exception may also have been made that better prices should have been got for the goods taken over by the underwriters after the fire of April 20, 1910; but this was without foundation, and it, too, is abandoned, if ever made.

[5] The first serious exception of surcharge arises from the supposed failure of the defendants to charge themselves with the sale of certain of the returned goods; e. g., those contained on Schedule B of the answer. The plaintiff agrees that, when returned, the defendants had the right to credit themselves with the price at which they were originally sold, that having been once charged against them; but he insists that no charge appears upon their eventual disposition. The defendants reply that as to some of these goods their sale appears in the sales book, and that the proceeds are credited to the plaintiff in the later "accounts current." For those which did not so appear, the defendants say they have accounted in the "Fire Sales State-

ment," so called. This is a long statement delivered to the plaintiff and made up out of a larger statement of all goods injured by the fire of April 20th, under the following circumstances: The goods burned were in the third loft of the warehouse, and consisted not only of the plaintiff's but of others' goods. All these were insured by the defendants under general covering policies, and after the fire the defendant Blake took up the adjustment of the loss with the underwriters. I find as a fact that the plaintiff's assistant, Tate, was present when the goods were viewed by the adjusters, and undertook to identify which of the injured goods belonged to the plaintiff. In cases where the tags were not burnt, this could be done absolutely; in other cases, it was inevitably a doubtful conclusion. Tate gave to Blake the pages of the defendants' books upon which the prices of the goods could be found, and after Blake had agreed with the underwriters as to the price at which they would take the goods he had a general statement made and they settled with him on those figures. The "Fire Sales Statement," so called, is a compilation from so much of this general statement as concerns the plaintiff's goods. The prices were those found in the defendants' books, less certain discounts to be considered later.

The plaintiff's surcharge relates to these items of returned goods which first appear upon "accounts current" after the date of the fire; e. g., Schedule B, already mentioned. He urges that these certainly could not have been injured in the fire, and that the defendants' effort to include them in the credit allowed him in the "Fire Sales Statement" must obviously fail. Thus he depends upon the discrepancy of dates in the documents. The defendants answer that, when returned goods of the plaintiff came to their warehouse, they were entered in a receiving book by a boy, but were not opened at that time. They were sent directly upstairs, and afterwards either the plaintiff, or Tate, his agent, having counted the goods, made a list of them and brought it down to the shipping clerk, who entered them in the return book, from which they were posted into the credit book, and from there into the stock book. Now the return book, the credit book, and the receiving book have all been destroyed. I do not understand that the plaintiff suggests that there was anything sinister or improper in their destruction; I see no reason, in any event, if such a contention had been suggested, for supposing that the destruction was to suppress the books. As far as appears, certainly with the exception of the credit book, they were books of casual entry, the contents of which were posted into more permanent books in the course of bookkeeping. The only date which appeared, according to this custom of business, would be in the return book, and that date would be the date at which McManus or Tate informed the defendants that the goods had been returned. Andrews says that there was no date given by Tate and McManus of the return, and we do not know what the date of the return actually was. It is possible that McManus' own books, if they were available, might show us that, or they might not; but they are not available. In any case, the explanation given, which I accept as true, satisfies me that the goods carried in the accounts as returned after the fire might have been received before that time, and might

have been identified among those goods afterwards salved and included in the "Fire Sales Statement."

Furthermore, this appears to be certainly proved in some instances by the documents themselves, for the following reasons: On the "Fire Sales Statement" appear the case number and the yardage of some pieces which are located among the merchandise returned after May 1st. Now it is of course impossible that that piece should have been in the Fire Sales Statement, if it was not in the building at the time. The "Fire Sales Statement" was made up by going over each piece particularly, and, as has been said, the case and number and yardage of those pieces was put down, wherever the tag had not been burned off. When the same piece is identified in a subsequent "account current," it shows beyond question that at least in that instance the date of the return taken from the defendants' stock book was not the actual date of the return of the goods. This demonstration is not complete as to all the items challenged, but it serves as the strongest possible demonstration of the truth of the defendants' story as to how the apparent conflict in dates occurred. There is another consideration of no small weight, which further corroborates that story. If the returned goods in question were actually not in the fire, and were not accounted for in the "Fire Sales Statement," the books of the defendants could not possibly have balanced. Either they would have been credited to some other account, or they would have been altogether suppressed, which would amount practically to a larceny of the goods, and which the plaintiff expressly disclaims. That the goods could have been received after the fire, and have got into some other account, and never have been discovered subsequently, is of course a possibility in the sense that anything is a possibility; but it is an extreme improbability.

Therefore it seems to me from all these reasons that there can be no reasonable doubt that these items of returned merchandise, which are said to appear in the "Fire Sales Statement," actually did appear. I am quite aware of the fact that there is no indubitable tracing of some of these goods. Many of the goods in the "Fire Sales Statement" had their tags burned off. There was nothing left by which to identify them, but their yardage (which in many cases was estimated) and the pattern number of the goods, with their shade number or color. In placing some of this returned merchandise in the "Fire Sales Statement," therefore, it must be conceded that there is a certain measure of doubt. In some cases those pieces which Andrews picks out as accounted for in the "Fire Sales Statement" do not actually tally with the yardage shown upon the stock book for that piece. This may possibly be accounted for through loss by the cutting off of samples. In some cases a number of other pieces in the "Fire Sales Statement" than those selected by Andrews to answer the items in the stock book would answer equally well. It is impossible to know that he has selected the right pieces upon the "Fire Sales Statement." However, the "Fire Sales Statement" contains pieces which could respond to such of the returned goods as did not appear later to his credit in the sales book. If these returned goods are not in the "Fire Sales Statement," the defendants failed to put them in their account, and have

embezzled them, which I do not believe. I therefore find that the plaintiff has not shown that the goods so returned were not disposed of, either by insurance adjustment or by subsequent sale.

The next exception of surcharge is to the items of the 20 pieces which were in the fourth loft, and which suffered a smoke damage, for which the plaintiff was allowed $180.97, 30 per cent. of their value. These pieces have been traced into the sales book, and their disposition shown in each case. The plaintiff was credited with the sum which had been obtained from these, together with the allowance for depreciation, and no question can be raised about them.

The next exception of surcharge consists of two items of returned merchandise on Schedule G, bearing the name "A. D. Juillard & Co." and "Amoskeag Mfg. Co." The plaintiff claims that these should be charges, not credits, to the defendants, if they represent goods returned to the manufacturers who originally delivered the goods. This is explained as follows: Each manufacturer's account had a number on the defendants' stock book, and usually when goods were returned the "account current" identified them by reference to that number. On Schedule G only, for some quite unexplained reason, the name of the manufacturer was added to the account number. The explanation is adequate that it was only a redundancy in the account, and the goods are traced and later accounted for.

[6] The next exception of surcharge arises from the fact that the returned goods not accounted for in the fire were held for two years in some cases, and were then sold at greatly diminished value. This attempt at surcharge involves a misconception of the relation of factor and principal. The sale of the goods rested with McManus, the principal; they were his goods, and he was responsible for their value. Any rights of sale which the factor had were for the protection of his lien, and he was not an agent of the principal to sell. Hence, while he had the power to sell to protect himself, he had no obligation to sell to protect the principal. If he chose to leave the returned goods unsold for two years, the loss was on his own head. The factors might have sold, if they had thought it necessary, but are not chargeable with failure to do so.

[7] The next exception of surcharge is of the allowances of 2 per cent. and 10 per cent., amounting in all to 11.8 per cent., made to the underwriters when they took over the damaged goods. These allowances were from the prices at which the goods were carried upon the defendants' books. When Blake settled with the underwriters, he took as a basis the figures at which McManus carried the goods, and which he used in his sales to customers. These prices were, of course, not those at which he had purchased, and the underwriters insisted upon some deduction. McManus' usual terms were 7 per cent. off if the payment were made in 60 days. The allowance was certainly reasonable, in view of all the circumstances, and was the equivalent of a bulk sale at 4.8 per cent. less than what McManus would himself have received after he had succeeded in selling all the goods by separate contracts. He complains that the payment was not made in 60 days, but I do not find any proof of this. It does not appear when the under-

writers paid the defendants, but it does appear that McManus was allowed full credit for the sum allowed upon the defendants' books on August 3, 1910, which was 74 days after the fire, and which was equivalent to a cash payment at that time.

The question remains whether Blake had authority to make the settlement, which depends upon the question of fact between McManus, on the one hand, and Blake and Andrews, on the other. I find in favor of the defendants upon this issue. In the first place, McManus' bearing was not impressive. Again, I am satisfied that he destroyed his books. Again, his claims have been shifting, vague, and baseless. Finally, Andrews' memorandum seems to me to remove any doubt about the fact. It is true that McManus' letter of June 6th may be read to imply that the matter had not been left in Blake's hands; but, considering its source, it may well have resulted from a change in his position after he had found that the settlement would not be to his liking.

This completes the exceptions of surcharge, and the plaintiff has failed in each case.

There are two exceptions of falsification: The first is that the defendants have credited themselves with compound interest on their advances; the second, that they have credited themselves with a 4 per cent. commission on effecting the settlement with the underwriters.

[8] Respecting the exceptions of interest, the facts are as follows: The accounts were figured monthly and each side of the account was charged with interest. The balance was then carried forward to begin the next account, and necessarily in that balance was included the balance of interest found due in the last account. As interest was figured upon that balance, the result unquestionably was to allow interest upon interest. This had been the uniform course of the parties throughout their two years of dealings, and at no time did McManus raise any question about it. Compound interest is not illegal, and the parties may agree upon it if they wish. Allen-West Commission Co. v. Patillo, 90 Fed. 628, 33 C. C. A. 194. The question is whether the parties had agreed upon this method of keeping their accounts. As the plaintiff returned each of the "accounts current" sent after the fire, no estoppel can arise from them; but he did not adopt this practice before that time. From March, 1908, the parties had been in business together, and throughout all the time the "accounts current" had been regularly sent, and there is no suggestion that they had been returned. On the contrary, the whole business had been done upon their basis without any complaint by the plaintiff. This established the course of the business by mutual consent upon a footing which was entirely reasonable in itself. The credit is therefore allowed.

The second exception of falsification is of the credit of a 4 per cent. commission upon effecting the adjustment. This depends wholly upon the testimony of Blake, in which he is contradicted by McManus. Upon the authority to settle with the underwriters Blake is corroborated by Andrews' memorandum; not so as to the promise to allow commissions. Blake says that McManus came in on the morning after the fire, April 21st, and that Blake at that time said that he would under-

take the adjustment if he was allowed his commissions, to which McManus assented. In McManus' letter of June 18, 1910, he speaks of allowing the commission, but not allowing any more than 7 per cent. discount. He is, however, not referring to any talk, but to the contract of March 31, 1908, which certainly did not govern the case of an insurance adjustment. That the defendants should, however, have been allowed something for adjusting the loss, was a very natural thing; they had an immense deal of clerical labor to perform, and Blake's work counted for something. The fact that McManus contradicts Blake counts for nothing, in my judgment; the only question is whether Blake's memory is to be trusted, in view of his interest. I see no sufficient reason to doubt his story, and I find that the credit has been proved.

[9] Thus the exceptions to the account, either of surcharge or falsification, are all overruled. Now an account, when duly presented under the oath of the accounting party, will be passed by the court save in those respects in which the other party excepts to it. Moreover, it is a well-established rule that a party who demands an accounting submits himself to the result of the account if it goes against him. No cross-bill is necessary, and a decree may go for the balance either way. Wilcoxon v. Wilcoxon, 199 Ill. 244, 250, 65 N. E. 229. It follows that the defendants may take their decree for $808.94 against the plaintiff, which is the balance due on the account.

In this view no consideration of the counterclaims is necessary. However, they must be dismissed, since they rest upon an account stated, and none such was proved. This, however, will not take from the defendants their costs.

CLINE v. SOUTHERN RY. CO.

(District Court, W. D. South Carolina. March 10, 1916.)

1. DISMISSAL AND NONSUIT ⊂=58(1)—MOTIONS—GROUNDS.

In an action for personal injuries, where defendant pleaded a release and plaintiff was not required to reply under the law unless so required by order of the court, a motion to dismiss on the ground that a court of law had no jurisdiction would be denied, since while in the federal courts matters cognizable in equity cannot be considered on the law side of the court, and while the only fraud permissible to be proved at law would be fraud touching the execution of the instrument, it could not be assumed that the release was executed as alleged or that plaintiff could only get relief from the release in equity.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134, 138; Dec. Dig. ⊂=58(1).]

2. JUDGMENT ⊂=828(3)—JUDGMENTS OPERATIVE AS BAR.

Under Const. art. 4, § 1, providing that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, a federal court gives the same effect to a judgment of a state court as it had in the state where it was rendered, and a judgment which bars an action in the state where it was rendered is res judicata in the federal courts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1507, 1508; Dec. Dig. ⊂=828(3).]

3. JUDGMENT ⇐570(5)—JUDGMENTS OPERATIVE AS BAR—NONSUITS.
In an employé's action for injuries in a South Carolina state court, the court granted a nonsuit "for the reasons taken down by the stenographer." In ruling on the nonsuit the court stated that he thought plaintiff was a foreman; that it was his business to make an unsafe business safe and to prepare a safe place for himself and his men to work; that he did not think it made any difference whether defendant was negligent or not; that he could not escape the conclusion that plaintiff's foot slipped and that when he fell down he pulled a bent on him, and therefore the only reasonable inference that could be drawn was that he was injured by an unfortunate accident; that he did not think he could sustain a verdict if rendered against defendant on the evidence; and that he was going to grant a nonsuit on the ground that there was no other reasonable inference to be drawn from the evidence, and for the further reason that coal under his foot was possibly put there or left there by himself or his men. *Held*, that the nonsuit was clearly granted for insufficiency of the evidence to support a verdict for plaintiff, and not because the evidence showed affirmatively that plaintiff was not entitled to recover, and hence under the rule in South Carolina it would not prevent a new action.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1032; Dec. Dig. ⇐570(5).]

4. JUDGMENT ⇐570(5)—JUDGMENTS OPERATIVE AS BAR—NONSUITS.
In an employé's action for injuries in a South Carolina state court, the court granted a nonsuit for insufficiency of the evidence. The judgment was affirmed on appeal, the Supreme Court stating, in closing its opinion, that it appeared that the injury was due to plaintiff's own fault and that defendant was not liable. In that state a judgment may be affirmed on grounds other than those upon which it was based in the lower court. *Held*, that the expression in the opinion of the Supreme Court did not show that it placed its judgment on a ground other than the insufficiency of the evidence, and hence the judgment did not bar a new action.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1032; Dec. Dig. ⇐570(5).]

At Law. Action by D. J. Cline against the Southern Railway Company. On motion to dismiss the complaint. Motion refused.
See, also, 101 S. C. 493, 86 S. E. 17.

J. Harry Foster, of Rock Hill, S. C., for plaintiff.
McDonald & McDonald, of Winnsboro, S. C., for defendant.

JOHNSON, District Judge. This is a motion by the defendant to dismiss the complaint herein on two grounds: First, because it appears upon the face of the pleadings that this court sitting as a court at law has no jurisdiction of this action; second, because the plaintiff is estopped by the judgment of the state court which is res judicata of the matter now sought to be litigated in this court.

[1] The motion to dismiss for want of jurisdiction is based on the defendant's fourth defense, which sets up a release alleged to have been executed by plaintiff, whereby for a valuable consideration he released the defendant from any further liability to him on account of his alleged personal injuries growing out of the facts set up in the complaint. It is contended that, inasmuch as the plaintiff has not made replication to the answer, it is admitted, and that such release on the law side of the court stands as a full and complete defense to

the plaintiff's alleged cause of action, and that he has no right to proceed as long as said release is unassailed. Defendant further insists that while under the practice in the state courts the question of the validity of the release may be tried in the same action, and any question affecting its validity submitted to the jury with the other issues, under the practice in the federal courts such cannot be done, because in the latter courts the distinction between law and equity is rigidly and strictly observed. Unquestionably, matters cognizable in equity cannot be considered on the law side of the court, nor can matters of a legal nature be considered on the equity side of the court. It is not deemed necessary to quote authorities on this point, as this doctrine in the federal courts is fundamental and elementary. The real difficulty is in determining the applicability of the law to this particular case. The plaintiff is not required under the law of pleadings to reply to an answer unless the answer sets up a counterclaim. The answer in this case does not set up a counterclaim, but in the fourth defense there is set up a release which, if established, will avoid the plaintiff's action. The defendant may, where his answer sets up new matter constituting a defense by way of avoidance, move the court to require a reply thereto, and, if the court shall order a replication, it is subject to all the rules of pleadings in regard to an answer; that is, the plaintiff must admit or deny or avoid the new matter so set up. In the present state of the pleadings, the court cannot assume that the release set up by the defendant was executed, nor can the court anticipate the character of the reply the plaintiff may make to the release if required to make replication. If the cause shall go to trial on the pleadings as now made up, the court cannot anticipate the plaintiff's attitude with respect to the release, nor can the court now rule upon the character of evidence that will be admissible. In the case of George v. Tate, 102 U. S. page 570, 26 L. Ed. 232, it is said:

"It is well settled that the only fraud permissible to be proved at law * * * is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give."

It is not necessary to multiply authorities. This doctrine has been announced repeatedly, and is settled law in this court, and will be binding on the court when the cause comes on for trial. Whether the plaintiff can bring himself within this rule to avoid the alleged release, or whether it is such a paper as he can only get relief from by proper action in a court of equity for its rescission, the court is not advised.

[2] The second ground upon which the defendant's motion is based is that the plaintiff is estopped by the judgment of the state court which is res judicata of the matters now sought to be litigated in this court. The plaintiff brought his action in the court of common pleas for York county on May 16, 1914, for personal injuries growing out of the same state of facts alleged in the complaint now before the court. The court of common pleas for York county acquired jurisdiction of both the parties and the subject-matter, and that court is a court of general jurisdiction and has concurrent jurisdiction with

this court in the cause of action set out in the complaint. This cause being at issue came on at the November, 1914, term before Special Judge Efird and a jury, and after the taking of all the testimony offered by the plaintiff to sustain his cause of action, upon motion of counsel for defendant therein, a nonsuit was granted. From the order of nonsuit the plaintiff appealed to the Supreme Court of the state of South Carolina, and the Supreme Court of the state sustained the order of nonsuit and affirmed the judgment of nonsuit. 101 S. C. 493, 86 S. E. 17. Section 1, art. 4, of the Constitution of the United States provides that:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

The federal court gives the same effect to a judgment of the state court as it had in the state where it was rendered. In the case of Hampton v. M'Connel, 3 Wheat. 234, 4 L. Ed. 378, decided by Chief Justice Marshall, the syllabus of the case was as follows:

"A judgment of a state court has the same credit * * * and effect in every other court within the United States, which it had in the state where it was rendered; and whatever pleas would be good to a suit thereon, in such state, and none others, can be pleaded in any other court within the United States."

In Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261, it is held that an adjudication in the state court which binds the plaintiff, whether it was right or wrong, precludes him until it has been reversed or set aside. It cannot be disregarded any more in the courts of the United States than in those of the state itself. Is the matter in controversy res judicata? Could the plaintiff again bring his action in a state court in South Carolina? If he could not bring his action again in the state court because the previous adjudication is binding upon him and determined the merits of his cause, then he cannot bring it in this court. In South Carolina an ordinary nonsuit does not adjudicate anything. There are nonsuits, however, which go to the merits of the matter in issue. Such a nonsuit is binding upon the parties. In the case of Cartin v. R. R. Company, 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829, an action was brought upon a written instrument. At the close of the plaintiff's testimony, Judge Witherspoon construed the written instrument upon which the plaintiff's cause of action was based and held that the plaintiff did not have a cause of action under that written instrument. Whereupon he granted an order of nonsuit. Thereafter the same plaintiff brought action against the same defendant upon the same written instrument, and Judge Benet with the record in the previous case before him held that Judge Witherspoon's construction of the deed involved was res judicata and dismissed the complaint. In the case of Morrow v. Railroad Co., 84 S. C. 224, 66 S. E. 186, 19 Ann. Cas. 1009, Morrow had been injured in North Carolina. He had brought one action in the superior court of North Carolina and had been nonsuited, which nonsuit was affirmed by the Supreme Court of the state. Thereafter he brought a second action in the superior court of North Carolina upon the same cause

of action and was again nonsuited, and upon appeal to the Supreme Court of the state the order of nonsuit was affirmed. Thereafter he brought his action in the court of common pleas for Spartanburg county, S. C., upon the same cause of action, and it was decided by the court upon the inspection of certified records of the North Carolina cases that the decision involved the merits and that he was precluded from again suing in North Carolina, and, of course, the court, giving full faith and credit to the North Carolina adjudication, dismissed the complaint. In the case of Hughes v. Ry. Co., 92 S. C. 1, 75 S. E. 214, the Supreme Court said:

"A nonsuit is not usually a judgment upon the merits. It was originally given against the plaintiff when he introduced insufficient evidence to support a verdict or when he refused or neglected to proceed to the trial of the cause after it had been put at issue. It is different, however, where the plaintiff is nonsuited or a verdict is directed because the evidence introduced by the plaintiff proves affirmatively as a matter of law that he is not entitled to recover. The difference is that in one instance the plaintiff fails to make out his case; in the other instance he proves affirmatively facts which as a matter of law show that he is not entitled to recover." Jenkins v. A. C. L. R. R. Co., 89 S. C. 408, 71 S. E. 1010; Morrow v. Railroad Co., 84 S. C. 224, 66 S. E. 186, 19 Ann. Cas. 1009.

[3] Coming to the case under consideration, did the court grant the nonsuit because the plaintiff had failed to introduce sufficient evidence to sustain a verdict, or because the evidence showed affirmatively that the plaintiff was not entitled to recover? The order is very short:

"After hearing argument of counsel and for the reasons taken down by the stenographer, it is ordered that a nonsuit be granted herein."

In ruling on the nonsuit, the court said:

"Gentlemen, I have given the testimony very careful thought, and I think this man was the foreman and intrusted by the master to do the work. It was his business to go and make an unsafe business safe, and it was his business to prepare a safe place for himself and for his men to work. I don't think it makes any difference in the case whether the master was negligent in the particulars mentioned in the complaint or not. I cannot escape the conclusion that he had safely placed all of the bents, that he had safely removed this one, and, in attempting to put it back in place, his foot slipped from under him, and when he fell down he pulled the bent on him, and therefore the only reasonable inference that could be drawn from the facts is that he was injured by one of the unfortunate accidents that befalls humankind; and I do not think I could sustain the verdict if the jury were to render one against the railroad company on this evidence, and I think it would be useless to go on with the case. I do not go into any of the other questions as to whether this is a cause under the United States Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]). For in this case I think it makes no difference and I do not pass on the validity or invalidity of the release, but I am going to grant the motion for a nonsuit and put it on the ground that there is no other reasonable inference to be drawn from the evidence on his part caused by his foot slipping and pulling down the bent on him and for the further reason that the coal under his foot was possibly put there or left there by himself or by the men who were under his control or direction."

[4] Clearly, the court granted the nonsuit because the evidence was not sufficient to support a verdict. The difficulty in the case is found

in the last clause of the last sentence of the reasoning of the Supreme Court:

And it appears "that the plaintiff's injury was due to his own fault, and that the defendant is not liable. Judgment is affirmed."

That language is far broader than the language used by Judge Efird in granting the nonsuit. The Supreme Court has held that it is a judgment of the court that controls, and not the reasoning of the court in reaching that conclusion. I am not able to hold that that expression found in the reasoning of the Supreme Court is of such force and effect as to make the matters herein res judicata. Judge Efird's judgment of nonsuit was before the Supreme Court to be either affirmed or reversed. Under the practice in that court, the respondent may ask that the judgment appealed from be sustained on other grounds than those upon which it was based in the lower court. From the record before me it does not appear that the Supreme Court placed its judgment of affirmation upon grounds other than Judge Efird's. The action now before this court is brought under the Employers' Liability Act. Judge Efird distinctly refused to decide the question whether it was a common-law action or an action under the Employers' Liability Act. I am therefore constrained to hold that Judge Efird's judgment of nonsuit was based upon the insufficiency of evidence to support a verdict.

Wherefore, the motion to dismiss the plaintiff's complaint is refused.

NOTASEME HOSIERY CO. v. STRAUS et al.

(District Court, S. D. New York. February 9, 1912.)

1. TRADE-MARKS AND TRADE-NAMES ⟸85(1)—SUIT FOR INFRINGEMENT—RIGHT TO RELIEF.

A trade-mark is in the nature of a property right which a court of equity will protect from invasion, but he who seeks such relief must himself be free from fraud or misrepresentation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. ⟸85(1).]

2. TRADE-MARKS AND TRADE-NAMES ⟸45, 85(2)—RIGHT TO PROTECTION IN EQUITY—MISREPRESENTATION.

Where complainant registered a trade-mark for hosiery packages consisting only of a device or symbol in different colors, the placing thereon in use of the word "Notaseme," which had been refused registry as a part thereof, in connection with a statement of the registry, constituted a material misrepresentation which invalidated the trade-mark and was a bar to equitable relief.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 53, 59, 94; Dec. Dig. ⟸45, 85(2).]

3. TRADE-MARKS AND TRADE-NAMES ⟸75—UNFAIR COMPETITION—USE OF SIMILAR LABELS.

The use by defendant of a label on hoisery boxes similar in shape and coloring to complainant's, but differing in the arrangement of the colors and especially in the trade-mark name conspicuously shown thereon, *held* not sufficient to establish unfair competition, in the absence of proof that

customers were actually deceived into buying defendants' goods for those of complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. ⊂⊃75.]

In Equity. Suit by the Notaseme Hosiery Company against Isidor Straus and Nathan Straus, doing business as R. H. Macy & Co. On final hearing. Decree for defendants.

Decree reversed, 201 Fed. 99, 119 C. C. A. 134. Subsequent decision, 209 Fed. 495, following that of Circuit Court of Appeals, affirmed 131 C. C. A. 503, 215 Fed. 361, which is reversed by Supreme Court, 240 U. S. 179, 36 Sup. Ct. 288, 60 L. Ed. ——.

D. Frank Lloyd, of New York City (Robert M. Barr and E. Hayward Fairbanks, both of Philadelphia, Pa., of counsel), for complainant.

Wise & Seligsberg, of New York City (Edmond E. Wise, of New York City, of counsel), for defendants.

HAZEL, District Judge. The bill in this case alleges unfair competition in trade and infringement of a trade-mark adopted and used by complainant corporation since October 1, 1907, as a label in connection with the manufacture and sale of hosiery. There is attached to the statement and declaration a sketch or drawing of the trade-mark which consists of a square having a black band extending diagonally from the left-hand upper corner to the lower right corner of the design, and a triangular space or panel above and below the band printed in red. There is no other mark, lettering, or coloring specified in the application filed December 14, 1907, and registered May 4, 1909, though the evidence shows that the mark as used by the complainant has printed upon the band in white script the word "Notaseme," and on a flourished ending of the script are printed the words "Trade-Mark," while the words, "Reg. U. S. Pat. Off.," are in small type underneath the design, as required by statute. The drawing also shows a narrow white border on either side of the diagonal band, but in actual use such border is of decorative gold.

The alleged infringement of the registered trade-mark consists in the adaptation and use by the defendants of labels for their boxes, cartons, and advertisements in connection with the sale of stockings, which comprise a rectangular design with a diagonal black band extending across and dividing it into an upper and lower panel or space; each being red in color. On the black band the trade-mark, "Irontex," is conspicuously printed in white script, and in the upper panel is inserted in black type, "The hose that," and in the lower panel the words, "wears like iron." The band upon which the word, "Irontex," is printed extends from the lower left-hand corner to the upper right-hand corner.

The evidence produced shows that the defendants adopted their trade-mark and label about six months after the adoption of the trade-mark by complainant. If the trade-mark or label in controversy is valid, the defendants have not the right to appropriate it in conjunction

with the sale of a like vendible commodity by either copying, imitating, or simulating it. But the defendants contend that the principal characteristic of complainant's trade-mark was the word, "Notaseme," which was refused registration by the Patent Office on account of its descriptive character; that complainant in legal effect disclaimed such word as an element of the combination comprising the trade-mark; and that the continuance of the use of the word, "Notaseme," in connection with the representation that such word was also an element of the registered trade-mark, renders the latter invalid. Whether the contention comes within the rule of the decisions to which attention is directed is a question not altogether free from difficulty.

[1, 2] To merely display the word, "Notaseme," on the face of the design, would not disentitle the complainant to relief, but the addition of the words, "Trade-Mark," printed on the flourished ending of the script, was, I think, a material misrepresentation. It is a well-established rule of law that a trade-mark is in the nature of a property right which a court of equity will protect from invasion, but he who seeks relief must himself be free from fraud or misrepresentation. Prince Mfg. Co. v. Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 19; Preservaline Mfg. Co. v. Heller Chem. Co., (C. C.) 118 Fed. 103. Ordinarily, misrepresentations to the public arise from statements appearing on the trade-mark relating to the materials composing the manufactured article and the place of manufacture. Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706. In Holzapfel's Co. v. Rahtjen's Co., 183 U. S. 1, 22 Sup. Ct. 6, 46 L. Ed. 49, a principle is enunciated by the Supreme Court which is determinative of this question and which seems to broadly include a false claim or a misrepresentation of the character appearing on the face of complainant's trade-mark. In that case it was held that no right to a trade-mark which includes the word "patent" or describes the article as "patented" can arise when the article is unpatented, and the Supreme Court said:

"A symbol or label claimed as a trade-mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained."

There are earlier cases in the lower federal courts holding that there can be no title in a trade-mark which operates to mislead or deceive the public, and that the defendant may avail himself of such deception by answer, even though infringement is imputable to him. Consolidated Fruit-Jar Co. v. Dorflinger, Fed. Cas. No. 3,129. And in Preservaline Mfg. Co. v. Heller Chem. Co., supra, Judge Kohlsaat denied equitable relief in an unfair competition case where no false statements were made in connection with the trade-mark or packages, but where it appeared that in advertising circulars the word "patented" was used in relation thereto. While it is true that the misrepresentation in each instance in the cases cited implied that the article was patented, or that the patent had not expired, still it seems to me that the same principle as emphasized in the Holzapfel Case applies here. The exclusive right to the use of the word, "Notaseme," was apparently

disclaimed in the Patent Office, and yet the complainant continued to use such word at the same time, claiming it was a feature of the combination comprising the registered trade-mark. Such misrepresentation by complainant invalidates the registered trade-mark and operates as a bar to equitable relief from the asserted infringement by the defendants.

[3] The next ground for relief to be disposed of is whether, notwithstanding the invalidity of the trade-mark the defendants are guilty of unfair dealing in trade. That there is in defendant's label a resemblance to complainant's label would seem to be apparent on comparison. The form or shape of the label, the diagonal black band, the red panels, and the white lettered inscription on the band, tend to create the impression that the labels used on the boxes containing the defendants' hosiery are the labels of the complainant; but the resemblance or similarity is not thought sufficiently close to justify the presumption of an intention by the defendants to mislead the ordinary buyer into buying their goods when he intended to buy those of the complainant. The variations made by the defendants in their label, though probably not a complete differentiation, nevertheless were sufficient to require proof that some individual buyer had been deceived.

Complainant produced testimony of specific sales to show that there was a palming off of the goods of the defendant for those of the complainant, but I am left unpersuaded by such testimony. The witness Keefe swears that he bought stockings at defendants' store on three different occasions. On the first and second visits to the defendants' store he pointed out to the saleswoman the box of hosiery he wanted to buy, and he swears he does not recall what was said by either the salewoman or himself at the time of the purchase, or what happened on any of the occasions in relation to which he testifies. It appears that he made a report in writing to the complainant of a purchase of stockings on July 19, 1910, wherein he stated that he had asked the saleswoman for a pair of "Notaseme" hose, and he purchased the hose delivered to him by the saleswoman, which were those of the defendants. The exhibit report was not used by him to refresh his recollection or in relation to the said purchase, and it is therefore not entitled to consideration as evidence tending to establish the fact. At the time of such claimed purchase, he was accompanied by a friend who had been instructed to observe the transaction with the view of later becoming a witness if necessity arose. Such witness, however, is not produced.

Evidence has been given by the defendants to show that their labels, which they placed on the front ends of the boxes containing their hosiery, were of rectangular shape, and that, in addition thereto, they placed on the front ends of the covers of the boxes another label which had printed on it in clear type the name, "Macy's"; that after the adoption of their trade-mark, "Irontex," they extensively advertised it in the newspapers of New York City in connection with the sale of stockings and created a demand for the particular kind of stockings sold by them. Under the circumstances, I am satisfied that no

confusion resulted from the similarity of the two labels, and that the substitution of the defendants' goods for those of the complainant is not proven.

The bill is dismissed, with costs.

In re BONDURANT HARDWARE CO.

(District Court, N. D. Georgia. March 13, 1916.)

No. 550.

1. BANKRUPTCY ⟸140(1)—TITLE TO PROPERTY—DELIVERY ON CONSIGNMENT.
Implements delivered by the manufacturer to a dealer which were not to be paid for until sold were held on consignment, and can be recovered by the manufacturer after the bankruptcy of the dealer.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⟸140(1).]

2. SALES ⟸465—CONDITIONAL SALE—CONTRACTS—RECORDING—WITNESS.
Where a contract between a manufacturer and dealer, reserving to the former title to goods sold until paid for, was signed by the dealer by its president, followed by the word "Accepted," with a signature, after which was the word "salesman," the signature could not be considered that of a witness to the signature of the president, so as to authorize the recording of the contract.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. ⟸465.]

3. SALES ⟸451—CONDITIONAL SALE—CONTRACT—LAW GOVERNING.
Under Civ. Code Ga. 1910, § 8, providing that the validity, form, and effect of all contracts are determined by the laws of the place where executed, but that when such contract is intended to have effect in the state it must be executed in conformity to the laws thereof, a contract between an Indiana manufacturer and a Georgia dealer, whereby the former was to ship goods to the dealer, was a Georgia, and not an Indiana, contract, and must be executed in accordance with the laws of Georgia to be valid there against the trustee of the dealer for bankruptcy.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1323; Dec. Dig. ⟸451.]

4. SALES ⟸465—CONDITIONAL SALE—REGISTRATION—STATUTE.
Civ. Code Ga. 1910, § 3259, providing that mortgages executed on personalty not within the limits of the state should be recorded within six months after the property was brought in, does not apply to a conditional sale contract of goods to be shipped into the state.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. ⟸465.]

5. BANKRUPTCY ⟸219—JURISDICTION—REFORMATION OF CONTRACT.
A court of bankruptcy cannot reform a contract for the sale of goods to the bankrupt on application to the referee, with request that if he be without jurisdiction, he shall forward it to the court, but it ought to be by a bill filed as a plenary proceeding on the equity side of the district court.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 356; Dec. Dig. ⟸219.]

In Bankruptcy Proceeding against the Bondurant Hardware Company. On reclamation proceedings by the Oliver Chilled Plow Works.

Petitioners' claim to part of the property sustained, and claim to the balance denied.

Holden, Shackelford & Meadow and Stephen C. Upson, all of Athens, Ga., for intervener.

T. S. Mell and Cobb, Erwin & Rucker, all of Athens, Ga., for trustee.

NEWMAN, District Judge. [1] In this case as to the two riding cultivators in the possession of the bankrupt company when it failed, it is clear to me from the evidence of both Mr. Bondurant and Mr. Wall that these articles were held on consignment. The whole testimony shows that the Bondurant Hardware Company was not to pay for them unless it sold them. This necessarily makes a consignment. So I think the Oliver Chilled Plow Works is entitled to receive these two riding cultivators from the trustee.

[2] Of course, any one examining it must be satisfied that, on the face of it, the contract by which it is claimed title was reserved in the Oliver Chilled Plow Works is not properly attested for record. No one reading it would suppose, seeing Mr. Langdon Wall's signature as it is there appended, that he was signing it otherwise than as the representative of the seller, the Oliver Chilled Plow Works. It reads, in print, "Accepted, subject to approval of Oliver Chilled Plow Works, South Bend, Indiana, by," then in writing, "Langdon Wall," and after that, "Salesman," this being just below the signature of the Bondurant Hardware Company, by E. J. Bondurant, president.

The affidavit made in Virginia for the purpose of admitting it to probate would clearly be insufficient. The only purpose for which it could have any weight would be, as suggested in the argument, to show that Mr. Wall really thought he was signing it as a witness to Bondurant's signature, and not on behalf of his company.

[3] I am not impressed with the argument that this was an Indiana contract. Section 8 of the Code of Georgia, 1910, is as follows:

"The validity, form, and effect of all writings or contracts are determined by the laws of the place where executed. When such writing or contract is intended to have effect in this state, it must be executed in conformity to the laws of this state, excepting wills of personalty of persons domiciled in another state or country."

This was a contract for the sale of goods by an Indiana establishment to a Georgia corporation. The cases cited by counsel, where mortgages were made in other states and the property brought into this state, do not seem to me to apply here. In the case of Cunningham & Co. v. Cureton, 96 Ga. 489, 491, 23 S. E. 420, in the opinion of the court this is said:

"The reservation of title in the vendors of the machinery having been recorded without due attestation or probate, the record did not operate as constructive notice to the mortgagee (Code 1882, §§ 1955a, 1959; Code 1910, §§ 3318, 3262); and it was admitted that he did not have actual notice prior to the execution of the mortgage. Moreover, there could not be any reservation of title as against third persons, unless the contract was attested in the manner prescribed by the statute. Merchants' Bank v. Cottrell, 96 Ga. 168 [23 S. E. 127]. It was contended that compliance with the law of this state as to the

execution and recording of such contracts was not essential, inasmuch as the notes were executed and made payable in the state of Tennessee, and were therefore governed by the law of that state, under which no writing was necessary to render the reservation of title good as against third persons. We do not agree with counsel in this contention. Where the property is brought into this state, the requirements which our law imposes for the benefit of third persons, as to the attestation and recording of such contracts, are not dispensed with by the fact that it was purchased or is to be paid for in another state. On this subject Mr. Wharton, in his work on the Conflict of Laws, § 275f, says: 'It is scarcely necessary to say that where the lex situs makes the validity of a document to depend upon a certain mode of acknowledgment and registry, these conditions must be complied with. Their omission cannot be made good by the most solemn modes of attestation and registration adopted by the state from which the document emanates.' "

[4] Neither do I concur in the argument as to the six-month period allowed for registration. I think this statute, allowing six months for registration (Code 1910, § 3259), provides that if mortgages are executed on personalty not within the limits of this state, and such property is afterwards brought within this state, then such mortgages should be recorded within six months after such property is brought in. I do not think the provisions of this statute can be construed in any possible way so as to include a contract like this where goods are sold by an establishment doing business in another state to parties in this state and the goods are sold and delivered here and attempted to be held with reservation of title in the seller. It is entirely clear to me that it should be recorded within the 30 days provided by the general statute as to the record of mortgages and conditional bills of sale.

[5] The effort in this case to reform this contract in the manner in which the proceeding was instituted is unusual and somewhat peculiar to me. The application to reform the contract seems to have been made to the referee, with request that if he thinks he lacks jurisdiction to entertain it, he should forward it to the court. The referee held that he had no jurisdiction, and forwarded it to the court.

It does not come before the court, as I see it, in a proper way for the court to consider it. A proceeding like this, to reform a contract, ought to be instituted by a bill filed in the District Court regularly, and it seems to me it would necessarily be a plenary proceeding on the equity side of the court.

I do not think, however, that the facts shown by this record justify a reformation of the contract, even if the proceeding was clearly in proper shape and presented in proper form to the court.

If counsel desire to institute more apt proceedings in the District Court, the dismissal of the proceeding here will be without prejudice.

I hold: First, that the two riding cultivators should be delivered to the Oliver Chilled Plow Works; second, that the bill of sale does not, on its face, appear to be attested by Langdon Wall as a witness; third, that this is not cured by the argument that this is an Indiana contract, or that the vendor had six months within which to record it; and, fourth, that the proceeding here, by which it is sought to reform the contract, is not sufficient to justify any relief from the court in that way, but with the direction that this last matter shall be without prejudice if counsel for the Plow Works desire to institute additional proceedings.

THE LYRA.

(District Court, N. D. California, First Division. March 14, 1916.)

Nos. 15071, 15134.

SHIPPING ⊂=132(3)—SUIT FOR DAMAGE TO CARGO—BURDEN OF PROOF.

In a suit to recover for damage to a cargo of sugar shipped under a bill of lading, reciting the receipt in good order and condition of a stated number of bags of sugar, "weight and contents unknown," the shipper has the burden of proving by evidence other than such recital, that the sugar was in good order and condition when received on board.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 479–481; Dec. Dig. ⊂=132(3).]

In Admiralty. Suit by the Federal Sugar Refining Company against the American Steamship Lyra, and cross-suit by J. A. McDonald, master of the Lyra, against the libelant. Order of reference.

McCutchen, Olney & Willard and Ira A. Campbell, all of San Francisco, Cal., for Federal Sugar Refining Co.

William Denman and Denman & Arnold, all of San Francisco, Cal., for the Lyra.

DOOLING, District Judge. These cases arise out of the shipment of a cargo of refined sugar on board the steamship Lyra from New York to San Francisco by way of Cape Horn. The first is for damage to the cargo, and the second is for freight. They were tried together. The shipment consisted of 112,000 bags, of which about 30,000 were found to be caked when unloaded. There were some other elements of damage to other bags, but the matters in issue here have only to do with the sugar that was caked. The bills of lading contain the following: "Shipped in good order and condition ——— bags of refined sugar"—with the added words, "weight and contents unknown." Under these provisions the burden is upon the shipper to show, by proof other than the recitals in the bills of lading, that the sugar was in good order and condition when received on board the ship. Libelant has offered proof of the fact, and contends that the caking of the sugar was the result of a failure to ventilate it at any time during the voyage, which lasted 71 days. Respondent contends that the caking was not due to lack of ventilation, but to the fact that the sugar absorbed sufficient moisture to produce this effect while on its way from the refinery to the ship, and particularly while on board the lighters by which it was conveyed to the ship. It is further contended that the failure to ventilate, which is admitted, was due to instructions given by the libelant's president. The shipment of this large cargo of sugar from the Atlantic to the Pacific Coast was in the nature of an experiment, and great care was taken by libelant to have it reach the ship in good condition. It is not impossible, however, that despite this care some of the sugar, which left the refinery warm, and remained at times for hours upon the lighters within a few feet of the waters of the Hudson river, did

absorb moisture sufficient to produce the caking complained of without the knowledge of libelant, and without showing any external signs thereof which would put either the shipper or the ship upon notice. I cannot account for the fact that upon unloading, bags of caked sugar were found alongside of others that were absolutely free from caking, and the further fact that blocks of caked bags were found in the center of piles surrounded by bags that were not caked at all, upon any other theory than that the caking was the result of conditions existing in the sugar rather than of conditions existing in the ship. It is undisputed that dry sugar will absorb moisture, and that, when warm, it is very prone to do so. It is also true that the caking of sugar is due to the presence of moisture therein and its subsequent drying out. If in the present instance the moisture were absorbed after the sugar was stowed, we would expect to find the outer layers most affected. But if the moisture was absorbed before the sugar was stowed, we would expect to find the conditions actually existing. That is to say, if the load or any portion of it upon any lighter absorbed moisture sufficient to produce caking, we would find the caked sugar distributed just as the moist sugar from the lighter was stowed. Taking the whole case together, the evidence does not warrant a finding that the caking was due to lack of ventilation. The circumstances all indicate that it was due to moisture in the sugar, and not to moisture in the ship, and that the presence of such moisture in the sugar was not noticeable when the sugar was taken on board. It is therefore not necessary to determine whether the majority of sugar cargoes were ventilated at this time, or whether orders were given to the captain of the Lyra to keep this cargo closed. Considering, however, the failure to ventilate after all the preparation made therefor, I am of the opinion that the captain understood that he had received such instructions.

As to the damages claimed, other than those arising from the caking, the cause will go to the commissioner to ascertain and report the amount thereof. The decree to be entered will be determined when the amount of such damage is ascertained.

In re ALL STAR FEATURE CORP.

Ex parte KLAUBER.

(District Court, S. D. New York. February 14, 1916.)

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

An actress, contracting to fill a four weeks engagement, for which she was to receive $5,000, and, besides acting, furnish her own costumes, and, if necessary, give also a fifth week, was not entitled to priority in bankruptcy as a "workman" or "servant," as those words are used in their colloquial sense, and the word "servant" does not include all cases where the formal relation of master and servant exists.

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

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

In Bankruptcy. In the matter of the All Star Feature Corporation, bankrupt. On petition to review an order of the referee denying priority to the claim of Jane Klauber. Order affirmed, and motion denied.

The petitioner is the well-known actress going by the name of Jane Cowl, who entered into a contract with the bankrupt to perform as actress in a motion picture play entitled "The Garden of Lies." She was to receive $5,000, for four weeks' engagement, beginning November 1, 1914, and ending not later than December 1, 1914. Besides acting, she was to furnish her own costumes. It was agreed that if necessary she should give also a fifth week.

Arthur Butler Graham, of New York City, for petitioner.
John L. Lockwood, of New York City, for trustee.

LEARNED HAND, District Judge. It is a good deal easier to see that the petitioner is not entitled to a priority than to state any general rule which will be applicable in all cases. To succeed she must bring herself within the words "workman" or "servant." Everyone who understands words knows that it is absurd to call an actress who can command $5,000 for a four weeks engagement a workman or a servant. The words are used in their colloquial sense. Re Gurewitz, 121 Fed. 982, 58 C. C. A. 320; Re Grubbs Wiley Grocery Co. (D. C.) 96 Fed. 183. And the word "servant" does not include all cases where the formal relation of master and servant exists. Re A. O. Brown (D. C.) 171 Fed. 254. Of the two terms the case fits more nearly "servant" than "workman," yet, since "servant" does not include all cases where one must follow the directions of another, the distinction must be found in the kind of duties done. This lady was not engaged to perform any personal services, whether menial or not; she was engaged in a form of dramatic art, and if she was a servant, so would have been Rachel or Duse, whenever they were under contract to play a part for a manager. Just what kinds of services constitute a servant I do not need to consider, so long as hers are clearly not such, nor need I say whether the petitioner is an independent contractor. This is one of those classes of cases where it is safer to prick out the contour of the rule empirically, by successive instances, than to attempt definitive generalizations. Noble State Bank v. Haskell, 219 U. S. 104, 112, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. Re Caldwell (D. C.) 164 Fed. 515, is not binding, though in point.

Order affirmed; motion denied.

In re GREEN.

(District Court, E. D. Pennsylvania. January 5, 1916.)

No. 4643.

BANKRUPTCY ⊂=328—PROOF OF CLAIMS—LIMITATION—"EXPENSES OF ADMINISTRATION."

The limitation of time for proof of claims prescribed by Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 560 (Comp. St. 1913, § 9641), has no application to a claim for rent for premises while occupied by the trustee after bankruptcy, which is for an "expense of administration."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. ⊂=328.

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

In Bankruptcy. In the matter of Jacob Green, bankrupt. On review of order of referee disallowing landlord's claim for rent. Order revoked and record remitted, with directions.

See, also, 207 Fed. 693.

Alexander Conn, of Philadelphia, Pa., for petitioner.

Raymond A. White, Jr., and Maurice W. Sloan, both of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. The salient facts of this case are these: The petitioner was the landlord of the bankrupt. The rental of the premises occupied was $70 per month. The rent was paid to January 15, 1913; the month's rent having been due in advance on December 15, 1912, and paid. The petition in bankruptcy was filed December 28, 1912. The rent for the next month was also paid, carrying the rental as paid to February 15, 1913. The trustee remained in possession until the date of the sale of the effects of the bankrupt, which was held on May 22, 1913. By an arrangement between the landlord and the trustee, the former agreed to forego all claim of rent for the portion of rental due after May 15, 1913, in consideration of securing possession following the sale. This left due the landlord the three months' rent from February 15 to May 15, 1913. No formal proof of claim was offered until December, 1915. The adjudication was March 31, 1913. The petitioner excused the delay because he had understood counsel for trustee to advise that no proof of claim by him was required.

The claim was dismissed by the referee on the sole ground that the limitation of time allowed for proofs of claims prescribed by section 57, clause "n," of the Bankruptcy Act, was an absolute bar to the claim. In so holding the referee, without any fault of his own, was misled by the proof of claim into assuming the basis of the claim to have been the contractual obligation of the bankrupt, instead of being part of the cost of administration. It is among the possibilities that the latter may not arise until more than a year after the adjudication. In such a case the limitation clearly could not have been intended to apply. Nor do we think the limitation was intended to apply to any

claim which is a claim against the estate for something arising after the proceedings were instituted as part of the cost of administration. The referee properly ruled the question as raised by the fact presented to him. It appears now the fact is otherwise. The claim as presented should be amended, so as to unequivocally state the character of the claim, and the proofs in support may then be heard and considered.

For the purpose of enabling this to be done, the petition for review is allowed, the order dismissing the claim is formally revoked, and the record remitted, with directions to entertain such claim as may be made for rent subsequent to February 15, 1913, and to pass upon the same.

THE BOUKER NO. 2.

(District Court, S. D. New York. February 15, 1916.)

SEAMEN ⊂⊃11—MEDICAL TREATMENT AND MAINTENANCE WHEN DISABLED—TIME AFTER END OF VOYAGE.

A seaman who falls sick or is injured on a voyage is entitled to charge the expense of his maintenance and cure for a reasonable time after the end of the voyage.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39-44, 187; Dec. Dig. ⊂⊃11.]

In Admiralty. Suit by a seaman against The Bouker No. 2. Decree for libelant.

Silas B. Axtell, of New York City, for libelant.
Foley & Martin, of New York City, for claimant.

LEARNED HAND, District Judge. The question whether a seaman who falls sick or is injured while on his voyage may charge for his cure only till the end of the voyage or whether his cure covers a reasonable period thereafter is not settled by any authoritative decisions. Mr. Justice Story, however, held that the cure extended beyond the voyage (Reed v. Canfield, 1 Sumner, 195, Fed. Cas. No. 11,641), and his is a high authority in matters maritime. Judge Addison Brown, likewise a high authority in such cases, ruled the same way (The W. L. White [D. C.] 25 Fed. 503), and this has been followed in Wilson v. Manhattan Canning Co. (D. C.) 205 Fed. 996, by Judge Cushman, and in The Lizzie Frank (D. C.) 31 Fed. 477, by Judge Toulmin. Judge Ward, in The Bunker Hill (D. C.) 198 Fed. 587, obiter, seems to have approved the rule, as did also Judge Hoffman in Raymond v. The Ella S. Thayer (D. C.) 40 Fed. 902. Judge Henry B. Brown's decision in The J. F. Card (D. C.) 43 Fed. 92, proceeded rather upon the fear of danger to shipping than upon a consideration of the authorities. Judge Betts appears twice to have ruled against the right to cure after termination of the voyage (Nevitt v. Clarke, Fed. Cas. No. 10,138, and The Atlantic, Fed. Cas. No. 620), but those were each earlier cases than the W. L. White, supra.

Similarly Judge Ross ruled for the ship in The Tamerlane (D. C.) 47 Fed. 822, and Judge Miller in The Ben Flint, Fed. Cas. No. 1,299.

In this district it seems clear that the later cases are in accord with the libelant's position. Moreover, the cases to the contrary were all decided at a time when general notions of what was just in such matters favored the libelant much less than at present. Certainly I should not have the right to change a well-settled rule because it did not answer present convictions, but when the matter is open and inclines decidedly towards such convictions, it would be wrong to twist it back again.

The libelant may recover the expenses of his cure and maintenance as proved, $1,091.90. No costs.

In re FRENCH.

(District Court, N. D. New York. March 23, 1916.)

1. EXEMPTIONS ⟸45—PROPERTY EXEMPT—"NECESSARY WORKING TOOLS."
Milk cans, plows, harrows, cultivators, buzz saws, ice racks, hayracks, harness and team blankets are "necessary working tools" for a farmer within Code Civ. Proc. N. Y. § 1391, exempting necessary household furniture, working tools, and team not exceeding in value $250 when owned by a householder or person having a family for which he provides.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 56–61; Dec. Dig. ⟸45.]

2. EXEMPTIONS ⟸17—PERSONS ENTITLED—"HOUSEHOLD"—"HOUSEHOLDER."
Where a farmer rented a farm and occupied the farmhouse thereon, living in it and occupying it with his hired help, having sleeping rooms where they slept, a kitchen where the cooking was done and a common table where they all ate together, this constituted a "household," and he was a "householder" within Code Civ. Proc. N. Y. §§ 1390, 1391, exempting certain property when owned by a householder, though he was unmarried and had no children, and though a hired housekeeper, owning most of the household goods used in the house, kept house for him.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 20; Dec. Dig. ⟸17.

For other definitions, see Words and Phrases, First and Second Series, Household; Householder.]

3. EXEMPTIONS ⟸116—PROPERTY EXEMPT—NECESSITY OF SELECTION.
Code Civ. Proc. N. Y. § 1390, provides that certain property, when owned by a householder, including stoves put up or kept for use in a dwelling house, shall be exempt. Section 1391 provides that, in addition to the exemptions allowed by the preceding section, necessary household furniture, working tools, and team, not exceeding in value $250, are exempt when owned by a householder or person having a family for which he provides. *Held*, that stoves are absolutely exempt, regardless of their value, but the exemption created by section 1391 is a qualified one; and, where the debtor has property of the character specified of a greater value than $250, the exemption of any particular property is dependent upon his election to retain such property.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 137; Dec. Dig. ⟸116.]

4. BANKRUPTCY ⟸398(3)—EXEMPTIONS—WAIVER.
Under Code Civ. Proc. N. Y. § 1391, where a bankrupt's working tools and team exceeded $250 in value, it was immaterial, in passing upon a

chattel mortgagee's right to assert the exemption, where the bankrupt had not done so, that the team was covered by a prior mortgage, executed more than four months before bankruptcy, as the debtor waived his right of exemption as against the mortgagee as to all property mentioned and described in both mortgages.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 676; Dec. Dig. ⊂⊃398(3).]

5. BANKRUPTCY ⊂⊃399(1)—EXEMPTIONS—WAIVER OF EXEMPTIONS.

The right to claim the exemption of specific property exempted by law belongs to the bankrupt, and he may surrender or waive it in favor of general creditors, execution creditors, and the trustee in bankruptcy, but he should not be permitted to do so as against a mortgagee in good faith and for value who, under his mortgage, has succeeded to the bankrupt's title and interest.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. ⊂⊃399(1).]

6. BANKRUPTCY ⊂⊃400(1)—EXEMPTIONS—TITLE TO EXEMPT PROPERTY.

Bankruptcy Act (Act Cong. July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1913, § 9590]) § 6a, provides that such act shall not affect the allowance of exemptions prescribed by state laws. Section 47a, cl. 11 (section 9631), requires trustees to set apart the bankrupt's exemptions and report the items and value thereof. Section 70a (section 9654) vests the bankrupt's title in the trustee, except as to property which is exempt. Section 7, cl. 8 (section 9591), requires the bankrupt to schedule all of his property and make a claim for his exemptions. General order 17 (89 Fed. viii, 32 C. C. A. xix) requires the trustee to report the articles set off to the bankrupt as exempt. *Held*, that the title to property unqualifiedly exempt under the state law remained in the bankrupt, and never passed to or vested in the trustee, and no assertion or claim of exemption was necessary, and it was the duty of the trustee to set such property apart, or at least let it alone.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671, 673; Dec. Dig. ⊂⊃400(1).]

7. BANKRUPTCY ⊂⊃398(3)—EXEMPTIONS—RIGHTS OF MORTGAGEES.

A mortgagee of property of a bankrupt, unqualifiedly exempt under state laws, had the right to take and sell the property, though the mortgage was given within four months and constituted a preference; and, where the property was sold by the trustee, the proceeds belonged to the mortgagee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 676; Dec. Dig. ⊂⊃398(3).]

8. BANKRUPTCY ⊂⊃400(1)—EXEMPTIONS—RIGHTS OF MORTGAGEES.

Where a bankrupt's working tools and team exceeded $250 in value, and selection and election were therefore necessary to bring any particular property within the exemption of Code Civ. Proc. N. Y. § 1391, a mortgagee was not authorized to hold property on the theory that the bankrupt might have designated it as exempt, where the bankrupt made no claim of exemption, as the right to select or designate property is not assignable and cannot be conferred upon a mortgagee unless the property is designated in the mortgage as exempt and mortgaged as such.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 671, 673; Dec. Dig. ⊂⊃400(1).]

9. BANKRUPTCY ⊂⊃398(3)—EXEMPTIONS—RIGHTS OF MORTGAGEES.

Where a bankrupt did not expressly waive his exemption as to property specifically exempted by statute before a mortgage thereon was given and possession taken by the mortgagee, and the mortgagee, prior to the filing of the petition in bankruptcy, asserted his rights as mortgagee and reduced the property to possession, title passed to him, notwithstanding the

refusal or failure on the part of the bankrupt to assert the exemption, though the mortgage was preferential as to property not exempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 676; Dec. Dig. ⊂⊃398(3).]

10. BANKRUPTCY ⊂⊃311(4)—CLAIMS—SURRENDER OF "PREFERENCES."

Bankruptcy Act, § 57g, as amended by Act Cong. Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 (Comp. St. 1913, § 9641), provides that the claims of creditors who have received voidable preferences shall not be allowed unless they surrender the preferences. Section 60a, as amended by Act Cong. Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (section 9644), provides that a person shall be deemed to have given a preference if, being insolvent, he has, within four months made a transfer which will enable a creditor to obtain a greater percentage of his debt than other creditors of the same class. Section 60b, as amended by Act Cong. June 25, c. 412, § 11, 36 Stat. 842 (section 9644), provides that if a bankrupt shall have made a transfer, and if, at the time and being within four months before the filing of the petition, the bankrupt be insolvent and the transfer then operate as a preference, and the person receiving it then have reasonable cause to believe that it will effect a preference, it shall be voidable. Within four months before bankruptcy, a dairy farmer executed to a creditor a chattel mortgage and assignments of amounts coming due him for milk delivered to a milk condensary. The creditor knew that the bankrupt was on a rented farm, that his horses, tools, etc., and household furniture and all of his live stock was already under chattel mortgage to himself and others, or was then being put under the lien of the mortgage then given. By assignments of the amounts coming due for milk, the entire proceeds of the dairy were turned over to him and another secured creditor. The bankrupt had not been paying as agreed, and on several occasions had been "dunned" or urged to pay, but had not made payments except by means of the assignments. *Held*, that the creditor had knowledge of such facts and circumstances as put him on inquiry and charged him with knowledge of the bankrupt's insolvency, and such as would have caused an ordinary person to believe that a preference would be effected, and the mortgage and assignments were therefore voidable "preferences," moneys received under which should be returned before the allowance of the creditor's claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497–499; Dec. Dig. ⊂⊃311(4).

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

11. EXEMPTIONS ⊂⊃48(2)—PROPERTY EXEMPT—"EARNINGS" OF DEBTOR.

Where a dairy farmer sold the milk from the dairy to a condensary, amounts coming due him from the proprietor of the condensary were not his "earnings," and as such exempt under Code Civ. Proc. N. Y. § 2463, providing that supplementary proceedings cannot reach the earnings of the judgment-debtor for his personal services rendered within 60 days, when it is made to appear by his oath or otherwise that they are necessary for the use of a family, wholly or partly supported by his labor, especially where no such showing was made, and it appeared that no family was supported by the debtor's labor.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 71; Dec. Dig. ⊂⊃48(2).

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

12. BANKRUPTCY ⊂⊃188(2)—LIENS—RIGHT TO PROCEEDS OF PROPERTY SUBJECT TO LIEN.

Where a bankrupt, within four months before bankruptcy, purchased property, and for a part of the purchase price executed a property note

which became a lien on the property, the holder of the note was entitled to the proceeds of a sale of such property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 292; Dec. Dig. ⊂⊃188(2).]

13. BANKRUPTCY ⊂⊃311(6)—CLAIMS—SURRENDER OF PREFERENCES.

Where a trustee in bankruptcy held the proceeds of exempt property belonging to a mortgagee, who had received a voidable preference and was ordered to return the preferential payment as a condition to the allowance of his claim, the one sum might be offset against the other, and only the balance paid to the trustee, as a bankruptcy court is a court of equity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497–499; Dec. Dig. ⊂⊃311(6).]

In Bankruptcy. In the matter of Victor J. French, bankrupt. On petition to review an order of the referee. Modified.

This is a proceeding on petition of the trustee in bankruptcy to reconsider and revise the order allowing the claim of Thomas A. Jewell. The trustee in bankruptcy Willard B. Phetteplace asks that the claim be disallowed on the ground that said Jewell has received a preference or preferences. The validity of a chattel mortgage covering certain property is also in question as is the right of said Jewell to receive certain money from Borden's Condensed Milk Factory in the city of Norwich due for milk delivered at said factory by said French.

Frank W. Barnes, of Norwich, N. Y., for trustee.
James P. Hill, of Norwich, N. Y., for claimant Jewell.

RAY, District Judge (after stating the facts as above). The bankrupt, Victor J. French, was and is an unmarried man, but he rented and worked a farm in the town of Norwich, upon which was a dwelling house in which he lived and kept house, having a housekeeper, his aunt, who owned the larger part of the household furniture. However, the bankrupt purchased the supplies and boarded his hired help. He owned two Round Oak stoves and one cookstove, which were used in the house. This was a dairy farm, and the milk from the dairy was taken to Borden's Condensary in the city of Norwich in the name of French. On the farm French had a chestnut horse, a black mare, 13 milk cans, two land plows, a spring tooth harrow, two cultivators, one Stewart clipping machine, one Ireland buzz saw, two ice racks, two hayracks, a heavy single harness, a fur robe and four pairs of team blankets.

On the 27th day of October, 1915, being heavily in debt, which indebtedness he was unable to pay, said Victor J. French filed in this court a voluntary petition in bankruptcy, and he was duly adjudicated on or about that date and Willard B. Phetteplace at the first meeting of creditors was duly appointed and qualified as trustee of his estate in bankruptcy.

On the 1st day of May, 1915, the said Victor J. French was indebted to Thomas A. Jewell, the claimant here, in the sum of $1,115, and on that day he executed and delivered to Jewell a chattel mortgage as collateral security for the payment of two notes given to and held by Jewell, the aggregate of which were said $1,115. This mortgage

was a lien upon five horses and a colt, four sets of harness, wagons, cutters, and a manure spreader. I find no satisfactory or sufficient evidence to show that this mortgage, given more than four months prior to the filing of the petition in bankruptcy, constituted a preference, or that it was given and received in fraud of creditors.

On or about the 7th day of July, 1915, the said Victor J. French became indebted to said Jewell in the further sum of $25, part of the purchase price of a hay tedder, and on that day he signed and delivered to Jewell a property note for said sum of $25, which became a lien on the tedder. September 23, 1915, the said Victor J. French gave another chattel mortgage to Jewell to secure the sum of $538.77, which indebtedness was represented by a note of said Jewell, then in the Chenango National Bank of Norwich, N. Y. In fact this last-mentioned mortgage was also additional collateral security for the payment of the notes secured by the chattel mortgage of May 1, 1915. This second chattel mortgage covered the above-mentioned chestnut horse, black mare, two Round Oak stoves, cookstove, milk cans, land plows, spring tooth harrow, cultivators, clipping machine, buzz saw, ice racks, hayracks, single harness, robe and team blankets. The first mortgage covers the same two horses mentioned and described in the second mortgage. At the time this second chattel mortgage was given said French, by oral agreement, merely assigned a half interest in the milk checks thereafter to be received by him from Borden's Condensary to Jewell as further security for the payment of his indebtedness to Jewell then existing.

Later a judgment was obtained against French by other parties, and a levy was made by virtue thereof upon the personal property of French. French had given other chattel mortgages to other parties, and a sale of all the personal property of the bankrupt was advertised to take place on the 28th day of October, 1915. The voluntary petition in bankruptcy anticipated this sale, and this court granted an injunction, enjoining the parties interested from making such sale, but before same was served or brought to the knowledge of the holders of the mortgages, a part of the property had been sold. Of the property covered by the chattel mortgages held by Jewell there was sold the two plows, the two cultivators, one ice rack, the buzz saw, and the spring tooth harrow. The sum bid for these articles was $45.25, and the purchasers had paid thereon the sum of $30 and this $30 was paid over to Thomas A. Jewell, the claimant, and is held by him. The claim filed by Jewell does not credit this sum of $30, and in fact it is held awaiting the determination of this court as to the rights of the respective parties thereto. Said Borden's Condensary, out of one-half of the milk checks going to French, paid Jewell the sum of $13.28 on account of the September, 1915, milk delivery.

November 13, 1915, by stipulation of all the parties concerned, and pursuant to an order of this court, the personal property of French remaining unsold was sold at public auction, and the articles covered by the first chattel mortgage mentioned, given to Jewell, were sold for the sum of $748.50. The hay tedder, subject to the lien of the prop-

erty note, was sold for $9, and the proceeds, amounting to $757.50, were paid over to Thomas A. Jewell.

The claim of Jewell filed and heretofore allowed, and which is sought to be revised and disallowed unless Jewell shall surrender the alleged preference, is for the sum of $968.40. In getting at this sum credit is given for the $13.28 received of Borden's Condensary for the September milk, but not for the $30 received and paid over to Jewell on account of the articles sold at the auction on the 28th day of October, 1915. The said $757.50 is credited in the claim, leaving same at the sum of $210.90, and Jewell alleges that it is secured by the said chattel mortgage of September 23, 1915, and Jewell claims that he is entitled to have, receive, and retain the $95.50 received on the last mortgage sale for the articles mentioned in the second chattel mortgage given September 23, 1915, but which sum does not include the amount received for the horses therein mentioned. This $95.50 is now in the hands of the trustee in bankruptcy. This claim of $210.90 the trustee asks to have disallowed unless Jewell shall return the $30 hereinbefore mentioned, and also return or pay to the trustee in bankruptcy the $13.28 received by him from Borden's Condensary on account of the September milk. The claimant Jewell insists that an order should be made, awarding to him, not only the said $45.25, which sum includes the $30 mentioned, but the $95.50 now in the hands of the trustee, and which came from articles described in the second chattel mortgage and also the $13.28, and that his claim should be reduced by said sums of $95.50 and $45.25, in all $140.75, and that it should be allowed for the balance or in the sum of $70.15, and that he should share with unsecured creditors in the distribution of the assets of the bankrupt to that extent.

As to the stoves mentioned, and which were covered by the second chattel mortgage, the claimant Jewell asserts that French was a householder, and entitled to the exemption allowed householders by the laws of the state of New York. He insists that as the stoves were exempt property, that is exempt from levy and sale on execution against French, French had the right to mortgage them to the claimant Jewell, and that Jewell has the right to avail himself of the fact that they were exempt from levy and sale on execution as to all creditors. The trustee in bankruptcy insists that Jewell, as mortgagee, cannot assert any right in or title to such property or its proceeds under the chattel mortgage by virtue of its exempt character, inasmuch as no one but the householder himself can assert or avail himself of the exemption right or privilege given by statute. As to the plows, harrow, cultivators, buzz saw, rack, etc., mentioned, and which were covered by the second chattel mortgage, the same claims, in substance, are made by the respective parties, that is, it is asserted on the one hand that French was a householder and a farmer and that such articles were exempt from levy and sale, and that he had a right to mortgage them to Jewell, and that Jewell, as against the trustee in bankruptcy and other creditors, may assert such exemption in his own favor, while the trustee in bankruptcy asserts that French only can assert such right of exemption. The contention is—and this seems to be the fact

—that the bankrupt, French, has not asserted any claim of exemption as to any of the articles mentioned, either in his schedules or otherwise. By section 1390 of the Code of Civil Procedure of the State of New York (2 Bliss N. Y. Annotated Code, § 1390), it is provided:

"The following personal property, when owned by a householder, is exempt from levy and sale by virtue of an execution; and each movable article thereof continues to be so exempt, while the family, or any of them, are removing from one residence to another: 1. All * * * stoves, put up, or kept for use, in a dwelling house."

Beds and bedding necessary for the judgment debtor and the family are also exempt, but the robe and blankets mentioned do not seem to come within this description. By section 1391 of the said Code of Civil Procedure it is provided:

"In addition to the exemptions, allowed by the last section, necessary household furniture, working tools and team, * * * not exceeding in value $250.00, * * * are exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except," etc.

[1, 2] It seems to be clear that milk cans, plows, harrows, cultivators, buzz saws, ice racks, hayracks, harness for team and team blankets are necessary working tools for a farmer. There can be no question that the cans, plows, harrow, cultivators, buzz saw, racks, harness, robe and team blankets were exempt from levy and sale by virtue of an execution against French, provided he was a householder within the meaning of the law, and of course this is true as to the stoves. It is contended that French was not a householder, inasmuch as he was unmarried and had no children, but simply lived in the farmhouse, having a hired woman to keep house for him, and who owned most of the household goods used. I am not impressed with this contention, inasmuch as the statute quoted speaks of a "householder" and not of a "wife holder." In my judgment a farmer who rents a farm, occupies the house thereon, has it kept and managed by a hired woman, who cooks the meals and keeps and cares for the table, sleeping rooms, etc., for the accommodation of the farmer and his hired help, is a householder within the meaning and intent of the sections of the Code to which attention has been invited. In Vam Vechten v. Hall, 14 How. Prac. (N. Y.) 436, it is held one who rents a house and keeps boarders and servants is a householder, although he has no wife or children for whom he provides. In Chamberlain v. Darrow, 46 Hun (N. Y.) 48, it was said and held:

"The term 'householder,' as used in the statute, has a very well-defined meaning, and imports the master or head of a family who reside together and constitute a household. And the statute is entitled to a liberal construction, with a view to effectuate its purpose, which is the protection of families against being, by the process of execution, divested of the necessaries for support, which the exempted articles may furnish and provide the means to supply."

In Fink v. Fraenkle (N. Y. City Ct.) 14 N. Y. Supp. 140, it was held that:

"A householder is the master of a household; and that a household is a family living together, * * * not necessarily wife and children, but * * * a family, small or large, for which the debtor provides."

French hired the farm, including the house, and kept house. He hired a housekeeper and boarded his hired help. He had the right to rent all his furniture. In Griffin v. Sutherland, 14 Barb. (N. Y.) 456, it was held that "a person having, and providing for, a household is a householder." In Bowne v. Witt, 19 Wend. (N. Y.) 475, it was held that:

"The word 'householder' means the head, master, or person who has the charge of and provides for a family, and does not apply to the subordinate members or inmates of the household."

It seems to me that the man who rents, holds, and occupies the house, if he has and hires a housekeeper and keeps house and hires help to run his farm and boards such help in the house, is a householder. Bouvier's Law Dictionary defines "household" as "those who dwell under the same roof and constitute a family"; and as to "householder," that word is defined as "master or chief of a family; one who keeps house with his family * * * a keeper of a tavern or boarding house, or a master or mistress of a dwelling house."

French was in the actual and rightful sole possession of a dwelling house, a farmhouse, and he lived in and occupied it with others, having sleeping rooms where they slept, and kitchen where the cooking was done, and a common table where they all ate together. It seems to me that this constituted a household, and made French a householder. If he had been married and had kept house in the same way, his wife living with him but having a hired housekeeper, and his wife had died, would he have ceased to be a householder?

[3, 4] The exemption created by section 1390 of the Code of Civil Procedure is absolute if the owner is a householder (Wilcox v. Howe, 59 Hun, 268, 270 and 271, 12 N. Y. Supp. 783), but the exemption created by section 1391 is a qualified one, inasmuch as the exemption is limited and indefinite, and where a debtor has property of that character of greater value than $250, the exemption of any particular property and what property is dependent upon his election as to the particular property that may be retained by him. In the instant case the stoves were absolutely exempt from levy and sale on execution. Under section 1390 the value of the exempt property is immaterial, except as to the tools and implements of a mechanic. Under section 1391 the exemption applies to quite a large list of property which in the aggregate may be worth two to four times $250. Therefore an election was necessary in order to have the exemption applied. In the instant case it appears that French owned a team and working tools, and on the farm he probably had food for the team. It does not appear that the aggregate value of the working tools and team were less than $250 in value. So far as appears, Jewell took the team and harness, and the value of these may have satisfied the exemption. So far as this case is concerned on the question of exemption, it is immaterial that the team was covered by the first mortgage. Clearly as to Jewell, French waived his right of exemption as to all property mentioned and described in both mortgages.

We now come to the question whether the trustee in bankruptcy could have taken, and can take, the stoves and the farming tools sold

and covered by the mortgage as against French, in the absence of a claim of exemption asserted by French, and, even if so, is Jewell in any respect, or to any extent, so subrogated to the rights and privileges of French by virtue of his mortgage that he, independently of French, can assert the exemption and take the benefit thereof as against the trustee in bankruptcy who represents the general creditors, and which creditors could not have obtained judgment, issued execution and levied upon certain of this property against the objection and election if exercised by French?

In Field v. Ingreham, 15 Misc. Rep. 529, 37 N. Y. Supp. 1135, County Judge Metcalf held that property specifically, by section 1390, exempted from levy and sale by judgment creditors is exempt by operation of law absolutely, but that articles to a certain value, exempted under section 1391 of the Code referred to, must be claimed as exempt.

It would seem just that if a debtor, even in contemplation of bankruptcy, or knowing his insolvency, borrows money or purchases property to use up, and pledges as security his exempt property, property his trustee in bankruptcy cannot take and which it is the duty of the bankruptcy court to set aside, the pledgee or mortgagee ought to be able to himself assert such exemption to protect his security as against the trustee in bankruptcy. Such pledgee or mortgagee for a valuable consideration and in good faith should be held subrogated to the rights of such pledgor or mortgagor in the interest of fair dealing and justice. He ought not to be at the mercy of the mortgagor and his election. If this is permitted the general creditors and trustee are no worse off than they would be if such mortgage had not been given or pledge made, as the bankrupt has parted with his interest in his exempt property only. Such a transaction is not in derogation of the rights of general creditors in any respect or to any extent whatever.

[5-7] As matter of course, the right to claim exemption to specific property exempted by law belongs to the bankrupt householder, and he may surrender or waive it in favor of general creditors, execution creditors and trustee in bankruptcy, but should he be permitted to do so as against a mortgagee in good faith and for value, who, by virtue of his mortgage, has succeeded to his title and interest? True the right to claim exemption cannot alone be mortgaged, but does it not go as an incident of the property itself? If the owner of exempt property may waive such exemption in favor of his general creditors, or execution creditors, or trustee in bankruptcy, why may he not waive it in favor of his mortgagee or pledgee? Section 6 of the Bankruptcy Act (Comp. St. 1913, § 9590) provides:

"*Exemptions of bankrupts.*—a. This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

Section 47 of the Bankruptcy Act (section 9631) provides:

"Trustees shall respectively * * * (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."

It is seen that it is made the imperative duty of the trustee to set apart the exemptions of a bankrupt. The duty is on the trustee, and not on the bankrupt. General order 17 (89 Fed. viii, 32 C. C. A. xix), adopted and established by the Supreme Court of the United States under the provisions of the Bankrupt Act, provides that:

"The trustee shall make report to the court within twenty days after receiving the notice of his appointment of the articles set off to the bankrupt by him according to the provisions of the forty-seventh section of the act with the estimated value of each article and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report."

By section 70a of the act the trustee of the estate of a bankrupt upon his appointment and qualification is vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, "except in so far as it is to property which is exempt to all." Then follows a statement of the property the title to which vests in the trustee. In Collier on Bankruptcy (10th Ed.) page 191, it is said:

"Whether an exemption is a mere personal privilege which must be claimed by the bankrupt, or is a property interest accruing from the statute itself, will determine the necessity of claiming the exemption. If the exemption is of the former class, it must be asserted with the formality required by the state statute; if it is of the latter class the statute executes itself."

Moran v. King, 7 Am. Bankr. Rep. 176, 111 Fed. 730, 49 C. C. A. 578, is cited as authority. This decision was rendered in regard to the homestead exemption laws of the state of Virginia and Judge Boyd refers to Reed v. Bank, 29 Grat. 719. In Collier on Bankruptcy (10th Ed.) at page 191, it is also said:

"While an exemption is a matter of right, it, being personal to the bankrupt, must be asserted, or he will be deemed to have waived it. What he does not claim for himself and his family he leaves in the general fund for distribution."

In re Brown (D. C.) 4 Am. Bankr. Rep. 46, 100 Fed. 441, In re Bolinger (D. C.) 6 Am. Bankr. Rep. 171, 108 Fed. 374, and In re Sloan (D. C.) 14 Am. Bankr. Rep. 435, 135 Fed. 873, all Pennsylvania cases, are cited.

In Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, it was held:

"Under the Bankruptcy Act of 1898, the title to property of a bankrupt which is generally exempted by the law of the state in which the bankrupt resides remains in the bankrupt, and does not pass to the trustee, and the bankrupt court has no power to administer such property even if the bankrupt has, under a law of the state, waived his exemption in favor of certain of his creditors. The fact that the act confers upon the bankruptcy court authority to control exempt property in order to set it aside does not mean that the court can administer and distribute it as an asset of the estate. The two provisions of the statute must be construed together, and both be given effect."

In that case, however, the bankrupt set aside and claimed his homestead exemption in his schedules, and the trustee set same aside and designated the property claimed as a homestead exemption. By clause 8 of section 7 of the Bankruptcy Act, the bankrupt is required to schedule all his property, and to make "a claim for such exemptions as he

may be entitled to." In Lockwood v. Exchange Bank, supra, the Supreme Court said:

"We think that the terms of the Bankruptcy Act of 1898, above set out, as clearly evidence the intention of Congress that the title to the property of a bankrupt generally exempted by state laws should remain in the bankrupt and not pass to his representative in bankruptcy, as did the provisions of the act of 1867, considered in Re Bass. The fact that the act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act in unambiguous language declares shall not pass from the bankrupt or become part of the bankruptcy assets. The two provisions of the statute must be construed together and both be given effect. Moreover, the want of power in the court of bankruptcy to administer exempt property is besides shown by the context of the act, since throughout its text exempt property is contrasted with property not exempt, the latter alone constituting assets of the bankrupt estate subject to administration. The act of 1898, instead of manifesting the purpose of Congress to adopt a different rule from that which was applied, as we have seen with reference to the act of 1867, on the contrary, exhibits the intention to perpetuate the rule, since the provision of the statute to which we have referred in reason is consonant only with that hypothesis."

I think that under the decisions the title to the three stoves which were unqualifiedly exempt was in and remained in the bankrupt, French, and that such title never passed to or vested in the trustee in bankruptcy. No assertion or claim of exemption was necessary. It was evident on the face of things that these stoves were exempt, and it was the duty of the trustee to set them apart, or at least let them alone. French had the right to mortgage them, and Jewell, under his mortgage, had the right to take and sell them, even if such mortgage was given within the four-month period and constituted a preference. No general creditor of French, and no judgment creditor of French, could have seized, levied upon, or sold these stoves; and, as the title did not pass to the trustee, and as the mortgage, so far as the stoves were concerned, is valid in any event, the proceeds derived from their sale belong to Jewell.

[8] As to the proceeds of the other property, viz., the farming tools and implements, I do not see that Jewell can maintain his claim to the proceeds, provided his mortgage was given under such circumstances as to constitute a preference. This property may and may not have been exempt. That is, French might have asserted his claim to it as exempt and designated it as property which he claimed under his exemption rights, but I think that the Bankruptcy Act contemplates that the bankrupt himself shall designate what property he claims as exempt, and I find no authority which will sanction the idea that the bankrupt may mortgage such property which is not per se exempt, and thereby authorize the mortgagee to thereafter take and hold same on the theory that the bankrupt himself might have and, of right, could have, designated same as exempt. In my judgment, as the law stands, the right to select or designate property as exempt under section 1391 of the Code (N. Y.), and then assert and enforce a claim of exemption to such property, is not assignable, and such right cannot

be conferred upon a mortgagee unless the property is designated in the mortgage as exempt property and mortgaged as such. However, this is not at war with the proposition that property, which under the statute is absolutely exempted in any event and which by virtue of the Bankruptcy Act does not pass to the trustee, may be mortgaged by the bankrupt prior to adjudication and pass under such mortgage to the mortgagee on proof merely that it was in fact absolutely exempt. This applies to the stoves which sold for $29.25, but not to the other property, which required selection and election in order to bring the team and farming tools within the exemption of section 1391 of the New York Code of Civil Procedure. Reference to the list of property mortgaged by French and sold shows that he had much more than $250 worth of team, farming tools, etc., from which he might have selected his exemption. In Vitzthum v. Large (D. C.) 20 Am. Bankr. Rep. 666, 162 Fed. 685, it was held that a trustee may not recover as a preference exempt property, or the proceeds thereof, transferred by the bankrupt within the four-month period, citing In re Eash (D. C.) 19 Am. Bankr. Rep. 738, 157 Fed. 996. In the Eash Case the state court had adjudged the property in question to be exempt.

[9] As the stoves were absolutely exempt property in the hands of French, such exemption not depending on election or selection, in no event could the title thereto pass to the trustee in bankruptcy, unless French should have expressly waived his exemption before the mortgage was given and possession taken by the mortgagee; and, as this was not done, and Jewell, the mortgagee, prior to the filing of the petition in bankruptcy, asserted his rights as mortgagee and reduced the stoves to possession, which he had the right to do, both as against French and his trustee subsequently appointed, title passed to Jewell, and no subsequent act or declaration of French or refusal or failure on his part to assert the exemption of such stoves could affect Jewell's right thereto, and the trustee in bankruptcy cannot recover or hold or retain the proceeds of such stoves, conceding the mortgage must be avoided as preferential as to other property. The trustee has had no interest in such stoves or the proceeds thereof at any time.

[10] As to the milk checks or dividends, there is no written evidence of any transfer to Jewell, except written orders signed by French and delivered to the Borden's Condensed Milk Company, one of which, that relating to the September milk delivery, reads as follows:

"Norwich, New York, Sep. 28, 1915.

"To Borden's Condensed Milk Co., 108 Hudson Street, New York City: In making payment for milk delivered by me during the month of Sept., 1915, at the factory of Borden's Condensed Milk Co., located at Norwich, New York, please draw check or checks to the order of the following person or persons for the amount set opposite each name respectively, viz.:

"Check to the order of ½ Bert Hawley for $———
" " " " ½ T. A. Jewell " ———

"Victor J. French, Dairyman.

"Witness: G. A. Romer, Factory Supt.

"N. B.—This order applies only to the month above specified, and a separate order must be filed for each month a dairyman desires to assign money due him for milk."

The other two read precisely the same, date and all, except one reads, "during the month of October" and the other, "during the month of November." These orders direct the payment of one-half the proceeds of the milk for each of the months of September, October, and November, to Jewell, the other half to Bert Hawley, another mortgagee, having a mortgage on the dairy itself; that is, on the cows. There was no sale or transfer of these milk dividends, or of the milk for any new or present consideration. The money received on the orders was to be applied on the mortgage debt of September 23, 1915, and the money received was a payment on a prior debt and made within the four months period. It was not a payment made or an assignment or transfer made for the purpose of hindering, delaying or defrauding the creditors of French, or any one of them. Were these orders a preferential payment or security which must be returned as a condition of the allowance of Jewell's claim? French was badly insolvent at the time the orders were given, and at the time the chattel mortgage of September 23, was given and both the mortgage and orders were given to secure the antecedent or pre-existing debt before mentioned. Were the mortgage and orders received by Jewell "under such circumstances as naturally would have caused the ordinary person had he been the creditor receiving the securities, mortgage, and order, and the money thereon, so far as received, to have believed that thereby a preference would be effected"? Aronin v. Security Bank of New York, 228 Fed. 888, 890, — C. C. A. — where it is held,

"Voidable Preferences—Transfers Constituting. Where defendant, within four months before the filing of a petition in bankruptcy and while the bankrupt was insolvent, received from the bankrupt to apply on a pre-existing debt accounts due the bankrupt under circumstances such as naturally would have caused an ordinary person to believe that a preference would thereby be effected, the trustee could recover for the benefit of the bankrupt estate."

Section 57g of the Bankruptcy Act, as amended 1903 reads as follows:

"The claims of creditors who have received preferences, voidable under section sixty, subdivision 'b,' or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision 'e,' have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."

Sections 60a and 60b of the said act, so far as applicable here, provide as follows:

(a) "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. * * *

(b) "If a bankrupt shall * * * have made a transfer of any of his property, and if, at the time of the transfer * * * and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Therefore the question is, did Jewell when he received the chattel mortgage and when he received the orders referred to have knowledge of such facts that he is chargeable with having had reasonable cause to believe that the enforcement of same, that is, the taking possession of the property thereunder, would enable him to receive or obtain a greater percentage of his debt or claim than any other of the creditors of French of the same class? Mr. Jewell's attorney has not attempted to claim that the situation and Jewell's knowledge was not such as to charge him with having had the reasonable cause to believe above mentioned.

Jewell knew that French was on a rented farm; that his horses, harnesses, and farming tools, including robe and blankets, ice rack and hayracks and all the household furniture he owned and all the live stock on the farm either was already under chattel mortgage to himself and others or was then (in September) being put under the lien of a chattel mortgage to himself. By means of the orders on Borden's Condensed Milk Company the entire proceeds of the dairy (and this was a dairy farm) were turned over to Jewell and to Hawley, both holding security for their claims. Hawley's mortgage was on the cows principally. So far as appears, these mortgages and these orders covered all the property of French of every name and nature, except his clothing and his personal ornaments, if any. French was owing for rent of the farm he occupied, and hundreds of dollars to other persons, excluding from consideration his help on the farm. Jewell testifies that French did not pay as obligated and agreed, and that on several occasions he either "jacked him up" or caused him to be "jacked up," that is, "dunned," or urged to pay as agreed. Still payments were not made except as Jewell and Hawley drew from the Borden's Condensed Milk Company the proceeds of the dairy.

The evidence is conclusive that the indebtedness of French, aside from labor claims, was such that the enforcement of the chattel mortgage and orders, or of either, would give to Jewell a much greater percentage of the claim due him than any other creditor of the same class would or could obtain. French knew that he was giving a preference, and if Jewell did not actually know that French was insolvent, he had knowledge of such facts, conditions, and circumstances as put him on inquiry, and charged him with knowledge of that fact, and naturally would have caused even an ordinary person to believe that a preference would be effected by the giving and enforcement of the mortgage and orders of September, 1915. It is impossible to find or hold otherwise. The orders given by French to Jewell on Borden's Condensed Milk Company, to which company the milk from the dairy was daily delivered and sold, and the chattel mortgage of September 28th, all being dated the same day, are voidable preferences, and it is the duty of the trustee to collect of that company the balance due for milk, and Jewell's claim cannot be allowed until he surrender the preference received, $13.28 for milk.

[11] It is claimed by Jewell that the amount due from Borden's for the September milk was exempt property as being earnings of French within 60 days under section 2463 (N. Y.) Code of Civil Proc. In

substance and effect this section provides that proceedings supplementary to execution cannot reach—

"the earnings of the judgment debtor for his personal services, rendered within the sixty days, next before the institution of the special proceeding; when it is made to appear, by his oath or otherwise, that these earnings are necessary for the use of a family, wholly or partly supported by his labor."

No such fact appears in this case. There was no family supported by the labor of French. Being a householder is one thing, and having a family supported by his labor is another. The proceeds of the milk delivered at the Condensary were not "the earnings" of French within the meaning of this statute. He has not asserted any exemption or made any claim to these sums as earnings. This question is settled by Prince v. Brett, 21 App. Div. 190, 47 N. Y. Supp. 402; and Mulford v. Gibbs, 9 App. Div. 490, 41 N. Y. Supp. 273; Re Wyman, 76 App. Div. 292, 78 N. Y. Supp. 546; Martin v. Sheridan, 2 Hilt. (N. Y.) 586; Vam Vechten v. Hall, 14 How. Prac. (N. Y.) 436.

The conclusions and holdings are:

[12] 1. The hay tedder was the consideration for the property note which was a valid lien thereon, and consequently its proceeds, $9, belong to Jewell.

2. The first chattel mortgage, that of May 1, 1915, was and is valid, and hence the proceeds of the property covered thereby belong to Jewell.

3. The second chattel mortgage, that of September 23, 1915, was and is voidable and void as a preference, except as to the stoves, which sold for $29.25, and that part of the proceeds of the sale amounting to $95.50 belongs to Jewell.

[13] 4. The $30 received by Jewell from the sale of property covered by such second chattel mortgage, and not forming a part of the $95.50, belong to the trustee, and must be returned by Jewell as a condition of allowing his claim, but, this being a court of equity, the one sum, $29.25, may be offset against the other, said $30, and as a condition of having his claim allowed Jewell must return or pay to the trustee the difference, or 75 cents. Of the proceeds of the property covered by the second chattel mortgage and sold for $95.50, less the $29.25 or $66.25 and now in the hands of the trustee in bankruptcy, that sum belongs to him as such, or the estate in bankruptcy, and he will retain the same and all of said $95.50 because of the offset above made and directed.

5. The orders given by French to Jewell on Borden's Condensed Milk Company are voidable and void as a preference, and the $13.28 received by Jewell on the one given for the proceeds of the September milk must be returned to the trustee as heretofore stated as a condition of having his claim allowed, making a total of $14.03 to be returned or paid by Jewell to the trustee.

6. If such $14.03 is returned and such preferences surrendered, then the claim of Jewell will be allowed at the sum of $224.18. If such sum is not paid over to the trustee and the preferences surrendered, such claim will be disallowed, rejected, and expunged from the list of proved and allowed claims, and in such event the trustee will sue for

and recover such preferences for the benefit of the estate. At his election the dividend of Jewell on the $224.18 may be ascertained and deducted from the $14.03, if less than that sum, and he pay the balance to the trustee, or, if the dividend be more than $14.03, then the balance due Jewell will be paid by the trustee.

There will be an order accordingly.

UNITED STATES v. PEARSON, County Treasurer, et al.

(District Court, D. South Dakota, C. D. February 18, 1916.)

1. TAXATION ⟸5—PERSONAL PROPERTY OF INDIANS.

Personal property issued by the government to Sioux Indians, who live on separate allotments, but maintain their tribal relations, consisting of horses, cattle, and their increase, and farm implements and other property acquired by exchange of such property or otherwise, which is derived directly or indirectly from the government and is used by the Indians on their farms, is not subject to taxation by state authorities. Such property is not absolute property of the Indians, but is held in trust for their benefit by the government for the purpose of carrying out its policy of helping them to be self-sustaining, as is evidenced by Act July 4, 1884, c. 180, 23 Stat. 94 (Comp. St. 1913, § 4121), and Act March 2, 1889, c. 405, § 17, 25 Stat. 895, which restrict the sale of cattle issued, and their increase, by the Indians to members of their own tribe.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 17, 31–44; Dec. Dig. ⟸5.]

2. INDIANS ⟸31—STATUTES—EFFECT OF GRANTING CITIZENSHIP.

The citizenship conferred on Indian allottees by Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390 (Comp. St. 1913, § 3951), did not operate to withdraw them from the supervision, control, and protection of the government, both as respects themselves and their property.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 23; Dec. Dig. ⟸31.]

3. INDIANS ⟸23—STATUS—PERSONAL PROPERTY.

Under the provisions of the Enabling Act of South Dakota, Act Feb. 22, 1889, c. 180, 25 Stat. 676, 677, and article 22 of the State Constitution, reserving to Congress "absolute jurisdiction and control" over all lands within the state owned or held by Indian tribes, or by individual Indians who have not severed their tribal relations, not only the lands, but all other property issued by the government to such Indians for use thereon, remain subject to such control until Congress relinquishes the trust.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 15; Dec. Dig. ⟸23.]

4. INDIANS ⟸23—PERSONAL PROPERTY—TAXATION.

That Indian allottees, to whom live stock has been issued and the agents in charge, have failed to brand the increase of such stock, as required by the statute, does not release such increase from the trust restrictions by Congress, nor render it subject to state taxation.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 15; Dec. Dig. ⟸23.]

In Equity. Suit by the United States against John Pearson, County Treasurer of Dewey County, S. D., and Calvin M. Smith, Sheriff of said county. Decree for complainant.

Robert P. Stewart, U. S. Dist. Atty., and E. W. Fiske and George Philip, Asst. U. S. Dist. Attys., all of Sioux Falls, S. D.

James E. Truesdale, of Isabel, S. D., and Morris & Caldwell, of Sioux Falls, S. D., for defendants.

ELLIOTT, District Judge. This is a suit in equity, brought by the United States of America against John Pearson, county treasurer, and Calvin M. Smith, sheriff, of Dewey county, S. D. Upon the face of this record there is practically no dispute as to the facts. The controversy arises upon the application of the settled law to the facts as disclosed by the undisputed testimony.

[1] It appears from the undisputed record in this case that John Pearson is the duly elected, qualified, and acting county treasurer, and that the defendant Calvin M. Smith is the duly elected, qualified, and acting sheriff, of Dewey county, S. D., which county is a duly organized municipal corporation, existing under and by virtue of the laws of the state of South Dakota, within said state. It appears that Antoine Le Beau, Henry Le Beau, Eugene Standing Bull, Armstrong Four Bear, Alex Le Beau, and Thomas Low Dog are Indians, and members of the Cheyenne agency tribe of Sioux Indians, in the state of South Dakota, and have not abandoned their tribal relations; that at all times mentioned in the bill of complaint they were and are wards of the plaintiff, the United States of America, and under the guardianship and supervision of the plaintiff; that they are, and at all times named in the complaint were, residents of that portion of the Cheyenne River Indian reservation formerly situated and being in the county of Dewey, state of South Dakota; that each and all of them have been allotted Indian lands within the said Dewey county, and within the former Cheyenne River Indian reservation, which allotments were made under the provisions of the general allotment act approved February 8, 1887; that a particular description of the lands allotted to these Indians is as set forth in paragraph 3 of the bill of complaint filed herein; that each of these Indians lives, and at all times named in the complaint resided, upon his allotment, which was held by the government of the United States, subject to the trust patent referred to in the act of the United States above named, under which the allotment was made, except the Indian Armstrong Four Bear, who holds his allotment, but lived upon another allotment, made pursuant to the provisions of said statute to his mother, located in the same county; that during the year 1911 the proper officers of said Dewey county listed and assessed, and returned upon the tax rolls of that county, certain personal property against each of these Indians, consisting of horses, cattle, in one or two instances a wagon, and in another household goods; that the total tax for state and county purposes for the year 1911 against Antoine Le Beau amounted to $33.66, and at the time of instituting this action there appeared upon the books of Dewey county penalty and interest thereon amounting to $11.78, making a total tax, interest, and penalty, claimed to be due for state and county purposes for said year of 1911, in the sum of $45.44; that during the year 1912 the officers of said county listed and assessed Antoine Le Beau upon this same personal property a total tax for state and county

purposes of $42.83, which, with penalty and interest, at the time of the commencement of this action, amounted to $52.25; that during the year 1913 the officers of said county listed and assessed Antoine Le Beau upon this same personal property a total tax for state and county purposes of $22.83, which, with penalty and interest, at the time of the commencement of this action, amounted to $25.11; that during the year 1914 the officers of said county listed and assessed Antoine Le Beau upon this same personal property a total tax for state and county purposes of $23.64. It appears, further, that taxes were assessed against the personal property of the other Indians above named, for said years, in the amounts set forth in the bill of complaint, upon the property therein described, and it is unnecessary to set it forth fully herein.

It appears from the undisputed evidence that the personal property, consisting of cattle, horses, wagons, buggy, machinery, household goods, the same being all the property taxed as the property of Antoine Le Beau, and all of the property listed and taxed as the property of all of the other Indians referred to in the bill of complaint, was, at the time it was assessed, ever since has been, and now is, in the possession of the allottees, respectively, and was used by them in connection with their respective allotments as described in the bill of complaint. It is admitted that the legal title in and to said allotted lands has not passed from plaintiff, and that the same is held in trust by the plaintiff for the benefit and use of the said Indians. The court further finds that these Indians are wards of the plaintiff herein, and that the guardianship of the United States over said Indians has not been terminated.

I find from the undisputed record that this property is all of it either: (1) Issue property; that is, property issued direct by the government of the United States to the Indians, respectively. (2) Increase of such issue property. (3) Property purchased with the proceeds of the sale of trust or issue property. (4) Property purchased with the proceeds of the sale of the increase of issue property. (5) Issue property exchanged for similar property for similar use, and this consists of the increase of property received in such exchange. (6) The increase of issue property exchanged for similar property for similar use. (7) Property purchased with money given to the Indians by the United States.

Considering the foregoing classification, an enumeration of the personal property of the Indians named in the bill of complaint, assessed and distrained by the defendants, is as follows:

(1) Issue property:

First—Assessed:

Thomas Low Dog:

1912—One cow, issued by government.

1912—Agricultural implements, all issued.

1913—Same implements.

Henry Le Beau:

1912—Cattle, all issue stock.

1913—Same as 1912 and its increase.

Eugene Standing Bull:
1911—One mare, issued in 1909 or 1910.
(2) Increase of issue property:
First—Assessed:
Antoine Le Beau—Owned cattle during years 1909, 1910, 1911, 1912, 1913, and 1914. Owned no cattle during those years, except increase from two cows issued by government to him in 1893.
Same years—horses, all increase of issue stock.
Alex Le Beau—Owned cattle and horses during 1910, 1911, 1912, 1913 and 1914, all increase of issue stock and owned no other.
Armstrong Four Bear—Assessed for horses 1912 and 1913. All horses were and are increase of issue stock inherited from his father.
Thomas Low Dog:
1912—Eleven head of horses under three years old, six head three years old and over, all increase of issue mares inherited from his father.
1913—Same stock and its increase.
1912—One stallion, increase of issue stock.
Henry Le Beau:
1912—Horses, all increase of issue stock.
1913—Horses, same as in 1912, and their increase.
1913—Cattle, increase of issue cattle.
Eugene Standing Bull:
1911—Horses, increase of issue.
Second—Distrained by sheriff:
Antoine Le Beau:
One sorrel mare, nine years old, with colt.
Two bay mares, three years old.
One bay gelding, all increase of issue mares.
Henry Le Beau:
Two mares, two years old, and one mare, three years old, all increase of issue mares.
Eugene Standing Bull:
One three year old gray gelding, increase of issue mare, issued in 1909 or 1910.
Alex Le Beau:
Three two year old horses and one black mare.
Thomas Low Dog:
Two mares and a six year old colt, increase of issue mares inherited from his father.
(3) Property purchased with the proceeds of the sale of issue property:

There does not appear to be any of the original issue stock which was sold, nor does any of it appear to have been distrained. This classification should perhaps not have been made, in view of the fact that class (4) covers such property so far as this case is concerned. However, a general classification of the property of Indians would be incomplete without it.

(4) Property purchased with the proceeds of the sale of the increase of issue property:

First—Assessed:

Antoine Le Beau—In 1911 assessed for household furniture purchased with money derived from sale of increase of issue stock.

1912—Four hogs, paid for with cash from sale of increase of issue stock.

1912—Same household furniture as in 1911.

1913—One hog, one of 1912 hogs.

1913—Household furniture, same as in 1912.

(5) Issue property exchanged for similar property for similar use. This is further subdivided to include:

(a) The increase of property received in such exchange:

First—Assessed:

Eugene Standing Bull:

1911—One wagon received in exchange for increase of issue mare. (Same in 1912, 1913, and 1914.)

Alex Le Beau:

Owns some horses, increase of horses for which he traded issue cows 26 years ago.

Second—Distrained:

Alex Le Beau:

Three two year old horses and one eight year old mare, increase of horses for which he traded issue cows 26 years ago.

(6) The increase of issue property exchanged for similar property for similar use:

First—Assessed:

Antoine Le Beau:

1911—Mowing machine received in payment for horse, increase of issue stock. Cultivator, for which he traded a cow, increase of issue stock. One wagon received on similar trade.

1913—Machinery and implements, same as in 1911 and 1912.

(7) Property purchased with money given to the Indians by the United States:

First—Assessed:

Alex Le Beau:

1912—Two hogs, purchased with money paid by government to him and members of his family.

Eugene Standing Bull:

1911—Household furniture. (Same in 1912, 1913, and 1914.)

Armstrong Four Bear;

1912—One stallion, purchased with money derived from sale of inherited trust land on Yankton reservation.

Thomas Low Dog:

1912—One buggy purchased as above; also household furniture.

1913—Same buggy and household furniture.

Second—Distrained:

Eugene Standing Bull:

Bay mare with colt, and a yearling, increase of property issued to Sitting Eagle, brother of Eugene Standing Bull, and purchased by Eugene Standing Bull from Sitting Eagle.

Armstrong Four Bear:

One mare eight years old, purchased from George La Sart with money issued by the government as trust fund.

All of these Indians testified that they never acquired any property except such as they received directly or indirectly from the government, that they acquired no property through their own efforts, and that they own nothing except what the government has given them; and this is the undisputed record. I further find that all of this property, so assessed and distrained, being the total assessment against the various Indians named in the bill of complaint herein, has been identified by the various witnesses as coming within the classifications above set forth; and this, too, is the undisputed record.

These assessments against these Indians for the years above referred to were duly perfected by the officers of said county, and the said Indians, each and all of them, failed and neglected to pay the taxes thus assessed against them upon said property, and the defendants, as tax collectors of said county of Dewey, pursuant to the statutes of the state of South Dakota, seized certain of these cattle and horses, the property of these Indians respectively, and advertised the same for sale at public auction, with a view to securing money sufficient to pay the taxes, penalty, and costs of collection, as assessed and appearing upon the tax records of said county against these Indians, respectively.

The plaintiff brings this suit for the purpose of enjoining these sales, and further asks that the assessments of taxes against these Indians and their said personal property be canceled and set aside by decree of this court, that the same be decreed void and of no force or effect, and that the same, as a cloud upon the title of the plaintiff to their respective allotments, be removed and set aside by such decree.

It is conceded by counsel for defendants that plaintiff is a proper party, and can bring and maintain a suit of this character in this court, for the purpose of obtaining the relief demanded, if the property assessed in the possession of the Indian wards of the government is not subject to taxation by the county authorities, and is held in trust by the United States for the use and benefit of such Indians. But it is contended by the defendants that the property assessed against these Indians, a portion of which was levied upon by the defendant, sheriff of said county, was not, at the time the assessment was made, or at the time of said levy, "trust property," was not owned by the United States, or held in trust by the United States for the use and benefit of any of such Indians.

It is shown by the record, and conceded by the defendants here, that horses and cattle and machinery were issued and money was paid to these Indians by the government at various times, covering a period of the history of the entire dealings of the United States with the Indians named, and the tribe of Indians to which they belong. It is admitted by the defendants that when these horses and cattle were issued to the Indians named in the bill of complaint, or their predecessors, or comembers of the tribe, such property was turned over to the Indians by the United States, and that the United States did not re-

lease its title or ownership to such property at the time of delivery of the same to the Indians. It, therefore, is unnecessary to discuss the status of the property originally issued to the Indians, or the property purchased by the funds originally paid to these Indians, by the government of the United States.

The defendants concede, therefore, that the classes of property above set forth as Nos. 1 and 7 were and are exempt from taxation by the authorities of said county. Defendants, however, insist that it cannot be said that the United States expected for all time to retain in itself the title to such property and the increase thereof, and to retain title to other property that the Indians might have exchanged for the property originally issued, as covered by the classifications above named other than 1 and 7, insisting that there is nothing in the statutes of the United States or in any of the reported decisions that seems to defendant susceptible of any such construction.

I am of the opinion that the question of the liability of the property of these Indians in the classifications above set forth to assessment by the officers of said county must be determined, in its original forms and in its changed forms, by a consideration of the congressional legislation, together with the decisions of the courts, determining the status of this property. Act July 4, 1884, c. 180, 23 Stat. 76–94 (Comp. St. 1913, § 4121), provides:

"That where Indians are in possession or control of cattle or their increase which have been purchased by the government, such cattle shall not be sold to any person not a member of the tribe to which the owner of the cattle belongs, or to any citizen of the United States, whether intermarried with the Indians or not, except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. And all such sales made in violation of this provision shall be void, and the offending purchaser, on conviction thereof," etc.

By Act March 2, 1889, c. 405, 25 Stat. 888–895, relating to the Sioux Indians, including the tribe to which the Indians named in the bill of complaint belong, provides, at section 17, as follows:

"* * * The Secretary of the Interior is hereby authorized and directed to purchase, from time to time, for the use of said Indians, such and so many American breeding cows of good quality, not exceeding twenty-five thousand in number, and bulls of like quality, not exceeding one thousand in number, as in his judgment can be under regulations furnished by him, cared for and preserved, with their increase, by said Indians: Provided, that each head of family or single person over the age of eighteen years, who shall have or may hereafter take his or her allotment of land in severalty, shall be provided with two milch cows, one pair of oxen, with yoke and chain, or two mares and one set of harness in lieu of said oxen, yoke and chain, as the Secretary of the Interior may deem advisable, and they shall also receive one plow, one wagon, one harrow, one hoe, one axe, and one pitchfork, all suitable to the work they may have to do, and also fifty dollars in cash, to be expended under the direction of the Secretary of the Interior in aiding such Indians to erect a house and other buildings suitable for residence or the improvement of his allotment; no sales, barters or bargains shall be made by any person other than said Indians with each other, * * * and any violation," etc.

This act was amended June 10, 1896 (29 Stat. 321–334, c. 398) by a provision that the Secretary of the Interior, in cases where it is ascertained that the Indians will not be benefited by receipt from the

United States of the articles of personal property mentioned in the foregoing section 17, to convert the same, or so much thereof as he may think proper, into money and pay the amount to the Indians, the payment to be a liquidation of the obligations of the United States to said Indians under that section, so far as the articles of personal property therein named are concerned. This act of March 2, 1889, was further amended by Act June 21, 1906, c. 3504, 34 Stat. 325, which authorized the Secretary of the Interior to issue to any allottee Indian entitled to benefits under said section 17, in lieu of the milch cows, mares, and implements as named therein, an equal value in good stock cattle.

The regulations of the Indian Office (430–432) made pursuant to the statutes of the United States, provide:

"When cattle are issued to Indians either for work oxen or for breeding purposes, each animal must be branded in addition to the 'ID' brand, with a private mark to indicate the person to whom it belongs. A record of such private marks must be kept in the agency office. The agent is also required to see that the increase of all issued cattle are similarly branded. * * * Where Indians are in possession or control of cattle or their increase which have been purchased by the government such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong, or to any citizen of the United States, whether intermarried with the Indians or not, except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. All sales made in violation of this provision," etc.

Clearly, therefore, all property issued under said section 17 of the act of 1889 remained under the supervision and control of the United States, and was held by the United States in trust for the benefit of the Indians. These cattle, purchased by the government and issued to the Indians of a tribe, were not theirs absolutely and unconditionally, but were issued for the purpose of promoting their civilization and improvement and to encourage them in the habits of industry. And it has been held that it was the right and duty of the government to protect such conditional ownership. McKnight v. United States, 130 Fed. 659, 65 C. C. A. 37.

The purpose and object of the government in its dealings with these Indians, and in the relation that it maintains toward them and their property, is to encourage habits of industry and reward labor, and to encourage them to undertake the cultivation of the soil, the raising of stock, or engage in pastoral pursuits, enabling them to support themselves, and as a means of obtaining a livelihood. 130 Fed. 663, 65 C. C. A. 37. The personal property in the case at bar originally issued to these Indians named in the bill of complaint, or their ancestors, or to other members of the tribe to which these Indians belong, was purchased with the money of the government and was furnished to the Indians to induce them to adopt the habits of civilized life. It was in fact the property of the United States, and was put into the hands of the Indians to be used in the execution of the purpose of the government in reference to them. 130 Fed. 667, 65 C. C. A. 37; United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532.

These Indians named in the bill of complaint are yet wards of the nation, in a condition of pupilage or dependency, and have not been

discharged from that condition. They each of them occupy allotments, with the consent and authority of the United States, as a part of the national policy by which the Indians are to be maintained, as well as prepared for assuming the habits of civilized life and ultimately the privileges of citizenship. To tax cattle or personal property issued to these Indians by the government of the United States, as a part of the national policy by which the Indians are to be maintained, as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship, is, in my judgment, to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race, over which the Supreme Court of the United States has said that:

"From their very weakness and helplessness, so largely due to the course of dealings of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." United States v. Rickert, 188 U. S. 437, 23 Sup. Ct. 480, 47 L. Ed. 532; United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228.

One of the questions submitted to the Supreme Court of the United States, in United States v. Rickert, was as follows: Was the personal property, consisting of cattle, horses, and other property of like character, which had been issued to these Indians by the United States, and which they were using upon their allotments, liable to assessment and taxation by the officers of Roberts county? Answering this question, the court says:

"The answer to this question is indicated by what has been said in reference to the assessment and taxation of the land and the permanent improvements thereon. The personal property in question was purchased with the money of the government—was furnished to the Indians in order to maintain them on the land allotted to them during the period of trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose."

Counsel for defendant call my attention to the decision in the Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848; but the Supreme Court says in United States v. Rickert, supra, in determining that the principles which were announced as to the nature and character of an allotment of Indian lands and the interest of the United States therein, as trustee, before the expiration of the period for their final disposition, was in no way affected by the decision in the Heff Case, which dealt with the subjection of the allottee Indians in their personal conduct to the police regulations of the state of which they had become citizens, and this is cited with approval in McKay v. Kalyton, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566.

In an opinion by Judge Sanborn in United States v. Gray et al., 201 Fed. 291, 119 C. C. A. 529, Judge Sanborn referred to the relation of the government to these Indians, and specifically mentioned personal property as follows:

"The leases of these lands, * * * the tools, animals, houses and improvements, and other property furnished to these Indians by the United

States, and the proceeds and income from all these, are the means by which the nation pursues its beneficent policy of protection and instruction and exercises its lawful powers of government."

The Indian reservations and funds derived from the release of the Indian right of occupancy, the lands allotted to individual Indians, but still held in trust by the nation for their benefit, the improvements upon these lands, the agricultural implements and domestic animals, and other property of like character, furnished to them by the nation to enable them or induce them to cultivate the soil and to establish and maintain permanent homes and families, are the means by which the nation pursues its wise policy of protection and instruction and exercises its lawful powers of government.

The case of United States v. Thurston County, Neb., 143 Fed. 287–289, 74 C. C. A. 425, emphasizes the fact that the lands held in trust are exempt from state taxation *because they are the instrumentality lawfully employed by the nation in the exercise of its powers of government to protect, support, and instruct the Indians.* This same case holds proceeds of inherited Indian lands exempt. It further determines that no change of form of the property divests it of the trust. The substitute takes the nature of the original and stands charged with the same trust. The authorized sale of trust property by a trustee discharges the property sold from, and charges the proceeds of the sale in the hands of and under the control of the trustee with the trust.

[2] It has been held by the Circuit Court of Appeals for the Eighth Circuit, by the Supreme Court, and by other courts, that the citizenship conferred upon the allottees under and by virtue of the act of February, 1887, did not operate to withdraw them from the supervision, control, and protection of the government, but that such Indians still remained the wards of the government, and therefore these Indians and their property, named in the bill of complaint, are directly within the protection of the rules announced in the foregoing citations. McKnight et al. v. United States, 130 Fed. 659, 65 C. C. A. 37; United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; Farrell v. United States, 110 Fed. 942, 49 C. C. A. 183; Eells v. Ross, 64 Fed. 417, 12 C. C. A. 205; United States v. Logan (C. C.) 105 Fed. 240; United States v. Flournoy Live Stock & Real Estate Co. (C. C.) 69 Fed. 886.

All subjects over which the sovereign power of the 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.

[3] The Enabling Act of February 22, 1889, of the state of South Dakota (25 Stat. 676, 677, c. 180), and the Constitution adopted by the state of South Dakota (article 22), provide that all lands within the state, owned or held by Indian tribes, or by individual Indians who have not severed their tribal relations, shall remain under the absolute

jurisdiction and control of the Congress of the United States. Act May 8, 1906 (34 Stat. 182, c. 2348), under which the larger number of Indians on the Cheyenne River reservation were allotted, provides that until the issuance of fee simple patents all allottees to whom trust patents shall thereafter be issued shall be subject to the exclusive jurisdiction of the United States.

The attempt on the part of the state to use the taxing power of the state by an assessment of this personal property in the possession of these Indians, used by them upon their allotments, under the supervision of the government of the United States, the same being a means employed by the government of the United States in pursuance of the Constitution, is an abuse, because it is the usurpation of a power which the people of a single state cannot give. The power to tax involves the power to destroy, and the power to destroy may defeat and render useless the power to create, and there is a plain repugnance in conferring upon one government the power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exercises the control. A state has 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. United States v. Rickert, supra.

The civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power, nor relieve it of its duty, to control their property, to protect their rights from the rapacity and faithlessness of the members of the superior race, to discharge faithfully its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. This personal property named in the bill of complaint is, in the opinion of the court, trust property, and an instrumentality lawfully employed by the United States in the exercise of its lawful governmental authority, and is therefore necessarily exempt from all taxes and interference. United States v. Thurston County, Neb., 143 Fed. 287–289, 74 C. C. A. 425.

I am inclined to go even farther than is necessarily involved in the foregoing. The findings in this case determine that the Indians named in the bill of complaint are members of the tribe of the Cheyenne River Sioux Indians. They have a tribal organization, and are therefore subject to the exclusive jurisdiction of the United States. This, in view of the provisions of the Enabling Act above quoted, and that personal property of Indians having such tribal organization is exempt from taxation, has been recognized. United States v. Higgins (C. C.) 103 Fed. 348; United States v. Heyfron (C. C.) 138 Fed. 964. I am of the opinion that it rests entirely with the United States, as the trustee and guardian of these Indians and of this tribe of Indians, to determine when it will relinquish its trust and turn the property over to the Indians to do therewith as they may choose.

This doctrine is applicable, not only to the trust allotments, but to all property issued by the government of the United States, consisting

of horses, cattle, and farm implements, together with purchases made by them with the money paid to them and used in and upon the trust allotments of the individual Indians in pursuance of the policy of the United States for the good of the Indian and tending to his protection and development. This governmental policy has been recognized in the decisions above quoted, and especially in United States v. Rickert, supra.

Under this decision, the changed forms of the property held in trust, as time brings such changes about in live stock and other personal property of the Indians, even to exchanges between themselves of trust property, are impressed with the trust. Even the substitute takes the nature of the original and is charged with the trust. The authorized sale of trust property by a trustee discharges the property sold from, and charges the proceeds of the sale, in the hands of and under the control of the trustee, with the trust. United States v. Thurston County, Neb., supra.

The defendants contend that, even admitting the foregoing, all of the personal property of the Indians named in the bill of complaint is subject to taxation, except the original property issued to the Indian. This position, in my judgment, is not consistent with the foregoing facts, considered in the light of the relation the government bears to these Indians, or to the finding that the title of all of this property is really in the government of the United States, in trust for the Indians, and entirely disregards the duty the government has assumed to supervise, control, and protect these Indians, maintaining tribal relations, in their property interests, until such time as the patent in fee simple is issued to their allotted lands and they are released from the guardianship of the plaintiff. This personal property issued to these Indians was in fact the property of the United States, and was put into the hands of the Indians to be used in the execution of the purpose of the government in reference to them. It is not pretended that the government has ever consented to a disposition of any of this property or of its increase.

[4] It is insisted by defendants that it was the duty of the Indians to brand the increase of stock issued, and of property purchased, "ID" or "TF," or both, and thus keep the identification definite and certain, and that, because they have failed to comply with the regulations of the Department of the Interior in this respect, the property not so branded is released from the trusteeship in favor of the plaintiff. I am of the opinion that no act of these Indians, or the failure to act by them or the agent in charge, in accordance with the prescribed regulations with reference to the marking of this property, could affect the trust with which this property was impressed, or the right of the United States in said property, or its duty to protect said Indians in the possession and use of this trust property.

No act or omission of the Indians or of the state authorities can impair the trust restrictions upon this personal property or its increase. United States v. Osage County, 216 Fed. 883, 133 C. C. A. 87; Bowling v. United States, 233 U. S. 528, 34 Sup. Ct. 659, 58 L. Ed. 1080. Agents and officers of the United States have no authority to waive

exemptions of the United States or to submit the property of the United States to state authorities. Stanley v. Schwalby, 162 U. S. 255–270, 16 Sup. Ct. 754, 40 L. Ed. 960; United States v. Lee, 106 U. S. 196–205, 1 Sup. Ct. 240, 27 L. Ed. 171; Carr v. United States, 98 U. S. 433–438, 25 L. Ed. 209. The claim of the defendants, therefore, that because this increase of the original issue was not branded "ID" or "TF" by the Indians, or Indian agents, it is not impressed with the trust, cannot be sustained.

Defendants contend that, there being no statute fixing the time or the condition under which this trusteeship shall be released by the government, therefore the nature of the property and the conditions under which the Indians traffic in the property establish that the government has abandoned its title and trusteeship. A sufficient reply to this is that the court finds that this is trust property. The trust, once being established, follows the increase of the property and attaches to all such property in all of its changed conditions. The fact that Indians exchange and barter it with each other is consistent with the statute of the United States above referred to and the policy of the government in its treatment of these Indians.

The defendants suggest that there is an implied termination of this trusteeship on the part of the government, or an implied divesture of its title, and that by reason of the character of the property, and that it is hard to identify that the limit of the period of the protection of the property of the United States and its increase, is one generation of the live stock after the original parent stock. No basis for such suggestion is urged, except that "it is hard to identify," and it is suggested that this limitation would be reasonable, because it would be easy to identify the one generation of increase.

The reply to this is that the trust abides with the property, with its increase, with it in all of its changed forms, indefinitely, so long as it can be traced. In my judgment it is not a question of "easy identification." It is simply a question of *identification.* The record in this case conclusively shows that all of this property that has been assessed and distrained, of these various Indians named in the bill of complaint, is the original issue stock or property, or belongs to one or the other of the subdivisions into which the property has been above classified. This identification is definite and certain, with absolutely no testimony to dispute such identification—nothing tending to throw a suspicion upon it.

This limitation cannot be applied by the courts, for the elementary reason that courts cannot terminate the trusteeship of the United States. It is for the plaintiff, and the plaintiff alone, to say when this trusteeship shall terminate, and under the law as it now exists, and the policy of the government toward these Indians and their property, it continues until such time as fee simple patents are issued to their allotments, and tribal relations severed, and the relation of guardian and ward terminated. I repeat, under the undisputed testimony in this case, all of this property belongs to that subdivision or classification above set forth, and as above specified. It is impressed with the trust, though some of it came into existence long after the death or

disposition of the original issue, and this property, with its increase, will continue impressed with this trust until such time as Congress sees fit to terminate the trusteeship of the United States, or so long as it is capable of identification. I repeat that there is no question of identification here. There is no dispute upon that proposition. All of this property is the increase of the original issue of stock, implements, and money, identified and classified as above set forth, and it is the undisputed evidence in this case that no other property has been intermingled with it.

Argument has been made in behalf of the defendants that personal property is hard to trace, and therefore that the rule ought not to be applied that is laid down in Re Rickert v. United States and United States v. Thurston County, supra. It is not a question of whether or not it is "hard to trace" or "easy to identify." The question is: Can the property in the possession of these Indians be identified definitely and certain as belonging to either of the classes or subdivisions above enumerated? Without enumerating them here, I am of the opinion that any and all of such classes of property that can be identified are impressed with this trust, and not subject to taxation.

I may say, however, that I am of the opinion that any property in the possession of these Indians that cannot be so traced and identified as issue property, the increase of issue property, as property proceeds of the sale of issue property, property purchased with the proceeds of the sale of the increase of issue property, as property for which similar issue property has been exchanged for similar use, as the increase of property received in such exchange, as the increase of issue property exchanged for similar property for similar use, or property purchased with money given to the Indians by the United States, is not impressed with the trust, and therefore is subject to taxation. I therefore conclude:

1. That the taxation for state and county purposes of this personal property in the possession of the Indians named in the bill of complaint herein interferes with the execution of a wise governmental policy inaugurated and pursued consistently by the government over the period of a great number of years, and which is within the power of the government to undertake and carry out.

2. That the Indians named in the bill of complaint herein are wards of the plaintiff, have not abandoned their tribal relations, the periods of restricted alienation have not expired as to their trust allotments, and the property involved in this action is the property of the government of the United States, impressed with the trust, for the benefit of said Indians, and is within the exclusive jurisdiction and control of the plaintiff.

3. That the original issue of property to these Indians and to the members of the tribe of Indians to which they belong, was the property of the plaintiff, impressed with a trust for the benefit of the Indians respectively, issued pursuant to the policy of the United States toward these Indians heretofore fully set forth, and that this trust and ownership by the plaintiff follows the increase of issue property, and is applicable to all of the classes into which the same has been herein

divided, and will continue until such time as the United States sees fit to terminate the relation of guardian and ward between itself and the said Indians.

4. That in connection with the classification of property above named I am of the opinion that it is not a question of the remoteness from the original trust property that determines the question of the right to tax, but that the trust character of such property continues just so long as there can be an identification of it, and a determination that it belongs to either of the classifications, numbered 1 to 7, inclusive, set forth herein.

I am therefore of the opinion that the issues in this case must be resolved in favor of the plaintiff and against the defendants, and that judgment should be entered in accordance with the prayer of the bill of complaint filed herein.

It is so ordered.

In re SYRACUSE GARDENS CO.

(District Court, N. D. New York. April 3, 1916.)

1. BANKRUPTCY ⟸140(2)—RESCISSION FOR "FRAUD"—RECLAMATION OF PURCHASE PRICE.

The president of the S. Company, which was then insolvent and which soon afterwards was adjudicated a bankrupt, sold 2,500 bushels of onions to claimant and received $1,000 on account. The S. Company did not then have onions sufficient to fill the contract, but relied largely for fulfillment of the contract on onions which it had contracted to purchase. The president, however, did not tell claimant that the company was financially embarrassed or that it did not own the onions it was selling, but told claimant that it then had 3,000 bushels in crates, though it did not have near that amount in crates aside from those it had contracted to purchase. The claimant made the payment in the belief that the S. Company had the property and would make delivery, and would not have made such payment if it had known of the company's insolvency or the fact that it did not own the property. *Held*, that while no actual fraud or deception was intended, and though the S. Company expected to fulfill the contract, there were such representations and concealment of material facts as amounted to "fraud" and entitle the claimant to reclaim such of the money paid by it as was still in possession of the S. Company and capable of being identified when it became bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 219; Dec. Dig. ⟸140(2).

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

2. BANKRUPTCY ⟸11—COURTS OF BANKRUPTCY AS COURTS OF EQUITY.

A bankruptcy court is a court of equity and, controlled by the statute, may do equity guided by the well-defined and established principles of equity jurisprudence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. ⟸11.]

3. EQUITY ⟸11—GROUNDS FOR RELIEF—FRAUD.

It does not always require actual and intentional fraud to justify relief in equity, and implied or constructive fraud growing out of representa-

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

tions or the concealment of or failure to disclose material facts is many times ground for relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 21, 23, 24; Dec. Dig. ⟸11.]

4. SALES ⟸391(4)—RESCISSION FOR FRAUD—RECLAMATION OF PURCHASE PRICE.

A buyer of onions from a seller which soon after became bankrupt was induced to pay $1,000 on the purchase price by concealment of the seller's insolvency and the fact that it did not have onions sufficient to fill the contract. The payment was made by a check which was deposited in the bank and $500 of the proceeds remained in the bank when the seller became bankrupt. *Held*, that this identified money would be treated as specific property belonging to the buyer and subject to reclamation, though such relief could not be granted as to the specific check delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1116; Dec. Dig. ⟸391(4).]

5. SALES ⟸214—WHEN TITLE PASSES.

At the time parties raising a crop of onions on shares on land of the S. Company executed a contract of sale of their share of the onions to the S. Company, the onions had so far grown that the harvesting would soon commence, and some had been pulled; but many things were to be done before they would be suitable for delivery. The contract provided that the onions were to be harvested, divided, and removed from the land as provided in the contract of leasing, and that payment was to be made within three days from the loading of the onions in cars for shipment. *Held*, that title did not pass to the S. Company.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 571–573; Dec. Dig. ⟸214.]

In Bankruptcy. In the matter of the Syracuse Gardens Company, bankrupt. On application by the New York & New Jersey Produce Company for payment to it of certain money. Application granted.

The question at issue between the trustee in bankruptcy in the above-entitled matter and New York & New Jersey Produce Company, Inc., is whether the sum of $500 in the possession of the bankrupt at the time it was adjudicated a bankrupt October 6, 1915, or about that day, and which sum in bank passed first into the hands of the receiver appointed by this court and then into the hands of the trustee, belongs to and can be reclaimed and ordered repaid to said New York & New Jersey Produce Company, Inc., or whether said company is relegated to its proof and allowance of claim and compelled to share in any dividend that may be made herein.

Olmsted, Van Bergen & Searl, of Syracuse, N. Y., for trustee.

Thomas K. Smith, of Syracuse, N. Y., for New York & New Jersey Produce Co., Inc.

RAY, District Judge (after stating the facts as above). The bankrupt, Syracuse Gardens Company, a corporation of the state of New York, on the 5th day of May, 1915, was the owner of certain lands near the city of Syracuse, in the county of Onondaga, N. Y., especially adapted to the growing of onions, and on that day a lease of certain of the lands was entered into between the now bankrupt and Nicola Saracino and Congeta Saracino, by and under which the Saracinos were to sow, cultivate, and raise a crop of onions on said lands on shares. There were many conditions in the said lease or agreement which it is unnecessary to recite here. The Saracinos did sow onions

on said lands and cultivate same, and September 2, 1915, said onions had so far grown that the harvesting thereof would soon commence, and some had been pulled; but many things were to be done before suitable for delivery. September 2,. 1915, the Saracinos, by an instrument in writing, sold to the Syracuse Gardens Company, the bankrupt, their share of the onions raised on said lands and then thereon, and the harvesting of which had commenced, or soon would commence, and which agreement of sale is as follows:

"Town of Cicero, N. Y., Sept. 2, 1915.

"In consideration of the sum of fifty dollars ($50.00) paid to us, Nicolo Saracino and Congeta Saracino, of Syracuse, N. Y., receipt of which is hereby acknowledged, we herewith sell to the Syracuse Gardens Company all of our share of onions which we own through a contract with the said Syracuse Gardens Company, dated May 5, 1915, for the growing of onions on their land season of 1915. The said Syracuse Gardens Company to pay us a total of forty-five cents per bushel (A) for No. 1 good, sound, marketable onions, and fifteen cents per bushel for No. 2 grade onions, both grades to be screened over 1½-in. screen and ready for loading in car. The onions to be harvested, divided and the marketable onions removed from the said land, all as provided for in contract dated May 5, 1915.

"The balance due us, after deducting from the total value of our share of the said onions the sum first mentioned above, plus the Syracuse Gardens Company's charge to us for fertilizer as per contract of May 5, 1915, plus any labor performed by the said Syracuse Gardens Company and for which a charge is provided against us in the above mentioned contract, is to be paid to us within three days from the loading of the said onions by the Syracuse Gardens Company in cars for shipment. The company to not charge the Saracinos for loading and hauling to cars.

"Witness our hands and seals the date first above written.

"Note insertion (A).

"Nicolo Saracino. [L. S.]
"Congeta Saracino. [L. S.]

"Witness: Joseph Pirro."

All of the onions were on the premises.

The Syracuse Gardens Company had onions of its own, raised on other lands near by, and which on the 2d day of October, 1915, were being pulled and prepared for market as were the onions raised by the Saracinos and the harvesting of which had been commenced at that time. The Syracuse Gardens Company at the time the contract of purchase was made expected to pay for the onions and have same. October 2, 1915, said Syracuse Gardens Company was in fact insolvent and unable to pay its debts and obligations in full, and ought to have known this fact; but there is no proof that the company had actual knowledge of its insolvency.

[1] On the 2d day of October, 1915, the Syracuse Gardens Company, by its president, David B. Corse, sold to the New York & New Jersey Produce Company, Inc., five cars of well-cured, good, sound, good size 1½ screen yellow onions, 2,500 bushels of 56 pounds per bushel, at 70 cents per bushel; but no delivery was made, as the Syracuse Gardens Company did not have the onions ready for delivery, and in fact relied largely for delivery and fulfillment of its contract of sale with the New York & New Jersey Produce Company, Inc., upon the onions coming from the crop raised by the Saracinos. This sale of onions by the Syracuse Gardens Company to the New York

& New Jersey Produce Company, Inc., was evidenced by a memorandum of sale and the receipt on account signed by the Syracuse Gardens Company, by D. B. Corse, its president, and which reads as follows:

"New York, 10/2, 1915.

"David B. Corse, President, Syracuse Gardens Company.

"Sold to New York & New Jersey Prod. Co. 5 cars of well-cured, good sound, good size 1½ screen yellow onions, 2,500 bus. of 56 lbs. @ 70¢ bus.

"Received payment on account of above sale $1,000.00.

"Syracuse Gardens Co.,
"D. B. Corse, Pres."

At the time of the execution of said paper or memorandum of sale, the New York & New Jersey Produce Company, Inc., paid to said D. B. Corse, the president of the Syracuse Gardens Company, the sum of $1,000 on account of such sale and purchase. The Syracuse Gardens Company paid out $500 of said $1,000 and deposited the other $500 in bank, where it still remains; but it was deposited in the name and to the credit of the Syracuse Gardens Company.

In point of fact and as has been found and as this court finds, the Syracuse Gardens Company had relied largely upon the Saracinos' crop of onions to comply with the sale made to the New York & New Jersey Produce Company, Inc., and, while it had some onions of its own in process of harvesting, it did not have anything like five cars of yellow onions or 2,500 bushels of onions of the description contained in the memorandum of sale above quoted. On the 5th day of October, 1915, as stated, the petition in bankruptcy was filed, a receiver of the property of the Syracuse Gardens Company was appointed, and all its property passed to the hands of said receiver. The Syracuse Gardens Company had not obtained title to the Saracinos' onions and, as stated, did not have onions with which to fill its contract with the New York & New Jersey Produce Company, Inc. In short, the Syracuse Gardens Company did not have the property it purported to sell to the New York & New Jersey Produce Company, Inc., and on account of which it received the said $1,000 from that company. On the 2d day of October, 1915, in short the Syracuse Gardens Company purported to sell and deliver to the New York & New Jersey Produce Co., Inc., property which it did not own or have, but which it expected to obtain from the Saracinos under its agreement with them. It received on account of this purported sale the sum of $1,000 of the money of the New York & New Jersey Produce Company, Inc. It is not the case of mere breach of an agreement to sell, but a sale of property on the 2d day of October, 1915, by the Syracuse Gardens Company, which it did not have or own and which property it never did obtain, have, or own, and the receipt by it of $1,000 of the money of the vendee.

While the Syracuse Gardens Company was insolvent and unable to pay its debts, there is no evidence that on the 2d day of October, 1915, it intended to go into bankruptcy or contemplated bankruptcy. No title to the onions passed to the New York & New Jersey Produce Company, Inc., as the Syracuse Gardens Company did not own the property it purported to sell; but of this fact the New York & New Jersey Produce Company, Inc., had no knowledge whatever.

The last-named company parted with its money to the Syracuse Gardens Company in the belief that the Syracuse Gardens Company had the property and would make delivery. No fraud was intended by the Syracuse Gardens Company; but, as matters turned, the transaction operated and operates as a fraud, and there was an utter failure of consideration. The question is, as above stated, can this court direct the return of the $500 in the hands of the Syracuse Gardens Company at the time it was adjudicated a bankrupt to the New York & New Jersey Produce Company, Inc., or does such $500 belong to the trustee in bankruptcy for the benefit of creditors, and is the New York & New Jersey Produce Company, Inc., relegated to its remedy of filing a claim and sharing in distribution? Every equity is in favor of the New York & New Jersey Produce Company, Inc., and the $500 should be returned if lawfully such return may be directed.

The Syracuse Gardens Company, by offering to sell and selling 2,500 bushels of onions of a certain quality and description, impliedly represented that it owned them and would and could deliver them and in substance so stated. It did not disclose to the purchaser the fact that it did not own or have such onions, and we may safely assume it honestly expected to have them by paying the Saracinos therefor when harvested and delivered. In fact, it did not have the ability to perform its contract with the Saracinos and pay for the onions and obtain title thereto, and did not. On these implied representations above set forth, and relying thereon and the statements actually made, and because of a failure to disclose material facts, the New York & New Jersey Produce Company, Inc., parted with $1,000 of its money to the Syracuse Gardens Company, $500 of which, identified, that company had on the 6th day of October, four days later, when it went into bankruptcy, and this money passed to the possession of the receiver and later to the trustee and is now in the possession of this court. The Syracuse Gardens Company parted with nothing therefor and did not have or own the property it agreed to turn over and deliver in exchange therefor.

[2, 3] The bankruptcy court is a court of equity and, controlled by the statute, may do equity guided by the well-defined and established principles of equity jurisprudence. It does not always require actual and intentional fraud to afford a remedy in equity. Implied fraud or constructive fraud growing out of both representations and the concealment of or failure to disclose material facts, many times, is ground for equitable relief. Mr. Corse, president of the Syracuse Gardens Company, testified that he said to Mr. Fleming, who represented the New York & New Jersey Produce Company, Inc., in the purchase of the onions and in the payment of the $1,000 as follows:

"I said to Mr. Fleming that we had some very good onions on our land at Syracuse ready for shipment in a very short time, and that they were of good size and color, and they were in crates ready to be screened (an operation by which the small ones are separated from the large ones) and shipped, and the question arose whether we should ship them in bulk or bags, and we decided that, in case they wanted them in bags, they would send the bags to us and we would charge them a nominal amount or price for bagging them, and I explained that on account of certain conditions I would like the ready money, so they agreed to make an advance on these onions. * * * Q. Now,

after this talk with Mr. Fleming, did you go into the office of the company, or was this in Mr. Fleming's office? A. It was in Mr. Fleming's office. Q. Was there a memorandum made of your arrangement and a receipt given? A. Yes. Q. Did you at that time receive a check for $1,000 from the New York & New Jersey Produce Company? A. Yes."

He then said he signed and delivered the memorandum of sale and receipt above quoted.

The evidence is such as to justify and require a finding that the Syracuse Gardens Company was then in fact insolvent; that Mr. Corse knew it was financially embarrassed; and that the company did not own the onions it was selling, but did not communicate the facts within his knowledge to the said New York & New Jersey Produce Co., Inc. The evidence also justifies and requires a finding that neither Mr. Fleming representing that company, nor the company itself, would have advanced the $1,000 on the onions had they or either of them been informed of such facts as Mr. Corse actually knew. I think here were such representations and such concealment of material facts as entitles the New York & New Jersey Produce Company, Inc., to equitable relief and to reclaim the $500 deposited and not used by the Syracuse Gardens Company. True, no actual fraud or deception here was intended, but in obtaining such a large advance under such circumstances it was the duty of the president of the Syracuse Gardens Company to make full disclosure of the material facts, and clearly it was material that the Syracuse Gardens Company was financially embarrassed and did not own the onions or the greater part of the onions it was purporting to sell. The president testifies:

"Q. How many bushels did you tell him you had in crates? A. I told him 3,000 bushels."

Aside from the Saracino onions, the seller did not have near that amount in crates. Certainly it is not just or equitable that this trustee in bankruptcy shall retain all the onions the Syracuse Gardens Company did have, and it had hundreds of bushels, and also this $500 now in the possession of the trustee and paid to it under the circumstances mentioned. No right of any third party has intervened, or is to be affected by the return of this money to the party who paid it to the Syracuse Gardens Company for property which it did not own and which the party paying the money supposed that company did own and which that company represented it owned and expected to own, but was unable to obtain because of its insolvency and impending bankruptcy, and which money would not have been advanced or paid over had the party paying it been informed of the insolvency or financial embarrassment of the Syracuse Gardens Company, and of the fact that it did not own the property. The New York & New Jersey Produce Company, Inc., has several remedies. It has not concluded itself by electing one remedy in preference to another, and it may pursue the money and when found and identified, which has been done, in the hands of the trustee in bankruptcy of the Syracuse Gardens Company, which has parted with nothing therefor, reclaim the same. In 14 Am. & Eng. Encyclopedia of Law, 165, it is said, speaking of remedies in cases of fraud actual or implied:

"Recovery of What was Parted with. In General. If he has parted with money or property under the contract, as in the case of a sale and delivery of goods, or a purchase of goods and payment of the price, he may bring an action against the other party to recover the same. * * * Replevin. If he has parted with personal property, he may maintain an action of replevin to recover the specific property, unless it has passed into the hands of a bona fide purchaser for value."

[4] The trustee in bankruptcy is in the shoes of the bankrupt company, and neither has parted with anything, and, as stated, this money is in bank and identified. Not the specific check, but its proceeds, the check having been deposited in bank, and to the extent of $500 has not been drawn out. Equity should treat this identified money as specific property belonging to this claimant the New York & New Jersey Produce Company, Inc. See Root v. French, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482, and cases cited in 14 Am. & Eng. Encyc. of Law, supra. Modern law ought not to be so stupid as to make a distinction between specific personal property, such as a horse, or a cow, or a machine (identified), and money, also identified and in the hands of the person who wrongfully obtained same and holds it under such circumstances that it would be unjust and inequitable for him to retain it.

The general principle in the case of sales is that when the seller has no title (the sale being of property which the seller represents himself as owning), and advances have been made on the purchase price, the buyer may recover back such advances. 35 Cyc. 602; Wolf v. Michael, 21 Misc. Rep. 86, 46 N. Y. Supp. 991; Kneeland v. Willard, 59 Me. 445; Cook v. Redman, 2 Bush (Ky.) 52; Porth v. Lux, 40 Mo. App. 162; Peckham v. Kierman, 13 R. I. 354; Charlton v. Lay, 5 Humph. (Tenn.) 496; Mabry v. Harp, 53 Kan. 393, 36 Pac. 743; Hamrah v. Maloof, 127 App. Div. 331, 111 N. Y. Supp. 509. In this Hamrah Case the seller did own the goods, having imported them without paying duties, and the goods were delivered; but the United States seized them, and they were lost to the buyer, and the buyer was held entitled to recover the purchase price paid. The recovery of the money paid in all these cases rests on the proposition that it does not belong to the seller, who had no title to the goods purported to be sold, but to the buyer, who has parted with his money without consideration. Therefore the money paid while in the hands of such seller is not his, but belongs to the buyer, who in fact was defrauded. If such a seller is insolvent and, with the money in his pocket or in bank, goes into bankruptcy, shall his trustee in bankruptcy hold same and distribute it to pre-existing creditors, or shall the court return it to the party from whom thus obtained and to whom it rightfully belongs? If there is an agreement between two persons to trade or exchange personal property, as for instance three cows for a horse, the one party representing to the other that he owns the property he contracts to deliver and the one party to the agreement making such representation receives into possession from the other the property he is to have in the trade, but goes into bankruptcy and it turns out that he did not and does not own the property he has agreed to deliver, may his trustee in bankruptcy retain the property so delivered by the

other party, or may that other party reclaim it on the ground of fraud and failure of consideration? Would it be a defense to the reclamation proceedings that the bankrupt had made a contract to purchase property, such as he was to deliver, and that he expected to have it for delivery but was prevented by bankruptcy? It seems to me that in such case there is no doubt of the duty of the court and trustee in the matter and that reclamation should be sustained. In such case, there may not have been any actual intent to defraud, but, as stated, such intent is not always essential to the avoidance and rescission of a contract.

If we assume that the president of Syracuse Gardens Company honestly expected the company would pull out of its financial embarrassments, continue business, obtain title to the onions, and make delivery, in all of which accomplishments he was mistaken, still that company was in fact insolvent and did not have or own the onions sold, and in obtaining the money of the buyer the president of the company failed to disclose its financial embarrassments, known to him, or the fact, also known to him, that the company did not own the onions, and hence the payment of this money was induced by material misstatements of fact and a failure to disclose material facts which under the circumstances should have been disclosed. Here proof of claim and sharing in distribution is not an adequate remedy, but would result in loss to this claimant New York & New Jersey Produce Company, Inc., and it is perfectly practicable to direct a return of this money. 16 Cyc. 83, 84.

In 20 Cyc. 8, 9, and 10, we find "fraud" defined thus:

"Fraud as a generic term, especially as the word is used in courts of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. The classification of fraud most frequently used by courts and text-writers is: (1) Actual or positive fraud; (2) legal fraud or fraud in law; (3) constructive fraud. * * *

"A constructive fraud has been said to be 'an act which the law declares to be fraudulent, without inquiring into its motive; not because arbitrary rules on this subject have been laid down, but because certain acts carry in themselves an irresistible evidence of fraud.' * * *

"The same idea has been elaborated by Story, who says: 'By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law as within the same reason and mischief as acts and contracts done malo animo.'"

It is true, of course, as found, that the president of the Syracuse Gardens Company, in making his representations and in failing to make disclosure, intended that the New York & New Jersey Produce Company, Inc., should act thereon, for he was seeking to make a sale of onions that company did not actually own and to obtain a large advance of money thereon. His object was to obtain the money then, but probably he intended and expected that the contract would be eventually fulfilled. Every element of actionable fraud was present. 20 Cyc. 13, and cases cited, where it is said:

"The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury."

[5] My conclusions are that the title to the Saracino onions did not pass to the Syracuse Gardens Company; that the said company did not have title to onions of the kind described to fill its contract with the New York & New Jersey Produce Company, Inc.; that there was fraud by misrepresentation and concealment which in part induced the payment by the produce company to the Gardens Company of the $1,000 and justifies a rescission of the contract; that the title to the $500 identified and now in bank, and which came from the said produce company, did not pass to the Gardens Company and may be recovered; that same should be paid over to said New York & New Jersey Produce Company, Inc.

There will be an order accordingly.

MERCHANTS' & MANUFACTURERS' TRAFFIC ASS'N OF SACRAMENTO et al. v. UNITED STATES et al.

(District Court, N. D. California, Second Division. December 15, 1915.)

No. 191.

1. COMMERCE ⇐93—INTERSTATE COMMERCE COMMISSION—ORDERS—RIGHT TO SUE.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 13, 24 Stat. 383, as amended by Act June 18, 1910, c. 309, § 11, 36 Stat. 550 (Comp. St. 1913, § 8581), provides that any association, body politic, or municipal organization, complaining of anything done or omitted to be done by any carrier subject thereto, may apply to the Commission by petition. Act Feb. 19, 1903, c. 708, § 2, 32 Stat. 848 (Comp. St. 1913, § 8598), provides that in any proceeding for the enforcement of statutes relating to interstate commerce, whether instituted before the Commission or in any Circuit Court it shall be lawful to include as parties all persons interested or affected, and that investigations, decrees, etc., may be made with reference to and against them. Equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) provides that all persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and that persons having a united interest must be joined on the same side as plaintiffs or defendants. Equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix) provides that when the question is one of common or general interest to many persons, constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole. *Held*, that where an order of the Interstate Commerce Commission authorized, and a tariff filed thereunder provided, higher rates to four certain cities than to certain other cities, one of such cities, representing the interest of its citizens, and traffic associations formed for the purpose of representing jobbers and merchants in the three other cities, could maintain a suit to enjoin the enforcement of such order and tariff, as they were within the rule that bills may be filed in the name of unincorporated associations and parties in behalf of others similarly situated, and moreover the equity rules seem to contemplate such a suit for the common

benefit of all, where the parties are numerous and have a common or general interest.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 144; Dec. Dig. ⟸93.]

2. COMMERCE ⟸86—CHARGES—LONG AND SHORT HAULS—INTERSTATE COMMERCE COMMISSION.

Act Feb. 4, 1887, c. 104, § 4, 24 Stat. 380, as amended by Act June 18, 1910, c. 309, § 8, 36 Stat. 547 (Comp. St. 1913, § 8566), makes it unlawful for a carrier to charge a higher rate for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, provided, however, that upon application to the Interstate Commerce Commission the carrier may in special cases, after investigation, be authorized to charge less for longer than for shorter distances. Shortly prior to the amendment the Commission ordered certain changes in west-bound rates to points in Nevada, and thereafter transcontinental carriers made applications for authority to continue the practice of making commodity rates to the Pacific Coast lower than to Nevada points. Sacramento, Stockton, San Jose, and Santa Clara had long been designated as Pacific Coast terminals, and the applications did not propose to disturb the terminal or short haul rates to these points, and at no time in the ensuing proceedings did they ask the Commission to suspend the long and short haul clause with respect to these points; but the Commission removed these points from the class of Pacific Coast terminals and increased the west-bound rates to those points above the rates to San Francisco and other ports of call of steamship lines. *Held*, that the Commission had no power to suspend the long and short haul clause in this respect without an application being made to it by the carriers for that purpose and a hearing upon that particular application as in a special case, and the order to that extent was therefore void.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 140; Dec. Dig. ⟸86.]

Bledsoe, District Judge, dissenting.

In Equity. Suit by the Merchants' & Manufacturers' Traffic Association of Sacramento and others against the United States and others. On application for an injunction to restrain the Interstate Commerce Commission from enforcing certain orders of the Commission under Act Oct. 22, 1913, c. 32, § 1, 38 Stat. 208, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the fiscal year nineteen hundred and thirteen, and for other purposes." Interlocutory injunction issued.

John E. Alexander, of San Francisco, Cal., for petitioners.

Blackburn Esterline, Sp. Asst. Atty. Gen. (John W. Preston, U. S. Atty., of San Francisco, Cal., on the brief), for the United States.

Joseph W. Folk, of Washington, D. C., for Interstate Commerce Commission.

C. W. Durbrow and Allan P. Matthew, both of San Francisco, Cal., and E. W. Camp, of Los Angeles, Cal., for respondents.

Before MORROW, Circuit Judge, and DOOLING and BLEDSOE, District Judges.

MORROW, Circuit Judge. The petitioners are applying to this court, upon the bill of complaint and affidavits, for an interlocutory injunction to restrain in part an order of the Interstate Commerce Commission, dated April 30, 1915, and the tariff filed by certain of the

transcontinental rail carriers pursuant to said order (Supplement 16 to Transcontinental Freight Bureau West-Bound Tariff No. 1–N), in so far as the said order charges for west-bound transcontinental commodities destined to Sacramento, Stockton, San Jose, and Santa Clara any greater amount than is charged for the transportation of like commodities to San Francisco or Oakland.

[1] A preliminary motion to dismiss the bill has been made by the United States on grounds that appear to be sufficiently stated in the objections that the petitioners do not bring the suit as common carriers or as shippers; that they have no such interest in the orders of the Interstate Commerce Commission sought to be annulled and enjoined as to enable them to maintain the suit; that it does not appear that they will sustain irreparable injury, or any injury, by reason of any orders of the Commission made subject of complaint; and that the petitioners have no standing in a court of equity to maintain the suit.

Three of the petitioners are traffic associations formed for the purpose of representing jobbers and merchants located at Sacramento, Stockton, and San Jose in traffic matters in which all the parties represented are interested. The remaining petitioner, Santa Clara, is a municipal corporation representing the interests of the citizens of that municipality. All of the petitioners are authorized by section 13 of the Act to Regulate Commerce (Act Feb. 4, 1887, 24 Stat. 379) to apply to the Interstate Commerce Commission by petition for relief in certain matters; that is to say, they may become parties to certain proceedings before the Interstate Commerce Commission, thus recognizing their right to represent the interest of others before that body. And it is further provided in the section that:

"No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

It is further provided, in section 2 of the Act to Further Regulate Commerce with Foreign Nations and Among the States (Act Feb. 19, 1903, 32 Stat. pt. 1, p. 847):

"That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any Circuit Court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

The purpose of these statutes is plainly to meet a situation and bring in all parties interested in the controversy, to the end that the entire question involved may be settled and determined in the one proceeding. Such being the purpose, we see no objection to classes of persons similarly situated being represented by an association or other organization and coming into the controversy under the common name. This, we think, brings this case within the well-known rule that bills may be filed in the name of an unincorporated association,

and by parties on behalf of others similarly situated. In Foster's Federal Practice (5th Ed.) § 114, the rule is stated as follows:

"*Class Suits.*—When a number of persons have a common interest in a thing which is the subject of litigation, and in some instances when a number of persons have a common interest in a question which is before the court for decision, one or more may sue or be sued in behalf of the rest. Judge Story divides the first of these divisions into two: '(1) When the question is one of a common and general interest, and one or more sue or defend for the benefit of the whole; and (2) when the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole.' But there seems to be no reason for treating the two classes separately. They are called 'class suits,' 'creditors' suits,' or 'stockholders' suits,' as the case may be."

Moreover, the equity rules seem to contemplate such a suit for the common benefit of all where the parties are numerous and have a common or general interest. Equity rule No. 37 (198 Fed. xxviii, 115 C. C. A. xxviii) provides:

"All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and persons having a united interest must be joined on the same side as plaintiffs or defendants."

Equity rule No. 38 (198 Fed. xxix, 115 C. C. A. xxix) provides that:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

We think under these rules this action may be maintained by the petitioners. The motion to dismiss is therefore denied.

[2] After the passage of the Act of February 4, 1887, to Regulate Commerce (24 Stat. 379), it became unlawful, under section 4 of the act, for a carrier to charge or receive any greater compensation in the aggregate for the transportation of passengers or like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance. But there was a qualification provided in the statute that the transportation for the shorter and longer distances must be under substantially similar circumstances and conditions. There was a further provision that upon *application* to the Interstate Commerce Commission a carrier might in *special cases after investigation* by the Commission be authorized to charge less for the longer than for the shorter distance.

The controversy in the present case has its origin in proceedings arising out of an application made to the Interstate Commerce Commission by the Railroad Commission of Nevada. Prior to that application, all points in Nevada (which points are designated as *intermountain points*) had been charged much higher rates on both classes of west-bound freight, viz. freight designated as *class freight* and freight designated as commodities, than had been charged to Pacific Coast terminals. Sacramento, Stockton, San Jose, and Santa Clara, as well as other points in California, had long prior to such time been designated as *"Pacific Coast terminals"* and were such at the time of the

application to the Interstate Commerce Commission by the Railroad Commission of Nevada. The prayer of the Nevada application was:

"Nevada asks that she be given rates as low as those given to Sacramento."

Sacramento was the nearest Pacific Coast terminal to Nevada, and the former system of rate-making for points in Nevada was to charge the full rate to the nearest Pacific Coast terminal and then charge in addition thereto the full local back-haul rate to the point of destination. Thus Nevada points were charged for a shorter distance the full terminal rate for a longer distance and, in addition, the local back-haul rate to the point of delivery. The petition was that Nevada might have the full benefit of the long and short haul clause of the fourth section of the Commerce Act. The petition was not granted in full, but the Commission did establish *class rates* to be charged to certain Nevada points. The rates to points outside of Nevada were not considered. In fixing the *class rates,* the Commission stated that additional data as to *commodity rates* would be secured before an order would be made relative to such rates.

The findings and conclusions upon the foregoing application, and the order pursuant thereto, were entered of record on June 6, 1910. On June 18, 1910, Congress amended the fourth section of the Act to Regulate Commerce by striking out the clause, "under substantially similar circumstances and conditions." The provision relating to applications to the Commission by the carriers for authority to depart from the long and short haul clause of the section was amended slightly so as to read:

"Provided, however, that upon *application* to the Interstate Commerce Commission such common carrier may in *special cases, after investigation,* be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

Pacific Coast Terminals.

Prior to this amendment the construction of the fourth section had been that the rail carriers had the primary right to determine as to what constituted "under substantially similar circumstances and conditions," and when a departure could be made from the long and short haul requirements of section 4 because of a dissimilarity of circumstances and conditions. Intermountain Rate Cases, 234 U. S. 476, 482, 34 Sup. Ct. 986, 58 L. Ed. 1408. After the amendment, various transcontinental lines made applications to the Interstate Commerce Commission for authority to continue the then practice of making commodity rates to the Pacific Coast lower than to intermediate, or Nevada, points. The "Pacific Coast" here referred to was what was then known as "Pacific Coast terminals," and included, as before stated, Sacramento, Stockton, San Jose, and Santa Clara, and other points in California. The applications of the carriers did not propose to disturb the terminal or short-haul rates to these points. In other words, there was no application on the part of the carriers to suspend the long and short haul clause of section 4 with respect to these terminal

points. See Fourth Section Applications Nos. 205, 342, 343, 344, 349, 350, and 352, Commodity Rates to the Pacific Coast Terminals and Intermediate Points, decided January 29, 1915, 32 Interst. Com. Com'n R. 611.

Blanket Rates from the Missouri River to the Atlantic Ocean.

The Interstate Commerce Commission, in the report just cited, referring to the history of these applications, say:

"Fourth Section Order No. 124 recognized the existence of a wide blanket of rates as to points of origin extending from the Missouri river to the Atlantic Ocean on traffic to the Pacific Coast, while it did not provide for such blanketing of rates to points in the intermediate territory."

Then, after explaining the effect of this blanketing of rates from the Missouri river to the Atlantic Ocean, the Commission say:

"Upon the whole record we are of the opinion that these carriers are justified in the maintenance of a blanket as to points of origin on rates to the Pacific Coast, and that this practice carries with it no necessity or obligation of blanketing the same territory of origin in establishing rates to intermediate points."

The "intermediate points" referred to in this report are the intermountain or Nevada points; but the carriers were to be permitted to maintain blanket rates to Pacific Coast terminals.

Back-Haul Territory.

The Commission thereupon proceed to designate a territory on the Pacific Coast as back-haul territory, and say:

"We have heretofore described this territory as lying along the main lines of these railways immediately east of the terminals. For the purpose of this report this will be called the back-haul territory."

The Commission then make the suggestion that carriers readjust rates to back-haul points by either adding to the full terminal rates something less than full locals from terminal to destination, or by the publication of basing rates to the terminals, less than the terminal rates, to be used in connection with local rates from the terminals in determining rates to intermediate points. The Commission say:

"The record in this case is not sufficient to afford a basis warranting the Commission in prescribing the exact measure of these rates. We shall therefore make no order in regard thereto at this time."

The Commission continue:

"*No evidence has been presented in this case to show that it is necessary to apply the coast terminal rates to any points except the ports of call on the Pacific Coast at which the Atlantic-Pacific steamship lines deliver freight.* We shall authorize these carriers to establish the rates proposed to these ports upon all the articles in the list, excepting those to which exceptions have been noted."

This is the first intimation in these proceedings that the *Pacific Coast terminals* were to be reduced to "the ports of call on the Pacific Coast at which the Atlantic Pacific steamship lines deliver freight." No carrier had made application for such an order, and its consideration by the Commission was not had in any special case. It meant the

elimination of Sacramento, Stockton, San Jose, and Santa Clara from Pacific Coast terminals and their transfer to the newly created back-haul territory; such transfer resulting, as we shall presently see, in authorizing the carrier to charge a greater compensation for a shorter distance than for a longer distance at the *point of destination,* and in addition, to charge a still greater compensation if the *point of origin* should be between the Missouri river and the Atlantic Ocean; this increased charge or compensation at the point of origin resulting from the withdrawal of the blanket rates from back-haul and intermediate territory and substituting a differential therefor under a classification by zones. We find no application by any carrier for authority to charge more from the blanketed territory between the Missouri river and the Atlantic Ocean to Sacramento, Stockton, San Jose, and Santa Clara than to San Francisco and Oakland.

The Commission said further in their report:

"We shall expect the carriers within 60 days from date of service hereof to submit to the Commission such plan for adjustment of rates to the back-haul points as they may desire. Should the carriers submit no such plan within this time, the Commission will undertake such investigation as to these rates as will enable it to enter a proper order with regard thereto."

In response to this invitation of the Commission, the transcontinental lines to California terminals proposed for the so-called back-haul territory to deduct from the terminal commodity rates 7 cents per 100 pounds, carloads, and 10 cents per 100 pounds, less than carloads, for basing rates, and to add thereto the full local rate from nearest terminal to destination. This was to apply eastward from the terminal until the point is reached at which the prescribed maximum rate is the same or less; the rate to a back-haul point not to be less than that to the terminal point.

In the report of the Interstate Commerce Commission dated April 30, 1915 (34 Interst. Com. Com'n R. 13), this proposal of the carriers was not approved; but in lieu thereof, carriers were ordered to construct such rates *by adding to the terminal rates not more than 75 per cent. of the local rates from the nearest terminal to destination,* or by adding arbitraries to the terminal rates varying with distance from the ports, such arbitraries to be not more than 75 per cent. of the local rates, the aggregate not to exceed the maximum prescribed to intermediate points mentioned in the order.

It was further ordered that in the observance of this order as to rates on Schedule C commodities, the Pacific Coast terminals should consist of * * * San Francisco and Oakland, Cal.; * * * Sacramento, Stockton, San Jose, and Santa Clara being omitted from the order as Pacific Coast terminals.

We are advised in these proceedings that the proposal of rates for Schedule C commodities as made by the carriers for back-haul territory, for such points as Sacramento, Stockton, San Jose, and Santa Clara was the equivalent of terminal rates for San Francisco and Oakland; and such we understand to be the statement contained in the report of the Commission. Commenting upon the plan submitted by the carriers, the Commission say:

"The plan for constructing rates to back-haul points proposed by the lines leading to the California terminals would create a zone contiguous to the terminals to which terminal rates would apply. The extent of this zone would be limited by the distances to which local rates of 7 cents, carloads, and 10 cents, less than carloads, would reach. *It would, however, in substance include all of the points that have heretofore been accorded terminal rates.*"

In other words, points previously designated as terminal points would continue to have the equivalent of terminal rates. There was, therefore, no application on the part of the carriers, under section 4 of the Act to Regulate Commerce, to be authorized to charge less for a longer (to San Francisco and Oakland) than for a shorter distance (to Sacramento, Stockton, San Jose, and Santa Clara). With respect to differentials in the prescribed zone rates, the Commission say:

"In making rates from territories east of the Missouri river the carriers were authorized to add to the rates made from the Missouri river to intermediate points differentials of 25, 40, and 55 cents per 100 pounds from Chicago, Pittsburgh, and New York, respectively."

Here was a further increase of rates for Sacramento, Stockton, San Jose, and Santa Clara if the commodity originated east of the Missouri river; 25 cents per 100 pounds if the commodity were shipped from Chicago, 40 cents per 100 pounds if the commodity were shipped from Pittsburgh, and 55 cents per 100 pounds if the commodity were shipped from New York. No application was ever made by the carriers for the increase arising from such a change from blanket to zone rates east of the Missouri river.

Our attention is called to another provision of this order of April 30, 1915. In the applications made by the carriers, commodities were divided into three classes designated as Schedules A, B, and C, each containing a different class of commodity. The order of January 29, 1915, referred only to Schedule C commodities, the order specifically stating in the first sentence that a hearing had been had "with reference to the justification for the additional relief sought by the carriers *respecting the rates on the commodities listed under Schedule C.*" It appears, however, that the order of April 30, 1915, has the effect of assigning Schedule B commodities to a per cent. of increase prescribed in zone rates, as follows: Seven per cent. from points in zone 2, 15 per cent. from points in zone 3, and 25 per cent. from points in zone 4. This feature of the transcontinental tariff was never mentioned in any application, and there was never a hearing of any kind upon that subject.

The effect of this feature of the order is this: It authorizes the carriers to charge more for the shorter haul to Sacramento, Stockton, San Jose, and Santa Clara than for the longer haul to San Francisco and Oakland on both Schedules B and C commodities, without any application having been made by the carriers for such authority. The order of April 30, 1915, as a whole, increases the transcontinental rates to Sacramento, Stockton, San Jose, and Santa Clara, over the previously existing rates for commodities in Schedules B and C, in the following particulars: (1) An increase of rates on such commodities by the transfer of the points named from terminals to back-haul

territory; and (2) an increase of rates from points of origin east of the Missouri river by taking from such points the blanket rates of the Eastern territory.

The discussion of the questions involved in these proceedings has taken a wide range; but we are of the opinion that the only question we have to deal with in this case is the statutory power of the Interstate Commerce Commission. Had the Commission, in the absence of an application by the carriers, the statutory power to make the order it did? Can the Commission suspend the long and short haul clause of section 4 of the Act to Regulate Commerce without an application being made to it by the carriers for that purpose and a hearing upon that particular application as in a special case? We are of the opinion that this is beyond the statutory power of the Commission; and such we understand to be the decision of the Supreme Court in United States v. Louis. & Nash. R. R., 235 U. S. 314, 322, 35 Sup. Ct. 113, 59 L. Ed. 245.

An interlocutory injunction will therefore issue, restraining the respondents from further enforcing the order of April 30, 1915, in so far as it increases west-bound transcontinental freight rates on Schedules B and C commodities to Sacramento, Stockton, San Jose, and Santa Clara.

BLEDSOE, District Judge. I am unable to concur with my Associates in this case. The decree to be entered pursuant to their conclusions will enjoin the respondents from further enforcing the order of the Interstate Commerce Commission dated April 30, 1915, "in so far as it increases west-bound transcontinental freight rates on Schedule B and C commodities to Sacramento, Stockton, San Jose, and Santa Clara." In all other respects, and with reference to all other communities in the so-called back-haul territory (hundreds in number, obviously), the order is to stand. If the order lacks validity because in excess of the jurisdiction conferred upon the Commission, it should be annulled, and its operation stayed, in toto.

I cannot acquiesce, however, in the conclusion that the order was in excess of the jurisdiction conferred upon the Commission. By the majority opinion such invalidity is made to rest upon the single fact that no "application" for the order had been made, and that, under the construction given to section 4 of the Act to Regulate Commerce, as announced in 235 U. S. 314, 322, 35 Sup. Ct. 113, 59 L. Ed. 245, the making of such "application" is a necessary pre-requisite to action on the part of the Commission. I do not so construe the section and do not so read the decision.

It is clear that Congress intended that the general rule should be that a common carrier should not charge more for a shorter than for a longer haul over the same route in the same direction. It was seen, however, that occasions would doubtless arise justifying, if not demanding, exceptions to this general rule, and it was therefore provided that:

"Upon application to the Interstate Commerce Commission, such common carrier may, in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances."

Now the thing that Congress was insisting upon as a condition precedent to the creating of an exception to the general rule was not the making of an application by the carrier, but the *granting of consent by the Commission.* It was the judgment of the Commission, after investigation, that was to warrant the setting aside of the statutory rule, and the provision for the making of an "application" was intended merely as a means of securing such investigation and judgment. The making of an application by the carrier was of the form, perhaps, but not of the substance, of the proceeding; it was a mere means to an end, and should not, in my judgment, be confounded with the end itself. The large purpose of the amendment to section 4 was to substitute the *judgment of the Commission* for that of the carrier, as to the necessity for a violation of the long and short haul clause of the Commerce Act. The amendment took "from the carriers the deposit of public power previously lodged in them and vested it in the Commission as a primary instead of a reviewing function." Intermountain Cases, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408.

If no order of the Commission providing for an exception to the general rule respecting the long and short haul clause is valid unless preceded by an "application" therefor, then, in logic, the application must have been for the order as precisely made, and in consequence the Commission could make no order respecting relief from the controlling provisions of section 4 save such order as had been specially "applied" for. The net result of this would be to reduce the Commission almost to a mere automaton, with no power save to say yes or no. This illy comports with the "primary instead of a reviewing function" vested in the Commission by the amendment, and is, as I read it, in direct contravention of the holding in the Intermountain Cases, supra.

Indeed, the Supreme Court in those cases, quoting the language of section 4 immediately following the clause just referred to, say that the section as amended gives to the carrier the right to apply for authority to charge less for the longer haul, "and gives the Commission authority, from time to time, 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.'" The Commission could hardly be said to be vested with the right to exercise its authority "from time to time," if such exercise was absolutely dependent, as held in the majority opinion herein, upon the filing of an "application" with it.

Moreover, by section 13 of the Act to Regulate Commerce as amended at the same time section 4 was amended, it is specially provided:

"* * * And the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before said Commission by any provision of this act, or concerning which *any question* may arise under *any of the provisions of this act*, or relating to the *enforcement of any* of the provisions of this act. And the said Commission shall have the same powers and authority to proceed with *any* inquiry *instituted on its own motion* as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to

the matter or thing concerning which the inquiry is had excepting orders for the payment of money." (Italics mine.)

Language could hardly be more comprehensive. If this section does not give to the Commission primary and plenary authority to do the thing complained of in this proceeding, it is difficult for me to conceive of language possessing that efficacy. The suggestion has been made that because the word "application" was not used along with "complaint" and "petition" in the last sentence that therefore there was no intention to accord to the Commission independent authority to conduct an investigation in any of the instances where provision was made for the filing of an application. It is a sufficient answer to this, however, to say that the first sentence quoted contains no such qualifying phrases, and of itself would seem to afford ample authority for the action under review, even if the last sentence, containing the reference to "complaint" and "petition" and omitting any reference to "application," be completely disregarded. In addition, "application" and "petition" are synonymous terms; in fact, the Century Dictionary defines a "petition" as a "written *application*" for relief. It were in furtherance of the general remedial spirit of the Act to Regulate Commerce to construe, if such construction be necessary, the word "petition" to include and embrace "application."

Section 15 of the Commerce Act, as amended at the same time as above indicated, provides:

"That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, *or after full hearing under an order for investigation* and hearing made by the Commission *on its own initiative (either in extension of any pending complaint or without any complaint whatever)*, the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are *unjust or unreasonable or unjustly disciminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the* maximum to be charged, and *what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and* observe the regulation or practice so prescribed." (Italics mine.)

This provision is all-comprehensive in its language and purpose, and to me is in emphatic disaffirmance of the position assumed in the majority opinion. It seems to have been so considered in a proceeding somewhat analogous to this reported in Philadelphia & R. R. Co. v. United States (D. C.) 219 Fed. 988, 991, 992.

There is no requirement anywhere that notice of the application referred to in section 4 shall be given to any one. The hearings had and orders made in the proceeding under consideration could and

probably would have taken exactly the same course they did take even if the formal "application" whose absence is now relied on, had been made. The absence of any requirement of notice, is not of course an argument that an application should not have been made, but it is peculiarly persuasive with me to the effect that Congress did not intend that the making of an application for relief should constitute a jurisdictional prerequisite to the granting of relief. If it had, it would have provided for some notice of the application to be given. The absence of any provision for notice, the empowering of the Commission to afford relief "from time to time," together with the comprehensive phraseology of section 13 and 15, supra, lead me to conclude that the hearing, investigation, and order countenanced by the act are to be had "upon application" of the carrier, or on the initiative of the Commission as the circumstances may demand.

Conceding, however, that the making of an application is a jurisdictional prerequisite to the charging of a higher rate for a shorter haul, the filing of the tariffs with the Commission by the carriers involved, pursuant to the order of April 30, 1915, could in itself reasonably be construed as such application. (It appears from the record that such tariffs were filed, and, being approved by the Commission, have been officially promulgated.) Considering the fact that no notice of the application has to be given, it would seem that an application made subsequent and pursuant to a hearing, if approved by the Commission, would possess all the efficacy of one made before the hearing. If the carriers had not filed their tariffs pursuant to the order of April 30th, and had themselves objected to that order, a much stronger case than is here would have been presented. This, as I read it, however, was the course followed in the Intermountain Cases under analogous circumstances, and yet there the order of the Commission was expressly affirmed.

In the only case cited in the main opinion (235 U. S. 314, 322, 35 Sup. Ct. 113, 59 L. Ed. 245) the carrier was objecting to a ruling of the Commission holding a certain rebilling privilege violative of the Act to Regulate Commerce. In reversing a decision of the Commerce Court overruling the Commission, the Supreme Court held that under section 4 as amended no such rebilling privilege was valid until the consent of the Commission to that end was obtained. There was no case, as here, of such consent having been given, and in consequence I cannot see anything in the decision declarative of the proposition that such consent, if given, would have been inefficacious if it had not been preceded by a formal application.

In the case at bar it stands as indubitably true that a hearing and extended investigation was had by the Commission, and that their conclusions embraced in the order complained of were the result of most careful consideration. The evidence upon which the order was based is not before us, but the sworn answer of the Commission is to the effect that the order was made upon ample evidence, and on this hearing we must assume such to be the case.

Section 13 of the Commerce Act affords ample machinery for the Commission upon application to it to remedy any injustice done to

these complainants. They have made no such application and in that behalf have never submitted their claims or exhibited the prejudice suffered by them to the Commission. They were not parties to the proceedings leading up to the order of April 30th and were not represented thereat. It may be that as to them the order is full of injustice; but if such be the fact it must be assumed that upon a showing thereof, pursuant to the terms of section 13, complete relief would be afforded them by the Commission. Until at least they have made the application and have met with refusal, they are not in a position to ask relief at the hands of this court.

In my opinion the application for temporary injunction should be denied.

SUNNY BROOK ZINC & LEAD CO. v. METZLER et al.

(District Court, Southern District of New York. March 13, 1916.)

1. TRUSTS ⟸231(1)—TRUSTEES—DUTIES OF.
A trustee, or one occupying a fiduciary position with respect to property, has no right to obtain the property for himself, as against the beneficiary, by any device whatsoever.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330, 335; Dec. Dig. ⟸231(1).]

2. TRUSTS ⟸102(1)—CONSTRUCTIVE TRUSTS—CREATION.
Where the manager of a mining company, on foreclosure of a mortgage on the mining property, acquired it under an option secured from the mortgagee, he holds it subject to a constructive trust in favor of the company.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 153; Dec. Dig. ⟸ 102(1).]

3. TRUSTS ⟸372(3)—CONSTRUCTIVE TRUSTS—ACTIONS—EVIDENCE.
In a proceeding to charge the manager of a mine with a constructive trust, it appearing that he procured the property after foreclosure of a mortgage, evidence *held* insufficient to show that he misrepresented to his principal the amount for which the property could be purchased under an option given by the mortgagee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 602, 603; Dec. Dig. ⟸372(3).]

4. TRUSTS ⟸102(1)—CONSTRUCTIVE TRUSTS—OPTION.
Where the manager of a mining company who had been told to buy in the property if he desired, it having been foreclosed under mortgage, undertook, at the request of the principal stockholder, again to represent the company, he resumed his old obligations, and could not acquire the property as against his principal.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 153; Dec. Dig. ⟸102(1).]

5. MORTGAGES ⟸596, 597—FORECLOSURE—REDEMPTION.
Under Rev. St. Mo. 1909, § 2829, giving a mortgagor the right to redeem property sold under mortgage foreclosure within one year if he gives a bond, the bond must be given promptly, and a delay of 40 days is a waiver of any right.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1742–1752; Dec. Dig. ⟸596, 597.]

6. MORTGAGES ⟸591(1)—FORECLOSURE—REDEMPTION.
While a mortgagor is given a statutory right of redemption within a year, Rev. St. Mo. 1909, § 2829, does not destroy the old common-law right of redemption when trustee buys in for himself under a power of sale.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1699; Dec. Dig. ⟸591(1).]

7. MORTGAGES ⟸596, 597—REDEMPTION—LACHES.
Where the owner of mining property, knowing that the trustee had bought in the property for himself or for the benefit of the mortgagor, delayed for over two years in asserting any right of redemption, such right was waived, the property in the meantime having greatly enhanced in value, for such right of redemption may be lost by delay; this being particularly true in case of mines, which are speculative in value.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1742–1752; Dec. Dig. ⟸596, 597.]

8. TRUSTS ⟸102(1)—CONSTRUCTIVE TRUSTS—RIGHTS IN RESPECT TO.
Where the manager of a mining company, whose property was sold under mortgage foreclosure, was told to acquire the property for his own benefit if he desired, and the company ceased any efforts to redeem, the manager, having acquired the property from the mortgagee, who bought it in, does not hold it subject to any constructive trust, the company's right of redemption having been waived.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 153; Dec. Dig. ⟸102(1).]

In Equity. Bill by the Sunny Brook Zinc & Lead Company against Zade A. Metzler and others. Bill dismissed, with costs.

This is a suit in equity to impress a trust upon certain real property in Joplin in the state of Missouri, held by the defendant formerly belonging to the plaintiff. The property, which was a mine with attendant machinery, was conveyed to the plaintiff on June 27, 1912, at which time it was already incumbered with a purchase-money mortgage in the face value of $24,000 in favor of one Luke, the vendor upon a former sale. The plaintiff's vendor was itself a mining company, known as the "Hackett Mining Company" which had operated the mine unsuccessfully and had come to an end of its resources. Its capitalization was $121,000, which was represented in the purchase or reorganization by the plaintiff by a substantially corresponding amount of debenture bonds, issued to the former stockholders of the vendor. In order to clear away the debts of the vendor one Isaac Rosenfield advanced to the plaintiff $25,000 upon the security of a mortgage, which was junior to Luke's mortgage, but prior to the debenture bonds. The plaintiff's own capitalization was $121,000, of which Rosenfield or his agents held 51 per cent. for control; this being a condition of his advance. At the time of the conveyance, therefore, the property stood incumbered by Luke's mortgage, then reduced to $18,000, Rosenfield's mortgage of $25,000, the debenture bonds of $120,000, and the capital stock of $121,000. In November, 1912, the company issued another mortgage for $5,000, not all of which, however, was paid in. The amount of this incumbrance is not definitely stated.

The defendant Metzler had been a stockholder in the Hackett Mining Company, and with parties affiliated in interest with him held over $100,000 of the debenture bonds, and a substantial part of the minority stock. He was a director of the company, the sole local manager at Joplin, Mo., during the operation of the mine as hereinafter set forth, its treasurer, with power to draw money upon his own name alone, and the only person interested in the property in the state of Missouri.

The original purchase from Luke had been for $36,000, and the Hackett Mining Company had put upon it machinery and fixtures of about $80,000 or $90,000 in value, which had not been substantially impaired by use. However, the property was always run at a loss. Hackett, after whom the vendor

company was named, had run it much into debt, though he was thought to be a capable engineer, because the cost of recovery much exceeded the price that could be obtained for the concentrates. After the purchase by the plaintiff, the ill success continued until in January, 1913, at which time, as it had become apparent that under Metzler's management the mine was a failure, it was leased for a period of some months to the Federal Lead Company, which was thought to have exceptional capacity to exploit the mine successfully. Nevertheless, after some five months' trial, the mine continuing to run behind, the Federal Lead Company announced that it would not continue with the lease, and all operations ceased. Meanwhile an installment of $6,000 upon Luke's mortgage was coming due on July 1, 1913, which it was necessary to meet to avoid foreclosure.

In this posture of affairs, there being substantially no cash in the treasury, Metzler came to New York to try to raise money, and first visited Rosenfield, the president, a man of ample means. Rosenfield told Metzler that he had put all the money into the property that he wished, and that he refused to advance anything, except $100 to cover the expenses of an effort by Metzler to get a better sale for the machinery than at auction under foreclosure. Thereupon Metzler saw all the directors, but Hollander and the two Bernheimers, who merely represented Rosenfield upon the board, and tried to get them to rescue the company from its embarrassment. They were unwilling to help, and Metzler tried to persuade all the New York stockholders within reach to make some advances, but also without result. He had therefore tried out nearly all the stockholders, as well as Rosenfield, the majority owner. Finally, he left New York for Joplin, with the understanding that he would try to sell out the property for what he could in advance of the foreclosure sale, sharing with Rosenfield anything above the mortgage to Luke. Rosenfield denies this agreement, but it is extremely probable that something of the kind took place. In any case, there can be no doubt that Rosenfield deputed Metzler to try to sell the property at private sale, in the hope that it would thus bring more than it would at foreclosure. That he should, in addition, have agreed to share the balance the plaintiff claims to be the insinuation of a corrupt bargain, but there is no reason to think that any one could very seriously have supposed that the property at that time would bring more than the sum of the three mortgages. If, not, it is not apparent that the agreement was in any way in fraud of the plaintiff, though it was undoubtedly of an informal character. This consideration should be borne in mind throughout the negotiations between Metzler and Rosenfield in which they treated the property as disposable between them. On his return to Joplin Metzler in pursuance of his agreement made serious efforts ineffectually to sell the machinery, and, finding that impossible, was obliged to let it go in foreclosure.

The trustee under Luke's mortgage was one Boggess, a banker in Joplin, and the owner of practically all the stock in the Boggess Land Company and upon the foreclosure sale, August 15, 1913, the property was bid in by the company. Before the sale Metzler obtained an option from Boggess of 10 days within which he could redeem from the mortgage and reclaim the property. Acting upon the strength of this option, Metzler entered into a contract with the United Iron Works to purchase all the machinery from the land for $16,000, which he hoped might induce Rosenfield to advance the sum of $18,000 sufficient to redeem the whole mine from the mortgage. It seems fairly clear that at this time Metzler intended to buy in the property for himself and Rosenfield to the exclusion of the plaintiff, but his plan miscarried because Rosenfield declined to accept the notes of the United Iron Works, which were to be given in part payment, and advised Metzler in the most categorical way that he was free to take over the property and make from it for himself anything that he could. In consequence Metzler's option from Boggess expired without any result. Shortly thereafter, and early in September, 1913, Rosenfield seems to have changed his mind and wired Metzler that if he could arrange the matter with the United Iron Works and would share equally with him in paying the balance, he would take it on, great care to be exercised to secure Rosenfield even against the stockholders. Although Metzler hoped that he would be able to get an extension of his option from Boggess, it was in

fact too late, because Boggess for Luke on August 30, 1913, had sold the machinery to the United Iron Works, and the transaction was off.

It is the law of Missouri by statute that if a mortgagee under a mortgage buys in the property, the mortgagor may redeem within the year, if he gives a bond promptly to secure the mortgagee. Also the courts of Missouri recognize that a trustee under a mortgage stands charged with the usual liabilities of a trustee towards the mortgagor as well as the mortgagee, and holds any property purchased by him at such a sale charged with the trust. Rosenfield learned of the first provision from Spencer, Graystone & Spencer, attorneys of Joplin, as early as July 9, 1913. On September 16, 1913, Metzler, by letter, explained to Rosenfield that his lawyers had advised him that Luke had no right to take the property and sell it off, and that not only was he subject to a suit for redemption, but that an action might also lie for damages. Rosenfield at once took up the matter with Spencer, Graystone & Spencer, who wrote him on September 29, 1913, that Metzler had had an agreement with Luke and Boggess by which he should have till August 25, 1913, in which to sell off the machinery to the United Iron Works and redeem the property; that the agreement had lapsed; and that Boggess, having bought it in by his company, had sold the property. Rosenfield answered on October 2, 1913, showing his knowledge of the purchase of the property on foreclosure by the Boggess Land Company, and of the rights arising therefrom, and suggesting that Spencer, Graystone & Spencer take the case on a contingent fee. Spencer, Graystone & Spencer wrote on October 16, 1913, refusing to take the case on that basis.

On October 11, 1913, Metzler had an interview with Luke, in which he says he agreed to pay him $3,060 by a note and to cancel a claim he had against him for $2,000, for which Luke agreed to sell him the land. On October 13, 1913, the Boggess Land Company conveyed to Virginia Metzler, Metzler's mother, who in turn conveyed to him two days later. The plaintiff insists that the claim of $2,000 is spurious, and that the total consideration was the note in question. The matter is considered in the opinion which follows. It does not appear that Rosenfield or the plaintiff learned of the conveyances to Virginia Metzler, and from her to Metzler, for a period of over 18 months, that is, until the end of March, 1915. Meanwhile, the value of the mine had greatly changed, owing to the demand caused by the great war. From October 25, 1912, till February, 1913, when the Federal Lead Company took a lease, the average cost of recovery from the mine had been over 80 cents a ton, and under the Federal Lead Company it had cost over $1. The prices in New York for zinc ores continued through 1913 and until the very end of 1914 at less than 60 cents, so that any operation made loss certain. At the end of the year the price of ore began to rise, and in January, 1915, they had reached 65 cents, in February, 1915, 75 cents, after which there was a reaction. In May and June, 1915, they shot up to nearly $1.40 a ton, and with variations have remained at extraordinarily high prices ever since. Early in 1915, and apparently upon the prospect of this rise, Metzler effected a lease of the property, and has been in receipt of substantial royalties ever since.

After some correspondence not necessary to state, the plaintiff filed this bill on July 21, 1915. Metzler alone of all the defendants has been served.

Hollander & Bernheimer, of New York City, for plaintiff.
Louis B. Eppstein, of New York City, for defendant Metzler.

LEARNED HAND, District Judge (after stating the facts as above). The case has been tried upon the assumption throughout that Rosenfield was at no time acting in fraud of the plaintiff, and that notice to him or to his representatives, Bernheimer & Hollander, was notice to the plaintiff. The suit is not by a minority stockholder, seeking to avoid the consequences of the fraudulent acts of its directors; indeed no stockholders appear to be interested in the case save the Rosenfield majority, and I shall therefore assume that Rosenfield

was throughout acting in behalf of the plaintiff. This is indeed clearly not the fact, because his telegram of September 4, 1913, was, beyond question, part of a negotiation intended to be on his own behalf and to secure the property for Metzler and himself to the exclusion of the company. It would be a different question altogether if the plaintiff should take the position that after the telegram in question, no notice to Rosenfield could be notice to the company. For obvious reasons the plaintiff does not take that position, and, there being no evidence that any one in interest objects to this, I must accept the conduct of the cause as presented by the recognized authorities now in control of the plaintiff.

[1] The plaintiff's theory is that Metzler, being a fiduciary, had no right to get the property for himself by any device whatever. This is too well established to require the citation of authorities; the question is of its application. When Metzler went to Joplin in July, 1913, he had absolute knowledge that no money would be forthcoming to redeem the property from the mortgage. His only duty was to get the best sale he could before foreclosure, or to protect the property at foreclosure, if he failed. He could not sell in advance, and on the day of the foreclosure he had no duty but to protect the equity of redemption so long as it lasted. He is criticized for not bidding at the sale, but his arrangement with Boggess before the sale, by which he got an option till August 23, 1913, afterwards extended till August 25, 1913, was all he could do. He had nothing to bid with, no cash, no contract, until his agreement of August 19, 1913, with United Iron Works, and I can see no purpose in his being present and standing idly by at the auction. He had done all he could in getting the option, though probably he intended to hold the property for himself and Rosenfield alone, a purpose certainly not technically regular, but, in view of the liens upon the property, not inconsistent wth substantial honesty.

[2, 3] However, it is quite apparent that had he got the property under that option, he would have held it charged with a constructive trust in favor of the plaintiff. A question arises as to the actual terms of this option, whether $18,000, as he advised Rosenfield, or $16,000, as the plaintiff maintains. That the amount due upon the mortgage was $18,000, and that Luke always insisted that he must get back the full amount of his debt, admit of no dispute. The reasons for doubting whether the option was for $16,000, rather than $18,000, are that in the letter of Spencer, Graystone & Spencer to Rosenfield of September 29, 1913, they say that Metzler had an agreement with Boggess for a deed upon paying "something over $16,000," and that later it was agreed, while Graystone was present, that the deed should pass upon payment of "something over $16,700." It is impossible to reconcile this statement with Boggess' determination to get back the amount due, unless the phrase "something over" includes $1,300, but I see no difficulty in supposing that it might do so. If not, Metzler must be supposed to be stealing $1,300 from Rosenfield, a purpose which the plaintiff says it corroborated because of his insistence upon Rosenfield's keeping the matter secret from Luke, who would only

deal with Metzler personally, though Luke swears that Metzler always professed to be dealing for his principal. In Metzler's wire to Luke of August 21, 1913, occurs the phrase:

"Now if you really want to help me, so that no one but myself will be benefited, this is the time to show it."

I can see no reason for such language if Metzler's version is not true, and I can see a motive of self-protection on Luke's part, who is a defendant, to represent that he never intended to cut the plaintiff out of the benefit of the transaction, and supposed that the plaintiff's rights had terminated when he sold to Metzler.

This does not, however, alone settle the question of the amount of the option which Boggess gave Metzler, though it takes from it the most sinister feature. I do not think that Metzler's wire to Luke of August 21, 1913, just mentioned, should be taken as indicating that the amount of the option was $16,000 rather than $18,000. He was interested in getting Luke to accept the notes of the United Iron Works in place of cash, and he was talking of that. Luke's answer of September 3, 1913, was addressed to this wire and may have had in mind only the failure to produce the cash. Yet the consideration mentioned in the deed somewhat corroborates Graystone's recollection that the price was $16,700 because Luke had realized $13,600 from his own sale of the machinery which would have made the proper balance $3,000. On the other hand, Metzler's story that the eventual sale to him involved also the settlement of his claim against Luke for $2,000 is undisputed, though Luke was not asked about it.

It must be conceded, therefore, that the price of the option is not free from some doubt, yet on a consideration of the situation as a whole, I accept Metzler's story. There can be no doubt, I think, that until Rosenfield's refusal on the 22d, Metzler was exceedingly anxious to get back the property, which he had given every evidence that he thought valuable, and to serve which he had tried his best. He was also in desperate straits to finance the United Iron Works notes, and eventually failed because he could not. It seems to me most improbable that he would have loaded the terms in his wire to Rosenfield with an extra $1,300, which he meant to steal from Rosenfield when he was in such an extremity. Had it not been for Graystone's letter, the matter would have been clear enough, and as I have said, the language of that letter admits of the existence of an option of $18,000.

Metzler is again criticized for failing to tell Rosenfield of his option in season, but the contract with the United Iron Works was dated August 19, 1913, and already on the 18th Metzler was trying to get into touch with Rosenfield. His wire of the 20th told the whole truth to his principal as he knew it, and Rosenfield's answer of the 22d relieved him absolutely of any further liability; it gave him a free hand to get the property for himself. Nothing in the law prevents a fiduciary in such a case to buy for himself; it would be absurd if it did.

[4] The option expired on the 25th, and Metzler thereafter rightly tried to interest Higginbotham, but unsuccessfully. Then on September 2, 1913, Rosenfield changed his mind and took up the negotiations

once more. I agree with the plaintiff that Metzler consented to act again as a fiduciary, and that in so doing he assumed the old obligations and became subject to the same disabilities. His last letter of September 16, 1913, shows that he deemed himself to be still acting for the company.

[5-7] His duty, being to try to redeem the property from the mortgage, was necessarily limited by the rights which the plaintiff still had in it. Under the law of Missouri, when a mortgagee buys in under his power of sale, the mortgagor has the right, within a year, to redeem if he gives a bond, R. S. 1909, § 2829. But this bond must be given promptly, and 40 days' delay has been held too much, Moss v. King, 212 Mo. 578, 111 S. W. 589. Rosenfield learned of this right as early as July 9, 1913, from Spencer, Graystone & Spencer, and allowed the right to lapse. However, that right is not exclusive of the old common-law right of redemption when a trustee buys in for himself under a power of sale. Arnett v. Williams, 226 Mo. 109, 125 S. W. 1154. Such a right had long been recognized in Missouri (Thornton v. Irwin, 43 Mo. 153), and applied equally whether the mortgagee was donee of the power, or some third person. It is not necessary to consider whether the statute is exclusive if the mortgagee is donee because in the case at bar there was a trustee, and it certainly was not.

The plaintiff's rights, therefore, were limited to a redemption in case the trustee under the mortgage bought in for himself, which Boggess did through his company. Nor does it make any difference that the purchase was in fact for Luke, the mortgagee, who had transferred to Boggess by a collusive sale of the notes. These rights arise from Luke's relation to the property, but a quite separate right arises from Metzler's dealings with it. As Metzler had again assumed the character of fiduciary, I think he could not buy in the property until he was discharged of his obligations, and that his purchase of October 13, 1913, must be judged upon that basis. I shall consider each aspect separately.

The plaintiff's rights against Luke were, of course, subject to the usual rule of equity, that inaction might make their subsequent assertion unjust. The statute itself fixes a year even when a bond is given, but the Missouri cases recognize a common-law limitation upon the common-law right (Landrum v. Union Bank, 63 Mo. 48; Kitchen v. St. Louis, etc., Ry. Co., 69 Mo. 224, 264), and the rule is well settled generally (Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Hoyt v. Latham, 143 U. S. 553, 12 Sup. Ct. 568, 36 L. Ed. 259; Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134; Clegg v. Edmondson, 8 De G. M. & G. 787). In considering the application of this rule the first question is the plaintiff's knowledge of the facts. The only relevant facts to its right to redeem were that Boggess, the trustee, had bought in the property by his company, and that he had done so in the interest of Luke; indeed the latter fact is unnecessary. Metzler's letter to Rosenfield of July 16, 1913, asserted that there would be no doubt of showing that the conveyance to Boggess of the notes was an evasive subterfuge, and his

letter of September 16, 1913, left little to conjecture. Rosenfield's two letters of September 25 and October 2, 1913, to Spencer, Graystone & Spencer show that he had a quite correct understanding of the fact that Boggess was acting for Luke, and that the company was in the control of one or both. Spencer, Graystone & Spencer's letter of September 29, 1913, leaves it without question that all three were in a community of interest, and it also informs Rosenfield that the price of the option was "something over $16,700" which, if it had been true, would have been information of the only fact not yet disclosed. It is clear that it was not from any lack of information that Rosenfield failed to proceed, for all the relevant facts were before him, but because he did not rate the value of the property highly enough to be willing to risk any more money in it. What he wanted, and all that held him back, was that he should get some lawyer who would take the case upon a speculative basis. He shows the most certain determination to abandon the claim if he could not get it prosecuted for nothing.

It is quite true that the delay in the case amounts to less than two years, and that in the cases cited it was much longer, but the rule is in no wise rigid or fixed; it depends in each case upon what equity and fair dealing require. In Twin-Lick Oil Co. v. Marbury, supra, pages 592 and 593 of 91 U. S., 23 L. Ed. 328, where the delay was four years, the court says that in cases such as mines, where the value is variable and the variations sudden, the time may be short; the same is held in Clegg v. Edmondson, supra. The case at bar is an extreme instance of the rule. Nothing could be clearer than the determination of the plaintiff to abandon the property as soon as it found it could not get the necessary work done for nothing; the case is not one of mere inaction, but of a proposed suit, abandoned because the property was thought valueless. Mines are notoriously speculative and men should be required to take their position regarding them with some consistency if one is to have the least security in dealing with them. To allow the owner of an equity of redemption after sale to lie back for nearly two years and then to move only when the whole situation has changed is to let him gamble on the mine at the expense of the mortgagee. It is not equity, but injustice.

[8] The remaining question is whether Metzler's purchase of Luke's title changes the situation and gives the plaintiff greater rights against Metzler than it had against Luke. Had Metzler waited until July 1, 1915, the plaintiff's rights being then extinguished, and his own possible duties being long since ended, he could have bought the land free from any obligation. Robertson v. Chapman, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592; McKittrick v. Arkansas Central Ry. Co., 152 U. S. 473, 497, 14 Sup. Ct. 661, 38 L. Ed. 518. The question depends, I think, upon whether Metzler had still any duty to the plaintiff which his purchase prevented him loyally from fulfilling. A trustee may not buy in an adverse title, while he still has any duties to discharge, because that prevents his loyal adherence to his beneficiary. On September 20, 1913, Rosenfield wrote Metzler that he was unwilling to spend any money upon a suit, and that if Spencer, Graystone & Spenc-

er would not take the suit upon a contingent fee, which in fact they would not do, he (Metzler) was to drop it as far as Rosenfield was concerned. What had Metzler to do further? He had told his principal all the facts, had urged a suit, and been told that no money was forthcoming. Was he not justified in assuming that his duties were at an end, and that his hands were free? Must he assume that Rosenfield would, a second time, revoke his purpose and seek to recover the property? He was not dealing with children who are of one mind to-day and another to-morrow. He did what any man would have done, who supposed he was dealing with responsible persons, and concluded that the thing was over, and that he was free. So he bought the property on October 13, 1913, having learned presumably that Spencer, Graystone & Spencer would not take the case for nothing. On October 20, 1913, came the next letter, suggesting that the case was still open, and that some of the facts were undisclosed. What again was he to do? Certainly, he acted as any one would have acted, that is, as though with such infirmity of will he could not deal in any way whatever, and that if they wished to do anything, they had the facts to begin. I confess I cannot see how any one could have had better warrant for his conduct or come out with cleaner skirts than he.

Now when after nearly two years of inaction Rosenfield again seeks to press the cause, the situation has totally changed. Metzler's blind and unreasonable confidence in the property has, by a surprising windfall, become justified, and the scepticism of all the others concerned has been disappointed. They seek by this belated assertion of their rights to take from him the reward of his not very intelligent, but persistent faith, in the mine. It seems to me the extreme of injustice that they should be allowed to do so.

Bill dismissed, with costs.

In re PIERCE, BUTLER & PIERCE MFG. CO.

(District Court, N. D. New York. March 20, 1916.)

1. NEWSPAPERS ⟸5(2)—PUBLICATION—COMPENSATION—LEGAL NOTICE.

Where a trustee in bankruptcy as an officer of the court sends to a newspaper a legal notice of sale of property which the court has ordered published, there is a necessary implication that such notice should be published as a legal notice, and the publisher is not, in the absence of any direction, entitled to infer that the notice should be published as a display advertisement, and to collect compensation on that basis.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 23, 24; Dec. Dig. ⟸5(2).]

2. NEWSPAPERS ⟸5(2)—PUBLICATION OF NOTICE—"EXPRESS CONTRACT"—"IMPLIED CONTRACT."

"Express contracts" are where the terms of the agreement are openly avowed and uttered, while "implied contracts" are such as are presumed by the law from the nature of the transaction; therefore, where a trustee in bankruptcy, under order of court, sent for publication to a newspaper a legal notice of a sale of property, there is an implied contract that the notice would be published at the customary rates for publication of such notices, and the newspaper company, which was directed in case

of doubt to consult the trustee, cannot, having published the notice as a display advertisement instead of as a legal notice, recover extra compensation.

[Ed. Note.—For other cases, see Newspapers, Cent. Dig. §§ 23, 24; Dec. Dig. ⟸5(2).

For other definitions, see Words and Phrases, First and Second Series, Express Contract; Implied Contract.]

In Bankruptcy. In the matter of the bankruptcy of the Pierce, Butler & Pierce Manufacturing Company. Application by trustee to have fixed the amount he should pay the Tribune Company of Chicago, Ill., for printing notice of sale and notice of adjournment. On exceptions to the report of the special master. Report disapproved, and compensation in a less amount allowed.

This is an application to the court by the trustee in bankruptcy to have fixed the amount he shall pay the Tribune Company of the city of Chicago, Ill., for printing a notice of sale and notice of adjournment thereof in the Chicago Tribune printed and published in that city. The matter comes up on the report of a special master to whom it was referred by the court for examination, testimony, and report of the facts, together with his conclusions thereon. The special master reports certain facts, and then that: "In my opinion, an order should be made by the court, directing the payment of the bill as rendered for $1,384.56 and the expense of the hearings before the special master." The trustee in bankruptcy attacks this report, and asks the court to disregard and set aside this conclusion and fix the amount that should be paid at a just and fair compensation.

Wilson, Cobb & Ryan, of Syracuse, N. Y., for claimant.

N. P. Bonney, of Norwich, N. Y., and Wm. A. MacKenzie, of Syracuse, N. Y., for trustee.

RAY, District Judge (after stating the facts as above). In the course of the administration of the bankrupt estate of Pierce, Butler & Pierce Manufacturing Company, it became necessary to sell and dispose of the assets of the bankrupt company, consisting of parcels of real estate in various localities, with a manufacturing plant at Syracuse, N. Y., and raw material, merchandise, machinery, patterns, tools, and equipment going with the plant. The bankrupt company had acquired large property interests in the city of Chicago, or that vicinity, and in authorizing the public sale of the assets of the bankrupt, real and personal, the court in its discretion deemed it necessary and proper to direct that the notice of sale be published in more than one newspaper, and therefore directed that it be published in the Post Standard at Syracuse, N. Y., where the main business plant and offices of the bankrupt were situated, and also once each week for three weeks in a newspaper regularly issued and having a general circulation in the cities of Chicago and New York.

The notice of sale, which was an ordinary legal notice of sale, headed:

"United States District Court, Northern District of New York. In the Matter of Pierce, Butler & Pierce Manufacturing Company, Bankrupt. In Bankruptcy No. 5460. Notice of Sale"

—recited in the very beginning that notice was given pursuant to an order of the court, duly entered in the above-entitled proceeding on

the 29th day of June, and, after giving the time and place of sale contained a description of the property to be sold, and was dated June 30, 1914, and signed "James P. Hill, Trustee." This was a legal advertisement pure and simple, and so showed on its face. This notice was forwarded on the 30th day of June, 1914, to the Chicago Tribune, Chicago, Ill., for publication therein accompanied by the following letter:

"James P. Hill, Trustee,

"Pierce, Butler & Pierce Mfg. Co., Bankrupt,

"821 Onondaga County Savings Bank Bldg.

"Syracuse, N. Y., June 30, 1914.

"The Chicago Tribune, Chicago, Ill.—Gentlemen: I hand you herewith notice of sale of the property and assets of the Pierce, Butler & Pierce Manufacturing Company, bankrupt. This must be published once a week for three successive weeks, beginning Thursday July 2d. Do not fail to get it into the Thursday issue of this week. Forward the bill at once to James P. Hill, trustee, 821 O. C. S. B. Bldg., Syracuse, New York, and we will remit promptly.

"If any question comes up about the notice call me on the phone at the office of William A. MacKenzie, O. C. S. B. Bldg., Syracuse, New York, Phone, Warren 619, and if I am not there ask for Mr. MacKenzie, or if you do not get him call me at 109J, Norwich, New York.

"To repeat the directions publish this notice in your daily paper once in each week during three successive weeks beginning Thursday July 2d and continuing Thursday July 9th, closing July 16th.

"Please acknowledge receipt by telegraphing at my expense.

"Very truly yours, N. P. Bonney, Attorney for Trustee."

This communication from Mr. Bonney as attorney for the trustee, as will be seen, contained no request or suggestion that the notice be published as other than an ordinary notice of sale of property made pursuant to an order of the court. There was no suggestion or request that it be put in any particular place in the paper, or published as a display or financial advertisement. The implied request was that it be published in the Chicago Tribune as and for just what it was on its face, a legal notice of sale of property. The notice was received by Mr. McFarland, the manager of the classified advertisements, but he, instead of causing it to be published as a classified advertisement, where the rates for publication would have been 20 cents per line, as established by the Tribune Company, turned it over to a Mr. Lowery, manager of the financial department of advertising, and it appears from the evidence that the established rates of the Tribune Company for publishing "display" advertisements was 40 cents per line in the daily paper reduced to 36 cents per line if the notice exceeded 2,500 lines. Mr. Lowery caused it to be published on the page in the paper preceding the classified advertisements, and on the page arbitrarily termed "display advertisements." One or both of these gentlemen states that while there were no directions or intimation that it was desired to give this notice other than ordinary position in the paper, they decided that, as it came from outside the state of Illinois, the trustee and his attorney, one or both, wanted a buyer for the property, and so decided to publish it on the so-called display advertisement page, where the rate, not counting deduction, would be just dou-

ble what it would have been had it been published on the classified advertising pages.

Later in the judgment of the court, adjournment of the sale being wise and necessary, six or seven short notices of postponement were published in the same paper, but the publication of the main notice was not continued under these adjournment notices. Prior to publishing the notice of sale and the notices of adjournment, the claimant, the Tribune Company, did not communicate with the trustee in any manner or with his attorney, although requested so to do "if any question comes up about the notice," and two persons, with their addresses, were named with whom communication could be had. After the publication was completed the Chicago Tribune rendered a bill for publishing the main notice July 2d, July 9th, and July 16th, at $480 for each publication, making $1,440, and for the notices of adjournment charging $20 for each of three publications, $14 for another and $5.40 for the publication of each of two of the adjournment notices, the two being published under "L. N. Class," and $12.40 for another, making a total bill of $1,537.20. A credit was given as follows:

"By credit to reduce rate of display advertising to 2,500 lines basis, 3,816 lines at difference of 4 cents per line, $152.64"

—leaving the net balance claimed $1,384.56. This bill the trustee refused to pay, on the ground that the charges were unreasonable, and that the notice and notices of adjournment should have been published in the paper as a legal notice, and at the rates fixed by the paper for publishing legal notices, and that the claimant had no right or authority to publish the advertisement as "display," if it published it at all, at least without first consulting or communicating with the persons named in the letter of June 30, 1914, above quoted. On the page where the original notice was published there is no statement, and nothing to show that it was published as a display advertisement and there is no evidence that there was any statement in the paper anywhere indicating or calling attention to the fact that such a notice was being published out of the usual order of legal notices. On the same page with one of the publications of the notice itself is a heading in the first column, "Wheat Stronger, Offerings Light," and in the heading of the next two columns we find "Board of Trade Transactions," and in the fourth, fifth, sixth and seventh columns, occupying the balance of that page, we find the notice in question. The heading of the notice:

"United States District Court, Northern District of New York. In the Matter of Pierce, Butler & Pierce Manufacturing Company, Bankrupt. In Bankruptcy No. 5460"

—is in larger type than ordinary, but the notice itself is printed in very small type.

The trustee has been willing to pay, and has offered to pay $500 for the publication of the notices, but this the Tribune Company refused to accept and filed a petition, setting out certain facts and praying:

"That an order be made herein, directing the said trustee to pay your petitioner the amount due it for said services so performed, with interest thereon

as aforesaid, and that your petitioner be allowed the costs and disbursements of this proceeding out of said bankrupt estate."

The matter was then referred as aforesaid for the purposes aforesaid.

The letters of July 23d, August 4th, August 12th, August 25th, September 1st, and September 10th, requesting publication of the adjournment notices, were accompanied by the notice to be published, each of which notices stated that it was in pursuance of an order duly entered in the matter, and stated, in substance:

"I hand you herewith copy of notice of adjournment of the sale in the Matter of Pierce, Butler & Pierce Manufacturing Company, Bankrupt. Please publish the same once this week and once next week and mail proof of publication and bill to James P. Hill, 821 O. C. S. B. Bldg., Syracuse, N. Y."

In each of these requests there was nothing said about the particular place in the paper in which same should be published, and there was no request that same be treated otherwise than as the ordinary legal notice of sale. On the notice of adjournment of August 5th was indorsed by the claimant a memorandum that it should be published on the financial page. This was true of the adjournment notice of August 12th, but on the adjournment notice of August 25th was indorsed by the claimant, "Legal," and on the adjournment notice of September 11th, was indorsed by the claimant, "Legal Notice."

Lowery, manager of the financial and industrial advertising departments of the Chicago Tribune, was asked, on direct:

"What directions, if any, as to what particular class of advertisement this was to appear in? A. I gave the order clerk instructions to run it in the financial and commercial section. Q. Why? A. Because that was the usual place for advertisements of that character. Q. Now tell us why it would run there instead of what you might call 'classified'? A. Well, advertisements of that character may be run either display or classified. If it is in the classified, it would have taken, at the time that advertising was sent in, the regular classified rate, which was 20 cents a line, daily, and 35 cents a line Sunday. Q. And in the display it came to— A. In the display it would take the rate of 30 cents a line, or of 40 cents a line daily, and 50 cents a line Sundays. * * * Q. Why did you direct that to go as display rather than as classified? A. The administrative rule of the Tribune provides that in all legal notices wherever the notice—and this is the custom which we follow—whenever the notice is published because of some legal requirement, and there is not the maximum amount of publicity required or desired, it shall go into the classified, but wherever the advertisement is placed for the publicity value of it, we put it in the financial and commercial section. * * * Q. You may proceed now? A. In this case it was apparent to me that the advertisement was not being placed in Illinois to comply with any legal requirement. Secondly, it was apparent that this advertisement was being placed for the purpose of selling real estate situated in other states, stocks, bonds, choses in action, equipment of the plant, and so on, and the ordinary and usual place, and the only place in the Chicago Tribune for such advertising is in the financial and commercial section."

The witness McFarland for the claimant, testified that he is the advertising manager, and has held the position five years, and was asked what they put in the classified advertisements, and answered all the character of the advertisements that come under the heading of classified index. He stated that he saw the letter inclosing the advertisement of this sale in question here, and was asked:

"Q. Would that [referring to classified index] include an advertisement such as was included in this letter from Mr. Hill's attorneys?"

His answer was, "Yes, sir." He said that he received the letter first, and then turned it over to Mr. Lowery, and heard nothing more of it. He then attempted to justify putting this notice of sale into the display column at double rates for the reason:

"A. Because it appeared from the copy that they wanted a buyer for this sale."

Nothing of this kind appears in the evidence from anything stated or written by the trustee in bankruptcy, and nothing of the kind appears in the notice itself, except as it is inferred from the fact that it was a notice of sale. McFarland further testified:

"Q. What class of advertisements go into the financial display as a rule? A. Merchandise advertisements, advertisements that required what we call attention getting power; that is, what is known as display advertisements."

There was no request from the trustee or his attorney that this notice of sale be published as a merchandise advertisement, which it was not, or that it was to be published so as to have "attention getting power." The witness further says that if a lawsuit was pending in Illinois, where under the law, in order to have a valid decree, there had to be an advertisement placed in a newspaper in Chicago, that advertisement would go in the classified columns of the paper. The witness also testified that this legal notice in one of the papers appeared on page 21, and that if it had appeared as a classified advertisement, it would have been on page 22 or one of the following pages.

There is evidence that for display advertising in this paper the charge of 36 cents per line is reasonable for Chicago. The question is, Was this claimant, the Chicago Tribune, justified in publishing this legal advertisement of this sale in the display columns on so-called display pages, instead of in the classified advertisements and on the classified pages where legal advertisements required by law to be published are published in the absence of special contract or special request?

[1] When this trustee in bankruptcy, an officer of this court, sent this notice of sale of property in a legal proceeding pending in and directed by this court, and which notice was ordered by the court to be published in the Chicago Tribune, the trustee expected, and had the lawful right to expect, as did the court itself, engaged as it was in administering the estate of the bankrupt, that the Chicago Tribune, if it undertook to publish the notice as requested, would publish it on the days mentioned and once in each week for three successive weeks, and that it would publish it as a legal notice of sale of bankrupt property required to be published by law, for it showed on its face that it was a legal notice to be published according to law, and one required to be published by law, as it recited that the sale had been ordered by the court in a pending bankruptcy proceeding. It was the duty of the Chicago Tribune, and necessarily implied if that company undertook the publication, that it would publish the notice if reasonably possible in that part of the paper devoted to the publication of notices of that

kind and description, to wit, legal notices of sale in legal proceedings and charge therefor the legal rates fixed by law, if any, for publishing legal notices, or, if there were none, then the rates for such a publication fixed by the custom and usage, or rules and regulations of the Chicago Tribune regulating rates, if any, and in this case 20 cents per line was the charge or rate so fixed. If any question arose as to this publication and its proper location in the paper, the trustee was to be notified. This was a specific instruction, and the Chicago Tribune was under no obligation to accept the work if unable or not willing to comply with this condition imposed by the trustee. In accepting the proposition or offer of the work to be done by it, the Chicago Tribune was not called upon to assume on conjecture, or justified in assuming on conjecturing, that the trustee in bankruptcy or the court had any purpose or desire other than that such notice should be published in that paper in due course on the days referred to, and in spaces or columns of that paper devoted to the publication of that class and kind of work, viz., legal notices in a pending proceeding in the bankruptcy court, and in accepting the work, in the absence of any special or specific agreement relating thereto, the Chicago Tribune impliedly undertook and agreed to charge therefor and accept its usual and customary price for publishing that class and kind of notices, and which in this case was 20 cents per line. That price and no other there was an implied promise to pay. It was, of course, implied and well understood that notice of the sale of the property was desired and intended to be given to all who might desire to purchase so far as possible, as otherwise the notice and its publication in Chicago would not have been directed by the court or trustee, but it was perfectly plain on the face of the papers to any intelligent mind that no special or extra or "display" notice was intended or desired, either generally or to any special or specific class of readers of the Chicago Tribune, by giving the notice a preferential or "display" position, as nothing to that effect was contained in either the letter of Mr. Bonney, the attorney for the trustee, or in the notice itself even by implication. But more than this, it is obvious, on inspection of the paper itself, that no unusual or special notice of this sale was in fact given to its readers by reason of the location, place, or page this notice occupied in the paper. No special attention was called to it in any way. In fact readers looking for bankrupt sales or other "legal sales" would look in the columns devoted to such notices.

If when an ordinary legal notice of sale of bankrupt property is sent to the publisher of a newspaper for publication he may assume, or in his own mind conclude and determine on his own surmises and understanding, without consulting or notifying either the court or trustee, that more than ordinary notice is desired and intended, and thereupon place such notice in some conspicuous or "display" place in the paper for which double the usual rates for the publication of such a notice is charged, a wide field for extensive newspaper charges and profits will be opened, and bankrupt estates and dividends therein correspondingly decreased.

[2] This court does not regard it necessary that a trustee in bank-

ruptcy shall affirmatively instruct newspaper publishers, to whom a legal notice of a proceeding in bankruptcy is sent for publication, that such notice must not be published in so-called "display" columns or on so-called "display" pages. The instruction is implied to publish it in the columns and on the pages devoted to the publication of legal notices. If a special contract is to be made or a special and extraordinary obligation or liability imposed, it is necessary that the minds of the parties meet, or that something be done and brought to the attention of the party to be charged, accompanied by such conduct or want of action on his part that assent may be inferred and found, or that such party be estopped thereafter to deny the implied contract arising from either conduct or silence. The advertising managers of the Chicago Tribune, acting alone, could not make a special contract with or impose an extraordinary liability on this trustee in bankruptcy, or the estate represented by him, by publishing this notice as "display," in the absence of something in the order for the work authorizing it or conferring discretion in the premises. The witness Lowery states that:

"Whenever the notice is published because of some legal requirement, and there is not the maximum amount of publicity required or desired, it shall go into the classified [20 cents per line], but whenever the advertisement is placed for the publicity value of it, we put it in the financial and commercial section. * * * In this case it was apparent to me that the advertisement was not being placed in Illinois to comply with any legal requirement. Secondly, it was apparent that this advertisement was being placed for the purpose of selling," etc.

This notice was published because of a legal requirement, the order of the court, and Lowery had no authority to determine otherwise, and it was not for Lowery, in the absence of the trustee, either to assume or try and determine the question how much or what degree of publicity was desired by such trustee. Presumably the trustee wanted such publicity as a notice of sale in a legal proceeding would give readers of legal notices of sale, not display advertisements, and presumably the notice was published to aid in securing a sale. I think all courts assume that the publication of notices of sale in legal proceedings are required by statute and by courts for the purpose of giving notice and to aid in securing a sale of the property. This is the "legal requirement" to be "satisfied" in all cases, and requires no action or determination on the part of a newspaper manager to determine it. If the trustee desired extra notice or "display advertising" at an added expense of some $700 due solely to location of the advertisement in the paper, it was for him, not the Tribune Company, to say. If a question arose in the mind of Lowery, that is, "If any question comes up about the notice," says the letter, it was incumbent on the Tribune to call up Bonney or MacKenzie as directed. An extra or added expense of $700 in publishing an ordinary notice of sale of bankrupt property is not a small matter, and creditors who are represented by the trustee have the right to have the estate economically administered.

"Express contracts are where the terms of the agreement are openly avowed and uttered at the time of the making of it. Implied contracts are such as reason and justice dictate from the nature of the transaction, and which, therefore, the law presumes that every man undertakes to perform." Morley

v. Lake Shore, etc., R. Co., 146 U. S. 162, 173, 174, 13 Sup. Ct. 54, 58, 36 L. Ed. 925; 4 Encyclopedia of U. S. Sup. Ct. Reports, 568.

Reason and justice in this case, from the very nature of the transaction and the fact that legal notices had a customary place in this paper at 20 cents per line, dictate that the Tribune should have accepted the publication at that rate, and that the trustee and this court had the right to assume that it would and did, if it published the notice at all. That was the customary and reasonable charge for publishing or printing such a notice on the classified pages, and in the classified columns where the notice belonged.

There is not a scintilla of evidence in the case that it cost the claimant here more to publish this notice on the pages where it was published than on the pages where it should have been published. This contract was partly written and partly implied, but no agreement can be implied that the notice might at the option of the Tribune Company, without notice to the trustee, be published as a "display advertisement" at double the rates charged for legal notices required by law to be published. There is no evidence the trustee knew of or had his attention called to any "display" columns, and it is certain there was no order or authority from this court or the trustee to give the notice extra or special location or display. No such contract was made, and no such contract can be implied. See generally 9 Cyc. 252, 270, 582, and cases cited. This court finds and holds on the entire evidence that 20 cents per line for the publication of these notices of sale was the fair, just, and reasonable value of the work done and service performed. There were 3,870 lines, and at 20 cents per line the amount of compensation should be $774. No tender was made, and for this reason interest on that sum will be allowed from November 1, 1914, or $64.50, in all $838.50.

The report of the special master is disapproved and not adopted or confirmed.

There will be an order allowing and directing the payment of the claim by the trustee at the sum stated, $838.50, from the assets of the estate.

EASTMAN KODAK CO. v. NATIONAL PARK BANK et al.

(District Court, S. D. New York. March 13, 1916.)

1. ASSIGNMENTS ⇐49—CHECK AS "ASSIGNMENT"—LETTERS OF ADVICE.

That simultaneously with the drawing of a check on a bank by a foreign depositor the depositor, pursuant to the usual practice between the parties, sent the common letter of advice which frequently goes with a foreign check, to the bank, directing it to protect the check, did not create an "assignment" in view of Negotiable Instruments Law N. Y. (Consol. Laws, c. 38) § 325, providing that a check does not operate as an assignment and that the bank is not liable to the holder unless and until it accepts or certifies the check.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 85–98; Dec. Dig. ⇐49.

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

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2. BILLS AND NOTES ⊂=429—CHECKS—PAYMENT THROUGH CLEARING HOUSE.
A check drawn on one bank in favor of another was presented for payment at the clearing house and marked as a credit to the payee bank on the sheet of the drawee, but before the clearing house closed it was returned to the payee with the statement that the drawee had no instructions to pay it. Under the rules of the clearing house, the whole day must expire before the credit entries are to be taken as receiving the assent of the debtor members, and it makes no difference for what reason they decline to admit the item. *Held*, that there was no payment of the check, and it did not alter the situation that the payee, upon return of the check, drew its check and in form made a repayment to the drawee instead of changing the clearing house entries.

[Ed. Note.—For other cases, see **Bills and Notes**, Cent. Dig. §§ 1245–1250, 1262, 1263; Dec. Dig. ⊂=429.]

3. BANKS AND BANKING ⊂=140(1)—CHECKS—REFUSAL TO PAY—LIABILITY.
That a bank's refusal to pay a check was based upon a mistake of fact, in that it incorrectly believed it had received no letter of advice from the depositor directing payment of the check, did not make the bank liable to the holder of the check in view of Negotiable Instruments Law N. Y. § 325, providing that a check does not operate as an assignment and that the bank is not liable to the holder unless it accepts or certifies the check.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 380, 394–397; Dec. Dig. ⊂=140(1).]

4. BANKS AND BANKING ⊂=140(3)—CHECKS—ACCEPTANCE.
A check drawn on a bank by a foreign depositor in favor of another bank was presented for payment at the clearing house and credited to the payee, but on the same day it was returned to the payee with the statement: "No instructions to pay. Present again." *Held*, that there was no acceptance, and moreover the clearing house is a means of payment of checks and not of their acceptance, and checks do not contemplate acceptance, but payment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 385–388; Dec. Dig. ⊂=140(3).]

5. BANKS AND BANKING ⊂=140(7)—CHECKS—EQUITIES.
Where a check or draft to the order of a bank for plaintiff's account was purchased from a drawer who made an assignment for the benefit of creditors and against whom a petition in bankruptcy was filed before payment of the check or draft, plaintiff had no greater equities than other creditors of the drawer and was not entitled to have the drawee adjudged to hold the amount of the draft in trust for it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 392; Dec. Dig. ⊂=140(7).]

6. COURTS ⊂=281—JURISDICTION—LAW OR EQUITY.
A draft or check was purchased in England and sent by the purchaser to a bank for plaintiff's account. It was presented for payment at the clearing house and credited to the payee, but subsequently returned on the ground that the drawee had received no instructions to pay it; whereupon the payee bank drew its check and in form repaid the amount to the drawee. Before payment, the drawer made an assignment for the benefit of creditors, and a petition in bankruptcy was filed against him in New York. A creditor attempted to attach the account in the drawee bank, and plaintiff sued the bank to declare a trust for plaintiff and named as defendants the drawee bank, the attaching creditor, the purchaser of the draft, the drawer, his assignee, the petitioning creditors in bankruptcy, and the receiver in bankruptcy. *Held* that, there being the requisite diversity of citizenship between plaintiff and the drawee bank, the court had jurisdiction, since, if equitable jurisdiction did not exist, jurisdiction at law existed on the theory that there was a claim in personam

against the drawee for money had and received under a mistake of fact, and under the new equity rules the claim would be disposed of whether at law or in equity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-825; Dec. Dig. ⊂⊃281.]

In Equity. Suit by the Eastman Kodak Company against the National Park Bank and others. On motion to dismiss. Bill dismissed on the merits.

This is a motion to dismiss a bill in equity, of which the following is an analysis: The plaintiff is the purchaser from the defendant Kodak, Limited, of a draft or check drawn upon the National Park Bank and in favor of the Bankers' Trust Company, to the account of the plaintiff. The drawer was one Alfred Edward Berthoud, a subject of Great Britain. The defendant Kodak, Limited, paid Berthoud for the draft, received it, and sent it by mail to the Bankers' Trust Company. This took place on January 24, 1914. On the same day Berthoud sent a letter to the National Park Bank as follows:

"Dear Sirs: Please protect our checks for:

$ 75.00 % American Electric Ry. Association
30,000.00 % Bankers Trust Co. % Eastman Kodak Co.

$30,075.00 by the debit of our account."

On February 2, 1914, the defendant Bankers' Trust Company received the check in the mail and the National Park Bank received the letter. On the morning of February 3, 1914, after receipt of the letter by the defendant, the check was presented for payment at the clearing house and was marked as a credit to the Bankers' Trust Company on the sheet of the National Park Bank. At 2:45 o'clock on that day, before the clearing house closed, the check was returned to the Bankers' Trust Company with the statement: "No instructions to pay. Present again"—this being through a mistake on the part of the National Park Bank. The check was presented on February 4th and payment refused by the National Park Bank. At all the times in question, Berthoud had on deposit at the National Park Bank the sum of more than the face of the draft, $30,000. Berthoud has made an assignment for the benefit of creditors in England, a petition in bankruptcy has been filed against him in the Southern District of New York, and a receiver appointed. The Farmers' Loan & Trust Company has attempted in the state court to attach the account of Berthoud in the National Park Bank upon a claim of its own. The parties defendant, besides National Park Bank, are the Farmers' Loan & Trust Company, who attached the credit, Kodak, Limited, the original purchaser of the draft, Berthoud, his assignee in England, the three petitioning creditors in bankruptcy, and the receiver in bankruptcy. The relief demanded is that the Park National Bank be adjudged to hold the amount of the draft in trust for the plaintiff and that the interests of the other defendants be declared at an end.

Clarence P. Moser, of Rochester, N. Y., and Joseph M. Hartfield, of New York City, for plaintiff.

Louis F. Doyle, of New York City, for National Park Bank.

James F. Horan, Edward H. Blanc, and George S. Mittendorf, all of New York City, for Farmers' Loan & Trust Co.

LEARNED HAND, District Judge (after stating the facts as above). [1] It is not necessary to cite authorities for the rule that the execution and delivery of a check effects no assignment of the fund, because that is now provided by section 325 of the Negotiable Instruments Law. The plaintiff claims to have established a collateral agreement taking this case out of that rule. Courts have no doubt often

gone to some lengths to interpret the surrounding circumstances as indicating an agreement to assign, but in no case like this, when the check was neither upon a specific fund nor for the whole amount of the fund. The only facts to change the rule are that simultaneously with the check went an advice to the drawee as follows: "Please protect our checks for $30,000^{c}/_{o}$ Bankers Trust Co. $^{a}/_{c}$ Eastman Kodak Co. by the debit of our account." This is no more than the common letter of advice which frequently goes along with a foreign check; it does not create an assignment. Ætna National Bank v. Fourth National Bank, 46 N. Y. 82, 7 Am. Rep. 314; Hopkinson v. Forster, L. R. 19 Eq. 74. This is indeed alleged to have been the usual practice between the parties, and as such it cannot well have been meant to create an assignment. If so, the bank would at its peril have been obliged to keep a list of the advices in the order of their priority. To have paid out a later check, when advice had been received of the issuance of an earlier check, would have exposed the bank to a suit unless the account was good for all. No bank would consider a customer's business which was to be done in such terms. It pays checks as they are presented, and receives advices in the case of foreign depositors only for the purpose of identifying the items as they arrive. They serve as a safeguard to the validity of the paper when the business is done at long range.

None of the cases cited by the plaintiff have any bearing upon the facts here at bar. Coates v. First Nat. Bank of Emporia, 91 N. Y. 20, was not a case of a check given to the payee and presented by him. The Emporia bank asked the insolvent to remit funds to New York bankers on which it might draw. The insolvent advised the Emporia bank that it had done so, and in performance of its representation drew a draft upon the New York bankers and told them to credit the account of the Emporia bank. Whether the case was correctly decided or not, it was not a usual mercantile transaction consisting merely of the delivery of a check to the payee. Similarly, Fourth Street Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855, depended wholly upon the fact that it was a transaction out of the common and by special agreement to meet the embarrassments of the drawer. Such cases cannot control a case like this. National Union Bank v. Earle (C. C.) 93 Fed. 330, is indeed more nearly in point, but one of three things about it must be true: Either it violates the general rule, or it depends upon the fact that the drawer had been collecting funds for the payee, or that there was an actual payment of the check. I think that it depends upon the last point and shall consider it later. Throop Grain Gleaner Co. v. Smith, 110 N. Y. 83, 17 N. E. 671, was not a case of a check on a bank at all, and the drawer actually advised the drawee that he had "assigned." Fortier v. Delgado, 122 Fed. 604, 59 C. C. A. 180, was a case of a check upon an especial fund set aside for laborer's pay, and held, somewhat doubtfully in my judgment, to be on that account an assignment. Re Hollins, 215 Fed. 41, 131 C. C. A. 349, L. R. A. 1915B, 438, and Muller v. Kling, 209 N. Y. 239, 103 N. E. 138, are so remote as to require no notice. In all the cases cited some facts existed other than a mere advice to the drawee that the checks had been drawn and

a request that they should be honored, which is all that there was in the case at bar.

I think it an extremely pernicious thing to throw doubt upon the scope of doctrines governing negotiable paper which, though a mere skeleton of expression, is among the most useful inventions of mankind. To seek too readily for exceptions from the well-settled rules upon this branch of the law in pursuit of a supposed equity, which incidentally does not exist here, is an evidence of insufficient understanding of the economies of finance and their immense value to industry.

[2] The only remaining question is whether the check was paid when it was presented. If I were to take the bill as it stood, I should have to decide that question for the plaintiff, because the allegation is categorical; but the parties agree that it shall be interpreted in the light of the rules and constitution of the clearing house. Payment is a matter of intent, and it seems to me quite clear that the mere entry of the items upon a sheet in the clearing house is not intended as a payment. It is what Mr. Justice Miller calls it in Columbia-Knickerbocker Trust Co. v. Miller, 215 N. Y. 191, 195, 109 N. E. 179, 180, "a sort of tentative or provisional payment." "As between the immediate parties to the transaction, then, there was plainly no payment," 215 N. Y. 180, 109 N. E. 196. The rules make it clear that the whole day must expire before the credit entries are to be taken as receiving the assent of the debtor members, and it makes no difference for what reason they decline to admit the item.

It is true that the Bankers' Trust Company drew its check on February 4th to make good the deficit, and in form that was a repayment, but it was not such in its whole setting; it was only to avoid garbling the original entries and the footings, and so confusing the bookkeeping. In just the same way a bank will always correct errors in its customer's account by a new check from the customer, rather than to correct its books and make a change in the books. The case cited, Columbia-Knickerbocker Trust Co. v. Miller, supra, required a decision that the provisional entries were not payments and proceeded upon that theory, because if the National Bank of Commerce had once collected the check it held the amount for the Columbia-Knickerbocker Trust Company, and they were responsible to Miller, the customer, if they did not collect. In that case, as well, the National City Bank drew a check to correct the provisional credit to itself, as it was obliged to do by the clearing house rules. In Hentz v. National City Bank, 159 App. Div. 743, 144 N. Y. Supp. 979, the Appellate Division for the First Department made a similar ruling, and it must, of course, be taken as a fixed rule of commercial law in the state of New York. Aside from the fact that it appears to me a correct decision, I should feel very doubtful of the propriety in such a matter of trying to start an opposite rule upon such a question, so that the decision might be one way when the suit was between citizens and another when this court had jurisdiction. Such a condition is always to be avoided unless it is absolutely necessary, although this court is, of course, not authoritatively bound by the rulings of state courts on matters of commercial law. I believe that Judge Dallas'

decision in National Union Bank v. Earle, supra, is certainly to the contrary, but it was some time ago, and appears to have proceeded without any consideration of the actual machinery of the clearing house; payment seems to have been assumed without discussion. If it must be taken as an authority consciously contrary to the rule in Columbia-Knickerbocker Trust Co. v. Miller, supra, and Hentz v. National City Bank, supra, I can only say with the greatest respect that, being forced to choose between authorities none of which is authoritative, I must select that one which appears to me more consonant with the real purpose of the parties to the transaction.

[3, 4] Some point is made that the first refusal to pay the check was based upon a mistake of fact as was the case, because notice had in fact been received and the statement to the contrary was incorrect. The mistake was quite irrelevant. Had the National Park Bank refused to honor the check willfully and for no reason whatever, no liability would have attached to it; the payee can sue only the drawer, and the drawer must look to the drawee. Negotiable Instruments Law, § 325. There is perhaps also a faint suggestion that the transaction may be regarded as an acceptance, but this, too, is without foundation. Waiving the point that an acceptance must be in writing, it is enough to say that there was no intention to accept. The clearing house is a means of payment of checks not of their acceptance; indeed, checks are drafts which do not contemplate acceptance but payment. If the transactions on February 3, 1914, constituted a payment, then the plaintiff has a good cause of action in personam against the National Park Bank, because the "repayment" of the Bankers' Trust Company was without doubt by mistake; but, if they did not create payment, then the National Park Bank was not liable to the plaintiff upon any theory whatever. Payment therefore is the only possible ground of recovery.

[5] The plaintiff makes much of its supposed equities, but I confess I can find no reason to prefer it against other creditors, whose money was no doubt as dear to them as the plaintiff's was to it. They bought a check, nothing more, nothing less. They knew what a check was, and that in buying it they got nothing whatever but the credit of the drawer until they got it paid. Just what the injustice is in keeping them in the same class with other creditors who equally took the chances of the drawer's credit is not apparent to me.

[6] The point of jurisdiction it is not necessary to consider, except to say that the bill attempts to present some cause of suit or cause of action against at least the drawee bank. It makes no difference whether that claim is at law or in equity under the new equity rules. I ought to call it by the proper name and dispose of it, if it were good from any point of view. If equitable jurisdiction does not exist on the theory of adjusting the rights in a res in court, jurisdiction at law does exist on the theory of a claim in personam against the drawee for money had and received under a mistake of fact, because the plaintiff and the National Park Bank have the requisite diversity of citizenship.

Therefore a decree may be entered on the merits, and that decree will be a dismissal of the complaint, with costs.

UNITED STATES v. FLETCHER et al.

(District Court, D. South Dakota, S. D. February 29, 1916.)

1. UNITED STATES ⊜133—ACTIONS BY—LACHES.
The principle that the United States is not bound by any statute of limitations, nor barred by any laches of its officers, is applicable only to suits brought in its capacity as a sovereign government to enforce a public right or to assert a public interest.
[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 127, 128; Dec. Dig. ⊜133.]

2. PARTIES ⊜6(1)—NOMINAL PARTIES—REAL PARTIES IN INTEREST.
A court may look beyond the names of the parties to a suit and ascertain the real parties in interest from the facts as they appear in the record.
[Ed. Note.—For other cases, see Parties, Cent. Dig. § 6; Dec. Dig. ⊜6(1).]

3. UNITED STATES ⊜133—SUIT BY NOMINAL PARTY—LACHES.
Where a suit by the United States to set aside a patent to land was allowed to stand without action for 35 years before a subsequent purchaser through mesne conveyances from defendant was brought in as a party, and it appeared from the record that complainant had no interest in the land, but that in case it succeeded in the suit the same would be patented to a third person on a homestead entry made before the suit was brought, the laches was such as to constitute a bar to the further prosecution of the suit.
[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 127, 128; Dec. Dig. ⊜133.]

4. EQUITY ⊜67—LACHES—FAILURE TO PROSECUTE SUIT.
The mere institution of a suit does not relieve a party from the charge of laches, but if he fails in its diligent prosecution the consequences are the same as though no suit had been brought.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191–196; Dec. Dig. ⊜67.]

5. LIS PENDENS ⊜10—OPERATION AND EFFECT—PROSECUTION OF ACTION.
The protection afforded by a lis pendens filed pursuant to statute is lost if the suit is not diligently prosecuted.
[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 29; Dec. Dig. ⊜10.]

In Equity. Suit by the United States against Nathan R. Fletcher, Hannah Jones, and Charles Gors. Decree for defendants.

Robert P. Stewart, U. S. Dist. Atty., and E. W. Fiske and George Philip, Asst. U. S. Dist. Attys., all of Sioux Falls, S. D.

Alan Bogue, Jr., of Centerville, S. D., and E. E. Wagner, of Sioux Falls, S. D., for defendant Gors.

ELLIOTT, District Judge. This is a suit commenced by the United States, by bill of complaint filed in the United States District Court in and for the territory of Dakota, on the 13th day of January, 1879, against Nathan R. Fletcher, for the purpose of canceling and vacating a patent theretofore issued to him for the N. W. ¼ of section 25, township 97, range 52, in the then territory of Dakota, situated in what is now Turner county, state of South Dakota, alleging fraud on the

part of Fletcher in procuring said patent. It is alleged that at the time of final proof Fletcher paid the government price for the land, and that patent was issued therefor on October 5, 1875.

Thereafter an amended bill was filed, making Hannah Jones defendant, alleging that after the date of final proof by Fletcher and before the issuance of said patent she became the purchaser from Fletcher, and held the title to said premises by deed from him. Thereafter an appearance was entered for both defendants, and on the 15th day of November, 1880, the defendant Jones filed her answer in said action, and no further steps were taken in the trial of said cause, except the taking of some depositions in the spring of 1881. Said action was never placed on the trial calendar for trial by either of the parties thereto, and when the territory of Dakota was divided into two states, and the state of South Dakota was admitted into the Union in 1889, the files in said case were included and bundled with other files of the territorial District Court, and conveyed to the city of Sioux Falls, one of the places provided for holding United States District Court in the state of South Dakota. Nothing was done therein until the fall of 1914, when, at the request of Daniel Farnum, hereinafter named, a petition was made to the court and a second amended complaint was filed, making Gors, the present holder of the title, a defendant. Service was had upon the defendant Charles Gors, and he came in and answered, and proofs were submitted upon all of the issues made by the pleadings.

It appears: That said Hannah Jones, on the 23d day of August, 1894, duly sold said premises and by deed transferred the same, by her attorney in fact, William Watts Jones, unto Joseph Allen. That Joseph Allen and wife conveyed the same by a good and sufficient deed, June 13, 1896, unto Joseph Allen. That thereafter an action was commenced in this court, by said Joseph Allen against said Daniel Farnum, to determine adverse claims to said premises, and upon stipulated facts a judgment was, on the 18th day of April, 1896, duly entered in this court, in substance determining that said Allen was the owner in fee of said premises and entitled to the possession thereof, and that said Farnum had no title thereto or right of possession thereof. That said Joseph Allen died, and a decree of distribution, distributing said premises unto his widow, Elizabeth Allen, was duly entered by the county court of the county in which the land was situated, and thereafter, May 28, 1900, said Elizabeth Allen sold and delivered her warranty deed to said premises unto the defendant Charles Gors, all of which deeds are duly recorded in the office of the register of deeds of Turner county, immediately after their respective dates. That Gors now holds the title thereto under and by virtue of said mesne conveyances.

Said lands, on the 18th day of December, 1873, at the date Fletcher filed his pre-emption declaratory statement, were public lands of the United States, subject to pre-emption settlement. It is further undisputed in the record that Daniel Farnum established his residence on the premises described in the bill of complaint April 4, 1874, made his application to enter the same under the homestead laws of the United

States, and has continuously resided upon this land, under that entry, up to the present time.

The answer of the defendant Gors pleads abandonment of the action by the plaintiff, pleads laches on the part of the plaintiff and therefore an estoppel to prosecute this action, and pleads that he was an innocent purchaser for a valuable consideration, with proper denials. I may add that there was offered an index of lis pendens of the county in which the land was situated, showing, in proper columns, the name of the plaintiff, the United States, the defendants Fletcher and Jones, the date of commencing the action, and the description of the premises; but no proof was offered that a lis pendens was on file in the office of the register of deeds, or that it had ever been recorded as required by the law of the state of South Dakota.

Upon the face of this record it seems undisputed that if the plaintiff is to succeed in this action and the patent of Fletcher is canceled, and if this defendant Gors is held not to be an innocent purchaser, the land will become the property of said Daniel Farnum, who has earned the right to make final proof thereon by his continuous residence, and that the government itself has no interest in or to said premises, but is the nominal plaintiff in this case, for the benefit of said Daniel Farnum.

Before considering the somewhat difficult issues that are presented in what may be termed the real defense of the defendant Gors, as to his being an innocent purchaser for value, and the holder of the legal title by mesne conveyance from the original patentee, it becomes necessary to consider the two defenses urged in behalf of the defendant Gors:

(1) That the long delay of 35 years from the institution of this suit to the time of making the defendant Gors a party thereto was, as to him, an abandonment of the suit, and that it therefore placed the plaintiff in the same position as if no suit had ever been commenced at the date of the second amended complaint, December 21, 1914.

(2) That the plaintiff in this suit is guilty of unusual and extraordinary laches—that it has been culpably negligent in failing to prosecute this action, and is estopped and barred by its laches to proceed against the defendant Gors.

These two questions may be considered together, as the same principles are, in my judgment, applicable to both. It is settled that the government of the United States, like an individual, may maintain an appropriate action to set aside its grants and recover property of which it has been defrauded. Generally speaking, the laches of officers of the government cannot be set up as a defense to a claim made by the government. United States v. Beebe, 180 U. S. 343, and citations at page 354, 21 Sup. Ct. 371, 45 L. Ed. 563; United States v. Insley, 130 U. S. 263, and citations at page 266, 9 Sup. Ct. 485, 32 L. Ed. 968. The claims of the United States cannot be treated as stale claims, nor can the defense of stale claim and laches be set up against them. United States v. Dallas Mil. R. Co., 140 U. S. 633, 11 Sup. Ct. 988, 35 L. Ed. 560.

This doctrine is applicable with equal force, not only to the ques-

tion of the statute of limitations in a suit at law, but also to the question of laches in a suit in equity. United States v. Insley, supra; United States v. Beebe, supra. The foregoing rule has, so far as I can find, never been departed from where an action is brought to enforce a public right or to assert a public interest.

In this connection, however, the defendant Gors asserts that the plaintiff in this case is a formal party to the suit, and the real remedy sought in its name is the enforcement of a private right for the benefit of a private party, and no interest of the United States is involved; that, therefore, a court of equity will not be restrained from administering the equities between the real parties by an exemption of the government, which exemption was designed for the protection of the rights of the United States alone, and therefore laches in this case may be charged against the government of the United States. This view has been sustained in United States v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121.

[1] The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, is applicable only to a suit brought by the United States as a sovereign government to enforce a public right or to assert a public interest. United States v. Nashville, etc., Ry. Co., 118 U. S. 120, 6 Sup. Ct. 1006, 30 L. Ed. 81. Upon the face of this record Farnum has resided upon this land all of these years since prior to the time Fletcher made his proof, claiming the same under his homestead entry. It was at his request that this suit has been attempted to be revived, and it is for his benefit it is being prosecuted, as the government has already received its price for the land, and the title thereto will vest in Farnum, by final proof under his homestead entry above referred to.

[2] Under these circumstances, I am of the opinion that this case stands upon a different footing and presents a different question than in those cases where the action is brought by the plaintiff as a sovereign government to assert a public interest; that the government is only a nominal complainant party, has no real interest in the litigation, and in effect, in prosecuting this action, it allowed its name to be used for the sole benefit of Farnum, a private person. It has not been unusual for the Supreme Court of the United States to determine the real parties to a suit by reference, not merely to the names in which it is brought, but to the facts of the case as they appear of record. United States v. Beebe, 127 U. S. 344, 8 Sup. Ct. 1083, 32 L. Ed. 121; United States v. Nashville, etc., Ry. Co., supra.

It is therefore not conclusive of the principal question in this case at bar that Farnum is not named as a party plaintiff. Whether he is the actual party must be determined by a consideration of the nature of the case as presented on the whole record, under the peculiar circumstances of the case, and upon the face of this record neither plaintiff nor defendant will contend that there would be any excuse for the prosecution of this action, or that there would ever have been any second amended complaint filed herein, except at the instance of and for the benefit of said Farnum, rather than the prosecution of any interest of the government therein. In re Ayers, 123 U. S. 443, 445,

493, 8 Sup. Ct. 164, 31 L. Ed. 216. The court will look behind and through the nominal parties on the record, to ascertain who are the real parties in interest. New Hampshire v. Louisiana, and New York v. Louisiana, 108 U. S. 76, 2 Sup. Ct. 176, 27 L. Ed. 656.

[3] I am of the opinion that in the case at bar the act of the government, the complainant, in its second amended complaint, filed December 21, 1914, was not for the purpose of asserting a public right in this property in controversy, or protecting a public interest in this property, but merely to form a conduit through which Farnum can proceed against the defendant Gors. Under these circumstances, the rule applicable to laches of officers of the United States has no application to govern this court. The rights of the parties must be decided as in like cases between private litigants. United States v. Beebe, supra.

[4] The court having determined to its satisfaction that this plaintiff does not bring this action as a sovereign government to assert a public interest, that it is only a nominal complainant and has no real interest in the litigation, it comes into this court of equity and prays its decree that the title to the land in controversy be quieted in it. It slept upon its rights for 35 years. It is true it commenced an action, but the mere institution of an action does not relieve the plaintiff of the charge of laches because of its failure to diligently prosecute said action. Northrup v. Browne, 204 Fed. 224, 122 C. C. A. 496.

Plaintiff was not guilty of laches before filing the original bill, but has been guilty of laches in not prosecuting the same with diligence, in that it has failed for 35 years to prosecute the same, after the filing of its bill. The law is well settled that the mere institution of a suit does not relieve a person from the charge of laches, and if he fail in its diligent prosecution the consequences are the same as if no action had been begun. Johnston v. Standard Mining Co., 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; United States v. Des Moines Navigation & Ry. Co., 142 U. S. 510, 12 Sup. Ct. 308, 35 L. Ed. 1099; Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214; Hagerman v. Bates, 5 Colo. App. 391, 38 Pac. 1100; Willard v. Wood, 164 U. S. 502, 17 Sup. Ct. 176, 41 L. Ed. 531. The doctrine operates, not only as against the filing of a stale suit, but also against the slothful prosecution of a suit seasonably filed. Drees v. Waldron et al., 212 Fed. 93, 128 C. C. A. 609.

I therefore conclude that, while it is undoubtedly true that when the government is the real party in interest and is proceeding simply to assert its own rights and recover its own property, there can be no defense on the ground of laches or limitations, yet where, as in this case, suit is brought in its name to enforce the rights of individuals, and it appearing to the satisfaction of the court that no real interest of the government is involved, the defense of laches on the part of the defendant Gors should be sustained as though the government was out of the case, and the litigation was carried on in name, as in fact, for the benefit of Farnum. Under any view of the facts in this case, it cannot be for a moment claimed that this suit has been prosecuted with diligence, it having been allowed to linger for 35

years, with no steps taken in its prosecution, and the action is therefore, as to defendant Gors, the same as if no action had been begun.

Applying the doctrine of laches to the plaintiff, there is no equity in its claim against the defendant Gors, it does not appeal to the conscience, it is met by an equitable estoppel, it was not prosecuted with reasonable diligence, and a court of equity should not sustain it. Johnston v. Standard Mining Co., supra; State of Iowa v. Carr, 191 Fed. 257, 112 C. C. A. 477.

The plaintiff attaches some importance to the fact that a lis pendens was filed in the office of the register of deeds of Turner county, S. D. By the statutes of Dakota, passed in the year 1885, it was provided that a lis pendens might be filed and recorded in the office of the register of deeds upon the commencement of an action. There is no proof offered in this case that any record was ever made of any lis pendens in this action; only an index to lis pendens was introduced, with nothing of the contents of the lis pendens, except the names of the parties to the action and the date of filing and the premises affected by it. This alleged filing was of the date of March 29, 1880.

[5] To apply the doctrine of lis pendens it was necessary that the suit be continuously prosecuted, and the protection, if any, afforded to plaintiff under the doctrine that this lis pendens record was notice to the world, was lost by failure on its part to prosecute its action with due diligence. Kelley v. Culver's Administrator, 116 Ky. 241, 75 S. W. 273, 25 Ky. Law Rep. 443; Taylor v. Carroll, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479; Trimble's Lessee v. Boothby, 14 Ohio, 109, 45 Am. Dec. 526.

I repeat that there is no evidence in this case that any notice of lis pendens was filed in the office of the register of deeds and entered as required by section 108 of the Code of Civil Procedure of this state; a simple index having been offered. It is not pretended that this is a compliance with such lis pendens statute, and owing to the failure to prosecute said suit no interest can be claimed by virtue thereof.

Judgment should be entered in favor of the defendant Gors, and against the plaintiff, dismissing said action, and that defendant go hence without day.

SPRINGFIELD GAS & ELECTRIC CO. v. BARKER, Atty. Gen., et al.

(District Court, W. D. Missouri, S. D. July 6, 1915.)

No. 9.

1. ELECTRICITY ⇐11—RATES—ESTABLISHMENT BY COMMISSION.

A public service commission cannot base the establishment of rates by it on the fact that the reduction of electric service rates in a particular city would equalize conditions, so as to build up a profitable patronage and enable the company to produce a net return equal to that in another city where the new rates were in force.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. ⇐11.]

2. ELECTRICITY ⇐11—SUPPLY—TEMPORARY INJUNCTION.

Where the valuation placed by a public service commission in fixing electric service rates on a number of large items was seriously contro-

verted, and it appeared that if the company's contention was correct the rates fixed were confiscatory, and it was doubtful whether the commission's findings were sufficient under the law, the difficulty the company would experience in collecting the increased rates for past services after the final hearing if the rate should be found confiscatory, and the fact that the consumers can be protected by requirement that accounts of collections be kept and an injunction bond given for the payment of the excess charges if the order of the commission be sustained, justifies the issuance of a temporary injunction restraining the enforcement of the commission's order pending the final hearing.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. ⊂=11.]

In Equity. Suit by the Springfield Gas & Electric Company against John T. Barker, Attorney General, and others, to restrain the enforcement of an order made by the Public Service Commission of the State of Missouri. Temporary injunction granted.

W. D. Tatlow, of Springfield, Mo., John M. Olin, of Madison, Wis., and Tatlow & Mitchell, of Springfield, Mo. (Olin, Butler, Stebbins. Curkeet & Stroud, of Madison, Wis., of counsel), for complainant.

William G. Busby, of Carrollton, Mo., and E. C. McAfee and T. Neville, both of Springfield, Mo., for defendants.

Before SANBORN, Circuit Judge, and POLLOCK and VAN VALKENBURGH, District Judges.

PER CURIAM. The defendants seek to restrain the enforcement of an order made June 23, 1914, by the Public Service Commission of the state of Missouri, fixing the value of complainant's property, conceived to be used and useful in the public service in supplying electric energy at Springfield, Mo., and the rates to be charged for electricity by complainant, on the stated ground that said rates are unreasonably low, and are based upon an unreasonable and illegal valuation of complainant's property, and on the further ground that the enforcement of said rates would deprive complainant of its property without due process of law, and would deny to it the equal protection of the laws, in contravention of the Constitution of the United States and of the Constitution of the state of Missouri; also on the still further ground that said commission, in fixing said rates, exceeded its powers under the Constitution and laws of the state of Missouri. The present hearing is upon motion for a temporary injunction; therefore we shall consider only so much of the issues presented as concern the propriety of the immediate relief prayed, reserving a determination of the merits for the final hearing of the cause. The power of the commission to establish just and reasonable rates, based upon a fair valuation of complainant's property after a full and fair hearing, such as the law guarantees, will be assumed.

The valuation fixed by the commission as a basis for determining reasonable and just rates was $300,000. The rate of return allowed was 7 per cent. Complainant insists that this rate of return is unreasonably low, and that the valuation fixed is less than one-half the actual value of the property used and useful in the business, and of the price paid therefor by complainant. Since the order of June 23,

1914, became effective, an actual test, covering a period of approximately eight months, has been made of the effect of these rates upon the business of complainant, monthly reports thereof have been filed with the commission, as required, and the results have been placed before the court.

The opinion and order of the commission discloses that it took the lowest of the computations, made by three several engineers, of the cost of reproduction new of the property involved, less depreciation, made substantial reductions thereon, and therefrom deduced an actual cost of reproduction, less depreciation, of $200,126. The fixed valuation of $300,000 was arrived at by the addition thereto of $100,000, because of "considering said plant as a going concern and taking into account the fact that said plant is in successful operation, and including engineering, supervision, and interest during construction, organization and general expenses, legal expenses, contingencies, insurance, general contractor's profit, promotion and other development expenses, working capital, and including all other elements of value, tangible and intangible, as used in the public service in supplying electric energy at Springfield." It is contended by complainant that this allowance for the various items thus recited is unreasonably low to the point of confiscation. The commission has made an omnibus allowance, without itemization in findings, opinion, or order. Hence it is impossible to test the reasonableness of its findings without such a comprehensive examination of the entire case as is impracticable upon a preliminary hearing of this nature. We turn, therefore, to such elements of disagreement as are presented in tangible and defined form upon the face of the proceedings.

[1] Especial emphasis is laid by complainant upon the following items disallowed by the commission: Steam power plant, $106,000; going value, $60,000 to $140,000; cash working capital, $20,000 to $25,000; managerial and legal expenses, $9,000 per year; new business expenses, $2,500 per year; expenses of the rate-making proceeding, approximately $50,000. It is practically conceded, and sufficiently appears, that if complainant is correct in its contentions respecting these several items the rate of return would be unreasonably low, and the order of the commission probably confiscatory, even upon the rate of return established by it. On the contrary, if all these items be disallowed, the percentage of net return would be so unusually high in comparison with that in a great number of cities presenting conditions sufficiently analogous for purposes of useful comparison as to cast a reasonable doubt upon the estimates and computations of the commission which could make such a result possible.

Replying to this suggestion at the argument, counsel for defendants sought to justify the order of the commission in this case upon the ground that a like rate is in force at Joplin, Mo., a city of almost the same population. Complainant asserts that the nature of the industries and business conditions at Joplin operate to produce a materially greater net return at Joplin than at Springfield. To this the defendants reply that the establishment of an identical rate at Springfield would tend to build up a profitable patronage at that place to such

an extent as to equalize industrial conditions in the two cities; but such a result must necessarily be theoretical and speculative. Commission action based upon such considerations invade the right of control and management incidental to ownership. In Northern Pacific Railway Company and Minneapolis, St. Paul & Sault Ste. Marie Railway Company v. State of North Dakota ex rel. T. F. McCue, Attorney General, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735, the Supreme Court of the United States has said that it is beyond the power of the state to compel the establishment and maintenance of rates not otherwise reasonable in order to build up a local enterprise.

[2] It is apparent that, if the contentions of complainant be sustained in any substantial degree, the return upon its investment would fall short of a fair and reasonable return at the rate fixed by the commission itself. It further appears that such claims demand serious consideration. The court has been embarrassed, in its review, by the form of the decision and findings which enumerate, in general terms, the items included, but fail to specify the amount allowed for each.

Subsection 2 of section 78 of the Public Service Commission Act (Laws 1913, p. 616) provides:

"The commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have bearing on the value of the property of the gas corporation, electrical corporation or water corporation affected. Such findings shall be subject to review by any circuit court of this state in the same manner and within the same time as other orders and decisions of the commission. The findings of the commission so made and filed, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing before the commission or any court, in which the commission, the state or an officer, department or institution thereof, or any county, city or municipality or other body politic and the gas corporation, electrical corporation or water corporation affected may be interested whether arising under the provisions of this act or otherwise, and such findings, when so introduced, shall be conclusive evidence of the facts therein stated as of the date therein stated under conditions then existing, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined."

It may be doubted whether a decision and findings which state nothing but the total valuation fixed by the commission, without showing the amount allowed for each item included, would be a compliance with the manifest purpose of the law to permit the parties interested to test in court the questions involved. Under such circumstances, what is the duty of the court upon temporary hearing? In Newton v. Levis, 79 Fed. 715, 25 C. C. A. 161, the Court of Appeals announced the rule which prevails in this circuit:

"When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great, and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is granted. A preliminary injunction maintaining the status quo may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

Counsel for defendants in their brief point out that, if its contention is sustained, complainant will seek to recover its losses by making charges against consumers in excess of the rates then in force. They say:

"After a final hearing, and these rates declared illegal, the complainant will be admirably situated to make such collections. Having a monopoly of the business, and power to discontinue the service at will, complainant has the whip hand and requires no aid from court to maintain its rights."

A sufficient answer to this argument is found in the fact that consumers of electricity are constantly changing, and that additional charges could scarcely be enforced against those who had not enjoyed the lower rate. Moreover the powers of complainant are not so absolute as this suggestion of counsel would imply. It would, in most cases, be put to its recovery at law, and this would involve a multiplicity of suits, such as it is the province of equity to prevent.

On the other hand, the injury to the moving party in this case will be certain, great, and irreparable if its motion be denied and its contentions ultimately sustained, while the inconvenience and loss to each consumer will be inconsiderable and may well be indemnified by a proper bond. A course of business that will insure a prompt refund of charges ultimately adjudged to be excessive may easily be prescribed in a case like this. The complainant offers, in place of the old 15-cent rate for residence lighting, to install rates not in excess of 10 cents per kilowatt hour, and the temporary injunction will be granted upon that condition. It will further be provided by the order that such a record shall be kept by the complainant, and such evidences of consumption and payment issued to the consumer that any excess due the latter may be readily computed and judicially determined. A bond in sufficient amount and with appropriate conditions will be exacted to insure compliance with the order made, and jurisdiction will be reserved in this court to adjudicate all claims which may be found to accrue from the granting of the temporary injunction prayed.

An order may be prepared in accordance with the views herein expressed.

In re ALIENS.

(District Court, N. D. New York. April 1, 1916.)

1. ALIENS ⇐54—DEPORTATION OF ALIENS—SUSPENSION OF DEPORTATION.
Immigration Act Feb. 20, 1907, c. 1134, § 19, 34 Stat. 904 (Comp. St. 1913, § 4268), provides that the Commissioner General of Immigration may suspend, upon conditions to be prescribed by him, the deportation of any alien found to have come in violation of that act if the testimony of such alien is necessary on behalf of the United States government in the prosecution of offenders against any provision thereof. *Held*, that such alien may be detained when his testimony is necessary in a suit to recover a penalty for a violation of that act as well as when his detention is necessary or desired for prosecution of a criminal offense thereunder.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⇐ 54.]

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2. ALIENS ⟸54—DEPORTATION OF ALIENS—SUSPENSION OF DEPORTATION.
Immigration Act Feb. 20, 1907, § 19, authorizes the Commissioner General of Immigration to suspend, upon conditions to be prescribed by him, the deportation of any alien whose testimony is necessary in the prosecution of offenders against any provision thereof. A rule of the Commissioner General of Immigration provides that, where the deportation of an alien is stayed so that he may testify concerning violations of the immigration law, the case must be promptly reported to the United States attorney, with request that if he decides to institute proceedings he either take the deposition of the alien or secure a court order for his detention as a witness. *Held* that, when a criminal offense has been committed in connection with the coming or bringing in of an alien for which the United States attorney determines to prosecute, the District Court has power to make an order detaining the alien as a witness and requiring him to enter into a bond for his appearance as a witness and in default of giving such bond to commit him to a suitable place of confinement.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

3. ALIENS ⟸54—DEPORTATION OF ALIENS—SUSPENSION OF DEPORTATION.
The court may also detain an alien and require him to give bail as a condition to allowing him to go at large, where his testimony is desired in civil suits for penalties such as the penalty prescribed by Immigration Act Feb. 20, 1907, § 5 (section 4250), for assisting in the importation of contract laborers, especially as detention in criminal cases was already provided for by Rev. St. § 881 (Comp. St. 1913, § 1492), which authorizes any United States judge, on being satisfied by proof that the testimony of any person is competent and necessary on the trial of any criminal proceeding, to compel such person to give recognizance.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

4. ALIENS ⟸54—DEPORTATION OF ALIENS—SUSPENSION OF DEPORTATION.
The suspension of the deportation of an alien whose testimony is desired in a suit or prosecution for a violation of the immigration laws provided by Immigration Act Feb. 20, 1907, § 19, is within the power of the government in dealing with aliens unlawfully in the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

5. UNITED STATES ⟸40—DEPARTMENTAL REGULATIONS—FORCE AND EFFECT.
When the power to make rules and regulations for carrying out a specific enactment of Congress is expressly conferred on the head of a department of the government, such rules and regulations have all the force of law, if consistent therewith, reasonable, and within the scope of the power conferred.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 29; Dec. Dig. ⟸40.]

In the matter of requiring a bond from aliens found or brought unlawfully into the United States. Order confirmed.

The question is raised whether the United States District Court has lawful power and right to hold an alien unlawfully in the United States to bail when his deportation has been stayed so that he may testify concerning the violations of the Immigration Law in both criminal and civil cases; that is, actions to recover penalties as well as in cases of misdemeanors.

D. B. Lucey, U. S. Atty. of Ogdensburg, N. Y.

RAY, District Judge. By section 19 of the Act of February 20, 1907 (34 Stat. 898), as amended by the acts of March 26, 1910 (36 Stat. 263), being "An act to regulate the immigration of aliens into the United States," it is provided that aliens brought to this country in violation of law shall, if practicable, be immediately sent back to the country whence they respectively came on the vessels bringing them. By other sections aliens who come in by land unlawfully are to be deported. The owner or owners of vessels on which such aliens come are to detain them thereon, and if they refuse or fail to return them to the foreign port from which they came, or to pay the cost of their maintenance while on land, etc., then such master, person in charge, agent, owner, or consignee shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not less than $300 for each and every such offense, etc. There are also other acts in violation of this law which are made misdemeanors. By section 20 of the act, aliens who enter the United States in violation of law are to be arrested upon the warrant of the Secretary of Labor and deported to the country whence they came, etc.

[1] The act also provides that, when an alien brought into the United States in violation of law is desired by the United States or its immigration officers as a witness, the deportation of such alien may be suspended, and that such alien may be held to be used as a witness. It is not required that the detention of the alien be necessary or desired for the prosecution of a criminal offense under the act. If his detention be necessary in a suit to recover a penalty for the violation of some provision of the immigration laws, such alien may be detained.

[2] The Commissioner General of Immigration is authorized to make such rules and regulations and prescribe such forms, etc., and issue such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of the act and for protecting the United States and aliens migrating thereto from fraud and loss, etc. The Commissioner General of Immigration has made Rule 25, which reads as follows:

"Where the deportation of an alien is stayed so that he may testify concerning violations of the immigration law, the case must be promptly reported to the United States attorney with request that if he decides to institute proceedings he either take the deposition of the alien or secure a court order for his detention as a witness. In either event the Bureau shall be promptly informed as to any action taken hereunder."

It is seen by examination that there are misdemeanors specified in more than one section of the Immigration Act. It would be the duty of the district attorney of the district to prosecute the offenders, and it may and frequently does become necessary to delay or suspend the deportation of the aliens unlawfully brought into the United States under such circumstances as to constitute a misdemeanor, that is, the commission of a crime against the United States that they may be used as witnesses. In such cases, it is for the immigration officers to determine whether or not the alien shall be detained and deportation stayed. If that conclusion is arrived at, then it becomes the duty of the United States attorney to inquire into the case and, if he de-

termines to prosecute, apply to the court for an order holding such alien as a witness, and the witness or alien may be required to enter into a bond. In these cases, the district court has the power to make an order detaining the alien as a witness and requiring him to enter into a bond. In default of giving such bond, such alien may be committed to a suitable place of confinement. This place may be the jail, when no other place is provided.

Cases of this character are criminal cases, and the alien is detained as a witness in a criminal case by the same authority that other witnesses in criminal cases are detained as such and required to give bond.

When an alien is unlawfully brought into the United States and found therein, he may be arrested and deported by the immigration authorities. When a criminal offense has been committed by any one in connection with the coming or bringing in of such alien, it, of course, is proper to prosecute the offender, and it frequently happens that such alien is a necessary and material witness in the prosecution of the case. The rule (25) clearly applies to cases of this character, and, when the United States attorney decides to "institute proceedings," he may either take the deposition of the alien or secure a court order for the detention of such alien as a witness. This provision is not a punishment of the alien, or intended as such, but is a provision in his interest, as it will secure to him witness fees by reason of his detention at the rate of $1 per day during such detention. In any event, such alien is held in the custody of the immigration officers when deportation is stayed.

I think the statutes and the rules read together make it plain that when a criminal offense—that is, a misdemeanor—has been committed, the authority to make an order detaining the alien as a witness and exacting a bond if he goes at liberty is beyond question.

[3] We come to the question whether a detained alien unlawfully brought into the United States, or found therein, unlawfully, and held for deportation, and whose presence in the United States as a witness in the prosecution of suits brought by the United States to recover penalties for violation of the immigration laws, may be held to bail, if he would go at large, pending the trial of such action. And, especially, may such aliens be held to bail in cases brought to recover a penalty for a violation of section 5, Act of Feb. 20, 1907 (34 Stat. L. 898)?

Sections 4 and 5 should be read together, and read as follows:

"Sec. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.

"Sec. 5. That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States, shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall

first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

The presence of these alien witnesses unlawfully in the United States and subject to deportation is as necessary when the case of a violation of the "Contract Labor" provisions is being prosecuted by suit for the penalty as when being prosecuted criminally. The violation may be prosecuted in either manner. United States v. Stevenson, 215 U. S. 190, 30 Sup. Ct. 35, 54 L. Ed. 153. In that case the court said:

"A reading of these sections makes it apparent that the act makes it a misdemeanor to assist or encourage the importation of contract laborers, and that violations thereof may be punished with forfeiture and payment of $1,000 for each offense, which, it is provided, may be sued for and recovered by the United States, or by any person bringing the action, as debts of like amounts are recovered in the courts of the United States; and it is made the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States. * * *

"Congress having declared the acts in question to constitute a misdemeanor, and having provided that an action for a penalty may be prosecuted, we think there is nothing in the terms of the statute which will cut down the right of the government to prosecute by indictment if it shall choose to resort to that method of seeking to punish an alleged offender against the statute. Nor does this conclusion take away any of the substantial rights of the citizen. He is entitled to the constitutional protection which requires the government to produce the witnesses against him, and no verdict against him can be directed, as might be the case in a civil action for the penalty. Hepner v. United States, 213 U. S. 103 [29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960]."

[4] I do not see that any right of the alien in such a case is invaded by an order providing that he be held or detained as a witness when his deportation is delayed or suspended by competent authority for that purpose as may be done under the provisions of section 19 of the Immigration Act, and that he may be committed unless he shall give bail to appear as a witness at a time and place designated. I do not know of any treaty stipulation which will be violated by such action. It would seem that Congress as it has done may provide for or authorize delay in the execution of an order of deportation and a suspension of action thereunder for a reasonable time to serve some public purpose. The arrest and detention without bail of alien Chinese laborers in the United States and here contrary to law has been authorized, and the act has been repeatedly held constitutional. As bail in all cases of aliens unlawfully in the United States and subject to deportation is in the discretion of the court, and their detention to be used as witnesses is authorized by act of Congress, I do not see that it is an abuse of authority or an invasion of any right of the alien subject to deportation to fix bail for his appearance in court at a definite time and allow him to go at large on giving bail accordingly which otherwise he could not do. Subject to deportation and lawfully held in custody for that purpose, and with the immediate execu-

tion of the order of deportation lawfully suspended, it would seem proper and lawful to provide that such alien may go at large, provided he gives a bond to appear at a designated place and time fixed. The suspension of the execution of the order of deportation is not conditioned on his giving a bond. The suspension is within the power of the government in dealing with aliens unlawfully in the United States. The giving of the bond is a mere condition of his being at liberty while in the United States.

I think the section of the immigration law referred to, authorizing suspension of deportation when the presence of the alien at a future day is deemed necessary, and rule 25 quoted, were intended to apply, and do apply, to both the criminal and civil prosecutions under and authorized by the Immigration Act. If not so, then the rule would be unnecessary, for in all criminal cases prosecuted by the United States witnesses, whether aliens or not, may at the request of the United States attorney be held to bail for attendance at court. Section 881, Revised Statutes of the United States; 1 U. S. Compiled Statutes (1913) § 1492, p. 638. That section reads as follows:

"Sec. 1492. (R. S. § 881.) *Recognizance of Witnesses Required at any Time on Application of District Attorney.*—Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge."

In view of the purpose of the law and of the end to be attained, I cannot arrive at any other conclusion. I have no doubt that the detention of the alien under a suspension of an order of deportation is valid. That lawfully he may be allowed to go at large on bail prior to actual deportation cannot be questioned. The act provides for bail pending deportation, and in my opinion the bond, if given, will be valid and enforceable. The practice authorized by the statute and rule quoted will give reasonable assurance to the United States attorney that the attendance of the necessary alien witnesses is certain on the trial of actions for penalties incurred through a violation of the Immigration Act, and this without added hardship to such aliens. As already stated, the provision for a court order allowing bail as a witness is in the interest of the detained alien, as it assures him the sum of one dollar per day while so detained. But for such court order authorized by the rule the alien would be detained without pay.

[5] It is unnecessary to refer to the numerous decisions to the effect that, when the power to make rules and regulations for carrying out a specific enactment of Congress is expressly conferred on the

head of a department of the United States government, such rules and regulations have all the force of law if consistent therewith, reasonable, and within the scope of the power conferred.

My conclusions and holding are that where an alien has been duly held for deportation and his deportation duly suspended to enable him to be used as a witness for the United States in the prosecution of either a criminal case arising under the immigration law or a civil case to enforce a penalty incurred by a violation of the Immigration Act, and such facts are brought to the attention of the United States attorney and he determines to institute proceedings, such alien may be detained by order of the District Court as a witness.

The order made is confirmed accordingly.

HOUGH v. SOCIÉTÉ ELECTRIQUE WESTINGHOUSE DE RUSSIE et al.

(District Court, S. D. New York. March 6, 1916.)

1. CITIZENS ⊜11—CITIZENSHIP OF UNITED STATES AND OF THE SEVERAL STATES.

One may be a citizen of the United States, and yet not a citizen of any state.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. § 18; Dec. Dig. ⊜11.]

2. REMOVAL OF CAUSES ⊜26—GROUNDS—DIVERSITY OF CITIZENSHIP.

Under Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1913, § 991), giving the District Court jurisdiction over actions between citizens of different states, and section 28 (section 1010), providing for the removal of causes of which the District Courts have original jurisdiction which may be brought in the courts of a state, a citizen of the United States, who resides in a foreign country and is not a citizen of any state, cannot remove an action brought against him in a state court, since no case may be removed on that ground unless the defendants are citizens of some state other than the plaintiff.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 60–63; Dec. Dig. ⊜26.]

3. REMOVAL OF CAUSES ⊜36—RIGHT TO REMOVE—FRAUDULENT JOINDER TO PREVENT REMOVAL.

To establish fraudulent joinder of a citizen to prevent removal to the federal court, it must be shown that plaintiff could not reasonably suppose that relief could be given; it not being sufficient that plaintiff's motive was to prevent removal, if he supposed he had an honest chance to procure a judgment against the joined defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. ⊜36.]

4. REMOVAL OF CAUSES ⊜36—RIGHT TO REMOVE—VIOLATION OF CONSTITUTION.

The fact that the state courts could give no judgment against a defendant, alleged to have been joined to prevent removal, except in violation of the fourteenth amendment, does not entitle defendant to removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. ⊜36.]

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5. REMOVAL OF CAUSES ⊂⊃89(2)—DETERMINATION OF QUESTIONS—FRAUDULENT JOINDER OF DEFENDANTS.

The question whether a defendant was fraudulently joined to prevent removal is a question for the federal court alone.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 192–195, 197; Dec. Dig. ⊂⊃89(2).]

6. REMOVAL OF CAUSES ⊂⊃36—FRAUDULENT JOINDER OF DEFENDANT—REASONABLE GROUNDS.

Where a corporation was organized under foreign laws which permitted the appointment of a liquidator with powers limited by the stockholders, and a resolution of the stockholders authorized the liquidator to undertake all proceedings, as well as all legal suits, to represent the company in suits between itself and third persons, and to fulfill all necessary formalities under the laws of other countries, there was, under all the circumstances, reasonable ground for plaintiff to believe that he would be in a better position if he secured a judgment against the liquidator, as well as against the foreign corporation, so that it cannot be held that the liquidator was fraudulently joined to prevent removal of the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. ⊂⊃36.]

At Law. Action by David L. Hough against the Société Electrique Westinghouse de Russie and another, originally brought in the Supreme Court of the state of New York. On plaintiff's motion to remand, after removal of the cause to the United States District Court, and defendants' motion to dismiss the action. Motion to remand granted, and motion to dismiss itself dismissed for lack of jurisdiction.

This is an action originally brought in the Supreme Court of the state of New York against a French corporation doing business in Russia and Robert H. McCarter, who was appointed its liquidator by resolution of the shareholders at a general meeting held in the city of Paris on the 30th day of June, 1913. At the proper time the defendants filed a petition for removal in the state court, with the necessary bond, setting forth that the action had been commenced on the 27th of January, 1915, by service of the summons upon the defendant McCarter, the liquidator of the corporation, at 71 Broadway, in the city of New York, and that thereafter, on the 8th day of March, 1915, a copy of the verified complaint was served upon the attorneys for the defendant, who had appeared specially for the purpose of removing and dismissing. The petition then alleged that the controversy was between the plaintiff, who was a citizen of New York, the defendant company, and McCarter, who was a citizen of the United States, resident in the city of London, and that the allegation in the complaint that McCarter was a citizen of the state of New York was false and fraudulent. The petition likewise alleged that the cause of action was for breach of a contract entered into in Russia between the plaintiff and the defendant company through McCarter, who was then its president; that the corporation still existed and had not been dissolved; that McCarter, as its liquidator, had no title to the assets; that the company had no assets in the state of New York, and had never transacted any business there, and that under the laws and customs of France the function and powers of McCarter as liquidator were simply those of an attorney in fact or general agent, to collect the assets, pay the debts, and wind up the affairs; that McCarter was acting in pursuance of the resolution aforesaid, and not under any statute or common law of the republic of France. The petition further alleged that the plaintiff had fraudulently and improperly joined McCarter as liquidator for the sole purpose of preventing removal to this court, and that the plaintiff in the complaint did not set forth facts sufficient to constitute a cause of action against McCarter as liquidator, who was there-

fore not a necessary or proper party, the controversy being wholly between the plaintiff and the French corporation.

The order of removal was made in the state court. The plaintiff moves to remand the case to the Supreme Court, and the defendants to dismiss the suit against both defendants—against the corporation on the ground that no jurisdiction could be acquired over it, and against the defendant McCarter upon the ground that as liquidator, in which capacity alone he is joined, no cause of action is shown against him. In support of both motions the parties submitted extended affidavits relating to the law of France, designed to show that the defendant McCarter, as liquidator, could or could not be sued outside the republic of France and that the service was therefore void.

Charles K. Carpenter, of New York City, for plaintiff.

M. W. Wynne and H. E. Chapin, both of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] The first question to be considered is the motion to remand, for if that should be granted this court has no jurisdiction to pass on the question of the validity of the service against McCarter. McCarter's testimony shows that he is a citizen of the United States, and alleges that he resides in London, England; that he came to New York shortly after the outbreak of the Great War, and is now temporarily sojourning in New York on that account. He does not rest his right of removal upon the fact that he is a citizen of any of the states, for the record is barren of any evidence upon that score. One may be a citizen of the United States, and yet not be a citizen of any state. The Slaughter House Cases, 16 Wall. 36, 74, 21 L. Ed. 394. Yet, under sections 24 and 28 of the Judicial Code, no case may be removed, unless the defendants are citizens of some other state than the plaintiff. As the citizenship in another state of McCarter has not been shown, and as the jurisdiction of this court must be proved, the motion to remand must be disposed of in precisely the same way as though he was in fact a citizen of New York, of which the plaintiff is a citizen.

[3] Therefore the motion to remand is good, unless McCarter can show that he has been joined with the fraudulent purpose of preventing a removal into this court. Upon this issue he must show more than that no relief can be granted against him in the state court; he must show that the plaintiff could not reasonably suppose that no such relief could be given. If so, it would necessarily follow that the joinder was fraudulent; but it is irrelevant that the plaintiff's motive was to prevent removal, provided he supposed that he had an honest chance to procure judgment against McCarter. Chicago, R. I. & P. Ry. v. Schwyhart, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. Ed. 473.

[4] Nor does it make a different case, even though it appeared that the state court could give no judgment against McCarter, except in violation of the fourteenth amendment, because the right to remove rests wholly on diversity of citizenship, and if the fourteenth amendment does protect McCarter, he may raise it in the state court, and, if it is disregarded, prosecute his writ of error to the Supreme Court, where he will be protected. Riverside, etc., Mills v. Menefee, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910.

[5] Hence the sole question, which is a question of fact for this court alone (Ches. & Ohio Ry. v. Cockrell, 232 U. S. 146, 153, 34 Sup. Ct. 278, 58 L. Ed. 544; Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757), is whether McCarter has shown that the plaintiff had no "real intention to get a joint judgment" and that there was no "colorable ground for it shown" (Chicago, R. I. & P. Ry. v. Schwyhart, supra, 227 U. S. 194, 33 Sup. Ct. 250, 57 L. Ed. 473); that is, whether the joinder "was without any reasonable basis" (Ches. & Ohio Ry. v. Cockrell, supra, 232 U. S. 153, 34 Sup. Ct. 278, 58 L. Ed. 544).

Therefore the precise character of a liquidation under the French law is only indirectly involved; that is, only so far as to see whether the plaintiff could honestly suppose that he could get some relief against McCarter upon personal service made here. That is a question of state law. Chicago, R. I. & Pac. Ry. v. Schwyhart, supra; Chicago, R. I. & Pac. Ry. v. Whiteaker, 239 U. S. 421, 36 Sup. Ct. 152, 60 L. Ed. ——. I shall assume that the petition of removal is sufficient upon its face, since it sets forth the basis of its conclusion, and I shall proceed directly to the merits of the issue joined.

The decision of the Supreme Court in Riverside, etc., Mills v. Menefee, supra, destroys any possible use for the joinder of McCarter as liquidator, since the state court must in any case dismiss as against the defendant corporation; but it does not avoid the necessity of deciding whether the joinder was fraudulent when made, because the decision was rendered after this action was commenced.

[6] Some consideration is therefore still necessary of the powers of a liquidator, appointed as he was by a French corporation, at least to the extent of learning whether the plaintiff had any reasonable chance of success against him. Both sides agree that such a liquidator is limited by the powers which the stockholders give him, if they give him specific powers. The resolution appointing McCarter provided, among other things, that he might undertake all "proceedings," as well as all legal suits, might represent the company in suits between itself and third persons, as well as in all other public or private "administration" (whatever that may mean), and might fulfill all necessary formalities under the laws of all other countries. The language is certainly not clear, and I am by no means sure what construction another court would be disposed to put upon it. That they might say that McCarter had authority to appear here for the company seems to me almost certain. That his powers so to represent the company in all litigations might subject him to an involuntary suit elsewhere than in France is a question not without doubt. It may possibly be that the power ought to be construed as only intended to allow his voluntary appearance elsewhere as a defendant, but I should be unwilling to say that there was no color for a broader construction. The resolution at the outset states that McCarter is to have the most extended powers accorded by the laws and customs of commerce, and there is much evidence that these include a liability to service, at least in France. While, on the other hand, there is no evidence whether such liability extends under the law of France to suits outside of France,

I ought not assume that the courts of New York will certainly say that it does not, and surely not that the plaintiff does not believe so.

In a case so doubtful, where the validity of a judgment against the corporation would at best have been of very doubtful validity extra-territorially, even before Riverside, etc., Mills v. Menefee, supra, I should suppose that the plaintiff might well think his case would stand better if he got judgment in addition against the liquidator. I believe that to be the fact, though how far he will succeed I cannot tell. Even if I thought that judgment certainly valueless elsewhere, it would make no difference, unless I thought in addition that the state courts would not grant it for such effect as it might have.

Motion to remand granted.

Motion to dismiss itself dismissed for lack of jurisdiction, but of course without prejudice.

HILL et al. v. HILL et al.

(District Court, E. D. Arkansas, E. D. March 20, 1916.)

No. 370.

1. HOMESTEAD ⊂=115(2)—VALIDITY OF MORTGAGE—LAW GOVERNING—CHANGE IN CONSTITUTION OF STATE.

The validity of a mortgage of homestead lands executed in Arkansas while the Constitution of 1868 of that state was in force, which differs materially from the Constitution of 1874, must be determined by the earlier instrument.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 186–190; Dec. Dig. ⊂=115(2).]

2. COURTS ⊂=366(1)—DECISIONS OF STATE COURTS—STATE CONSTITUTION—CONSTRUCTION BY FEDERAL COURT.

The decisions of the Supreme Court of the state of Arkansas, construing its Constitution, are conclusive on a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⊂=366(1).]

3. HOMESTEAD ⊂=115(2)—VALIDITY OF MORTGAGE—CONSTITUTION OF ARKANSAS.

Under Const. Ark. 1868, art. 12, § 2, providing that hereafter the homestead of any resident of the state who is a married man or the head of a family shall not be incumbered in any manner while owned by him, with exceptions, a husband's mortgage of his homestead, though joined in by his wife, was void.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 186–190; Dec. Dig. ⊂=115(2).]

4. HOMESTEAD ⊂=115(2)—INCUMBRANCE—NECESSITY TO CLAIM EXEMPTION—STATUTE.

Sess. Acts Ark. 1871, p. 285, entitled "An act to regulate the practice in the matter of exemption of property from execution under final process," was intended to apply only to executions, and the head of a family, who failed to claim his land as a homestead in conformity with the statute before sale thereof was made under power contained in his mortgage, did not lose his homestead right; his incumbrance being void under Const. 1868, art. 12, § 2.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 186–190; Dec. Dig. ⊂=115(2).]

At Law. Action by Mary M. Hill and others against Will Hill and others. On demurrer to defendants' plea. Demurrer overruled.

This is an action in ejectment, instituted by the plaintiffs to recover certain lands lying in the county of Phillips, state of Arkansas. The plaintiffs claim to be the owners of the lands by certain mesne conveyances, hereinafter more fully set out. The original defendants are tenants of the children and heirs of John R. Williams, deceased. They were not made parties originally, but by leave of the court were made parties defendants, claiming to be the real owners of the lands.

The plaintiffs claim ownership of the lands as follows: That on April 9, 1873, one John R. Williams was the owner in fee simple of the lands in controversy, and certain other lands, constituting a large plantation. Being indebted to a mercantile firm, doing business under the name of Hill, Fontaine & Co., he executed a deed of trust, in the nature of a mortgage, to Napoleon Hill, as trustee, to a large plantation, of which the land in controversy, comprising 160 acres, was a part. The mortgage contained a power of sale upon default. Having made default in payment of the debt intended to be secured by this mortgage, the trustee, Napoleon Hill, sold all the lands covered by the mortgage on April 20, 1875, and the plaintiffs claims under this sale.

The complaint also alleges that on March 7, 1874, after the execution of the mortgage, but before the sale under the foreclosure by the trustee, the mortgagor, John R. Williams, filed in the office of the circuit clerk and ex officio recorder of Phillips county, a schedule of homestead, wherein he claimed the lands now in controversy as a homestead.

The complaint further alleges that at the time of the execution of the mortgage, and prior thereto, the said John R. Williams was a married man and the head of a family; that he died in November, 1879, leaving surviving him his wife and a number of children; that after the sale of the lands under the mortgage by the trustee, the mortgagor remained in possession of the property described in the schedule of homestead, and which are the lands in controversy, and after his death his widow and children continued in the possession of the homestead; that in October, 1913, the widow died; and that since then the defendants have continued in possession as tenants of the heirs of John R. Williams.

This action was instituted on November 29, 1915.

The heirs of John R. Williams, after having been made parties defendants to this action, filed an answer, and among other pleas set up the following: "They say that at the time of the execution of the deed of trust by the said John R. Williams to Napoleon Hill as trustee, on the 9th day of April, 1873, the said John R. Williams was a married man and the head of a family; that he resided upon the lands sued for herein; and, said lands being his homestead, they allege that said deed of trust, so executed to the said Napoleon Hill, as trustee, was, under the Constitution of 1868, null and void, and that no title passed from the said John R. Williams to the said Napoleon Hill as trustee. They further state that no title having passed to the said Napoleon Hill as trustee under said deed of trust, none passed to said plaintiffs by reason of the mesne conveyances arising from the foreclosure of the same, but, on the contrary, they say that the title remained vested in the said John R. Williams, and after his death in his heirs at law, these defendants, who are now the sole and absolute owners of these lands sought to be recovered by the plaintiffs in this action."

To this plea the plaintiffs have filed a demurrer, alleging that these allegations do not constitute a defense to the action.

The Constitution of the state of Arkansas in force at that time was the Constitution of 1868, which continued in force until October 30, 1874, when the present Constitution of the state was adopted. That Constitution contained the following provisions:

Article 12. Exempted Property.

"Sec. 2. Hereafter the homestead of any resident of this state who is a married man or head of a family shall not be incumbered in any manner while

owned by him except for taxes, laborers' and mechanics' liens and securities for the purchase money thereof.

"Sec. 3. Every homestead not exceeding one hundred and sixty acres of land, and the dwelling and appurtenances thereon, to be selected by the owner thereof, and not in any town, city or village, or in lieu thereof, at the option of the owner, any lot in any city, town or village, with the dwelling and appurtenances thereon, owned and occupied by any resident of this state, and not exceeding the value of five thousand dollars, shall be exempted from sale on execution or any other final process from any court; but no property shall be exempt from sale for taxes, for the payment of obligations contracted for the purchase of said premises, for the erection of improvements thereon or for labor performed for the owner thereof. Provided, that the benefit of the homestead herein provided for shall not be extended to persons who may be indebted for dues to the state, county, township, school or other trust funds.

"Sec. 4. If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt, and the rents and profits thereof shall accrue to her benefit during the time of her widowhood, unless she be the owner of a homestead in her own right.

"Sec. 5. The homestead of a family, after the death of the owner thereof, shall be exempt from the payment of his debts, in all cases, during the minority of his children, and also so long as his widow shall remain unmarried, unless she be the owner of a homestead in her own right."

H. R. Boyd, of Memphis, Tenn., for plaintiffs.

Moore, Vineyard & Satterfield and Fink & Dinning, all of Helena, Ark., for defendants.

TRIEBER, District Judge (after stating the facts as above). [1] The mortgage under which plaintiffs claim title having been executed while the Constitution of 1868 was in force, and which differs materially from the present Constitution, the validity of the mortgage must be determined by that instrument.

[2] The question raised by the demurrer involving the construction of the Constitution of the state of Arkansas, it is conceded by both parties that the decisions of the Supreme Court of the state construing it are conclusive on this court.

On behalf of the plaintiffs it is claimed that, unless the owner of lands occupied as a homestead claimed the same in conformity with the provisions of the act of the General Assembly of the state of Arkansas, approved March 28, 1871 (Session Acts Arkansas 1871, p. 285) before the sale was made under the power of the mortgage, the homestead right is lost, and the sale passes a perfect title to the purchaser at that sale. It is also claimed that the homestead right, in case of a mortgage, gives the owner thereof only the right of possession during his life, and after his death to his widow for life and his children during minority, and as the widow is dead, and all the children have attained their majority, the purchaser at the foreclosure sale and his grantees are entitled to the possession of the lands. On the other hand, the defendants contend that under the Constitution of 1868 a mortgage of a homestead was absolutely void, and passed no title whatever to the mortgagee or his assigns.

The plaintiffs rely upon Norris v. Kidd, 28 Ark. 485, and the cases which follow the rule established in that case. But Norris v. Kidd does not construe section 2, of art. 12, of the Constitution, but sec-

tion 3 of this article, which applies solely to sales under execution, or any other process from a court, and not to mortgages. This was expressly decided by the Supreme Court in Frits v. Frits, 32 Ark. 327, 332. In that case an action was brought to foreclose a mortgage, and the plea was interposed that it was a homestead, and for that reason the mortgage was void under the Constitution of 1868, which was in force at the time of the execution of the mortgage. On behalf of the mortgagee, it was there claimed that the plea was defective in not alleging that appellant had scheduled the lands claimed as a homestead, as required by the act of 1871, citing Norris v. Kidd. The court, in overruling this contention, held:

"That case [referring to Norris v. Kidd] is unlike the one now before us, in that the claimant permitted the land to be sold under an execution issued upon a judgment, without scheduling the property as required by the statute (Gantt's Digest of the Statutes of Arkansas, § 2635, which is the act of March 28, 1871), and afterwards the homestead claim was set up as a defense to an action of ejectment by the purchaser, and was held to be too late. Here the homestead claim was properly interposed in the answer to the bill to foreclose the mortgage, and condemn the lands to be sold to satisfy the debt."

And the court held that under the provisions of the Constitution of 1868 a mortgage on a homestead, except for taxes, laborers' and mechanics' liens, and purchase money is void.

[3] That a mortgage, even if the wife joins in it, executed while the Constitution of 1868 was in force, as is the case in the case at bar, is absolutely void has been uniformly held by the Supreme Court of Arkansas. As that Constitution was only in force for six years, the decisions on this subject are more numerous than might be expected, and they are all to the effect that a mortgage on the homestead is invalid. The first case decided was Harbison v. Vaughan, 31 Ark. 15 (without an opinion, except, "Mortgage of homestead under the Constitution of 1868 is invalid"). Other cases in which the same conclusion was reached are Frits v. Frits, supra; Sentell v. Armor, 35 Ark. 49; Klenk v. Knoble, 37 Ark. 298, 304; Webb v. Davis, 37 Ark. 551, 555; Sims v. Thompson, 39 Ark. 301; Brown v. Watson, 41 Ark. 309, 313. In the last case it was held:

"What this court has so often asserted as to make any further assertion of it unnecessary in the reports is that a mortgage or a deed of trust, or any attempted incumbrance on a homestead, other than those excepted in the Constitution, is void."

In Webb v. Davis, supra, the mortgage contained a provision "that said property is not our homestead, and forms no part thereof, and we do not claim it as much." In the proceeding to foreclose this mortgage the plea of homestead was set up, and the court held that the plea was good. The court said:

"The fact that any of these lots were or were not the homestead of appellees depended not upon any recitals, statements, stipulations, or covenants contained in the mortgage. The actual use and occupation as a home and residence constituted the homestead, and could only be shown by extrinsic evidence. * * * Any recitals, statements, stipulations, or covenants incorporated in the mortgage to prevent the pleading or proving this fact, or having that effect, if any, according to the legal construction thereof, were in violation of the Constitution in force at the time of its execution (referring to the Consti-

tution of 1868) and against its policy, and are void. * * * The facts stated in the answer are sufficient to constitute a defense."

To the same effect is Klenk v. Knoble, supra. In that case the court said:

"It would be mere child's play to enable the lender to neutralize that [referring to the prohibition against mortgaging the homestead] by exacting from the borrower a statement in the instrument, denying the character of the property, and then closing his mouth by an estoppel."

[4] The act of 1871, which was construed in Norris v. Kidd, digested as section 2635 of Gantt's Digest of the Revised Statutes of Arkansas of 1874, shows clearly that it was only intended to apply to executions, as was held in Frits v. Frits. This is conclusively shown by the title of the act, which was "An act to regulate the practice in the matter of exemption of property from execution on final process." The Constitution of 1868, art. 5, § 22, provided:

"No Act shall embrace more than one subject, which shall be embraced in its title."

So, while in the absence of such a constitutional provision the title would not be considered as a part of the act, under a provision like that contained in the Constitution of 1868, the title of an act is of great importance in determining the intention of the Legislature. Cooley on Constitutional Limitations (7th Ed.) p. 202; Sedgwick on Construction of Statutes (3d Ed.) p. 40.

In view of the uniform rulings of the Supreme Court of Arkansas, there can be no doubt that a mortgage executed on a homestead while the Constitution of 1868 was in force was absolutely void, and passed no title. This conclusion makes it unnecessary to determine the effect of the filing by Williams of the schedule of homestead after the execution of the mortgage and before the sale under the mortgage.

The demurrer is overruled.

SMITHSON v. RONEO, Limited.

(District Court, E. D. New York. March 11, 1916.)

1. COURTS ⇐274—UNITED STATES COURTS—JURISDICTION—ACTIONS AGAINST ALIENS.

A British corporation can be sued in a United States court only in a district where it can be validly served.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⇐ 274.]

2. COURTS ⇐276—UNITED STATES COURTS—JURISDICTION—WAIVER OF DEFECTS.

As under Act March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433, giving the Circuit Courts jurisdiction of suits involving controversies between citizens of a state and foreign states, citizens, or subjects, the District Courts generally have jurisdiction over any case between an alien and a citizen of any state, the right of an

alien to object to the place of suit or to any defect in the service can be waived.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. ⊂⊃276.]

3. CORPORATIONS ⊂⊃668(7) — FOREIGN CORPORATIONS — ACTIONS — SERVICE OF PROCESS.

The managing director of an English corporation, while in the United States upon a pleasure trip, negotiated with parties seeking to enter into business relations with the corporation, but confined his activities to preliminary negotiations, leaving the making of any contract to the corporation in England. The corporation owned stock in a New York corporation conducting a somewhat similar business, but left ordinary business transactions to the New York corporation as within its territory. *Held*, that process in a suit on a cause of action arising some time previously in connection with transactions in England between plaintiff and the corporation could not be served on such managing director while so in the United States, as the corporation was not conducting business, and had no place of business within the district, so as to justify such service.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2613; Dec. Dig. ⊂⊃668(7).]

4. CORPORATIONS ⊂⊃668(7)—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS.

A foreign corporation could not object to the service of process upon an officer while within a district, if while in such district, upon the primary purpose of a pleasure trip, he exercised his official connection with the company in the conduct of its ordinary business and was served in such capacity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2613; Dec. Dig. ⊂⊃668(7).]

5. CORPORATIONS ⊂⊃642(6)—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS.—"ENGAGED IN BUSINESS FOR CORPORATION"—"REGULAR PLACE OF BUSINESS"—"OFFICE FOR TRANSACTION OF BUSINESS."

The making of a contract or entering into business relations with a party within the boundaries of any certain district may render the terms of that contract subject to the laws of the jurisdiction, and in so far as an officer or agent of the corporation was concerned with the making of such a contract he would be "engaged in business for the corporation"; but the hotel or other casual place in which the transaction might be had could not be construed as a "regular place of business," nor "office for the transaction of business" of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2526; Dec. Dig. ⊂⊃642(6).]

6. CORPORATIONS ⊂⊃642(6)—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS—"DOING BUSINESS."

The mere taking advantage of casual presence in a given locality, and the direct interview or arranging for business by word of mouth rather than letter or telephone, would not constitute "doing business" by a foreign corporation and the maintenance of a place of business, unless the circumstances indicated that the corporation was entering upon the actual conduct of business in the mercantile sense, in the place where the negotiations were had, and that the appearance of accidental or casual coincidence and negotiation was but a subterfuge or cloak.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2526; Dec. Dig. ⊂⊃642(6).

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

7. CORPORATIONS ⟸642(1)—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS—DOING BUSINESS.

To be doing business in a jurisdiction the business done by a foreign corporation must be such in character and extent as to warrant the inference that it has subjected itself to the jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520, 2521; Dec. Dig. ⟸642(1).]

8. CORPORATIONS ⟸674—FOREIGN CORPORATIONS—ACTIONS—SERVICE OF PROCESS.

Whether a foreign corporation is conducting business and has a sufficiently defined place of conducting business to justify the United States courts in holding that it has been found and is liable to service within the district is primarily a question of fact, and the legal position rests upon the determination of this question of fact.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2651, 2652; Dec. Dig. ⟸674.]

At Law. Action by William C. Smithson against Roneo, Limited. Service held void, and action dismissed.

Nicholas W. Hacker, of New York City, for plaintiff.

Parsons, Closson & McIlvaine, of New York City, for defendant, appearing specially.

CHATFIELD, District Judge. [1] The defendant is a corporation of Great Britain. It can be sued in a United States court only in a district where it can be validly served. In re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991; In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; Barrow Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964.

[2] The right to object to the place of suit (or any defect in service) can be waived, as the United States District Courts generally have jurisdiction or power of removal over any case between an alien and a citizen of any state. Chapter 373, Act March 3, 1887, as corrected by chapter 866, Act Aug. 13, 1888.

In this case the defendant has objected from the outset, appearing specially for the purpose, to the exercise of jurisdiction by the court over the defendant, on the ground that the defendant has not been validly served. The summons was served upon a person who sufficiently represented the corporation, if it was doing business within the state. Brush Creek Coal & Mining Co. v. Morgan-Gardner Electric Co. (C. C.) 136 Fed. 505.

[3] It appears that this person, who was the managing director (that is, the official head of the corporation under the English law), was in the United States upon a pleasure trip. While here he looked into certain matters or had certain negotiations with some four parties who were seeking to enter into business relations with the defendant corporation. In each instance this managing director apparently confined his activities to preliminary discussion or negotiations, and carefully left the making of any contract for formal action by the corporation in England.

It appears from the record that the defendant corporation owned a certain amount of stock in a New York corporation, which main-

tained an office here and conducted a somewhat similar business. The defendant left the ordinary business transactions to the New York corporation, as within its territory. Under such circumstances, it could not be said that the managing director was improperly enticed within the state, or that he was brought here under compulsion. Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782; Fitzgerald Const. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608.

[4] Nor could the defendant object, if while here upon the primary purpose of a pleasure trip, he exercised his official connection with the company in the conduct of its ordinary business, and was served in such capacity. But if the company did no business in the usual course in the state of New York, if it maintained no office, and if it carefully observed the rights of the New York corporation, so as to leave to the New York corporation all business within this state, a different situation is presented.

A corporation has been held not to be doing business, in the sense of maintaining a regular place of business and being liable to service, where the business is really that of another corporation which it controls. Peterson v. Chicago, Rock Island & Pac. Ry., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113.

[5] The making of a contract or entering into business relations with a party, within the boundaries of any certain jurisdiction, may render the terms of that contract subject to the laws of that jurisdiction, and in so far as an officer or agent of the corporation was concerned with the making of such a contract he would be engaged in business *for* the corporation. But the hotel, train, attorney's office, or casual place in which such transaction might be had, could not be construed as a regular place of business, nor as an office for the transaction of business, of the defendant corporation.

[6] Nor would the mere taking advantage of casual presence in any given locality, and the direct interview or arranging for business by word of mouth, instead of by letter or telephone, constitute the doing of business and the maintenance of a place of business, unless the circumstance indicated that the corporation was entering upon the actual conduct of business, in the mercantile sense, in the place where the negotiations were being had, and that the appearance of accidental or casual coincidence and negotiation, through the physical presence of the two parties at the same spot, was but a subterfuge or cloak to cover the real facts.

[7] The business done by a foreign corporation must be such in character and extent as to warrant the inference that it has subjected itself to the jurisdiction. St. Louis S. W. Ry. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77. In the present case the plaintiff is seeking to bring suit upon a cause of action arising some time before, in connection with transactions in England, between the plaintiff and the defendant corporation. To hold that the defendant corporation may be sued in the United States, because the managing director took up certain business for it personally while traveling in this country, instead of conducting that

business by letter, is impossible, under the authorities. The case of St. Louis S. W. Ry. v. Alexander, supra, presents an entirely different state of facts.

[8] If the negotiations or business talks had taken place upon a train between San Francisco and New York, claim might be made that the defendant corporation was doing business in every district through which the train passed. Certainly it would have no property resident in that district, and would have no established place of business, nor any office. This indicates that the question of law, as to whether a corporation is conducting business and has a sufficiently defined place of conducting business to justify the United States courts in holding that it has been found and is liable to service within the district, is primarily a question of fact, and that the legal position rests upon the determination of this question of fact.

In the present case, even though the defendant is thus able to appear specially and to avoid the litigation of the alleged causes of action urged against it by a resident of this country, it must be found that the defendant has not conducted business nor established a place of business within this district, in such a way as to justify service of process upon one of its officers, who was, in pursuance of a preconceived plan, taking up certain business matters while incidentally in the city of New York.

The service will be held void, and the action dismissed.

VANE et al. v. A. M. WOOD & CO., Inc., et al.

(District Court, S. D. New York. February 15, 1916.)

1. SHIPPING ⟸150—FREIGHT—LIABILITY OF CONSIGNEE.

A consignee, who receives a cargo under a bill of lading which contains an agreement that he shall pay the freight, becomes personally liable therefor; but his liability is limited to the amount for which the ship has a lien, and where under a charter the ship is to be paid a per diem freight he is liable therefor only up to the time when his goods are discharged.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 511; Dec. Dig. ⟸150.]

2. SHIPPING ⟸147—FREIGHT—LIABILITY OF SHIPPER.

A shipper, whose contract is with a charterer, and who had no knowledge of the charter and did not receive the bill of lading, which referred thereto, is not liable for freight in accordance with its terms; but the extent of his liability is determined by his own contract with the charterer.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 500, 506, 507; Dec. Dig. ⟸147.]

In Admiralty. Suit by William B. Vane and others against A. M. Wood & Co., Incorporated, and the American Smelting & Refining Company. Decree for libelants.

This is a libel in personam for the recovery of freight upon a voyage of the schooner Fannie H. Stewart, of Cambridge, Md., from Baltimore to Perth Amboy and back to Chesapeake Bay. The libelants chartered the vessel to

one Anthony McGarvey for the voyage in question, to carry a complete cargo of pyrites cinders at a hire of $20 per day for every day from the day the vessel reported ready to load cargo in Chesapeake Bay until her return. The vessel reported at the place stated in the charter party on June 6, 1914, and cleared on June 8th with a full cargo of pyrites cinders, which had been shipped by the respondent A. M. Wood & Co., and was consigned to the other respondent, American Smelting & Refining Company. The vessel arrived at Perth Amboy on June 26th and delivered her cargo to the American Smelting & Refining Company, returning to Chesapeake Bay about July 19th. The libelants claim freight for 44 days, $880, together with towing charges of $56, and give credit for $200 paid. The charterer, McGarvey, made a contract with the respondent A. M. Wood & Co. for the carriage of pyrites as referred to, and A. M. Wood & Co. had previously sold the cargo to the American Smelting & Refining Company at "$1.90 per gross ton f. o. b. barge alongside dock, your works, Perth Amboy." When the cargo came on board the Fannie H. Stewart, the master, Clyde Elliott, issued a bill of lading in usual form, with the following clause: "To be delivered in like good order and condition at aforesaid port, Perth Amboy, N. J., * * * unto American Smelting & Refining Company, or assigns; he or they paying the freight for the said goods at the rate of freight and all conditions as per charter party." This bill of lading was given by the master to the American Smelting & Refining Company after the ship reached Perth Amboy. The company received it and thereafter directed the loading to proceed. This was on the 26th of June. After the cargo was partly unladen, the captain, Elliott, demanded his freight, whereat the American Smelting & Refining Company communicated with A. M. Wood & Co., who thereupon paid the amount of freight due to McGarvey under their contract of carriage with him, which amounted to about $400; McGarvey promising to pay the vessel's freight out of the sum thus paid, a promise which he performed only to the extent of the $200 credited by the libelants.

George Whitefield Betts, Jr., of New York City, for libelants.

Chauncey I. Clark, of New York City, for respondent A. M. Wood & Co., Inc.

Cletus Keating, of New York City, for respondent American Smelting & Refining Co.

LEARNED HAND, District Judge (after stating the facts as above). [1] The American Smelting & Refining Company is certainly liable for a certain amount of the freight. It has been held for many years that a consignee, who receives goods under a bill of lading which contains an agreement to pay freight, is personally responsible for the freight. The theory is that the acceptance of the goods under the bill of lading is evidence of an agreement by the consignee to be bound in accordance with its terms. Cock v. Taylor, 13 East, 399; Sanders v. Vanzeller, 4 Q. B. 206; Moeller v. Young, 25 L. J. Q. B. at page 96. The American cases accord, although the reason for the rule is not always stated. Certain Logs of Mahogany, 2 Sumner, 589, Fed. Cas. No. 2,559; Phila. & Reading R. R. v. Barnard, 19 Fed. Cas. 478; Shaw v. Thompson, Fed. Cas. No. 12,726. The rule has, however, been stated as an absolute legal liability. Union Pac. R. R. Co. v. American Smelting & Refining Co., 202 Fed. 720, 121 C. C. A. 182. And this apparently is the effect of the English Bills of Lading Act, 1855 (18 & 19 Vict. c. 111, § 1).

It is not important for this case to decide which doctrine is correct, for there is no question here of the American Smelting & Refining Company's implied undertaking to pay the freight. The real question

at issue is the extent of the obligation. As the charter party was at the rate of $20 per day, and the freight under all the authorities was earned de die in diem, there had been earned only so much as had accrued by the lapse of time up to the 27th of June, together with the towing charges. The rest of the freight was to be earned in the future. There is no doubt, I think, that the master could not have held the cargo under a lien for more than the freight due up to that time. Foster v. Colby, 3 H. & N. 705; Thompson v. Small, 1 C. B. 328; Alsager v. St. Katherine's Docks, 14 M. & W. 794. The question, therefore, depends on whether the implied agreement should be interpreted as commensurate with the lien, or whether it should be interpreted as an absolute agreement to pay the full amount of freight, even though it had not yet been earned at the time of delivery. Justice Story, in Certain Logs of Mahogany, said obiter that the agreement would be implied, even where there was no lien; but it was quite unnecessary for the disposal of that case. He had before him the question of lien, and lien only, the voyage was complete, the charter money was a lump sum down, and had all been earned at the time the lien was asserted. It is true that he held the inward cargo for both outward and inward freight; but it was not necessary for him to dispose of the question which his dictum refers to, and he obviously did not give it the same consideration as the other points which had arisen.

In White & Co. v. Furness, Withey & Co., [1895] A. C. 40, the House of Lords decided, however, that the liability in such a case depends upon the existence of the owners'. That was a case where, under the statute, the consignee had deposited money to pay the lien in the hands of the warehouseman, who acted as stakeholder. A question afterwards arose as to the amount of the freight, and the owner sued the consignee, disregarding the deposit of the lien. The House of Lords held, reversing the Court of Appeal, that, where the consignee under such a bill of lading accepts the goods, the whole transaction is evidence of an undertaking, but that it depends upon the existence of the lien, and since, under the statute, the lien ceased with the deposit, there could be no implied liability. Although this is not binding upon me, it is of the highest authority, especially in matters concerning shipping, and I have been referred to no case which holds to the contrary.

The main importance of importing such an agreement rests in the fact that it enables ships to discharge their cargo without the embarrassment involved in protecting the lien, provided the owners are satisfied with the consignee's solvency. The consideration for the agreement is the release of the lien, and there seems no reason in justice to suppose that the consignee means to agree to pay more than so much as is necessary to release his goods. By paying down the lien at once he could compel the owner to deliver, and could, indeed, sue him for trover if he does not. Foster v. Colby, supra; Thompson v. Small, supra. Why, then, should it be supposed that he intended to pay more than was necessary to release his goods? It seems to me clear that to impose larger liability upon him is not reasonable. I think, therefore, that the liability of the American Smelting & Refining Company ex-

tends to only so much freight as was earned up to the final discharge of the vessel, together with her towing charges up to that time.

[2] The question then arises of the liability of the shipper, A. M. Wood & Co. That the shipper is himself liable for freight when he ships the goods is well settled law, where there is no charter party. Fox v. Young, 40 L. J. Exch. 259. Moreover, this obligation, at least in the absence of a cesser clause, endures after the consignee has accepted delivery, because the clauses in the bill of lading imposing liability upon the consignee are for the protection of the owner, and not of the shipper. Shepard v. De Bernales, 13 East, 565; Donnett v. Beckford, 5 B. & Ad. 521. The question thus arises, however, whether, when the shipper, as here, never received the bill of lading, and when there was a charter party outstanding between a third person and the owner, of which the shipper never had notice, the same law arises.

I see no basis for the construction of any such obligation. In the case of the consignee, as I have already stated, the contract arises from his acceptance of the bill of lading, containing, as it does, an agreement that he shall pay freight, as per the charter party. But the shipper in this case had received no bill of lading and made no such agreement, unless it is to be imported from the mere fact of placing his goods on board the ship. There is good reason for importing such an agreement where he deals only with the ship, and not with the charterer; but in this case he dealt with the charterer, under a specific agreement which limited his obligation by its own terms. I see no reason in such a case to imply any agreement to pay any part of the hire reserved in the charter. Had the shipper actually received the bill of lading, an entirely different situation would have arisen.

The remaining question is whether the American Smelting & Refining Company can throw the loss upon the shipper, A. M. Wood & Co. There seems to be little doubt that in fact A. M. Wood & Co. must, in the final event, bear the loss, for the reason that under the contract between itself and the American Smelting & Refining Company it agreed to deliver the goods f. o. b. Perth Amboy. There is, however, a technical difficulty involved, due to the fact that the American Smelting & Refining Company has not filed any petition against A. M. Wood & Co. for this leave. In order to grant such relief there must be some such petition and demand, and A. M. Wood & Co. must have an opportunity to be heard on that question.

As a result, therefore, the libelants may take a decree against the American Smelting & Refining Company for the sum above stated, and the American Smelting & Refining Company may file a petition against A. M. Wood & Co., which A. M. Wood & Co. will have leave to answer, if so advised. Upon that petition and answer the case will come on again upon the existing proofs and any others which the parties may present for disposition of that petition. It may be, however, that A. M. Wood & Co. will agree that it has no defense against the American Smelting & Refining Company, and will consent that a decree can go against them, in which case the decree will read against

both American Smelting & Refining Company and A. M. Wood & Co., with a direction that process shall issue first against A. M. Wood & Co. and no process against the American Smelting & Refining Company unless on failure of satisfaction.

The libelant may have one bill of costs against both respondents. The payment made by McGarvey to the libelants out of the money which A. M. Wood & Co. paid him may be marshaled against so much of the whole charter hire as was earned on the return trip. It was a payment made by McGarvey without attribution, and gave the owners the right to apply it as they chose.

SCOTTEN et al. v. ROSENBLUM et al.

(District Court S. D. New York. February 28, 1916.)

1. PLEADING ⊂=8(2)—PLEADING CONCLUSION—"WRONGLY."
A bill of review, alleging that defendant's attorney "wrongly" entered the judgment, pleaded merely a conclusion of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 13; Dec. Dig. ⊂=8(2).]

2. EQUITY ⊂=447(2)—BILL OF REVIEW—NEWLY DISCOVERED EVIDENCE.
A bill of review for newly discovered evidence, which does not show evidence that would support a different conclusion, is insufficient.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1093; Dec. Dig. ⊂=447(2).]

3. EQUITY ⊂=447(4)—BILL OF REVIEW—GROUNDS—NEWLY DISCOVERED EVIDENCE.
A bill of review for newly discovered evidence will not lie where the evidence was available at the time of trial.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1094; Dec. Dig. ⊂=447(4).]

4. DISCOVERY ⊂=5—DISCOVERY OF DOCUMENTS—DELAY UNTIL AFTER JUDGMENT—EXCUSE.
It was never possible for a party to an action at law successfully to apply for discovery after verdict and judgment, unless the delay was excused by accident, surprise, or fraud.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 6; Dec. Dig. ⊂=5.]

5. DISCOVERY ⊂=19—DISCOVERY IN AID OF ACTION AT LAW—SHOWING OF POSSESSION OF DOCUMENTS.
A bill for discovery of documents in aid of an action at law must show that defendant has possession of material documents.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 20–26; Dec. Dig. ⊂=19.]

6. DISCOVERY ⊂=3—BILL TO PUT PARTY ON OATH—OBSOLETE CHARACTER.
A bill for discovery to put a party on his oath is obsolete, since the remedies now given at law in allowing parties to be sworn are adequate, while the whole basis of bills for discovery by answer to the charges of the bill lay in the disqualification of parties to testify in a court of law.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 3, 4; Dec. Dig. ⊂=3.]

7. JUDGMENT ⊂⊃378—EQUITABLE RELIEF—NEWLY DISCOVERED EVIDENCE.
A judgment cannot be reopened for so-called newly discovered evidence, which was available at the time of first trial.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 715, 716; Dec. Dig. ⊂⊃378.]

8. JUDGMENT ⊂⊃512—EQUITABLE RELIEF—FRAUD.
Assignees of a corporation could not have equitable relief from a judgment adverse to them in their suit against the corporation's debtor because he fraudulently denied his signature on the sheriff's certificate, in suit against the corporation in which he was attached, that he was indebted to the corporation, thereby perjuring himself, since only where the defeated party has been prevented by fraud from presenting his own case is he entitled to equitable relief.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 955; Dec. Dig. ⊂⊃512.]

Bill by Samuel C. Scotten and another against Max Rosenblum and another. On motion to dismiss as against the named defendant. Bill dismissed, with leave to amend.

This is a motion to dismiss a bill in equity as against the defendant Rosenblum. The bill is filed by the assignees of a corporation whose business consisted in placing the advertising of its customers, in paying the cost of advertising to the several publications, and of collecting the cost from the customer, with 10 per cent. addition, which constituted the commission of the corporation. The corporation employed the other defendant Samuels as its agent in New York upon an agreement under which he was to receive one-third of the corporation's commissions for the work he was to do. Rosenblum was in the cigar business, and through Samuels placed with the corporation orders for large amounts of advertising which was actually published, and for which Rosenblum left unpaid a balance of over $7,000. Thereafter Samuels left the corporation's employ and sued it for his share of the commissions. In this suit he attached the claim of the corporation against Rosenblum, who filed the usual certificate with the sheriff, saying that he was indebted to the corporation in the sum of over $7,000 as now claimed. The corporation released this attachment and Samuels recovered judgment which was later paid by the corporation. In the trial Samuels testified that he had procured certain advertising for Rosenblum which he enumerated in detail, and for which he had sent the invoices to Rosenblum himself. These invoices he procured again from Rosenblum and put in evidence upon the trial. The advertising amounted to $19,906.60 on which the commissions were $1,990.21, one-third of which Samuels recovered under the judgment in question, Samuels always insisting, however that he could not exactly fix the amount of the corporation's claim against Rosenblum.

Meanwhile the plaintiffs sued Rosenblum at law in this court for more than $8,000, and were beaten, Rosenblum denying his signature to the certificate and saying that he had paid Samuels in full for all his advertising. The decision in that action, which was without a jury, declared that the plaintiffs had failed to show that the corporation had expended any sums for Rosenblum, and that the latter should have judgment with costs. Upon this Rosenblum's attorney "wrongly" entered a judgment, dismissing the complaint on the merits. The date of this judgment is not given, but thereafter the plaintiffs sought in every way to get evidence of the payment by the corporation of moneys for Rosenblum, especially plying Samuels to discover what documents he might have and what information he might acquire, since it was through him alone that all the work had been done. Finally, despairing of getting any help from Samuels and suspecting that he was trying to shield Rosenblum, the plaintiffs brought this suit, asking for a discovery from Rosenblum and Samuels and a decree opening the judgment between itself and Rosenblum if it were determined that Rosenblum owed the money.

Marx & Snydecker, of New York City, for the motion.
Thorndike Saunders, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1-3] The bill is presented in several aspects; as a bill of review, as a bill to reopen a judgment for fraud, as a bill for a discovery. As a bill of review, it cannot be for error appearing upon the record, since it does not appear from the bill that there was any error appearing upon the record of the action of the plaintiffs against Rosenblum. The decision does not contradict the judgment, and there is no reason to suppose that it was erroneous, except from the allegation that Rosenblum's attorney "wrongly" entered the judgment, which is a mere conclusion of law. As a bill of review for newly discovered evidence, it will not serve, because no evidence is suggested which would support a different conclusion, unless it be found in the affidavits of David N. Carvalho and Milton Foreman. These are not parts of the bill, but as they may be made such upon an amendment, it is well to consider their contents now. Foreman was the attorney of the plaintiffs in that action, and swears on February 25, 1914, that in January, 1910, Rosenblum had admitted the claim, and allegation also contained in the bill. It nowhere appears that the trial of the action was before January, 1910, and that this evidence was not available at the time. The reasonable inference is the contrary. Carvalho swears that on December 3 and 4, 1913, he compared Rosenblum's signature in the certificate with his signature on a certificate of incorporation, and found them the same. It does not appear that this was after the trial of the action, and if it did, it would amount to nothing, because the evidence was available at any time after the certificate was filed. I do not mean to consider how far a motion in the action itself for a new trial, being an appropriate remedy, would, in any event, cut off the right to a bill of review. I dispose of the matter on the merits.

[4] Under its aspect as a bill for discovery in aid of the action at law against Rosenblum, the bill is likewise bad. It is quite possible that since Carpenter v. Winn, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842, a bill for discovery of documents in aid of an action at law will still lie. This seems to be the effect of the language of Mr. Justice Lurton, on page 539 of 221 U. S., on page 683 of 31 Sup. Ct., 55 L. Ed. 842, and this was the opinion in Colgate v. Compagnie Française, etc. (C. C.) 23 Fed. 82, although it was generally thought before Carpenter v. Winn, supra, that the discovery available at law under section 724, Rev. St. (Comp. St. 1913, § 1469), had superseded discovery of documents in equity. Safford v. Ensign Mfg. Co., 120 Fed. 480, 56 C. C. A. 630. See, also, the language of Mr. Justice Peckham as to section 724 in United States v. Bitter Root Co., 200 U. S. 451, 475, 26 Sup. Ct. 318, 50 L. Ed. 550.

But that question need not be decided in this case, because even under the old rule it was never possible for a party in an action at law to wait until after verdict and judgment in order to apply for discovery (Brown v. Swann, 10 Pet. 497, 9 L. Ed. 508),

unless there was some charge of accident, surprise, or fraud. It is true that in that case the judgment had been entered by consent, but that was not the basis of the decision, which rested again upon the general rule that such delay in the absence of some excuse was fatal.

[5, 6] Furthermore, no case is made in any event for the discovery of documents, because no evidence is stated in the bill from which it appears that Rosenblum had possession of any documents which are material to the action at law. The proper course, laid down in rule 58 (33 Sup. Ct. xxxiv), has been entirely disregarded, but it would make no difference if it had been followed, because there appears to be nothing to inspect. As a bill for discovery to put Rosenblum on his oath, it is clearly obsolete, since the remedies now given at law in allowing parties to be sworn are adequate for that purpose, and the whole basis of bills for discovery by answer to the charges of the bill lay in the disqualification of parties to testify in a court of law.

[7, 8] The final defense of the bill is as a bill to reopen a judgment at law upon the ground of fraud or newly discovered evidence. In the last point Pickford v. Talbott, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. Ed. 1240, controls. The evidence must not have been available at the time of the first trial. The bill is really indistinguishable in that aspect from a bill of review for newly discovered evidence. As a bill for relief for fraud, the bill is lacking in any specific allegations of fraud, but that I will pass by because it may be cured by amendment, and I wish to dispose of the matter upon the merits. The only conceivable ground of fraud which could arise from the allegations is that Rosenblum fraudulently denied his signature on the sheriff's certificate, and therefore perjured himself. This is not enough, when the very matter has been inquired into and decided. Only in case the defeated party has been prevented by fraud from presenting his own case can he get relief; otherwise there might be indefinite retrials, United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929; Estes v. Timmons, 199 U. S. 391, 26 Sup. Ct. 85, 50 L. Ed. 241; Greenameyer v. Coate, 212 U. S. 434, 29 Sup. Ct. 345, 53 L. Ed. 587; United States v. Gleeson, 90 Fed. 778, 33 C. C. A. 272 (C. C. A. 2d Cir.). Cases like Johannesson v. United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066, where the first decision was ex parte, are to be distinguished.

This bill from every aspect appears to be no more than an effort to retry the action of the plaintiffs against Rosenblum without the limitations applicable to such relief. The bill is dismissed with leave to amend within 10 days after the entry of this order.

ELVERS et al. v. W. R. GRACE & CO.

(District Court, N. D. California, First Division. May 17, 1915.)

No. 13980.

SHIPPING ⊂=173—CONSTRUCTION OF CHARTER PARTY—CESSER CLAUSE.

A charter party provided that the charterers should pay demurrage for delay through their fault in loading or discharging beyond the lay days allowed, but by a cesser clause it was further provided that the ship should have a lien on the cargo for all freight, dead freight, and demurrage, and that "all and any liability of the charterers * * * shall cease and determine as soon as the cargo is on board, all questions, whether of demurrage or otherwise, to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose." *Held* that, in the absence of any provision showing that the lien given was not commensurate with the liability of the charterers, such clause was valid and enforceable, and that a suit in personam could not be maintained against the charterers for demurrage because of delay in loading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 570; Dec. Dig. ⊂=173.]

In Admiralty. Suit by Martin H. A. Elvers and Frederic A. Zimmer against W. R. Grace & Co., a corporation. On exceptions to amended libel. Sustained.

Andros & Hengstler and G. W. Bell, all of San Francisco, Cal., for libelants.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for respondent.

DOOLING, District Judge. This is an action on the part of the shipowners against the charterers for demurrage at the port of loading. The charter contains the following provisions:

"For each and every day's detention by the fault of party of the second part (charterers) or agents, they agree to pay to said party of the first part demurrage at the rate of three pence sterling per register ton per day."

"Bills of lading to be signed for pieces with the clause 'All on board to be delivered,' and at any rate of freight shippers may desire without prejudice to this charter; but if at a lower rate than provided in charter, difference to be paid in cash at port of loading, less commission, interest, and insurance."

"Vessel to have a lien on cargo for all freight, dead freight and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose."

The provision for the payment of demurrage by the charterers applied alike to delays in loading and delays in discharging.

As the libel is against the charterers in personam, exceptions have been filed to it, on the ground that it states no cause of action against respondents, the charterers, because of the cesser clause in the charter, but that libelants' only remedy is an action in rem against the cargo. The action was, however, fully tried, and these exceptions are taken to an amended libel, filed at or about the close of the trial. Similar exceptions taken to the original libel were overruled by the former

judge of this court. The high regard which I have for the late Judge De Haven's learning has caused me to hesitate long before deciding that the exceptions to the amended libel are well taken. But a careful study of the English and American cases in which the effect of so-called "cesser clauses" has been passed upon, has led me to the conclusion that under the provisions of this charter the cesser clause is effective.

In the first place, there is nothing in the nature of the subject-matter which would prevent the parties from entering into any agreement satisfactory to themselves concerning the question of demurrage. The charter party might well have provided that no demurrage at all should be charged for delay, or it might provide, as here, that demurrage should be paid, but that after the ship was laden the owner should be given a lien upon the cargo, and should look to it for the purpose of securing such payment, and that:

"All and any liability of the charterers under the charter shall cease and determine as soon as the cargo is on board."

If there be nothing in the charter itself which renders it impossible, or even difficult, for the ship to secure and enforce the lien upon the cargo which the charter gives, and such lien would be commensurate with the liability of the charterers for demurrage, there is no reason why an admiralty court should not hold the parties to the contract which they have made. There does not seem to me to be any question of public policy involved which would prevent the enforcement of the contract as it is written, or permit its enforcement otherwise than as written. It is, after all, only the construction of the whole charter that is here involved. An early clause in the charter provides for the payment by charterers of demurrage for delays through their fault, either in loading or discharging the vessel, beyond the lay days allowed for such purpose. A later clause declares:

"Vessel to have a lien on cargo for all freight, dead freight and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose."

Is the lien here created commensurate with the liability of the charterers provided for in the antecedent clause? I cannot escape the belief that it is so commensurate with the charterers' liability, unless there be some other provision of the charter which permits the charterers to destroy or render valueless the lien so created. I find no such provision. In Clink v. Radford, 1 Q. B. 625, it was said by one of the judges:

"In my opinion, the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter party is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in another part of the contract."

Another one said:

"There is no doubt that the parties may, if they choose, so frame the clause as to emancipate the charterer from any specified liability, without providing for any terms of compensation to the shipowner; but such a contract would not be one we should expect to see in a commercial transaction. The cesser clauses, as they generally come before the courts, are clauses which couple or link the provisions for the cesser of the charterer's liability with a corresponding creation of a lien. There is a principle of reason which is obvious to commercial minds, and which should be borne in mind in considering a cesser clause so framed, namely, that reasonable persons would regard the lien given as an equivalent for the release of responsibility, which the cesser clause in its earlier part creates, and one would expect to find the lien commensurate with the release of liability."

And a third added:

"The rule that we are prima facie to apply to the construction of a cesser clause followed by a lien clause appears to me to be well ascertained. That rule seems a most rational one, and it is simply this: That the two are to be read, if possible, as coextensive. If that were not so, we should have this extraordinary result: There would be a clause in the charter party the breach of which would create a legal liability, there would then be a cesser clause destroying that liability, and there would then come a lien clause which did not re-create that liability in anybody else."

And in a later case (Hansen v. Harrold, 1 Q. B. 617), speaking of the foregoing, it is said:

"It seems to me that this reasoning has not been and cannot be answered. Therefore the proposition is true that, where the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter party the charterers are able to create, is not equivalent to the liability of the charterers. Where, in such a case, the provisions of the charter party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability."

The Supreme Court in Crossman v. Burrill, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106, quoting the foregoing, laid down the following as the true rule:

"In short, in a charter party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the shipowner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate."

The court held the clause of the charter there under consideration to be ineffective, because the lien created by the charter was not commensurate with the charterer's liability. But in that case the charter contained also the further provision, "Bills of lading to be signed as presented, without prejudice to this charter," and as the bills of lading as presented contained no reference to the payment of demurrage, nor any reference to the terms of the charter other than those concerning freight and average, the court held that the indorsees of the bills of lading were not bound by the charter provisions giving the vessel a lien upon the cargo for demurrage, and that the rights of the shipowners against the indorsees depended altogether upon the contract created by the bills of lading, except so far as that contract referred

to the charter party. It seems to me that the provision, "bills of lading to be signed *as presented,*" and the presentation of such bills containing no provision for the payment of demurrage, made a case such as is mentioned in Hansen v. Harrold, supra:

"Where, in such case, the provisions of the charter party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability."

In the case at bar, however, there is no provision in the charter party which would enable the charterers to make such terms with the shippers, or with the owners, as would render the lien created by the charter at all uncommensurate with the charterers' liability for demurrage, either at the port of loading or at the port of discharge.

There is nothing in this charter party which would prevent the master from preserving in the bill of lading the lien given by the charter for "all freight, dead freight and demurrage." The fact that he did not do so seems to me to be a false quantity, tending only to confuse the real question, which is the construction of the charter party itself. For otherwise, even if it were conceded that this charter party does absolve the charterers from the payment of demurrage, the master could defeat this absolution by failing to preserve the lien in the bill of lading. But the charter party is an instrument complete in itself, and when the parties thereto enter into certain agreements, it should not be in the power of the master to render any of those agreements abortive through the medium of a bill of lading. If the charter party itself and within its own four corners has the effect of rendering the lien created by it uncommensurate with the liability of the charterers under a stipulation for demurrage, then a cesser clause in such charter party will not absolve the charterers from such liability. But if the charter party itself gives a lien commensurate with the charterers' liability, the cesser clause will be given the full effect which its terms require. And this seems to me to be the only conclusion to be drawn from the adjudicated cases both English and American.

Many of these cases give to the cesser clause full efficacy as absolving the charterers from all liability, whether incurred at the port of loading or at the port of discharge. Others make this clause only effective as to liabilities accruing at the port of discharge, holding the charterers responsible for all liability incurred before the cargo is fully on board. Still others give no effect whatever to the cesser clause, for the reason that the court finds that the lien given by the charter is not commensurate with the liability of the charterers also created thereby. But in all the cases these various conclusions result from the consideration and construction of particular charter parties, according to the terms used in creating the liability, in providing for its cessation, and in creating the lien in lieu thereof.

It is a vexed and perplexing question, but, taking all the terms of the charter party under consideration here, I am of the opinion that the reasonable construction requires that effect be given to the cesser clause, and that the remedy of the libelants is not, under the charter,

"by action against the charterers at all on the charter, after the ship is fully loaded, but that they are to have as a remedy for their freight, dead freight and demurrage, nothing but a lien on the cargo." Sanguinetti v. Pacific Steam Navigation Co., L. R. 2 Q. B. D. 238.

The exceptions to the amended libel are therefore sustained.

THE JOHNSON LIGHTERAGE CO. NO. 24.

(District Court, D. New Jersey. February 23, 1916.)

INTERNATIONAL LAW ⟸10—JURISDICTION—PROPERTY OF FOREIGN GOVERNMENT—SUIT IN REM FOR SALVAGE.

A suit in rem may be maintained against property of a foreign government, although destined for its public use, to recover for salvage services rendered in saving it while in the possession of a lightering company, which had contracted to transport it from a railroad terminal to a vessel, but had no other connection with the foreign government, and where the property was still in its possession when libeled and seized by the marshal.

[Ed. Note.—For other cases, see International Law, Cent. Dig. §§ 10, 11; Dec. Dig. ⟸10.]

In Admiralty. Suit for salvage by the members of the firm of W. J. Scanlan Company against the deck scow Johnson Lighterage Company No. 24 and its cargo. On order to show cause why the cargo should not be released from seizure and delivered free and discharged thereof to its owner, the Russian government. Order discharged.

Foley & Martin, of New York City, for libelant.

John P. Murray (amicus curiæ) and Charles A. Conlon, both of New York City, for the rule.

J. Warren Davis, U. S. Atty., of Trenton, N. J., amicus curiæ.

HAIGHT, District Judge. The persons composing the partnership firm of W. J. Scanlan Company filed a libel in this court against the deck scow Johnson Lighterage Company No. 24 and its cargo, to recover for salvage services, alleged to have been rendered to such vessel and cargo. Process was thereupon issued, and by virtue thereof the vessel and cargo were seized by the marshal. Subsequently certain affidavits were filed on behalf of the Russian government with the Department of State, the purport of which was that the cargo (which consisted of munitions of war) was its sole and exclusive property. Upon these affidavits being brought to the attention of the court an order was made, directing the libelants before mentioned, as well as the Seaboard Equipment Corporation (the alleged owner of the vessel which rendered the salvage services, and which had also filed a libel for the same services), to show cause why the cargo should not be released from seizure and delivered, free and discharged thereof, to the Russian government. Mr. John P. Murray, who made one of the affidavits and who was therein stated to be one of the counsel for the Russian government, was designated amicus curiæ.

Upon the return of the order to show cause, testimony was taken respecting the character, ownership, and possession of the cargo at the times the salvage services were rendered and seizure made. I have no hesitancy in finding, as a fact, that the cargo was, at the times before mentioned, the property of the Russian government. In view of the conclusion which I have reached upon the whole matter, it seems unnecessary to state the reasons upon which this finding is based, especially since they were fully indicated to counsel at the conclusion of the hearing. It is also an uncontradicted fact that, at these times, the cargo was in the possession of the Johnson Lighterage Company (the charterer of the vessel upon which it was loaded) for the purpose of transportation from a railroad terminus in Jersey City to a vessel or vessels in New York Harbor, which latter were under the control of the Russian government. The transportation was undertaken by the Johnson Lighterage Company pursuant to a contract theretofore made between it and the commercial attaché of the Russian general embassy, whereby the former undertook, for certain prices, to transport and lighter such freight as the latter might desire to be carried from incoming railroads to ships of the Russian volunteer fleet, or any other line loading at a certain place in New York Harbor. As the cargo consisted of munitions of war, it will, of course, be presumed that it was destined for the public use of the Russian government.

It is undoubtedly the general rule that the courts of this country are without jurisdiction to entertain, except by consent, either an action in personam against our own government or that of a friendly foreign nation or sovereign, or an action against its property in its possession and devoted or destined to be devoted to the public use. The Siren, 7 Wall. 152, 154, 19 L. Ed. 129; Stanley v. Schwalby, 147 U. S. 508, 512, 13 Sup. Ct. 418, 37 L. Ed. 259; The Exchange, 7 Cranch, 116, 3 L. Ed. 287; Tucker v. Alexandroff, 183 U. S. 424, 440, 463, 22 Sup. Ct. 195, 46 L. Ed. 264; Hassard v. United States of Mexico, 46 App. Div. 623, 61 N. Y. Supp. 939; Briggs v. Light Boats, 11 Allen (Mass.) 157. But there is what may be termed an exception to this rule, although it is probably not strictly such, which was enunciated and applied by the Supreme Court, so far as our own government is concerned, in The Davis, 10 Wall. 15, 19 L. Ed. 875, and followed and applied as to a foreign government by Judge Brown, in the Southern district of New York, in Long v. The Tampico (D. C.) 16 Fed. 491. This so-called exception, I think, must control the questions to be decided in the case at bar. In the former of these cases it was held that personal property of the United States on board a private vessel for transportation from one point to another was liable to a lien for services rendered in saving it, and although such lien could not be enforced by a suit against the United States, or by a proceeding in rem, when the possession of the property could only be had by taking it out of the actual possession of an officer of the government, yet it could be enforced by a proceeding in rem where the process of the court could be enforced without disturbing the possession of the government. In that case a treasury agent of the United States had shipped a quantity of cotton from Savannah on a schooner belonging to and under the

control of a private individual, consigned to another agent of the government in New York. During the voyage the vessel met with disaster, and she and her cargo were saved from total loss by the libelants. Before any of the cotton was delivered to the agent in New York, the vessel was libeled for the salvage services and taken possession of by the marshal. It was held that it was the duty of the court to enforce the lien of the libelants for the salvage before it restored the cotton to the custody of the officers of the government. The facts respecting the possession of the property at the time the salvage services were rendered and the seizure made by the marshal were thus stated by Mr. Justice Miller, who delivered the opinion of the court (10 Wall. 21, 19 L. Ed. 875):

"Bringing the facts of the case before us to the test of these principles, the case was the usual one of a common carrier contracting to deliver goods on his own responsibility, and not the case, as alleged by the United States, of a charter of the vessel. The goods were then delivered to the master, and he contracted to deliver them to the agent of the United States in New York. Immediately on her arrival, and before any of the cotton was delivered to the agent, the vessel and cargo were libeled and taken possession of by the marshal under the writ which issued on the libel being filed. The possession of the master of the vessel was not the possession of the United States. He was in no sense an officer of the government. He was acting for himself, under a contract which placed the property in his possession and exclusive control for the voyage. His obligation was to deliver possession in New York to the agent of the government. This he had not done when the process was served on the cotton. The marshal served his writ and obtained possession without interfering with that of any officer or agent of the government."

In Long v. The Tampico two vessels which were built for the Mexican government were saved from burning at the dock at which they were moored in New York, and the libel was filed for the services thus rendered. It appeared that the agent of the Mexican government who had caused them to be built had, before the salvage services were rendered, entered into a contract with two independent sea captains to navigate the respective boats to Vera Cruz, Mexico, for delivery to the public authorities there. The captains had gone aboard the vessels and taken command before the fire. Judge Brown held (following the case of The Davis, that, assuming that the vessels had become the property of the Mexican government and were in its legal possession before the fire, still, as the salvage service had been rendered after delivery of the boats to the bailees, who were not officers of the Mexican government, for transportation and delivery to the government officers at Vera Cruz, and as the attachment had been made while the vessels were in the charge of the former, that the action in rem would lie, and the libels were sustained.

There is no essential difference between the material facts in the case at bar and those which were presented in The Davis and in Long v. The Tampico. It is true that in the Davis Case the person in whose possession the goods were at the time of the seizure was described therein as a "common carrier"; but I cannot conceive that this fact would make any difference. He was none the less a bailee for hire. The Johnson Lighterage Company, while it may not be strictly a com-

mon carrier, in the sense that it is subject to all of the peculiar liabilities which attach to a common carrier, was no more an officer of the Russian government than were the master of the vessel in the Davis Case and the captains in the Tampico Case. The Johnson Company contracted to deliver the goods on its own responsibility; the Russian government had not chartered the vessel upon which the munitions were loaded, nor, for that matter, any vessel of the Johnson Company. The latter was acting for itself under a contract which, necessarily, during the time of the transportation, placed the property in its possession and control. The Russian government, doubtless, could direct to what vessel or vessels the cargo was to be delivered; but this fact in no respect took the property out of the possession and control of the Lighterage Company during the time of transportation.

In the absence of treaty provisions, I know of no principle which, in a case such as this, would afford a foreign government greater immunity from judicial process than that which is enjoyed by our own government. The immunity granted to friendly foreign governments rests upon international comity (The Exchange, supra; The Santissima Trinidad, 7 Wheat. 253, 352, 5 L. Ed. 454); but the underlying principle upon which the immunity is granted is, nevertheless, the same in both cases, namely, that the exercise of jurisdiction is inconsistent with the independence of sovereign authority and public policy. See The Siren, supra; Stanley v. Schwalby, The Parliament Belge, 5 Prob. Div. 197; Long v. The Tampico, supra.

I therefore conclude that the property in question, although it belonged to the Russian government and was destined to its public use, was subject to a lien for salvage services rendered in saving it, and that as it was not at that time, or at the time of its seizure by the marshal, in the actual possession of an officer of the Russian government, the lien may be enforced in this court by a proceeding in rem. I understand that an interlocutory decree has been entered by default (the time in which to file a claim and answer having expired). I feel, however, that because of the peculiar circumstances of this case the decree should be opened in order to permit a claim and answer to be filed by any one duly authorized to do so, provided that a motion to that effect is made within a reasonable time.

The order to show cause will accordingly be discharged.

RUTAN, Internal Revenue Collector, v. JOHNSON & JOHNSON.

HEROLD, Internal Revenue Collector, v. SAME.

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

Nos. 2034–2045.

1. COURTS ⟸406(1)—CIRCUIT COURT OF APPEALS—REVIEW—QUESTIONS OF FACT.

In actions at law, referred to a special master by stipulation of the parties, and heard before the District Judge on exceptions to the master's report, the Circuit Court of Appeals could not weigh the evidence, or reverse findings of fact by the trial judge supported by submissible evidence, as his findings upon disputed facts were like the verdict of a jury and similarly conclusive.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. ⟸406(1); Appeal and Error, Cent. Dig. §§ 3385, 3387, 3389, 3392.]

2. INTERNAL REVENUE ⟸38—STAMP TAX—RECOVERY—QUESTIONS OF LAW OR FACT.

In actions to recover amounts paid for revenue stamps affixed to manufactured articles claimed by collectors of internal revenue to be subject to a stamp tax, the question whether the stamps were bought and affixed under duress and constraint was a question of fact.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⟸38.]

3. INTERNAL REVENUE ⟸38—STAMP TAX—RECOVERY—QUESTIONS OF LAW OR FACT.

In such actions, it was a question of fact what matters were presented and determined in similar actions previously brought and tried, and how far the same matters were again presented in the subsequent actions.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⟸38.]

4. JUDGMENT ⟸714(3)—CONCLUSIVENESS—MATTERS CONCLUDED.

Where plaintiff brought 18 actions to recover money paid during different periods for revenue stamps affixed to certain manufactured articles, and 2 of the actions were tried and determined in plaintiff's favor, and the statutory time for appealing from the judgments had expired, the judgments estopped the government from re-examining the same, or essentially the same, questions upon the trial of the other actions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1240; Dec. Dig. ⟸714(3).]

5. INTERNAL REVENUE ⟸20—STAMP TAX—DRUGS—"COMPOUNDING"—"COMPOUNDED."

War Revenue Act June 13, 1898, c. 448, § 20, 30 Stat. 456, provides, relative to the stamp tax imposed on medicinal proprietary articles and preparations, that no tax shall be imposed upon uncompounded medicinal drugs or chemicals, but that the tax shall apply to all medicinal articles compounded by any formula, published or unpublished, and put up in style or manner similar to that of patent, trade-mark, or proprietary medicines, etc. *Held*, that powders or tablets derived from the juice of the papaw, without adding anything effective, but simply taking something away, was not "compounded," as what was left was combined by nature, and "compounding" is only possible when two or more substances

previously separate are put together by human agency to form some kind of union.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 45; Dec. Dig. ⊂⊃20.

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

6. APPEAL AND ERROR ⊂⊃1010(1)—REVIEW—QUESTIONS OF FACT.
The trial judge's findings on pure matters of fact, or mixed matters of law and fact, are alike conclusive, when supported by submissible evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981; Dec. Dig. ⊂⊃1010(1).]

7. REFERENCE ⊂⊃100(6)—MASTER'S REPORT—HEARING ON EXCEPTIONS.
Actions to recover back amounts paid for revenue stamps affixed to manufactured articles were, after plaintiff's claims had been sustained in several particulars, referred to a special master, or referee, to ascertain the amounts due pursuant to a stipulation by the parties. Defendants objected to parts of the evidence, and, after the master filed his report, filed exceptions, and they were argued before the District Judge. *Held*, that the evidence should be regarded as if taken before the District Judge himself, and on the argument of the exceptions the situation was precisely as if the trial was still going on in open court, and as if the evidence considered by the master were then being offered for the first time before the judge.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 164–167; Dec. Dig. ⊂⊃100(6).]

8. APPEAL AND ERROR ⊂⊃266(2)—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS.
In an action referred to a special master pursuant to a stipulation, in which defendants objected to evidence and filed exceptions to the master's report, the court's order confirming the report in effect overruled the objections, and where no exception was taken to this ruling, or to the entry of judgment, the correctness of the ruling was not before the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1555–1558, 1561; Dec. Dig. ⊂⊃266(2).]

9. INTERNAL REVENUE ⊂⊃20—STAMP TAX—DRUGS.
War Revenue Act June 13, 1898, schedule B, imposed a stamp tax on medicinal preparations, or compositions made and sold, wherein the person making or preparing them has or claims to have any private formula or secret or occult art for making or preparing them, or any exclusive right or title to the making or preparing thereof, or which are prepared or vended under any patent or trade-mark, or which, if prepared by any formula, are held out and recommended to the public as proprietary medicines, or medicinal proprietary articles or preparations, or as remedies or specifics for any disease. Section 20 provides that the tax shall apply to all medicinal articles compounded by any formula, or put up in style or manner similar to that of patent, trade-mark, or proprietary medicines, or advertised as remedies or specifics for any ailment, or as having any special claim to merit, or any peculiar advantage in mode of preparation, quality, use, or effect. *Held*, that the act did not tax all medicinal articles, but merely those that were noncompetitive, such as are intended for selfmedication, and are accompanied with puffing inducements and unreliable statements about diseases, symptoms, etc.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 45; Dec. Dig. ⊂⊃20.]

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

Five actions by Johnson & Johnson, a corporation, against William D. Rutan, Collector of Internal Revenue, and eleven actions by the same plaintiff against Herman C. H. Herold, Collector of Internal Revenue. Judgments for plaintiff, and defendants bring error. Affirmed.

John A. Hartpence, Sp. Asst. U. S. Atty., of Jersey City, N. J., for plaintiffs in error.

Archibald Cox, of New York City, for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In 1900 and 1901, the plaintiff corporation, Johnson & Johnson, brought 18 suits in the Supreme Court of New Jersey to recover money paid during separate periods for stamps affixed to certain manufactured articles that had been taxed under the War Revenue Act of June 13, 1898. Of these suits 6 were against William D. Rutan as collector of internal revenue, and 12 were against his successor, Herman C. H. Herold. The controversy called in question the treasury's construction of certain language in section 20 and in schedule B. The articles in dispute are (1) medicinal plasters, of which we may take belladonna plasters as the type; (2) papoid powders and tablets; and (3) corn and bunion plasters.

Section 20 provides as follows:

"That * * * any person," etc., "that shall make, prepare and sell," etc., "drugs, medicines, preparations, compositions, articles, or things, including perfumery and cosmetics, upon which a tax is imposed by this act, as provided for in schedule B, without affixing thereto an adhesive stamp, * * * shall be guilty of a misdemeanor: * * * Provided, that no * * * tax shall be imposed upon any *uncompounded medicinal drug* or chemical, nor upon any medicine * * * mixed or compounded for any person according to the * * * prescription of any practicing physician, * * * or which may be put up * * * for said person by a druggist * * * selling at retail only.

"The * * * tax provided for in schedule B * * * shall apply to all medicinal articles compounded by any formula, published or unpublished, *which are put up in style or manner similar to that of patent, trade-mark, or proprietary medicine in general, or which are advertised on the package or otherwise as remedies or as specifics for any ailment, or as having any special claim to merit, or to any peculiar advantage in mode of preparation, quality, use, or effect.*"

Schedule B is as follows:

"*Medicinal proprietary articles and preparations:* * * * Upon every packet * * * containing any pills, powders, tinctures, troches or lozenges, syrups, cordials, bitters, anodynes, tonics, *plasters*, liniments, salves, ointments, pastes, drops, waters (except natural spring waters and carbonated natural spring waters), essences, spirits, oils, and *all medicinal preparations or compositions whatsoever, made and sold, or removed for sale, by any person or persons whatever, wherein the person making or preparing the same has or claims to have any private formula, secret, or occult art for the making or preparing the same, or has or claims to have any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent, or trade mark, or which, if prepared*

*by any formula, published or unpublished, are held out or recommended to the public by the makers, venders, or proprietors thereof as proprietary medicines, or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, * * * whatever affecting the human * * * body."*

Under the New Jersey practice, several defenses were specified, in substance as follows:

(1) That the money sued for was paid voluntarily, and was not collected by force or duress or under threat of distraint; on the contrary, the taxes were lawfully assessed and collected.

(2) That all the packages stamped contained medicinal proprietary articles or preparations, compounded according to formulas published or unpublished, and were put up in a style or manner similar to the style or manner used by patent, or trade-mark, or proprietary medicines in general.

(3) That these articles or preparations, thus compounded, were advertised on the packages or otherwise as remedies or specifics for some ailment, or as having special claim to merit, or as having peculiar advantages in mode of preparation, quality, use, or effect.

(4) That the plaintiff claimed to have private formulas, or a secret or occult art, for making or preparing the articles, or to have the exclusive right or title to the making or preparing of the same.

(5) That the articles were prepared, uttered, vended, or exposed for sale, under letters patent or trade-marks, or were held out or recommended to the public by the makers, venders, or proprietors, as proprietary medicines, or as medicinal proprietary articles or preparations, or were held out as remedies or specifics for some disease affecting the human or animal body.

(6) That the articles were compounded drugs or chemicals, or medicinal articles compounded.

(7) That the articles were made by mixing one or more medicinal drugs with a base that had either no medicinal effect or none that was designed or important, and were so mixed according to a private formula, although they were not held out as proprietary, such articles being advertised as having some special claim to merit, or as remedies or specifics for some ailment.

(8) That the articles, or their wrappings, boxes, or packages, bear the plaintiff's trade-mark, and a special style of display, consisting of markings and legends adopted by plaintiff in selling its goods.

The suits were removed from the state court to the federal court, and by consent were tried without a jury. Two of them were heard by Judge Archbald (specially assigned), and were decided in favor of the plaintiff. Johnson v. Rutan (C. C.) 122 Fed. 993; Johnson v. Herold (C. C.) 123 Fed. 409. Writs of error to this court were sued out, but were dismissed, because the statutory time for appeal had passed (Rutan v. Johnson, 130 Fed. 109, 64 C. C. A. 443); the force of the judgments below being therefore undisturbed. Afterwards the remaining 16 cases were tried before the late Judge Cross, who sustained the plaintiff's claims in several particulars. Johnson v. Herold (C. C.) 161 Fed. 593. Pursuant to a stipulation by the parties, the cases were then sent to a special master, or referee, to ascertain the

amounts due. Exceptions to his report were dismissed by Judge Haight (whose hitherto unpublished opinion appears on a subsequent page), and judgments were finally entered for the sums determined by the master.

[1] Since all the cases can be disposed of by deciding three or four questions, we need not take up each writ separately. At the outset, we are confronted by the question: What matters are now subject to review in this court? Certainly we can reverse no finding of fact by the trial judge, if the finding was supported by submissible evidence. It is not within our province to weigh the evidence; his findings are like the verdict of a jury upon disputed facts, and are similarly conclusive in a court of appeal. Fidelity Co. v. Commissioners (C. C. A. 8th) 145 Fed. 150, 76 C. C. A. 114; Oil Co. v. Holcomb (C. C. A. 8th) 212 Fed. 129, 138 C. C. A. 642; Nashville Railway v. Barnum (C. C. A. 2d) 212 Fed. 637, 129 C. C. A. 170; Philadelphia Casualty Co. v. Fechheimer (C. C. A. 6th) 220 Fed. 401, 136 C. C. A. 25; Wear v. Imperial Co. (C. C. A. 6th) 224 Fed. 63, 139 C. C. A. 622; Lupton's Sons v. Automobile Club, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; United States v. Fidelity Co., 236 U. S. 527, 35 Sup. Ct. 298, 59 L. Ed. 696. And, as the assignments of error do not attack any ruling by the District Judge during the trial, no question concerning the correctness of that proceeding is presented on these writs. So far therefore, as the findings of Judge Cross are upon questions of fact, they cannot now be successfully assailed, and a reference to his opinion (161 Fed. 593) will enable us to determine what questions (if any) may still be raised by the government.

[2] In the first place, it is undoubtedly a question of fact whether the stamps were bought and affixed under duress and constraint, and upon this point the third finding is explicit:

"That between the 1st day of July, 1898, and the 1st day of July, 1901, the plaintiff purchased large quantities of internal revenue stamps from the said defendants—purchases made between July 1, 1898, and March 1, 1899, being made from the defendant William D. Rutan, and during the balance of said period from the defendant Herman C. H. Herold. A part of the stamps purchased during the whole period were affixed on the articles mentioned in said declarations and canceled, such stamps being so affixed and canceled under rulings of the said defendants and the Commissioner of Internal Revenue of the United States that such articles were subject to a tax under the provisions of the act referred to, and the sums so paid for said internal revenue stamps by the plaintiff to the defendants were paid under protest and on threat of distress and confiscation in case of refusal and not voluntarily. For the sums thus paid, claims were duly presented by the plaintiff and disallowed."

[3] It is also a question of fact what matters were presented and determined in the first two suits tried before Judge Archbald, and how far such matters were presented again in the 16 suits that were afterwards tried before Judge Cross. Upon this point the seventh and eighth findings are as follows:

"(7) In the actions above mentioned, heretofore litigated and determined between the parties hereto, this court entered final judgment that the plaintiff was entitled to recover the amount paid by the plaintiff to the defendants under the identical circumstances under which payment was made herein, and as part of the same transaction for stamps affixed and canceled upon certain plasters, which in every respect were identical with the plasters involved

in the action now before the court, designated 'Class B,' which actions determined the following questions:

"(a) That the payments were not voluntary.

"(b) That the plaintiff has not and does not claim to have any exclusive right or title to the making or preparing the plasters. That the plasters are not prepared, uttered, vended, or exposed for sale under any letters patent or trade-mark, or held out or recommended to the public by the plaintiff as proprietary medicines, or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, diseases, or affections whatever affecting the human or animal body, or put up in style or manner similar to that of patent, trade-mark, or proprietary medicines in general, or advertised on the package or otherwise as remedies or specifics for any ailment or as having any special claim to merit or to any peculiar advantage in mode of preparation, quality, use, or effect.

"(c) That the use of plaintiff's trade-mark as it is used on said plasters did not render them liable to taxation.

"(d) That the amount paid as taxes on said articles should be returned to the plaintiff.

"(8) That the following articles, to wit: All the articles in class C. and all the articles in class D, and the capsicum, strengthening, porous, belladonna, and belladonna and capsicum, plasters, in class E, and the belladonna plaster in class H, not designated 'Johnson's'—each and all present no question not actually litigated and determined in the aforesaid actions between the parties hereto."

Clause (c) of paragraph 7 is a mixed finding of law and fact, and clause (d) is a conclusion of law; but the remainder of the two paragraphs contains statements of fact almost wholly. The plasters thus referred to were inclosed in wrappers bearing on the face two small red crosses and the following words:

"Apply heat if not sufficiently adhesive.
If the face cloth adheres too firmly, it can be easily removed by dampening.
B E L L A D O N N A
(cross) PLASTER (cross).
Prepared by
JOHNSON & JOHNSON,
New Brunswick, N. J., U. S. A.
Guaranteed to contain the full amount of the alkaloids of Belladonna root required by the Br. P. 1898."

On the back, are the following words in four languages:

"DIRECTIONS FOR USE.

"The part to which the plaster is to be applied should be dry and clean.

"The cloth on the face of the plaster should be removed by pulling it quickly. Having applied the plaster, rub it until it conforms perfectly to the skin.

"If the cloth, on the adhesive side of the plaster, should adhere too firmly, it can be easily removed by dampening, in which case the plaster should be wiped dry before applying.

"*To Remove the Plaster.*—After loosening one corner take firm hold and take off the plaster by a succession of quick jerks. Do not attempt to remove it by pulling steadily. A plaster should not be worn longer than necessary to produce the desired effect."

The other findings that are now relevant are Nos. 10, 12, and 14:

"(10) The following articles are each and all purely mechanical in their purpose and operation and are not medicinal articles or preparations: Finger hats; Dr. Don's corn plasters; Dr. Don's bunion plasters."

"(12) That 'Papoid Powder' and 'Papoid Tablets,' in class G, are the simple drug papain, the purified juice of the carica papaya (alone and with an excipient, which is purely mechanical and not medicinal, respectively), and are uncompounded drugs."

"(14) That, with the exception of the articles mentioned in findings 5 and 9 as withdrawn, in finding 6 [should be 10] as mechanical and not medicinal, and the 'Rheumatic Plaster' in class E, and that 'Belladonna Plaster' in class H which bears the word 'Johnson's,' and the papain preparations in class G, all the articles involved in these actions are in fact:

"(a) Not plasters wherein the person making or preparing the same has or claims to have any private formula, secret or occult art, for the making or preparing the same, or has or claims to have an exclusive right or title to the making or preparing the same. On the contrary, they are manufactured and prepared according to formulas taken from the United States or National Dispensatory or the British Pharmacœpia, all well-known publications of accepted authority, and are standard medical preparations recognized and constantly prescribed by the medical profession, the merits of which are discussed in medical text-books and journals, and are the same plasters made according to the same formulas as prepared and sold under the same name by other manufacturers in competition with the plaintiff.

"(b) They are not prepared, uttered, vended, or exposed for sale, under any letters patent or trade-mark, or held out or recommended to the public by the plaintiff as proprietary medicines or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, diseases, or affections whatever affecting the human or animal body, or put up in style or manner similar to that of patent, trade-mark, or proprietary medicines in general, or advertised as remedies or specifics for any ailment, or as having any special claim to merit or to any particular advantage in mode of preparation, quality, use, or effect. On the contrary, they are sold under the standard Pharmacœpia names, which are the equivalents of formulas, and the names used by the text-books and the medical profession and other manufacturers to describe the same plasters by whomsoever produced, and they are represented to be nothing except the standard remedies they in fact are."

[4, 5] It is unnecessary to cite authorities for the proposition that the judgments in the two cases before Judge Archbald operated by way of estoppel to prevent the government from re-examining in the present suits the same, or essentially the same, questions that he had previously decided. This covers the class of articles to which the belladonna plasters belong, but does not embrace the papoid preparations, or the corn and bunion plasters. About the last-named preparations and plasters, however, there is scarcely any dispute. Even if the tenth and twelfth findings were open to question now, little doubt can exist that the plasters do not act medicinally (in the sense used by the act), but only mechanically, and as little doubt, we think, that papoid is not "compounded." Nature combines the constituents in the juice of the papaw, and papoid is derived from the juice, not by adding anything effective, but simply by taking something away. What is left, and is sold in the form of powder or tablet, is what nature combined; man having had nothing to do with the process. Compounding (as the act uses the word) is only possible when two or more substances, previously separate, are put together by human agency to form some kind of union, and no such union has been brought about to produce the substance in question.

[6] There may perhaps be some room to question how far paragraph 14 is confined to pure findings of fact. It may contain mixed findings of law and fact, and perhaps (to some extent) conclusions of law. But we see no need to analyze the paragraph minutely, for, whether it states pure matters of fact or embraces mixed matters of law and fact, these are alike conclusive in this court. In the language

of Fidelity Co. v. Commissioners (C. C. A. 8th) 145 Fed. 151, 76 C. C. A. 115:

"The verdict of a jury concludes all issues of fact, and of mixed law and fact, save those questions of law which have been reserved for review by demurrer, motion, request, or exception. A finding of the court without a jury has the same effect, with the single exception that when the finding is special the question whether the facts found sustained the judgment is open to review. In the trial of an action by the court without a jury, the rulings of the court in the progress of the trial, and those only, are open to review. The true test for determining whether or not a question or ruling in a trial by the court without a jury is reviewable is the answer to the question whether or not it would have been open to review if the trial had been to a jury."

Nearly every verdict is unavoidably a mixed finding of law and fact. The court gives instruction concerning the legal rules that apply to the controversy, and after the jury have decided disputes about the facts they take up the facts thus found, consider them in the light of the rules, and decide what consequences are properly to follow. The verdict announces the result, and in this both elements are usually combined. Essentially a like course is pursued when the judge is trying the case alone. He finds the facts and applies the rules of law thereto, and in the end comes to a conclusion in favor of one party or the other. And—with the proviso that submissible evidence of the facts found must always be present—it makes no difference whether his findings of fact are implicit in his conclusion, or explicitly set forth. In either event he passes on the evidence, finds the facts, and applies the law thereto; his conclusion being no more subject to attack than is the verdict of a jury. If, however, we should be mistaken in believing that no question of law is now presented by these cases, we shall only add that we are in accord with the views expressed by Judge Archbald and by Judge Cross upon the construction and applicability of the statute, and need not repeat what they have already said.

[7-9] This leaves for consideration only one question, namely, the correctness of the report made by the special master. It is clear that the evidence taken before him should be regarded in the same light as if it had been taken before the district judge himself. Ordinarily, the parties would have been obliged to offer it before the judge; but, considering the extent and complication of the inquiry, counsel and judge alike recognized the convenience, if not, indeed, the practical necessity, of referring the matter to a master for a more leisurely and a more prolonged examination. After the master filed his report, the defendants filed exceptions thereto, and these were argued before Judge Haight. The situation then was precisely as if the trial had still been going on in open court, and as if the evidence that the master had considered were being offered for the first time before the judge. Important parts of this evidence had been objected to before the master as incompetent and inadmissible, and these objections were now repeated to the judge for his independent ruling thereon. Giving his reasons (reported in the margin),[1] Judge Haight overruled the objections and admitted the evidence; for this is the effect of his order con-

[1] See note at end of case.

firming the report of the master, which was in large part founded on the evidence attacked. Now, to this ruling by the court the defendants took no exception—and indeed, so far as we can discover, neither did they except to the entry of judgment—and we are therefore of opinion that the correctness of the ruling is not before us. Accordingly we shall not discuss it, but shall conclude this discussion by stating our agreement with the position taken by the plaintiff's counsel to the following effect:

Congress did not tax all medicinal articles, but merely those that were noncompetitive, in order that the tax should fall on the manufacturer. And as such articles are also intended for selfmedication, and are always accompanied with "puffing" inducements, and unreliable statements about diseases, symptoms, etc., they harm the public on the whole, and for this reason have been for many years, and were then, regarded as a proper object of taxation. The department was no doubt overwhelmed by the effort to decide what articles were taxable, and could scarcely avoid making occasional mistakes, and thereby taxing some standard, competitive, medicinal preparations. Among these we think the articles in question are properly to be included.

In each case the judgment is affirmed.

NOTE.—The following is the opinion of Haight, District Judge, referred to in the opinion:

HAIGHT, District Judge. Several suits were instituted by Johnson & Johnson against William D. Rutan and Herman C. H. Herold, respectively, collectors of internal revenue, to recover certain moneys which the plaintiff was compelled to pay under the War Revenue Act of June 13, 1898. The money was paid for stamps, which were affixed to various products manufactured by the plaintiff from July 1, 1898, to July 1, 1901. The plaintiff claimed that certain of the products which had thus been subjected to the stamp tax were not taxable within the act, and that it was entitled to have the moneys, so paid, refunded. The case was heard by the court without a jury, and as to certain products the plaintiff's contention was upheld. It was then referred to a referee, to ascertain and report the amount which the plaintiff was entitled to have returned to it in each case. The referee made his report, to which exceptions have been filed. The exceptions relate only to the admissibility and legality of certain of the evidence upon which the referee's report is based.

At the beginning of the hearings before the referee counsel entered into the following stipulation:

"Subject to the proper authentication of books, Exhibits P2, P3, and P4 for Identification as evidence, and also to the accuracy of the statements contained therein, it is stipulated that they show the manufactured goods on hand, and the goods manufactured by the plaintiff as tabulated by the witness, Mr. Porter, during the period stated by him in Exhibit P1 for Identification."

Mr. Porter was an employé of the government, who examined the books of the plaintiff prior to the hearing before the referee, and made a tabulation therefrom, showing the amount of moneys paid by the plaintiff as taxes on products, which the court had determined were not taxable, and which are therefore the amounts to be refunded. The amounts reported by the referee are those found by Mr. Porter. No question is raised as to the correctness of the tabulations, providing the books and data from which they were made have been properly authenticated to be admissible in evidence.

The only question, therefore, to be considered at this time, is whether the books and data from which Mr. Porter made his calculations have been properly authenticated. Whether they were admissible as independent evidence of the facts therein contained does not, in view of the stipulation, seem to be open to question.

The plaintiff, in order to establish the amounts paid, as no independent memoranda of that was kept, was first compelled to show the quantity of the various kinds of products, which the court held were not liable to tax, manufactured by it during the period before mentioned. Some of these were, however, exported, and no tax was paid on them, and some were on hand at the time the act was repealed. As to the latter, the government had, before the suits were instituted refunded the amount paid on them. As to certain products, it was also necessary to show the amount thereof which the plaintiff had on hand at the time the act went into effect. After deducting from the total amounts of the various kinds of products on hand at the beginning of the tax period, and those manufactured during the time that the act was in force, the amounts exported and the amounts on hand at the time the act was repealed, there was ascertained the quantity of goods upon which the taxes had been improperly paid. To ascertain the amount so paid, it was only necessary to multiply the number of packages of each kind by the denomination of the stamps affixed to each, respectively. Two books contained a record of the products manufactured during the tax period, and for some time before and after. The plaintiff's course of business in making this record was as follows: When the goods were completed, they were examined by inspectors, both to see that they were ready to be sent out and that they were properly stamped. After they had been inspected they were packed by the inspectors and sent to the shipping department, whence they were distributed. The inspectors counted them, and noted the amounts of each article upon temporary sheets of paper, which were then copied in the books in question; the temporary sheets being then destroyed. These books were those from which the government inspector made part of his tabulation. These books were authenticated in the following manner: The inspectors who counted and examined the articles, and who made the entries in the books (being the same persons), were called and testified that the entries were correctly taken from the slips, and that the slips contained the actual counts, which they, respectively, knew to be correct. There would seem to be no doubt but that these books were properly authenticated, so as to make their entries binding upon the parties, within the stipulation before referred to. But, irrespective of the stipulation, they could have been properly used by the respective witnesses to refresh their recollections. In fact, verified as they were, they were admissible, by the great weight of authority, in evidence as independent proof of the facts entered therein. Insurance Co. v. Weide, 9 Wall. 677, 19 L. Ed. 810; Insurance Co. v. Weide, 14 Wall. 375, 20 L. Ed. 894; Reyburn v. Queen City Savings Bank & Trust Co., 171 Fed. 609, 96 C. C. A. 373 (C. C. A. 3d Cir.); Wigmore on Evidence, vol. 1, § 754. The opinion of the Supreme Court in Bates v. Preble, 151 U. S. 149, 14 Sup. Ct. 277, 38 L. Ed. 106 (which is criticized in a footnote of the above-mentioned section of Wigmore), is not at all opposed to this, because the entries were made in the regular course of business, and were not independent memoranda such as the court stated, in that case, to be inadmissible as evidence.

The doctrine regarding the admissibility of regular entries made in the usual course of business, as I understand it, is generally confined in its application to cases where the entrant is unavailable. Wigmore on Evidence, vol. 2, § 1521. When the person who made the entries is available, then, upon verification of the entries by that person, they may become admissible, under the doctrine, broadly stated, of memoranda used to refresh a witness' past recollection. See Wigmore, § 1538, vol. 2. But, however this may be, the Supreme Court, in Bates v. Preble, supra, recognized that the entries, if made in the regular course of business, would be admissible, if properly verified. Nor are the books subject to the criticism that the entries were not made at or near the time when the events which they recorded were taking place, because the witnesses who made the entries also made the slips from which the entries were made. The slips were made at the very time that the articles were counted and were recorded in the book shortly thereafter. Both the slips and the books were testified, by the respective witnesses who made them, to be correct. It would appear, from the cases cited by counsel for the defendant, that they considered the books inadmissible, under the so-called "shopbook rule," the application of which is limited to the proof of the sale and delivery

of goods and the performance of work and services. The books were not admissible under that theory, but because they were records of past recollections of the witnesses who verified them. The question whether the stamps affixed to the goods manufactured, as shown in the two books before mentioned, were of the same denominations as figured by Mr. Porter in making his tabulations, does not seem to be within any of the exceptions filed, nor has it been the subject of argument. It is sufficient to say that those who made the entries in the books testified that each article therein recorded was stamped in accordance with a list prepared by one of the officers of the company, which list was, in turn, used by Mr. Porter in making his tabulation.

As to the suggestions that the two books mentioned may be inadmissible, because the witnesses who testified as to the accuracy thereof may have been away on short vacations, and, consequently, during these periods, may not have had personal knowledge of the facts which the entries purport to record, it is to be observed that it is clear that they made the entries in the books and that they were made in the regular course of business, presumably from slips furnished by those whose duty is was, during the absence of the witnesses, to make the counts, and that the entries so made were correct transcriptions of the slips. Under these circumstances, I think the books, as respects the time when the witnesses who made the entries were on vacations, were admissible under the general doctrine pertaining to the regular entries made in the ordinary course of business. Although the persons who had the actual knowledge were not shown to be actually unavailable, I think that, as far as this circuit is concerned, they were admissible under the principle recognized by the Circuit Court of Appeals in Reyburn v. Queen City Savings Bank & Trust Co., supra, and stated in Wigmore on Evidence, § 1521.

The inventory of the goods on hand at the beginning of the taxing period I consider to have been properly authenticated and to have been admissible in evidence independently of the stipulation. It appears that the clerks, under the direction of one witness, counted the goods and noted the results on slips which were handed to the witness. These he verified in a general way, in many instances checking them up by counting the goods himself. The figures upon the slips were then transcribed by him upon inventory sheets. Another witness testified that he copied the figures from the inventory slips in the exhibit which was offered in evidence. The original sheets were destroyed. The only way in which this inventory could have been proven more conclusively was by calling all the various clerks who had counted the goods in the bins. This was not necessary. Mississippi River Logging v. Robson, 69 Fed. 773, 16 C. C. A. 400. The case can properly be supported on the general doctrine pertaining to regular entries made in the usual course of business, on the theory that the persons who had the actual knowledge of the facts upon which the entries were based, were unavailable on grounds of mercantile inconvenience. Sections 1521 and 1530 of Wigmore on Evid. vol. 2. The same general doctrine of admitting so-called shop-books where the entries have been made by the bookkeeper, upon reports made to him in the ordinary course of business by workmen, is recognized in Corkran v. Rutter, 76 N. J. Law, 375, 69 Atl. 954. No question is raised as to the correctness of the inventory of goods on hand at the end of the tax period. In fact, the government had already refunded the taxes paid on those goods. The only remaining question is that pertaining to the data from which the amount of goods, which were exported during the tax period, was obtained. It appears that the list of exports furnished to Mr. Porter was taken from the summaries of exports sent from time to time to the government revenue officers, in accordance with the regulations of the department. An invoice was made out for each shipment and was sent to the government revenue officers, in whose care the goods themselves were shipped. Letter press copies of the invoices were kept and monthly summaries thereof were made and also sent to the collector. The list given to Mr. Porter was taken from the summaries sent to the collector and was verified as to its correctness in that respect. The original invoices and summaries received by the collector had been destroyed. The copies of the invoices, as well as the copies of the summaries, were offered. No objection was ever made by the government as to the correctness of the original invoices and summaries. Under these circumstances, I think that the

government would be estopped to deny that the original invoices and summaries, as furnished to them pursuant to departmental regulations, correctly showed the goods which were exported. As the original invoices and summaries have been destroyed, copies, under familiar rules, are admissible. Such copies, proven to be such, were offered and admitted. There is a slight discrepancy between the tabulations taken from the copies of the invoices and those taken from the summaries. This may be explained by the condition of some of the copies of the invoices. I think that the amounts which would have been payable on the exported goods, and which, therefore, must be deducted from the amounts figured to be the taxes on all the goods manufactured and on hand, was properly ascertained from data which was legal evidence. It also appears from the referee's report that in three cases the amount found to be due to the plaintiff exceeds the amount set forth in the declaration. A motion was made that the plaintiff be permitted to amend the declaration so as to recover these additional amounts. I see no reason why such an amendment should not be made, and it will, accordingly, be so ordered.

The referee's report will be confirmed, and there will be a judgment for the plaintiff in each of the cases for the amount found by the referee to be due in each case, respectively.

THE A. A. RAVEN.

(Circuit Court of Appeals, Third Circuit. February 28, 1916. Rehearing Denied April 20, 1916.)

No. 2056.

1. COLLISION ⊂⊃91—STEAM VESSELS MEETING—COMMON FAULTS.

A collision occurred at night on the Delaware river between the steamship Raven, passing down, and the large government suction dredge Delaware which was at work and moving up the river about on the range line. The deep channel was about 600 feet wide, and the dredge carried the regulation lights, showing that she was at work, but that approaching vessels might pass on either side. *Held*, on conflicting evidence, that both vessels were in fault; the dredge for failing to maintain an efficient lookout, by reason of which she started to turn around to the eastward before seeing the Raven, or in the belief that she was farther away than she was, and the Raven for not signaling her intention to pass to the eastward of the dredge, and for not changing her course to the westward when she saw the dredge beginning to turn.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187–192; Dec. Dig. ⊂⊃91.]

2. COLLISION ⊂⊃129—DAMAGES RECOVERABLE—WAGES OF CREW DURING REPAIRS.

A government dredge, injured in collision so as to necessitate repairs, employed a crew of 58 men. These men were not ordinary seamen, but were selected with care for their skill, efficiency, and experience in operating the dredge; some of them having been employed thereon for a number of years. The court found that three weeks was a reasonable time for making the repairs. *Held*, that the government was not required to discharge such men to save expense to the other vessel in fault, but was justified in keeping them, and was entitled to allowance as a part of the collision damages of the amount expended for their wages and maintenance during the three weeks.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 283; Dec. Dig. ⊂⊃129.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in admiralty for collision by the United States against the steamship A. A. Raven. From the decree, both parties appeal. Reversed on both appeals.

For opinions below, see 216 Fed. 572, and 222 Fed. 958.

Harrington, Bigham & Englar, of New York City, Conlen, Brinton & Acker, of Philadelphia, Pa. (D. Roger Englar, of New York City, and Jasper Y. Brinton, of Philadelphia, Pa., of counsel), for the A. A. Raven.

Francis Fisher Kane, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In this action for collision by the steam dredge Delaware against the steamship A. A. Raven, two appeals are before us, one by the Raven from so much of the decree as adjudged her to be solely in fault (216 Fed. 572), and the other by the United States, the owner of the dredge, from the award of damages (222 Fed. 958). We shall consider the appeals in their order.

Appeal of the Raven.

[1] The collision took place not long after 9 o'clock on the evening of December 5, 1913, on the Liston range of the Delaware river, a few miles above the head of the bay. There was no wind, and the tide was three-quarter ebb running about 2½ miles an hour. The night was clear; the half moon was occasionally obscured by thin clouds, but lights could easily be seen at the usual distance, and the moon (which was probably 3 hours high) helped to show the outlines of objects that were fairly near. The Raven is a freight steamship, 261 feet long, 43½ feet beam, with a capacity of 4,000 tons. She draws 24½ feet when fully loaded; on this voyage she had only half a cargo, and her draft was 18 feet aft and about 13 feet forward. She was bound south for Charleston, and was moving at full speed, probably 12 miles over the ground. The Delaware is a large steam dredge owned by the government, and was employed at the time in deepening the channel of the river. She is 315 feet long, displaces 6,400 tons, and has a maximum draft of 22 feet. She has an engine for each of her twin screws, and can turn with comparative ease—as her second officer testified, "in a space of 600 feet." She is a suction dredge, drawing up the silt through 18-inch pipes, one on each side; the silt being pumped into bins on board and carried to the place of deposit. On the night in question her bins were full, but she was still "agitating"—that is, her pipes were down and she was sucking up the silt, but this was allowed to run through the sluices in order that the tide might carry it away. She was moving upstream about 2 miles an hour over the ground.

Each vessel carried the ordinary running lights, all in order and burning brightly; in addition, the dredge carried four red lights, which the government asserts to be authorized by section 11 of the act of 1902 (Act June 13, 1902, c. 1079, 32 Stat. 374 [Comp. St. 1913, §

9861]), and by the regulations adopted thereunder. Section 11 is as follows:

"That it shall be the duty of the Secretary of War to prescribe such rules and regulations for the use, administration, and navigation of any or all canals and similar works of navigation, that now are, or that hereafter may be, owned, operated, or maintained by the United States, as in his judgment the public necessity may require; and he is also authorized to prescribe regulations to govern the speed and movement of vessels and other water craft in any public navigable channel which has been improved under authority of Congress, whenever, in his judgment, such regulations are necessary to protect such improved channels from injury, or to prevent interference with the operations of the United States in improving navigable waters, or injury to any plant that may be employed in such operations. Such rules and regulations shall be posted in conspicuous and appropriate places, for the information of the public. * * *"

Paragraph 7 of the regulations provides that:

"Dredges shall display by day a black ball 3 feet in diameter at the end of a horizontal spar extending to the line of the side of the dredge's hull, and at a height not less than 30 feet above the water, the ball to be set on the side of the dredge on which it is desired approaching vessels shall pass.

"Dredges shall display by night one white light on a staff in the middle of the dredge, and at least 30 feet above the water, to serve as the regulation anchor light, and 4 red lights suspended in a vertical line from the outer end of the horizontal spar used by day for the suspension of the black ball, the lights to be set on the side of the dredge on which it is desired approaching vessels shall pass. If approaching vessels may pass on either side of the dredge, no day mark shall be displayed, and by night the four red lights shall be displayed in a vertical line directly under the above-mentioned white light."

When the Delaware began dredging 10 years ago, she made public the following notice:

"The U. S. dredge Delaware will commence dredging in the Delaware river channel on March 28, 1906. When the dredge shows two blue flags (one on the foremast and one on the mainmast) in daytime, or four red lights (two on the foremast and two on the mainmast), at nighttime, she is engaged in dredging and is practically unmanageable; therefore all vessels are notified to give her as much room as practicable."

In accordance with this notice two lights in a vertical line were displayed on each mast of the Delaware on December 5th, and, although this arrangement did not follow exactly the paragraph quoted from the regulations, it indicated sufficiently to the Raven (to whom the dredge's presence in the river was well known) that a vessel about to pass was at liberty to choose either side.

Each vessel asserts that she saw the other in ample time and with ample room to pass in safety, and blames the collision on a sudden and unannounced change of course on the part of the other. They agree that one of them did make such a change, and they agree also that the contact was nearly at right angles on the eastern edge of the 30-foot channel. At this point the channel is about 600 feet wide, and on its western edge a black buoy (No. 3L) is nearly opposite the place of the disaster. The Raven struck the port bow of the dredge, a few feet aft of the stem, twisting her own stem round to port. All the witnesses of the Raven except one testified by deposition between April 10, and July 20, 1914; the witnesses for the dredge being heard in open court

on July 9. The District Judge adopted the theory of the government, and held the Raven to be solely in fault (216 Fed. 572); but he did not attempt to assign any motive or reason for the extraordinary maneuver that she must in that event have made. Since this is a case of collision, we expect to find positive contradiction between the two groups of witnesses; but, if a probable reason can be found for one account rather than for the other, this should help us to decide the conflict, or perhaps even to reconcile it in part. A prolonged and careful study of the record has led us to believe that the order of events was as follows:

The business of the Delaware was to dredge to and fro on the Liston range between black buoys No. 1L and No. 3L; No. 1 being about two miles south of No. 3. As her master testified, the work was to be done on the range line:

"We are supposed to work on the range and keep the center line down.
"Q. At that time your instructions were to work on the center line?
"A. Yes.
"Q. Not on either side?
"A. No, on the ranges; but * * * we do not stay on the center line when there is a ship passing by."

And the second officer testified:

"We have orders to dig on a range, and that means the middle of the channel. * * * We are not instructed to dig outside of the range, but we are instructed to keep away from the vessels which are coming down on the range."

On the night in question the dredge turned at No. 1 and started up stream to No. 3. This was about 8 o'clock, and not long afterward the steamship Mongolian overtook her, and passed on her starboard side, the dredge being then about in the center of the channel. In a short time her sister dredge, the Manhattan, which was working down the range, met and passed her port to port, the Delaware being still near the range. Farther up, she met the steamship Lexington coming down, and passed her starboard to starboard; she herself being somewhat westward of the range, and the Lexington being somewhat to the eastward. Behind the Lexington—"right astern of her," as the Mongolian's pilot testified—came the Raven, and we understand this testimony to mean at least that she was not far behind. At this time the tug Gettysburg, towing three empty barges tandem up to Philadelphia, was some distance astern of the dredge, and 1,000 feet or more to the eastward of the range. She was out of the channel altogether, was obviously not a source of danger to any vessel on or near the range, and was not as favorably placed for accurate observation as the other vessels named. She was moving more rapidly than the dredge, and at the time of the collision had come to a point practically opposite buoy No. 3, or perhaps a little below. Considering the distant and disadvantageous position of the tow, the evident bias of her three witnesses, the improbable precision that marks much of their testimony, and the variation in the two accounts they gave, we find ourselves unable to rely with confidence on what they said at the later hearing, and cannot regard it as of special value. Taking all the evidence together, we

incline decidedly to the conclusion that the dredge was where her business required her to be, where the work was ordered to be done, namely, somewhere near the line of the range. On this point much of the testimony will continue to be directly in conflict; but we attach a good deal of weight to the fact that, if we should assume the dredge's theory to be correct, namely, that she was coming up on the eastern edge of the channel, the Raven's change of course is then without a discernible motive, and indeed can hardly be accounted for, except by supposing that her navigating officer had taken leave of his senses. The dredge's account requires us to believe that, after the vessels had exchanged passing signals, port to port, their positions being then perfectly safe, the Raven—a loaded vessel, bound for sea, and going down on the range, with nothing at hand to crowd her eastward—nevertheless, on a clear, bright night, deliberately and without reason left her course and her safe position, turned several points to the eastward in violation of her signal, and in effect ran the dredge down. On the face of things this theory is unlikely, and needs strong evidence to establish it, and we think it should yield to a more probable view of the facts, and especially since that view is supported by testimony quite as weighty as the theory of the dredge.

How, then, is the collision to be accounted for? At this point let us turn to the Raven, and try to realize the situation produced by her appearance on the scene. Her master and her third officer were on duty, a quartermaster was at the wheel, and an experienced seaman was on lookout. When she turned from the Baker range into the Liston range, she was nearly 4 miles above buoy No. 3. The Delaware had had nearly an hour to cover the 2 miles from No. 1, and could not have been far south of No. 3. As the collision took place shortly after 9 o'clock, she was probably about half a mile below No. 3, and of course had an open view to the top of the range. How soon did she see the Raven, and what was done? And here we have the advantage of testimony that was not before the court below. The dredge was in sole charge of the second mate, with whom were a quartermaster at the wheel and a seaman supposed to be on duty in the bows. The quartermaster was not under obligation to look out for lights, and on this subject of lights the lookout did not testify at the trial; he was not produced, and no proof was offered that an effort had been made to find him. The failure to call this witness below, or account satisfactorily for his absence, afforded ground for presuming that his testimony would not support the dredge's case (The New York, 175 U. S. 204, 20 Sup. Ct. 67, 44 L. Ed. 126); and we are not sure that the presumption has been entirely removed by the belated agreement to permit the inspectors' notes to be read. He had been questioned by the inspectors a few days after the collision, and the Raven offered in evidence the notes of that examination. These (being ex parte) were properly excluded by the District Judge on the government's objection. On the argument of this appeal, however, the objection was withdrawn and the parties agreed to make them a part of the record. They show that the lookout was a deckhand who had only had nine weeks' experience as a seaman; that none of the officers had ever given him orders about his duty as a lookout; and that he

"supposed" he was to report lights, because he had heard some of the sailors say so. The notes then go on as follows:

"Q. How far off was the Raven when you first saw her?
"A. I don't know how far she was.
"Q. When you first saw her did you report her to the officer on watch?
"A. No, sir.
"Q. How long after you first saw her did you hear any signals blown or exchanged between these vessels?
"A. I only heard one signal.
"Q. How far apart were they when you heard it?
"A. I didn't see.
"Q. Did you hear the whistle?
"A. I heard our whistle.
"Q. Did you hear her whistle?
"A. No.
"Q. Had she blown a whistle, do you think you could have heard it from where you were?
"A. I don't know.
"Q. Do you know what this whistle signal was that was blown by your vessel?
"A. It was one blast.
"Q. When this signal was blown, did you notice what lights were being shown on the Raven?
"A. No, sir.
"Q. Did you hear any other whistle signals blown by the Raven or the Delaware?
"A. No, sir.

* * * * * * * *

"Q. When you were standing your lookout, did you stay on the lookout from the time you got there until it was time for you to be relieved by the other lookout?
"A. No; I did not.
"Q. What were you doing at the time that you should have been on the lookout?
"A. I was down doing nothing.
"Q. When you were down doing nothing, who was on the lookout then?
"A. Nobody."

It is conceded that he made no report that night, thus leaving the second mate to bear the responsibility of lookout in addition to his other duties. Certainly this is not the vigilance required of vessels in a narrow channel, and must be taken into account in determining what probably occurred.

The position of the dredge being ascertained to be near the line of the range, most probably somewhat to the westward, it is evident that her account of what lights she saw on the Raven, and how far away she saw them, needs to be modified. She received no help in this direction from her inefficient and apparently inattentive lookout, and the likelihood of the situation is not in favor of her account. We believe, however, that at some time she did give a signal of one blast; but in our opinion she did not give it until the vessels were much closer together than she had supposed, and until the danger of collision was already threatening. As we see the situation from the record, what happened was this: When they were at least a mile apart, the vessels were nearly head on, both being near the range. The Raven made out the approaching vessel to be a dredge, and saw that her peculiar lights indicated that she was at work; this meant that, if

she was moving at all, she was moving slowly—was "practically unmanageable," in the language of the notice quoted above—and, as the position of the vertical lights showed that she might be passed on either side, the choice of sides was thus left to the Raven. She chose the eastern side and started to execute the necessary maneuver. As the combined speed of the vessels was about 14 miles, they were approaching each other rapidly. The dredge had now nearly reached the buoy where she was to turn and work down stream, and, having failed to notice the Raven at all, or (as perhaps is more likely) supposing her to be farther away than was the case, she started to make the turn, believing that she could do so safely. This belief might have been justified, if, as she contends, she had already given ample notice by signal that she was going to the eastward. But, even if no signals had been exchanged, she might still mistakenly believe that she had plenty of time to get out of the way. Whatever the fact about the signals may be, she had scarcely begun the eastward movement when she discovered that the Raven was so near that the turn was hazardous. It was too late to go back, however; she was now committed to the maneuver, and she then did all that was possible under the circumstances. At that time at least, if not before, she blew one blast, and followed it almost immediately by the danger signal, starting her engines full speed astern and putting her helm hard aport, so as to turn to the eastward as rapidly as she could. The effort was unavailing, for, although the contact may have been delayed by these maneuvers, it could not be avoided, and the vessels came together as described above.

From the foregoing account the faults of the Delaware are sufficiently clear. She did not have a competent and attentive lookout, and she undertook a dangerous maneuver when she was too near the other vessel. And we agree that the Raven was also at fault. If her testimony be accepted, she gave no signals whatever from the beginning to the end, and assuming this to be true she cannot be absolved for such an omission. Her excuse is that, as she intended to pass between the Delaware and the Gettysburg, she feared to mislead one or the other of the vessels, and therefore refrained from signaling at all. We do not regard the explanation as sufficient. The Gettysburg was too far over to be misled by a starboard passing signal; she could not possibly suppose that such a signal was intended for her, since it would require the Raven to take the extraordinary course of leaving the range and the channel altogether in order to pass the tow on its starboard or eastern side. As the steamship intended to pass the Delaware starboard to starboard, she ought to have given the appropriate signal. She may have regarded the Delaware as "practically unmanageable," and may have believed that she herself had the choice of sides; but even in that event she was taking the risk of an unexpected movement on the part of the dredge, and that risk she could have avoided, or at least could have minimized, simply by giving the proper passing signal. This fault alone is sufficient to charge her with contributing negligence.

And we think she also committed a fault by persisting in her swing to the eastward and in maintaining her speed after she knew that the

Delaware was moving in the same direction. Her explanation is that by keeping her course and speed she thought she might be able to cross the dredge's bows in safety, and she points to the fact that the blow was so near the dredge's stem as to indicate that she nearly succeeded. This does not seem to be quite accurate. As we understand the situation, she was still far enough from success; obviously, it would not have helped matters to place herself across the Delaware's bow, for (instead of herself) the dredge would then have been the striking vessel. In our opinion the only chance of avoiding the collision after the dredge's mistake was for the Raven to stop and reverse, and make every effort to go to the westward in order to pass under the dredge's stern. As we see it, such a maneuver was less dangerous than to follow the other vessel to the eastward, and in our opinion it had a fair chance of success and should have been adopted.

We hold both vessels therefore at fault, and direct the court below to modify the decree accordingly.

Appeal of the United States.

[2] Having found the Raven solely at fault, the court below on September 10, 1914, appointed a commissioner to ascertain the damages, setting forth in the interlocutory decree that the—

"* * * damages [were] to embrace the reasonable cost which should have been incurred in making necessary repairs to the said Delaware, together with the amount of wages and cost of supplies and maintenance which should reasonably have been incurred in maintaining the said Delaware during the estimated period or periods of said repairs."

As stated by the District Judge in his opinion (222 Fed. 958), considering the commissioner's award, this decree "was made as a matter of course, without its terms being brought to the attention of the court."

And this may account for the government's application in November to amend the concluding clause of the decree. At all events the government did seek to amend that clause so as to make it read as follows:

"Together with the damages suffered by reason of the detention of the said Delaware during the reasonable period of repairs, which shall be measured by the reasonable cost of operating the said dredge during a period equal to the said reasonable period of repairs, including depreciation."

The court refused to allow the amendment, and the refusal is one of the errors now assigned. But we need not consider it, for in our opinion a controlling question raised by the record is well within the terms of the unamended decree, as will appear by a brief summary of the commissioner's award, which was approved by the court below.

During the hearings, which ended late in October, the government asked no allowance for depreciation, nor for the estimated value of the excavation that might have been done while the dredge was idle, but confined its claim to the actual cost of repair, and to the wages and maintenance of the full crew during the time consumed in that work. The commissioner fixed the sufficient, and therefore the reasonable, time at 21 days, instead of 40, and allowed the wages and maintenance of only 10 men (instead of 58), adding these sums to the cost of re-

pairs with one or two other expenditures. He recommended a decree made up of the following items:

Reasonable amount required in making repairs to the dredge	$3,842.75
Charge for docking	221.23
Charge for tug hire	37.50
Reasonable amount of wages to crew and officers for 21 days or 21/30 of monthly pay roll of 10 men	598.50
Cost of maintenance for 10 men for 21 days, at $1 per day	210.00
Vessel supplies for 21 days	229.07
Total	$5,139.05
Interest on same from January 14, 1914, to September 10, 1914, date of decree	202.13
	$5,341.18

The government assents to the reduction from 40 days to 21 days, and makes no complaint now, except that wages and subsistence should have been allowed for the full crew, instead of for the 10 men whom the commissioner regarded as a sufficient complement during the period of repair. The amount in issue is $1,863.72.

The situation is unusual, and the question presented has had our serious attention. In the first place we observe that all the items contained in the foregoing list are accepted as far as they go. The sole objection is that some of the allowances should have been large enough to provide for the whole crew. Confining our attention, therefore, to this matter, we start with the fact that the repairs were finished within a reasonable period, fixed by the commissioner at 21 days. To this finding neither party is now objecting. The period being reasonable, and nothing being in dispute except the number of men, we come to consider the ground on which the propriety of such an allowance should be determined. And we note, also, that the government is not claiming for loss of profits, or for losing the use of the dredge; it is simply asking to be reimbursed for money actually paid out for wages and supplies. No speculative element enters into the discussion; a definite amount has been ascertained, and the only inquiry is whether the government should be repaid a sum of money that has already been spent. Should this sum be charged against the Raven? We lay aside, as not in point, the case of The Conqueror, 166 U. S. 125, 17 Sup. Ct. 510, 41 L. Ed. 937, a decision much relied upon by the court below, and relied upon now by the Raven's counsel. As we understand the opinion there delivered, the important question presented to the Supreme Court was: What damages for unlawful detention should be awarded to the owner of a private yacht, intended and actually used solely for his own pleasure? He had lost no money by reason of losing her use, and had been debarred from no profits. He had, of course, suffered inconvenience, and his pleasure had been interrupted; but, as no measure is known for estimating such damage accurately, he was allowed no compensation therefor. In that very case, however (166 U. S. 134, 135, 17 Sup. Ct. 510, 41 L. Ed. 937), the owner *was* reimbursed for money actually paid out for wages and supplies during part of the period. For several weeks the yacht had been detained by the collector of customs, and during this time the

whole crew had remained on board under pay. They had rendered little actual service, and had been kept on the vessel more as a matter of precaution than because their presence was essential. The vessel was at anchor in New York Harbor, and the reason for keeping them was the fear that some contingency might arise that would call for the service of the whole crew. The expense of keeping them all was allowed for as reasonable, but after the yacht was removed to the Erie Basin, where no one could be needed except caretakers, the allowance was reduced to the pay of a few men.

In whichever form the question may be stated—whether a given number of men is necessary, or whether such a number is reasonable —the words "reasonable" and "necessary" carry practically the same meaning. Each situation must be taken by itself, and the inquiry is: What allowance should be made under the particular circumstances? We agree with the government's argument that the crew of this dredge differs from the crew of the ordinary vessel. A dredge is a floating machine, not a boat for commercial use, and of necessity most of her men are rather artisans or mechanics than common seamen. They must be familiar with machinery of one kind or another, and cannot be easily replaced from the wharf or a sailors' lodging house. In this instance, many of the crew had been employed for a considerable time, their periods of service ranging from seven years to a few months—see the government's list—and they had become so experienced and efficient as to be important factors in the particular work then being done. They had been sifted out from many others, and had been chosen, not only because of their skill and experience, but also because they were sober and reliable. Now, was it reasonable or unreasonable to retain such a crew intact during a period that has been found to be of no more than reasonable length? Was the government obliged to disperse an organized force, gathered with such care, and run the risk of reassembling the men after the vessel should be ready to resume work? No doubt many of them were practically idle on board the dredge while she lay in the dry dock. Should they have been discharged in order to save expense to a wrongdoer? If the situation is to be tested by what an ordinarily prudent business man would do—and both parties ask us to apply this test—we think only one answer is probable: Such a man would keep the crew together for three weeks under pay rather than risk their loss. The case might be different if the crew were of the usual type—wandering sailors without special skill or mechanical training, such men as can nearly always be found in a large port like Philadelphia. And the case might be different, also, if we were dealing with a time that would appear at once to be unreasonably long. Conceivably we might not find it easy to draw the line. No one would contend that a crew like this should have been discharged, if the repairs had been likely to be finished within three or four days. Would a week be too long? Or two weeks? Or three weeks? In the present inquiry, we are much assisted by the commissioner's finding, and the assent of both parties, that three weeks was a reasonable time for the necessary work; and we feel justified, therefore, in adding our own agreement on this sub-

ject, and in reaching the conclusion that the government did not go too far in keeping this exceptional crew together for the period thus fixed. There is no doubt that the government was acting in good faith, for it keeps the crew together when the work is interrupted by repairs or by unfavorable conditions. And in determining the question before us there is some force in the fact that negotiations were pending from December 5, to December 18, by which the government was delayed in deciding to repair the vessel at League Island—a delay for which we think neither party should fairly be held responsible.

On each appeal, therefore, the decree must be reversed. If the parties do not agree on the amount of the Raven's damages, a further inquiry will be needed before the commissioner; if they do agree, the District Court is directed to modify its decree in accordance therewith, and with this opinion. And we direct, also, that the costs below and in this court be equally divided.

GRAND UNION TEA CO. v. LORD.

(Circuit Court of Appeals, Fourth Circuit. March 1, 1916.)

No. 1373.

1. CORPORATIONS ⟸423—LIABILITY FOR AGENT'S TORTS—SLANDER.
A corporation is liable for the slanderous words of its agent if the agent at the time is transacting its business and the slanderous words are spoken in the course of such business and in connection therewith.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692–1695, 1903, 1906; Dec. Dig. ⟸423.]

2. CORPORATIONS ⟸423—LIABILITY FOR AGENT'S TORTS—SLANDER.
Plaintiff was in charge of one of defendant's stores, and while defendant's manager was making an inventory left the store without explanation. M., a friend of plaintiff, stopped at the store and inquired for him, and the manager told him that plaintiff had acted in a very peculiar way and went off without saying anything, and that his stock and his cash were short. *Held*, that defendant was liable for the manager's language, as he was engaged in its business and acting in its behalf when the words were spoken and they referred to plaintiff's acts in the work for which he was employed.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692–1695, 1903, 1906; Dec. Dig. ⟸423.]

3. LIBEL AND SLANDER ⟸54—DEFENSES—JUSTIFICATION.
Proof of the truth of the words spoken is a good defense in an action for slander, but the justification must be as broad and complete as the misconduct charged.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 152; Dec. Dig. ⟸54.]

4. LIBEL AND SLANDER ⟸123(7)—ACTIONS—QUESTIONS FOR JURY.
In an action for slandering plaintiff, who was in charge of one of defendant's stores, by saying that his stock and cash were short, evidence *held* insufficient to show that his stock was short, or that there was a shortage in the cash, at least in such amount as would justify the inference that he had misappropriated the money, with such a degree of certainty as to warrant the court in holding as matter of law that the

language complained of was true, and hence the direction of a verdict for defendant was properly denied.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 361; Dec. Dig. ⊂=123(7).]

5. LIBEL AND SLANDER ⊂=44(1)—PRIVILEGED COMMUNICATIONS—DISCHARGE OF DUTY.

Plaintiff was in charge of one of defendant's stores, and V. was defendant's general manager in charge of the territory, including such store. While V. was taking an inventory, plaintiff left the store without explanation, and did not return that day. M., a familiar friend of plaintiff, with whom plaintiff lived, called at the store and inquired for plaintiff, and V. told him that plaintiff had acted in a very peculiar way, and had gone off without saying anything, and that his stock and his cash was short. *Held*, that while, it was perhaps not unnatural for V. to tell M. of the shortage, he owed no duty to M. to make such statement, and there was no basis for a claim of privilege.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 133, 134; Dec. Dig. ⊂=44(1).]

6. APPEAL AND ERROR ⊂=1064(2)—LIBEL AND SLANDER ⊂=124(4)—ACTIONS—INSTRUCTIONS—PREJUDICIAL ERROR.

In an action for slandering a person in charge of a store by saying that his cash and stock were short, it was error and prejudicial to charge that, if defendant's manager spoke of plaintiff the defamatory words charged in the declaration under circumstances alleged, and if such words were false, then a recovery might be had, as it was for the jury to determine whether the language used was an accusation of crime or the imputation of conduct amounting only to irregularity or negligence, and the instruction in effect told the jury that the words spoken necessarily imputed the commission of a crime and were actionable per se, especially where the court further charged that if the manager slandered plaintiff as charged in the declaration, defendant was liable, and refused to charge that if the language used did not, according to its fair meaning under the circumstances, charge plaintiff with larceny, or if the hearers did not understand that it charged him with larceny, but that it simply charged him with some improper, negligent, or careless act, not amounting to larceny, then defendant was not guilty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4221, 4222; Dec. Dig. ⊂=1064(2); Libel and Slander, Cent. Dig. § 366; Dec. Dig. ⊂=124(4); Trial, Cent. Dig. §§ 475, 480, 525, 526, 553, 558.]

7. TRIAL ⊂=296(1)—LIBEL—INSTRUCTIONS—CURE OF ERROR.

Such error was not cured by charging that, in determining whether or not the language used imputed a criminal offense, the words must be construed in their plain and popular sense, and that it was not necessary that the manager should have expressly charged plaintiff with larceny or a breach of trust, but that it was sufficient if the charge consisted of a statement of matters which would naturally and presumably be understood by those hearing them as charging a crime or breach of trust, or as affecting plaintiff in his trade or calling, as this implied that the words were slanderous in their plain and popular sense, and failed to make it clear to the jury that the meaning of the words was for their determination.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–707; Dec. Dig. ⊂=296(1).]

8. LIBEL AND SLANDER ⊂=124(4)—ACTIONS—INSTRUCTIONS.

In an action for slandering a person in charge of a store by saying that his cash and stock were short, an instruction that it was sufficient to constitute slander if the words were naturally and presumably understood to charge a crime or breach of trust or to affect plaintiff in his

calling, was erroneous, as words not slanderous, but merely derogatory, would tend to affect plaintiff in his trade or calling.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 366; Dec. Dig. ⊂⊃124(4).]

9. LIBEL AND SLANDER ⊂⊃124(2)—ACTIONS—INSTRUCTIONS.

Plaintiff was in charge of one of defendant's stores, and claimed that while defendant's manager was making an inventory he told a friend of plaintiff, who inquired for plaintiff, that plaintiff was short in his cash and stock. Defendant requested an instruction, stating plaintiff's claim, and stating that defendant claimed that M., to whom the alleged slanderous statement was made, was a friend of plaintiff and lived in the same house with him; that defendant's manager was endeavoring to locate plaintiff and get some explanation of his conduct, and that the statement as to the shortage was true, and made in good faith and without malice; that proof of the truth of the statement was a complete defense; that the burden was on plaintiff to establish his case, and he must show that defendant used the language charged, and the jury must believe this language, if true, to be slanderous, or such as from its usual import was insulting and calculated to cause a breach of the peace, or there could be no recovery; and that if, after hearing the evidence, the jury believed the stock was short and the cash was also short, the verdict must be for defendant, whether the shortage was due to carelessness, ignorance, lack of attention, dishonesty, or other cause. *Held*, that this instruction, in substance, should have been given, as it presented defendant's theory of the case, and contained nothing objectionable, either as to matters of fact in the aspect of the facts claimed by defendant or as to the applicable rules of law, and it included propositions which defendant was entitled to have submitted when not covered by the instructions given.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 370; Dec. Dig. ⊂⊃124(2).]

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action by I. C. Lord against the Grand Union Tea Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. Randolph Hicks, of Norfolk, Va., for plaintiff in error.

Allan D. Jones and S. O. Bland, both of Newport News, Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The plaintiff in error, defendant below and hereinafter so called, conducts a large number of stores in different parts of the country. The territory in which it operates is divided into divisions, one of which, with headquarters at Washington, included the store at Newport News, Va. The general manager of this division was C. C. Van Allen, who lived in Washington. It was his duty, among other things, to take an inventory at least twice a year of the stores under his supervision, and he had authority to hire and discharge employés. The management of the business in his division, at least in large degree, was subject to his control. From January, 1913, until the 20th or 21st of April, 1914, the plaintiff, Lord, was in charge of the Newport News store. Van Allen visited this store, and took an inventory about the 7th of January, 1914, and found a shortage in the stock, as he asserts, of about $500. He took another in-

ventory on the 11th of February, and discovered a further shortage of upwards of $700, which had accrued since his January visit; but nothing appears to have been done about these shortages, and Lord continued in charge of the store. Van Allen went there again on Monday, the 20th of April, and claims to have found an additional shortage in the stock of 180-odd dollars, and a small shortage in the cash, the amount of which is disputed. This inventory was commenced soon after Van Allen's arrival at the store, and continued throughout the day and evening. It was resumed the next morning, but Lord soon afterwards left the store without explanation, and did not return during that day. In the afternoon some effort was made to locate him, but he was not found. Inquiry was made at his residence, and also at the store of one Moncure, in whose house Lord was living. It seems that Moncure himself had gone to Richmond that day; but he called at defendant's store on his return to inquire if Lord had gone home; and it was for words spoken to him at that time by Van Allen that this suit for slander was brought. At the trial Moncure was a witness for plaintiff and testified as follows concerning the incident:

"I met Mr. Van Allen one afternoon when I came to the store of the Grand Union Tea Company, from Richmond. I stopped by the store, poked my head in, and said—'Has Mr. Lord gone up?' Some one told me he was not there, and then Mr. Van Allen got up and said, 'Is not this Mr. Moncure?' and I told him that was my name. He asked me if Mr. Lord lived at my house, and I told him that he did. He said that Mr. Lord had acted in a very peculiar way, and that he went off without saying anything to us, and, about as I can remember, 'His stock is short and his cash'—he did not say how much—and I remarked, 'I am very much surprised to hear it,' and went home."

The words claimed by Moncure to have been spoken of and concerning Lord on this occasion, namely, "His stock is short and his cash," are substantially the words set out in the declaration and alleged to be actionable. There was a verdict of $2,000 for the plaintiff, and the case comes here on writ of error.

[1, 2] The defendant contends that a verdict should have been directed in its favor for reasons which will be briefly considered. It is argued, in the first place, that defendant, a corporation, is not liable for the alleged slander because the statement concerning Lord was not made by Van Allen in the scope of his employment or in the performance of his duties, and particularly because it was not authorized by the corporation. We deem it unnecessary to review the numerous cases involving the liability of a corporation for the tortious acts of its agent, because the law is well settled that a corporation is liable for the slanderous words of its agent if the agent at the time is transacting the business of the corporation, and the slanderous words are spoken in the course of such business and in connection therewith. Washington Gas Light Company v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543; Stewart v. Wright, quoting many cases, 147 Fed. 321, 77 C. C. A. 499; Waters-Pierce Oil Company v. Bridwell, 103 Ark. 345, 147 S. W. 64, Ann. Cas. 1914B, 837; Hypes v. Southern Railway Company, 82 S. C. 315, 64 S. E. 395, 21 L. R. A. (N. S.) 873, 17 Ann. Cas. 620; Fensky v. Maryland Casualty Company, 264 Mo. 154, 174 S. W. 416; Sun Life Assurance Company v. Bailey,

101 Va. 443, 44 S. E. 692. Van Allen was concededly engaged in the business of defendant and acting in its behalf when the words complained of were spoken, and the words themselves had reference to the acts of Lord in the work for which he was employed. Under the decisions quoted, and many others which have been examined, we are clearly of opinion that the defendant should be held responsible for the language of Van Allen on the occasion in question.

[3, 4] In the second place, it is insisted that the action must fail because the words used by Van Allen were shown to be true. It is of course familiar doctrine that proof of the truth of the words spoken is a good defense in an action for slander. But the justification must be as broad and complete as the misconduct charged in the utterance, and we are convinced, after careful reading of the testimony, that the justification attempted in this case did not reach that degree of certainty and completeness which would warrant the court in holding, as matter of law, that the language complained of was proven to be true. It is enough to say in support of this conclusion that Van Allen, upon whose testimony alone rests the charge of shortage in the stock, did not have that personal knowledge of the facts, particularly as to the January shortage, which enabled him to testify with certainty that such a shortage existed. When this inventory was taken the papers were sent to New York, the main office of the company, for the extensions to be carried out, and Van Allen had notice from New York, some three or four weeks afterwards, that the inventory "did not figure up exactly." He claimed to have himself verified the February inventory, but as this was apparently based on the January figures, its correctness depended upon the unproven accuracy of the previous inventory. Concerning the inventory in progress when the alleged slander was uttered, it is also true, as we understand the record, that Van Allen did not have the personal knowledge necessary to prove the shortage he claimed to have found at that time. It is significant that Lord made no attempt to explain the discrepancy, and there is much ground for belief that the alleged shortage existed; but we think there was lack of sufficient legal proof of the shortage alleged to make out a case of complete justification. Moreover, some circumstances were shown which the jury might properly take into account, such as the retention of Lord in charge of the store for more than three months after a shortage was first claimed to have been found, and the failure then or later to take any proceedings against him or his bondsmen for misappropriating the property with which he was intrusted. Nor in our opinion can it be said that there was convincing proof of a shortage in cash, at least of such amount as would justify the inference that Lord had misappropriated the money, if the language of Van Allen be assumed to impute to him misconduct in that regard. It follows that no error was committed in refusing to direct a verdict for defendant on the ground that the truth of what Van Allen said had been fully established.

[5] The claim that the words spoken to Moncure were a privileged communication, or of that nature, cannot be sustained. It is true that Lord lived in Moncure's house, and the relations between them were

inferentially shown to be those of familiar friendship. In view of this friendship, and, taking into account the circumstances of the situation, it was perhaps not unnatural for Van Allen to tell Moncure that there was a shortage in Lord's stock of goods and cash. But Van Allen owed no duty to Moncure to make such a statement, and we perecive no aspect of the case which brings the words spoken to him within the doctrine of privilege. Dillard v. Collins, 25 Grat. (66 Va.) 343; Farley v. Thalhimer, 103 Va. 504, 49 S. E. 644; Williams Printing Company et al. v. Saunders, 113 Va. 156, 73 S. E. 472, Ann. Cas. 1913E, 578. So far as this question was involved, we are satisfied that defendant was not entitled to a directed verdict.

[6] The errors assigned which challenge certain instructions to the jury, including those asked by defendant and refused, present a more serious question. As shown by the record, the first proposition submitted to the jury was this:

"The court instructs the jury that if they believe from the evidence that the defendant's manager spoke of the plaintiff the defamatory words charged in the declaration under the circumstances stated in the defendant's plea of justification, and that such words were false, then a recovery may be had."

By thus characterizing the words spoken as "defamatory," the court in effect held that they necessarily imputed the commission of a criminal offense, and were therefore actionable per se. We are unable to sustain this instruction. It seems to us by no means certain that the language of Van Allen implied the commission of a crime, or were so understood by Moncure. The circumstances attending the utterance were such that Moncure might have inferred that no more was meant than a discovered variance between the amount of stock on hand and the amount that ought to be on hand according to the books. In other words, the shortage mentioned might have been understood to be merely a discrepancy, resulting from carelessness or unintentional error, which called upon Lord for explanation. It was therefore a question for the jury to determine whether the language used was an accusation of crime or the imputation of conduct which amounted only to irregularity or negligence. Especially is this so, as it seems to us, since Moncure did not state, and apparently was not asked, what construction he himself put upon the language of Van Allen. And the misleading effect of the word "defamatory" is made more evident by the refusal of the court to give the following instruction requested by defendant:

"The court instructs the jury that if defendant's language used on the occasion complained of, taken as a whole, and all of it, did not, according to its fair meaning under the circumstances, charge plaintiff with larceny, or, if the hearers did not understand that it charged him with larceny, but that it simply charged him with doing some improper, negligent, or careless act, not amounting to larceny as the hearers understood it, then defendant is not guilty, for then he would not charge plaintiff with crime, and the charge of crime is the gist of the slander alleged."

Taking these instructions together, the one given and the one refused, the jury were virtually told that Van Allen's statement imputed to Lord the commission of a crime, and that Lord would be en-

titled to damages if they found that Van Allen actually used the language testified to by Moncure. Indeed, the jury were not left in doubt upon this point, because the court further instructed the jury as follows:

"The court instructs the jury that if they believe from the evidence that, acting within the scope of Van Allen's authority as an agent of the defendant company and in the course of the business in which said Van Allen was employed by said defendant, the said Van Allen slandered the said plaintiff as charged in the declaration, then the defendant is liable therefor, and the jury, in determining this question of the defendant's liability, may consider the plea of justification, if not sustained, and all facts and circumstances shown in evidence in this case."

As already indicated, we are of opinion that in the circumstances shown the words spoken did not necessarily convey the idea that Lord had stolen or embezzled the defendant's property; that the meaning and intent of Van Allen's language as understood by Moncure was a question of fact for the jury to pass upon, and therefore the instructions here considered were erroneous and prejudicial.

[7, 8] We do not overlook the statement in the charge—

"that in determining whether or not the language used does impute a criminal offense, the words must be construed in the plain and popular sense in which the rest of the world naturally understand them."

But this statement, as we take it, implied that the words spoken were slanderous in their "plain and popular sense," and failed to make it clear to the jury that the meaning of the words was for their determination. It is also noted that the language just quoted was followed with this amplification:

"It was not necessary that Van Allen should have expressly charged Lord with the larceny of the money and goods, or a breach of trust; it is sufficient if the publication or charge consists of a statement of matters which would naturally and presumably be understood by those who heard them to charge a crime, or breach of trust, or to affect Lord in his trade or calling."

But this does not avoid the criticism already made, because it carries the implication that the words spoken would "naturally and presumably be understood" to impute a criminal offense, and does not distinctly, if at all, leave to the jury the question whether the language of Van Allen should receive that construction. Besides, the concluding phrase of this instruction is clearly erroneous for the reason that words which are not slanderous, but merely derogatory, would tend "to affect Lord in his trade or calling."

[9] We are also of opinon that defendant was entitled to the substance of the following instruction which the court refused:

"The jury are instructed that this is an action on the part of Lord to recover damages. Lord claims that Van Allen, his superior officer in the Grand Union Tea Company, made a statement to R. C. L. Moncure that the stock in the store of the Grand Union Tea Company in Newport News, Va., and of which Lord was manager, was short, and that the cash in said store was also short. The defendant claims that Moncure was a friend of Lord and lived in the same house with him, and that Van Allen was endeavoring to locate Lord and get some explanation of his conduct, and that the statement made by Van Allen to Moncure as to the shortage in the stock and shortage in the cash was true, and was made in good faith and without malice. In actions

of this character, proof of the statement of which complaint is made, if true, is a complete defense. To slander a person implies a false statement about them, and a true statement of and concerning a person is not an insult for which there can be a recovery. The burden is on the plaintiff to establish his case; he must show that the defendant used the language set out in the declaration, and the jury must believe this language, if true, to be slanderous, or such as from its usual import is insulting, and calculated to cause breach of peace, before there can be any recovery. If, after hearing the evidence, the jury believe that the stock mentioned was short, and the cash mentioned was also short, then the verdict must be for the defendant, whether said shortage was due to carelessness, ignorance, lack of attention, dishonesty, or other cause."

We express the opinion that this instruction, in substance, should have been given, because it presents the defendant's theory of the case. We find nothing in it that appears objectionable either as to matters of fact, in the aspect of the facts claimed by defendant, or in that aspect as to the applicable rules of law; and it includes propositions which the defendant had the right to have submitted to the jury, but which are not covered by the actual instructions.

For these reasons we are constrained to hold that the judgment should be reversed.

MARYLAND CASUALTY CO. v. PRICE et al.

(Circuit Court of Appeals, Fourth Circuit. February 29, 1916.)

No. 1392.

1. ATTORNEY AND CLIENT ⊜129(2)—ACTIONS FOR NEGLIGENCE—BURDEN OF PROOF.
   In a suit against an attorney for negligence, plaintiff must prove the attorney's employment, his neglect of a reasonable duty, and that such negligence resulted in and was the proximate cause of loss to the client.
   [Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 288, 289; Dec. Dig. ⊜129(2).]

2. ATTORNEY AND CLIENT ⊜129(2)—ACTIONS FOR NEGLIGENCE—DECLARATION.
   In a suit against an attorney for negligence, the test of the sufficiency of the declaration is whether its allegations, if proved, would make out a case, and, if proof of the facts alleged as to the negligence and resulting loss would establish a cause of action, the declaration is not demurrable.
   [Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 288, 289; Dec. Dig. ⊜129(2).]

3. ATTORNEY AND CLIENT ⊜129(2)—ACTIONS FOR NEGLIGENCE—DECLARATION.
   In an action by a liability insurer, the declaration alleged that defendants had been for several years plaintiff's retained attorneys, that plaintiff notified them of an action against a policy holder and directed them to enter an appearance and instructed them to make such defense and take such steps as should be necessary to prevent a judgment, that they neglected to do so and a default judgment was recovered, and that plaintiff attempted to settle the suit, and could have settled it for $2,000 if the default judgment had not been rendered. *Held*, that while defendants were not advised of any facts constituting a defense, and it was not even alleged that there was a defense or that plaintiff intended to defend on the merits, and the inference was permissible that plaintiff's real purpose was to have a formal appearance or plea entered which would prevent a judg-

ment for a time and enable plaintiff to make an advantageous settlement, the declaration sufficiently showed defendants' employment by plaintiff.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 288, 289; Dec. Dig. 129(2).]

4. ATTORNEY AND CLIENT ⊜129(2)—ACTIONS FOR NEGLIGENCE—DECLARATION.
In a liability insurer's action against its attorneys for negligence, the declaration alleged the bringing of an action for injuries against a policy holder, that plaintiff was bound to indemnify the policy holder against loss not exceeding $5,000 and was bound to defend the suit at its own expense, that it instructed defendants to enter an appearance and make a defense, that it attempted to settle the suit and could have settled it if a default judgment had not been rendered, that defendants failed to enter an appearance or make any defense, and that by reason thereof a judgment for $15,000 was rendered by default, and that plaintiff was bound to pay the amount thereof. *Held*, that in the absence of any allegation that the policy holder had a defense to the action for injuries, or that the injured person was not justly entitled to recover $15,000, the declaration stated no cause of action, as it was not shown that if the attorneys had made a proper defense no judgment or a judgment for a less sum would have been recovered, and while it did allege that plaintiff was bound to pay the default judgment, though for more than its limited liability, there was no disclosure of facts showing such liability, and the allegation stated only a conclusion of law.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 288, 289; Dec. Dig. ⊜129(2).]

5. COURTS ⊜299—UNITED STATES COURTS—JURISDICTIONAL AMOUNT—ALLEGATIONS OF DECLARATION.
Though nominal damages were recoverable for the attorneys' failure to do anything whatever, the declaration nevertheless failed to show that the amount involved gave a federal court jurisdiction, since, where the pleadings show that there cannot legally be a judgment for an amount necessary to give jurisdiction, jurisdiction cannot attach, though the damages are laid in the declaration at a larger sum.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. ⊜299.]

6. PLEADING ⊜8(2)—DECLARATION—CONCLUSIONS OF LAW.
In a liability insurer's action against attorneys, an amended declaration alleged the bringing of an action for injuries against a policy holder, that plaintiff was bound to indemnify the policy holder against loss not exceeding $5,000 and to defend the suit, that defendants were instructed to appear and defend but neglected to do so and by reason of such neglect a judgment for $15,000 was rendered by default which plaintiff was bound to and did pay, that defendants knew that plaintiff's liability was limited and that it was obliged to defend the suit, that if they had appeared and made a defense plaintiff's liability would have been only $5,000, though the judgment against the policy holder might exceed that amount, and that their negligence was the direct cause of loss to plaintiff of the difference between $5,000 and the amount of the judgment. *Held* that, in the absence of any allegation that the policy holder had a meritorious defense which would have defeated a recovery or reduced the amount of the judgment, the declaration was insufficient, since it did not show that plaintiff was under any obligation to pay in excess of $5,000, as the allegation that it was compelled to pay the judgment was a mere conclusion of law without any facts to justify it, and it was evident that it was not liable to the policy holder for more than $5,000 if the policy holder had no meritorious defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 13; Dec. Dig. ⊜8(2).]

7. INSURANCE ⊂=635—LIABILITY INSURANCE—ACTIONS—ELEMENTS OF CAUSE OF ACTION.

The holder of a liability insurance policy, under which the insurer was bound to indemnify the policy holder against loss not exceeding $5,000 and to defend a suit at its own expense, could not recover more than $5,000 because of the insurer's failure to defend an action resulting in a default judgment for $15,000 without alleging and proving a meritorious defense to the action against it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1599–1602; Dec. Dig. ⊂=635.]

8. ATTORNEY AND CLIENT ⊂=129(2)—ACTIONS FOR NEGLIGENCE—BURDEN OF PROOF.

A liability insurer suing its attorneys for negligence in failing to defend an action against a policy holder resulting in a default judgment for $15,000 had the burden of showing that the party recovering the judgment did not have a valid claim against the policy holder for $15,000.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 288, 289; Dec. Dig. ⊂=129(2).]

9. PLEADING ⊂=246(1)—AMENDMENT OF PLEADING—PERMISSION TO AMEND—STRIKING OUT ALLEGATIONS.

A liability insurer suing its attorneys for negligence in failing to defend an action for injuries against a policy holder alleged that it was bound to indemnify the policy holder against loss not exceeding $5,000 and to defend the suit, that by reason of the attorneys' negligence a default judgment was rendered for $15,000, and that it could have settled for no more than $2,000 if the default judgment had not been rendered. An amended declaration proceeded on the theory that the attorneys' failure to defend made plaintiff liable for the full amount of the default judgment and sought to recover the difference between the amount of the judgment and $5,000. After the sustaining of a demurrer to the amended declaration, it asked leave to amend further by striking out the averment that it could have settled for not exceeding $2,000 had the judgment not been rendered. *Held*, that it was not error to refuse to allow this amendment, where it was not shown that the allegation sought to be stricken was inadvertently made, or that it was not in precise accordance with the facts established, as in one aspect of the case the facts averred would defeat a recovery if there was no meritorious defense to the action against the policy holder because the action would not then involve the jurisdictional amount.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 676–678, 681–683; Dec. Dig. ⊂=246(1).]

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 Maryland Casualty Company against George E. Price and others, partners doing business as Price, Smith, Spilman & Clay. Judgment for defendants on demurrer (224 Fed. 271), and plaintiff brings error. Affirmed.

Clyde B. Johnson, of Charleston, W. Va., and Walter L. Clark, of Baltimore, Md. (Conley & Johnson, of Charleston, W. Va., on the brief), for plaintiff in error.

Malcolm Jackson, of Charleston, W. Va. (George E. Price and Buckner Clay, both of Charleston, W. Va., on the brief), for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The Maryland Casualty Company brings this suit for damages alleged to have resulted from the negligence of defendants as attorneys at law employed by the plaintiff. The averments of the declaration filed January 6, 1915, may be summarized as follows:

That one Gail V. Lynch brought an action against the Wylie Permanent Camping Company to recover the sum of $15,000 for personal injuries received by her in August, 1908, while a passenger on one of the camping company's coaches in Yellowstone Park; that under its contract of insurance the plaintiff was bound to indemnify the camping company against any loss suffered by it in such suit, not exceeding $5,000, and was also bound to defend the suit at its own expense; that the defendants, who had been for several years the retained attorneys of plaintiff, were instructed by it to enter an appearance for the camping company in the suit of Mrs. Lynch, and to make such defense and take such steps as might be needful to prevent a judgment; that the defendants thereupon advised plaintiff that it was not necessary to enter an appearance at rules to avoid a default judgment, but that they would look after the case for the plaintiff and keep it advised in regard thereto; that the plaintiff, relying upon its attorneys to discharge their duty in the premises, attempted to settle the suit of Mrs. Lynch, and could have settled the same for not more than $2,000, if a default judgment in her favor had not been rendered; that the defendants wholly failed and neglected to enter an appearance or make any plea or defense in the action against the camping company, and that by reason of such neglect a judgment for $15,000, besides interest and costs, was rendered by default; that under its contract of insurance the plaintiff was bound to and did pay the amount of said judgment, amounting to about $20,000, and that said judgment would not have been rendered, and plaintiff would not have had to pay the same, except for the negligence of defendants; and that they thereby became indebted to plaintiff in the sum mentioned.

To this declaration a demurrer was interposed which was sustained by the court below, chiefly upon the ground that the declaration failed to allege properly that plaintiff had suffered any damages by reason of the negligence of defendants, and that it was necessary, in order to make out a case, to allege that the camping company had a good defense to Mrs. Lynch's action or allege that a less sum would have been recovered in that action but for the negligence of defendants.

The plaintiff then filed an amended declaration which repeated all the allegations of the original and added averments to the following effect: That the defendants by reason of their former employment knew that the liability of plaintiff under its contract of insurance was limited, and that by the terms of said contract the plaintiff was obligated to defend the Lynch suit; that the defendants were employed for that purpose; that, if they had appeared for the camping company and made a defense, the extent of the plaintiff's liability would have been only $5,000, although the judgment against the camping company might exceed that amount; and that the negligent failure of defendants to enter an appearance and defend the Lynch suit was the direct

cause of loss to the plaintiff of the difference between $5,000, its maximum liability under the policy, and the $20,000 default judgment which it paid.

The defendants demurred to the amended declaration, and this demurrer was sustained by the court for reasons stated in its opinion.

The plaintiff then asked leave to further amend its declaration by striking out the averment that it could have settled the Lynch Case, but for the fact that a default judgment was obtained, for an amount not exceeding $2,000. The court refused to allow this amendment on the ground that it did not appear that the allegation sought to be stricken out had been inadvertently inserted, and because that allegation was an admission of fact which affected the cause of action and the jurisdiction of the court. These rulings are challenged in the assignments of error.

[1, 2] In a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client. And the test of the sufficiency of the declaration in such a suit is whether its allegations, if proven, would make out a case. In other words, if proof of the facts alleged as to negligence and resulting loss would establish a cause of action, the declaration is not demurrable.

[3] With reference to these requirements, we hold that the fact of employment in this case is sufficiently pleaded, though a word of comment upon the averments in that regard may not be unsuitable. The declaration does not allege that the defendants were employed in this particular case, but that under their general employment they were notified of its pendency and directed to take certain action therein. The averment is this:

"This plaintiff notified the defendants of the institution and pendency of said action and directed said defendants as attorneys at law for and representing this plaintiff to enter an appearance on behalf of said Wylie Permanent Camping Company, defendant in said action so brought and pending as aforesaid, and instructed its said attorneys, the defendants herein, to make such defense and take such steps as should be necessary to prevent a judgment being rendered therein against said Wylie Permanent Camping Company; and plaintiff says that it became and was the duty of said defendants and each of them to enter an appearance in said action for the said Wylie Permanent Camping Company and do any and all other things of a legal professional character that were necessary to make up the issue in said action and defend against the judgment therein sought by said Gail V. Lynch."

It will be observed that the defendants are not advised of any facts which would constitute a defense in whole or in part to the suit against the camping company. It is not even stated that there was a defense to the suit, or that the plaintiff intended to defend it on the merits. Indeed, when the declaration is carefully read, and reference is made to what is said about the sum for which the case could have been settled, the inference is certainly permissible that the real purpose of plaintiff was to have a formal appearance or plea entered, which would for the time being prevent a judgment and thus enable plaintiff to effect an advantageous settlement. However, as already said, we do

not at all doubt that the declaration sufficiently shows the employment of defendants.

The neglect of a reasonable duty on the part of defendants under their employment is amply alleged, and no question is made as to the sufficiency of the declaration in that regard.

The case then comes to the question whether the averments of the declaration, if proven as set out, would establish that the negligence of defendants resulted in and was the proximate cause of loss to the plaintiff. In other words, does the pleading meet the third requirement above stated by sufficient allegations?

[4] We think it clear that the original declaration does not allege sufficient facts to charge the defendants with liability, because it does not show that plaintiff suffered any damage by reason of their negligence. It is not alleged that if the attorneys had appeared and made a proper defense there would have been no judgment against the camping company, or that the judgment would have been for a less sum. The averment is merely that the default judgment would not have been rendered if defendants had not failed to appear; and the declaration nowhere alleges that the camping company had any defense to the action of Mrs. Lynch, or that she was not justly entitled to recover $15,000 on account of her injuries. It is true that the declaration alleges that plaintiff under its contract of insurance was bound to and did pay the default judgment. But it does not allege how or why, or under what contract provisions, this obligation was incurred. It merely avers that plaintiff was liable to indemnify the camping company against any loss up to $5,000, and that it was bound to defend at its own expense the suit of Mrs. Lynch. In short, there is no disclosure of facts on which the liability is predicated, and therefore the averment at most states only a conclusion of law. It follows that the original declaration was properly held to be insufficient because it does not allege that the camping company had a meritorious defense to the Lynch suit, which the defendants negligently failed to interpose, and that she would not have recovered a judgment, or that such judgment would have been for a much less amount, if the defendants had not failed to discharge the duties of their employment.

[5] We are satisfied that this conclusion is in accord with the weight of authority, although there is some conflict in the reported decisions. Among the cases which sustain the views we have expressed are Harter v. Morris, 18 Ohio St. 492; Bruce v. Baxter, 7 Lea (Tenn.) 447; Spangler v. Sellers (C. C.) 5 Fed. 822; Staples v. Staples, 85 Va. 76, 7 S. E. 199; Goldzier v. Poole, 82 Ill. App. 469; Vooth v. McEachen, 181 N. Y. 29, 73 N. E. 488, 2 Ann. Cas. 601; Gabbert v. Evans, 184 Mo. App. 283, 166 S. W. 635. The rule established by these cases is to the effect that suits against attorneys for negligence are governed by the same principles as apply in other negligent actions. If an attorney, in disregard of his duty, neglects to appear in a suit against his client, with the result that a default judgment is taken, it does not follow that the client has suffered damage, because the judgment may be entirely just, and one that would have been rendered notwithstanding the efforts of the attorney to prevent it. It is said that

there is a difference between the case of an attorney who fails to do anything for his client, and one who makes an inexcusable mistake in attempting to comply with instructions; but we do not perceive any basis in principle for such a distinction. In either case the burden is upon the client to prove the damages he has suffered. Some of the cases hold that nominal damages may be recovered if the attorney fails to do anything whatever; but such a holding would not avail the plaintiff here, because upon that theory the amount involved would be insufficient to give the court jurisdiction. Vance v. Vandercook, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111. In that case the Supreme Court said:

"In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that, if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. Barry v. Edmunds, 116 U. S. 550, 560 [6 Sup. Ct. 501, 29 L. Ed. 729]; Wilson v. Daniel, 3 Dall. 401, 407 [1 L. Ed. 655]."

[6] As above stated, the original declaration was held demurrable because it did not allege that there was a meritorious defense to the Lynch suit which would have defeated recovery, or reduced the amount of the judgment, if the defendants had not failed to perform their duty. The amended declaration likewise omits these averments, and plaintiff contends that the necessity for making them is avoided by the added allegations of the amendment, the substance of which has been already recited. The contention advanced is set forth in the brief as follows:

"It must be borne in mind, however, that this suit is not by the defendant against whom the default judgment was rendered, but is by a casualty company with a limited liability, and the obligation to defend. This is important because it makes it unnecessary to charge that the actual defendant had a good defense to the action in which the default judgment was rendered. The defense which the attorneys were employed to make, if proper skill was used in and attention given thereto, would not affect the liability of the casualty company as to any sum above the $5,000 maximum liability under the policy."

It will thus be seen that under the amended declaration plaintiff seeks only to recover what it paid out in satisfaction of the default judgment in excess of its contract liability of $5,000. The right to recover this excess is based on the ground that, if plaintiff had performed its obligation to defend the Lynch suit, the extent of its liability would have been $5,000, even if there were no defense to that suit; that this obligation to defend was committed to defendants; and that by reason of their neglect the plaintiff suffered damages to the amount of the difference between $5,000 and the sum actually paid in satisfaction of the default judgment. It is sought in this way to avoid the necessity of proving that there was a meritorious defense to the Lynch suit. Indeed, the plaintiff says in effect that it does not at all matter whether or not there was a defense to that suit, since the defendants knew or should have known the character and extent of its obligation, and are therefore liable for the excess over $5,000.

We are persuaded that this contention, however plausible, will not bear the test of close examination. The declaration avers that the

plaintiff, by virtue of its contract of insurance, was under an absolute liability of $5,000, and also under a contingent liability arising out of its obligation to defend any suit against the insured. It does not attempt to recover the $5,000 paid on account of its absolute liability, because for that purpose it would have to show that the judgment would have been for less than $5,000 if the attorneys had defended the suit. But it says that it would not have been obliged to pay in excess of the $5,000, which was paid on account of its absolute liability, except for the negligence of defendants, as it was compelled to pay this excess because of the breach of its obligation to defend. But the difficulty is that the declaration fails to allege any facts which show that the plaintiff was under obligation to pay in excess of $5,000. True, the declaration alleges that by reason of the negligence of defendants the plaintiff breached its contract to defend any suit against the camping company, and that in consequence it was compelled to pay the default judgment. But the allegation that it was compelled to pay the default judgment is clearly a non sequitur, because no facts are stated which show how or why it was compelled to pay that judgment, except the averment that it violated its obligation to defend the suit. This is at best a mere conclusion of law without the disclosure of any facts which justify the conclusion.

It seems evident that the contingent liability of plaintiff for breach of contract to defend the Lynch suit could not exceed the damages suffered by the camping company because the suit against it was not defended; and manifestly that damage is the difference between the default judgment and the judgment which would have been rendered if the suit had been properly defended. But if there was no defense to that suit, and none of any sort is alleged by the plaintiff, there would be no difference because on that assumption the default judgment is the same as or no greater than the judgment which would have been recovered if defense had been made, and therefore no damage has been suffered by the camping company. If this be a correct analysis of the situation, it follows that the default judgment, so far as it exceeded $5,000, was paid without legal liability and cannot be recovered from defendants.

[7, 8] This appears from another point of view. If the camping company sued plaintiff to recover the amount of the default judgment, it would have to allege and prove, in order to recover more than $5,000, substantially the same facts that we think the plaintiff must allege and prove in this action. In either case, it would be necessary to allege and prove a meritorious defense to the Lynch suit. In other words, it comes to the question of which party must assume the burden of proof, and we are constrained to hold that the burden is upon the plaintiff to show that Mrs. Lynch did not have a valid claim against the camping company for $15,000, and that she would have failed to secure a judgment, or only secured one for a less amount, if her suit had been defended. For this reason we are of opinion that the new averments in the amended declaration do not avoid the necessity of alleging and proving that there was a meritorious defense to the Lynch suit, which if duly interposed would have defeated the action or re-

duced the judgment, and the amended declaration is therefore demurrable because it does not so allege.

[9] The remaining question needs but a word of comment. We are convinced that the court below did not err in refusing to allow plaintiff to further amend its declaration by striking out the following averment:

"Plaintiff avers that it could have compromised and settled the claim upon which the said action of Gail V. Lynch against Wylie Permanent Camping Company was instituted by the payment of a sum of money not in excess of $2,000, up to the time that the default judgment was rendered in said action as hereinafter set forth."

It is not shown that this allegation was inadvertently made, or that it is not in precise accordance with the facts. Moreover, in one aspect of the case, the facts averred would defeat plaintiff's right to recover, if there were no meritorious defense to the Lynch suit, because the jurisdictional amount would not then be involved. The state and federal statutes quoted by plaintiff are clearly designed to prevent injustice on account of formal defects in pleading, and to permit liberal amendments to cure such defects; and this purpose is emphasized in the authorities cited. We have carefully examined these statutes and decisions and are satisfied that they do not support the plaintiff's contention.

Affirmed.

GARDNER v. WESTERN UNION TELEGRAPH CO.

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

No. 4404.

1. TELEGRAPHS AND TELEPHONES ⟸54(7)—DELAY IN DELIVERY—ACTION IN TORT—NOTICE OF CLAIM.

The addressee of a telegram, suing in tort for damages resulting from delay in delivering the telegram to him, is bound by the provision of the contract between the company and the sender requiring notice of any claim for damages to be given within 60 days, since the only duty of the company to the addressee arose out of that contract.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 45, 46; Dec. Dig. ⟸54(7).]

2. TELEGRAPHS AND TELEPHONES ⟸54(4)—CONTRACT—NOTICE OF CLAIM.

A provision in a contract for the transmission of a telegram requiring notice of a claim for damages to be given within 60 days is valid at common law.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 42, 46; Dec. Dig. ⟸54(4).]

3. COURTS ⟸366(1)—RULES OF DECISION—CONSTRUCTION OF STATE CONSTITUTION.

The construction of Const. Okl. art. 23, § 9, making void any provision stipulating for notice or demand other than such as may be provided by law as a condition precedent to any claim or liability, by the Supreme

Court of that state, is binding on the federal court in an action for delay in delivery of a telegram, to which the provision is applicable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957; Dec. Dig. ⊂⊃366(1).]

4. COMMERCE ⊂⊃8—INTERSTATE COMMERCE—REGULATIONS—INTERSTATE TELEGRAMS.

By Act Feb. 4, 1887, c. 104, 24 Stat. 379, §§ 1, 6, 15, as amended June 18, 1910 (36 Stat. 539, c. 309 [Comp. St. §§ 8563, 8569, 8583]), and sections 2, 12 (Comp. St. §§ 8564, 8576), which make that act applicable to interstate telegraph business and make interstate telegraph companies common carriers of messages, who are required to publish their rates and regulations subject to control by the Interstate Commerce Commission, Congress occupied the whole field of regulating interstate telegraph business, and therefore Const. Okl. art. 23, § 9, making void any contract stipulating for notice or demand other than such as provided by law, as a condition precedent to liability, does not invalidate a clause in a contract for the sending of a telegram from the point in Oklahoma to a point in Kansas, which provides that the company shall not be liable for damages unless the claim is presented in writing within 60 days after the message is filed with the company for transmission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⊂⊃8.]

5. COMMERCE ⊂⊃85—INTERSTATE COMMERCE—REGULATIONS—DETERMINATION OF REASONABLENESS.

The question whether a regulation by an interstate telegraph company requiring notice of claim to be given within 60 days is reasonable is for the Interstate Commerce Commission to determine.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. ⊂⊃85.]

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

Action by John A. Gardner against the Western Union Telegraph Company. Judgment for the defendant on directed verdict, and plaintiff brings error. Affirmed.

Charles R. Alexander, of Woodward, Okl. (Howard W. Patton, of Woodward, Okl., on the brief), for plaintiff in error.

Frank Wells and Rush Taggart, both of New York City (Albert T. Benedict and Francis Raymond Stark, both of New York City, and James R. Keaton, David I. Johnston, and George G. Barnes, all of Oklahoma City, Okl., on the brief), for defendant in error.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. Gardner, hereinafter called the plaintiff, sued the Western Union Telegraph Company, hereinafter called the Company, for the delay in delivering a message to him which had been sent by Walter B. Scoville from Syracuse, Kan., to Quinlan, Okl., September 20, 1911. At the close of all the evidence taken at the trial of the action the court directed a verdict against the plaintiff, and he brings the case here assigning this ruling of the court as error.

The undisputed facts shown at the trial are as follows:

On the date of the message hereinafter set forth, the plaintiff was and had been a broom corn buyer at Quinlan, Okl., for about ten years.

He had an understanding with the Scoville Bros. that they would pay him $5 per ton commission on all broom corn purchased by him at the market price upon their request. On September 20, 1911, Scoville sent the following night letter:

"Send the following night letter subject to the terms on back hereof, which are hereby agreed to:

60 Paid.

"Syracuse, Ks., Sept. 20, 1911.

"To John Gardner, Quinland, Okla.:

"Hope you have secured choice crops amounting to five cars or more we need it so do not give it up even though you have to pay higher than we thought we must have it in fact to show our competitors a merry chase. So please secure all you can that is pea green. Hope you are feeling better.

"Walter B. Scoville."

The terms on the back of said message, which are referred to above and which are material in the consideration of this case, were as follows:

"Night Letter.

"All night letter messages taken by this company are subject to the following terms which are hereby agreed to:

"The Western Union Telegraph Company will receive not later than midnight NIGHT LETTERS, to be transmitted only for delivery on the morning of the next ensuing business day, at rates still lower than its standard night message rates, as follows: The standard day rate for ten words shall be charged for the transmission of fifty words or less, and one-fifth of such standard day rate for ten words shall be charged for each additional ten words or less.

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated message rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED MESSAGE AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the message and this Company as follows:

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission."

The night letter was received at Quinlan, Okl., at 11:15 p. m., on the day of its date, but was not delivered to the plaintiff until September 25, 1911, at 10 o'clock a. m. The evidence showed that on account of the delay in the delivery of the message the plaintiff suffered material damage in the purchase of broom corn at a certain price and subsequent decrease in the market value thereof. No claim for damages was presented to the Company by the plaintiff until on or about October 22, 1912. It was stipulated at the trial that A. R. Lingafelt, district commercial superintendent of the Company for the states of Oklahoma and Arkansas, would testify, if present:

"That he has knowledge and information concerning that department of defendant company which has to do with the filing of its rates, rules, tariffs and regulations and information with the Interstate Commerce Commission, as provided by law, and that such tariffs, rates, rules and regulations as are contained in the general tariff book for the year commencing July, 1911 (a printed copy of which will be offered in evidence in above case and more particularly identified), together with the regular printed sending blanks, generally and uniformly used by said company in its business, constitute the terms and conditions upon which the defendant company is doing business as a carrier of messages, and that said rates, tariffs, rules and regulations of

defendant company, as published in said tariff book, together with said blank forms, were within a reasonable time after July, 1911, and now are, offered for filing with the Interstate Commerce Commission, and are established and published annually with the knowledge and acquiescence of said Interstate Commerce Commission."

[1] In order to sustain the ruling of the trial court we must decide that the regulation in regard to the presentation of claims for damages within 60 days is valid as against the plaintiff. There is no indication on the face of the message that it was not an unrepeated message and paid for as such; hence, under the terms of the contract between Scoville and the Company the message must be considered as an unrepeated night letter for which the standard rate for unrepeated night letters was paid. In consideration of this rate Scoville agreed:

"That the company should not be liable for damages or statutory penalties in any case where the claim was not presented in writing within sixty days after the message was filed with the Company for transmission."

We accept the contention of counsel that this action is not upon the contract between Scoville and the Company strictly speaking, but for damages arising from a failure on the part of the Company to promptly perform a duty which under the law it owed the plaintiff. In other words, it is an action in tort. Assuming for the present that the regulation was valid as between Scoville and the Company the question then presents itself as to whether it is binding on the plaintiff notwithstanding the fact that this action is in tort and not on the contract.

There is not entire harmony among the authorities upon this question, but upon principle and sound reason we think the plaintiff is bound by the regulation in relation to the presentation of claims for damages. Let us analyze plaintiff's case. He says that the Company was negligent in failing to deliver the message promptly. Negligence arises from a violation of duty owing by one person to another. If there is no duty there is no negligence. Without the contract between Scoville and the Company, the latter owed the plaintiff no duty, and hence there could be no negligence in the absence of the contract. So it plainly appears that plaintiff would have no cause of action except for the contract because the duty of the Company arose from the contract. May the plaintiff charge the Company with the duty arising from the contract, and at the same time repudiate one of the conditions upon which the duty was assumed? We think not. The following cases support this view: Broom v. Western Union Telegraph Co., 71 S. C. 506, 51 S. E. 259, 4 Ann. Cas. 611; Halsted v. Postal Telegraph Cable Co., 120 App. Div. 433, 104 N. Y. Supp. 1016, affirmed by the Court of Appeals 193 N. Y. 293, 85 N. E. 1078, 19 L. R. A. (N. S.) 1026, 127 Am. St. Rep. 952; Ellis v. American Telegraph Co., 13 Allen (Mass.) 226; McGehee v. Western Union Telegraph Co., 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512; M. M. Stone & Co., v. Postal Telegraph Co., 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795; Western Union Telegraph Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366; Coit v. Western Union Telegraph Co., 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153; Frazier v. Western Union Telegraph Co., 45 Or. 414, 78 Pac. 330, 67

L. R. A. 319, 2 Ann. Cas. 396; Western Union Telegraph Co. v. Dant, 42 Wash. Law Rep. 722 (D. C. Court of Appeals); Findlay v. Western Union Telegraph Co. (C. C.) 64 Fed. 459; Culberson's Case, 79 Tex. 65, 15 S. W. 219; Manier's Case, 94 Tenn. 442, 29 S. W. 732.

[2] We have disposed of the question under discussion on the theory that the 60-day clause was valid at common law as between Scoville and the Company. We have no doubt of this. Southern Express Co. v. Caldwell, 88 U. S. (21 Wall.) 264, 22 L. Ed. 556; M., K. & T. Ry. Co. v. Harriman Brothers, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; Whitehill v. Western Union Telegraph Co. (C. C.) 136 Fed. 499; Manier v. Western Union Telegraph Co., 94 Tenn. 442, 29 S. W. 732.

[3] Counsel for plaintiff, however, contends that the clause in question is void under section 9, article 23, Constitution of Oklahoma, which provides that:

"Any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void."

The Supreme Court of Oklahoma in Western Union Telegraph Co. v. Sights, 34 Okl. 461, 126 Pac. 234, 42 L. R. A. (N. S.) 419, Ann. Cas. 1914C, 204, and in Western Union Telegraph Co. v. Crawford, 29 Okl. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930, did so decide. The case having arisen in Oklahoma this construction of the Constitution of that state is binding upon us, if it is applicable to the case at bar.

[4] Counsel for the Company, however, contend that by the act to regulate commerce, as amended June 18, 1910 (36 Stat. 539), the United States under the power to regulate commerce have occupied the whole field of transmission of interstate messages by telegraph, and therefore the provision of the Constitution of Oklahoma, above referred to, has been suspended so far as its effect on the regulation in question is concerned.

Pertinent to this contention, sections 1, 2, 6, 12, and 15 of the act to regulate commerce as amended, are cited. We cannot repeat those sections here, but it appears beyond question therefrom that, in so far as the provisions of the act to regulate commerce are applicable, it applies to all interstate telegraph business; that as to all interstate business, telegraph, telephone, and cable companies are common carriers within the meaning and purposes of the act; that as to their interstate business telegraph companies must print and publish their rates, rules, classifications, regulations, and practices, and file same with the Interstate Commerce Commission; that they shall establish reasonable rates, rules, regulations, and practices, but messages may be classified into day, night, repeated, unrepeated, and such other classes as are just and reasonable, and different rates may be charged therefor; that all rates, regulations, and practices must be reasonable and just; that penalties are imposed for any attempt to evade the published rates, rules, practices, or regulations; that the Interstate Commerce Commission shall determine what is a just and reasonable regulation or prac-

tice; that the rules and regulations established by telegraph companies or other common carriers are deemed reasonable and just until changed by the Interstate Commerce Commission. It results necessarily from the foregoing conclusions that Congress has not only taken possession of the field of interstate commerce by telegraph, but has also specifically prescribed the rules which shall govern the transaction of such commerce.

The Interstate Commerce Commission in W. N. White & Co. v. Western Union Telegraph Co., 33 Interst. Com. Com'n R. 500, assumed jurisdiction without question of a case involving the reasonableness of the rates of the Company between New York and San Francisco, and by cable from New York to points in England. Hall, Commissioner, in delivering the opinion of the Commission, said:

"Jurisdiction over these cable rates is clearly conferred upon us by the act to regulate commerce and is admitted of record by counsel for defendant."

The jurisdiction of the Commission was so plain in regard to the service between New York and San Francisco as not to call for any statement whatever. It was further said in the same case:

"It is plain that both classification and charge are to be made in the first instance by the carrier, and it follows by necessary implication that the carrier is to define the classes and formulate such rules and regulations pertaining thereto as shall be just and reasonable. The initiative is with the carrier."

See also Conference Rulings, Bulletin No. 6, regulations Nos. 407, 410, 420, 426, 456, and 460. These rulings show that the Interstate Commerce Commission has assumed specific control of interstate telegraphic business.

The case of Western Union Telegraph Co. v. E. A. Bilisoly, 116 Va. 562, 82 S. E. 91, was a suit by the sendee of a message for a statutory penalty on account of the delay in delivery of a night letter. In this case the Supreme Court of Appeals said:

"By an act of Congress approved June 18, 1910, telegraph companies, so far as interstate business is concerned, have been placed under the direct supervision of the Interstate Commerce Commission, and are subject, so far as applicable, to the same rules, regulations, restrictions, and penalties that are imposed upon common carriers. This act has occupied the entire field and taken complete control of the regulation of telegraph companies, and while it has impliedly exempted them from any penalty for negligence it has provided a severe maximum penalty for intentional discrimination. Before the passage of this act there had been no legislation by Congress affecting or conflicting with the state statutes imposing a penalty for failure to deliver messages promptly, and therefore the state statutes affecting telegraph companies were upheld, even as to interstate messages, upon the ground that until Congress had legislated upon the subject-matter of telegraph companies, the state statutes were applicable. James Case, 162 U. S. 650 [16 Sup. Ct. 934, 40 L. Ed. 1105]; Commercial Milling Co. Case, 218 U. S. 406 [31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815]; Crovo Case, 220 U. S. 364 [31 Sup. Ct. 399, 55 L. Ed. 498], and others. * * * It would be inconvenient, as well as unnecessary, to recite the detailed provisions of the act of Congress approved June 18, 1910. It is sufficient to say that by it Congress has occupied the field of regulation with respect to interstate telegrams, and hence the state statute imposing a penalty for failure to make prompt delivery can no longer be invoked in such cases. The act of Congress has ousted the state of jurisdiction over the subject."

This case was followed in Western Union Telegraph Co. v. First National Bank of Berryville, 116 Va. 1009, 83 S. E. 424. The following cases also directly support the contention of the Company: Dodge v. Adams Express Co., 54 Pa. Super. Ct. 422; Ridge v. Erie Railroad Co., 54 Pa. Super. Ct. 602; Strause Iron Co. v. Western Union Telegraph Co., —— Pa. Super. Ct. ——; Western Union Telegraph Co. v. Compton, 114 Ark. 193, 169 S. W. 946; Western Union Telegraph Co. v. Johnson (Ark.) 171 S. W. 859; Western Union Telegraph Co. v. Simpson (Ark.) 174 S. W. 232; Western Union Telegraph Co. v. Holder (Ark.) 174 S. W. 552.

The case of Western Union Telegraph Company v. Brown, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457, was a suit to recover damages on account of the negligent failure to deliver in the District of Columbia a telegram sent from South Carolina. The addressee of the telegram sued the company in the state court of South Carolina and sought to recover damages for mental anguish suffered by reason of the nondelivery of the telegram. This was made a cause of action by the statute of South Carolina (Civil Code 1902, § 2223). The Supreme Court, after holding that the law of South Carolina could not be invoked for the recovery of damages for a tort committed in the District of Columbia, also said:

"What we have said is enough to dispose of the case. But the act also is objectionable in its aspect of an attempt to regulate commerce among the states. That is, as construed, it attempts to determine the conduct required of the telegraph company in transmitting a message from one state to another or to this District by determining the consequences of not pursuing such conduct, and in that way encounters Western Union Telegraph Co. v. Pendleton, 122 U. S. 347 [7 Sup. Ct. 1126, 30 L. Ed. 1187], a decision in no way qualified by Western Union Telegraph Co. v. Commercial Milling Co., 218 U. S. 406 [31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815]."

We think also that the Supreme Court of the United States has in the following cases decided the question under consideration in favor of the company: Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Atchison, Topeka & Santa Fé Railway Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; St. Louis, Iron Mountain & Southern Railway Co. v. Edwards, 227 U. S. 265, 33 Sup. Ct. 262, 57 L. Ed. 506; Boston & Maine Railway Co. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; Erie Railroad Co. v. New York, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138; Southern Railway Co. v. Reid, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257.

We have examined the cases cited by plaintiff and find them to be cases which arose prior to the amendment of the Interstate Commerce Law of June 18, 1910, or they are cases in which state legislation only indirectly burdened interstate commerce. Since the amendment above referred to we find no conflict in the authorities in cases where the facts are similar to the one at bar. Congress has taken possession of the field of interstate commerce by telegraph and it results that the power of the states to legislate with reference thereto has

been suspended. The great necessity that commerce between the states should be free from such interference applies in a marked degree to interstate commerce by telegraph. If the regulation which is pleaded in bar in this suit should be held valid in Kansas, and void in Oklahoma, and the illustration may be extended to all the states of the Union, then the power of the United States to regulate commerce between the states in relation to telegraphic business would not only be directly interfered with, but destroyed.

[5] We think that the stipulation in the record that Mr. Lingafelt if present would testify to the facts therein stated shows that the Company has done all that can be required of it in regard to the filing of its schedule of rates, regulations, and practices. We are therefore of the opinion that Congress having taken possession of the field of interstate commerce by telegraph, the provision of the Constitution of Oklahoma relied upon has become inoperative for the purpose of striking down the regulation in question. Whether the regulation is a reasonable one or not is in our judgment a question for the Interstate Commerce Commission to determine. Mitchell Coal & Coke Co. v. Pa. R. Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472; Chicago & Alton Ry. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075.

Judgment affirmed.

AMERICAN DIST. STEAM CO. v. WALTERMIRE.

In re FINDLAY MOTOR CO.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1916.)

No. 2720.

1. COMPROMISE AND SETTLEMENT ⟸6(1)—VALIDITY.

The S. Co., owning a majority of the stock of the T. Co., which manufactured motor trucks, sold such stock to the F. Co. for an amount payable in installments, and agreed to assume the debts of the T. Co., consisting of amounts due itself and its officers and $20,000 due a bank. Without a formal transfer, the F. Co. took possession of the T. Co.'s assets. Subsequently a receiver was appointed for the F. Co. at a time when $19,500 remained unpaid on the purchase price of the stock. The S. Co. had paid $10,000 to the bank, and it purchased part of the notes for the balance, and it and the bank asserted their claims as creditors of the T. Co. against property then in the receiver's possession, valued at $25,000 or more, which had belonged to the T. Co. Thereupon the receiver made an agreement with the S. Co. whereby he issued receiver's certificates with the court's approval to the S. Co. and the bank for $10,000, subject to certain prior certificates, and released the S. Co. from its obligations under the prior contract, and the S. Co. credited the $10,000 upon its claim for $19,500, and released all claims against former property of the T. Co. upon the notes for $10,000 and all similar notes. *Held*, that the situation was such as justified a compromise to avoid litigation, as the receiver, by advancing $10,000 of the S. Co.'s claim to the rank of a

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

second preferred claim, secured at the least, and even if the claims could be defeated, escape from litigation and expense and damages from delay in carrying out the receivership plans.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 35, 42, 44–49; Dec. Dig. ⊂⊃6(1).]

2. COMPROMISE AND SETTLEMENT ⊂⊃19(1)—CLAIMS—CONSIDERATION.

That the receiver, in reporting the settlement with the S. Co. to the court, did not exhibit a copy of the contract, but reported only his conclusion as to the justness of the S. Co.'s contention, thus leading the court to believe that the S. Co.'s claims were clear, rather than doubtful, did not justify the cancellation of the receiver's certificates after such proceedings had been had as made it impossible to put the S. Co. in statu quo, where the receiver acted in good faith and on the advice of counsel, as, even though the S. Co. was wrong in its position, it would nevertheless have been prudent to approve a reasonable compromise and avoid delays and appeals.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 67, 75; Dec. Dig. ⊂⊃19(1).]

3. COMPROMISE AND SETTLEMENT ⊂⊃19(1)—CLAIMS—VALIDITY.

Where, after the settlement, the business was continued, the proceeds of sales of trucks received from the T. Co. were mingled and expended or reinvested, the material on hand was used up, and the machinery and other remaining assets which the S. Co. might have claimed were united with other assets in one gross sale, and it was impossible to trace the proceeds, and tell what part of the final purchase price was realized from the disputed assets, the S. Co. could not be put in statu quo upon a cancellation of the receiver's certificates.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 67, 75; Dec. Dig. ⊂⊃19(1).]

4. COMPROMISE AND SETTLEMENT ⊂⊃9—CLAIMS—CONSIDERATION.

The S. Co., in urging its claim, in settlement of which the receiver's certificates were issued, was not seeking to rescind its contract with the F. Co., but was rather insisting upon specific performance, as it only claimed that it should not be compelled to carry out the remainder of its contract and pay the rest of the T. Co.'s debts, unless the F. Co. carried out the remainder of its contract and furnished the money it had agreed to furnish, which could then be devoted to paying the debts.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 32–34; Dec. Dig. ⊂⊃9.]

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Receivership suit against the Findlay Motor Company. On petition of Beecher W. Waltermire, trustee in bankruptcy of the Findlay Motor Company, the court canceled receiver's certificates issued to the American District Steam Company, and required it to make good the amount of certificates issued to another party, and the Steam Company appeals. Reversed and remanded.

This controversy involves three corporations: The American District Steam Company and the American Motor Truck Company, both organized under New York laws, and the Findlay Motor Company, an Ohio corporation. They will be called, respectively, the Steam Company, the Truck Company and the Findlay Company. The Truck Company was actively manufacturing motor trucks, at Lockport, N. Y. It was, in a sense, a subsidiary of the Steam Company, which owned 510 out of the 760 shares of the capital stock of the Truck Company. The Findlay Company, engaged in similar business, desired to succeed to the business of the Truck Company. Accordingly, a contract in writing was

made, in February, 1911, between the Findlay Company and the Steam Company, whereby the Steam Company agreed to sell to the Findlay Company the entire capital stock of the Truck Company, and to assume to pay all the debts of the Truck Company—all the accounts and receivables of the Truck Company to be taken over by the Steam Company. On its part, the Findlay Company agreed to pay to the Steam Company $1,000 down, $24,000 in 32 monthly payments of $750 each, and $30,000 in the capital stock of the Findlay Company. Thereupon, but without any formal transfer from the Truck Company, the Findlay Company took possession of the assets, being machinery, materials, and manufactured trucks, and added them to its own property in its own plant. These assets inventoried about $45,000. The debts of the Truck Company which the Steam Company assumed consisted of $20,000 owing to itself, $8,000 owing to some of its officers for personal loans made to the Truck Company, and $20,000 owing upon the promissory notes of the Truck Company to a Lockport bank. The machinery, taken over by the Findlay Company, became a part of its own plant. The materials which it took over, it partly or wholly manufactured and sold in finished form, and of the 14 completed trucks which it took over at $2,000 each, it sold about 10. The purchase price of those which it sold had not been paid to it in November, 1911.

For a time after the contract of February, the Findlay Company continued to pay its monthly notes and the Steam Company continued to pay the debts of the Truck Company. In September, 1911, on a bill by creditors and the practical consent of the Findlay Company, the court below appointed a receiver for that company. At that date, the Findlay Company had paid to the Steam Company its down payment of $1,000 and its monthly notes to a total of $4,500, leaving $19,500 unpaid, and the Steam Company had paid $10,000 of the Truck Company's notes at the Lockport bank. Thereupon the Steam Company purchased from the bank $7,500 of the remaining $10,000 of these notes, and in November, 1911, the Steam Company and the bank asserted their claims as creditors of the Truck Company against all the property, which had belonged to the Truck Company, which was said never to have been transferred to the Findlay Company, but which was in the possession of its receiver. It demanded the machinery and the materials on hand, and gave notice to the purchasers of the trucks that it, the Steam Company, and not the receiver of the Findlay Company, was entitled to payment. The value of the property thus claimed was $25,000, or more. The Steam Company had theretofore filed its claim with the receiver as a creditor for the $19,500, but claimed to have done so under a misapprehension of fact.

The controversy between the Steam Company and the receiver soon crystallized into a dispute as to the effect of the February contract. Was the agreement of the Steam Company to pay the Truck Company's debts for the benefit of the Findlay Company dependent on the Findlay Company's agreement to pay the purchase price of the Truck Company stock, so that the Steam Company was justified in refusing to pay $19,500 of the debts, or was the agreement independent, so that the Steam Company was bound to pay all this indebtedness and stand only as a creditor of the Findlay Company upon the purchase price notes?

Counsel for the Steam Company and the bank came to Findlay, the receiver was advised by counsel, and a settlement was made by which the Steam Company and the bank were to abandon all claims against all property in the receiver's hands, the receiver was to give to the Steam Company and the bank receiver's certificates for the $10,000 and interest, subject to prior outstanding certificates, and the Steam Company was to credit the entire $10,000 upon its $19,500 claim on file. Upon a petition filed by the receiver reciting generally this situation and agreement and indorsed with the approval of the plaintiff in the receivership case, the court below approved this contract and ordered the certificates to issue and mutual releases to be delivered as agreed. Accordingly the certificates were delivered, and in January, 1912, the Steam Company and the bank canceled and discharged the $10,000 notes, the Steam Company released all claims which it might have against the former property of the Truck Company upon these notes and all similar notes, or which it might have against the Findlay Company for misapplying the proceeds of sales, and credited the receiver's certificates upon the face of the

claim on file, and the receiver released the Steam Company from all further and future accruing obligations under the February contract. Matters stood in this shape during 1912, while various proceedings were pending; but in December, 1912, the court ordered all the plant and property of the Findlay Company to be sold. This was done in February, 1913, and $50,000 realized. In the meantime, bankruptcy proceedings had been instituted against the Findlay Company, and the court ordered $12,500 of the proceeds to be held in court as a fund to provide for these certificates, if they should be held valid as against the expected opposition of the trustee in bankruptcy. Later, upon the petition of the trustee, claiming that the certificates had been improvidently issued, the court made an order canceling the $7,500 of certificates issued to the Steam Company, confirming the $2,500 certificates to the bank, but providing that the Steam Company should make good to the trustee the amount of the bank certificates. From this order the Steam Company appeals.

N. D. Fish, of North Tonawanda, N. Y., and David Tice, of Lockport, N. Y., for appellant.

Hiram Van Campen, of Findlay, Ohio, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and HOLLISTER, District Judge.

DENISON, Circuit Judge (after stating the facts as above). 1. The question mainly considered by the court below and argued here is whether the covenant of the Steam Company to pay the debts of the Truck Company, thereby giving to the capital stock of the Truck Company the greater part at least of its selling value, and the covenant of the Findlay Company to pay to the Steam Company the purchase price of this capital stock, were dependent upon each other, or whether they were independent, so that, therefore, the Steam Company had no right, as against the Findlay Company, to purchase the Truck Company's debts or otherwise stand as its creditor, and so that there was no sufficient justification for the issue of the receiver's certificates. This main question we find no occasion to decide; for the purposes of this opinion we assume that the conclusion reached below was right; but we think that, for other reasons, the result which was reached cannot be sustained.

[1] 2. The situation which existed when the Steam Company and the receiver reached an agreement was typical of those which justify a compromise to avoid litigation. It cannot be doubted that the Steam Company's claims were made in good faith. So far as expressly stated, they extended only to the last $10,000 of the bank notes, but it was as obvious then to the receiver as it is now to all that these claims extended also to the $20,000 of the Steam Company's own notes, which had been formally paid or canceled, if at all, only by bookkeeping entries. Since all these claims, as against the Findlay Company, could have been met by paying the $19,500 notes, it follows that the receiver was confronted by a situation where a $19,500 claim might be established as absolutely preferred, or else take away the bulk of the assets of the receivership, or at least enough to destroy the integrality of the plant and business. By advancing $10,000 of the claim to the rank of second preferred, at an apparent cost of the difference on $10,000 between par and the then expected general dividend, he secured, at the least and even if the claims could be defeated, escape from litiga-

tion and expense and damages from delay in carrying out the receivership plans, all of which might well amount to more than the difference between par and dividend on $10,000. That all this was in the minds of the parties is shown by the care with which the Steam Company's release was made to cover "all other similar notes." Indeed, the settlement seems practically to have included the $8,000 of individual claims.

[2] The only reason urged for doubting that the validity of the certificates was sufficiently supported, as being an accord and satisfaction of the dispute, is that the situation was not fully presented to or understood by the court when the certificates were authorized. It is quite true that the petition of the receiver, reporting the settlement made with the Steam Company, did not exhibit a copy of the contract, and reported only the conclusion of the receiver that the two covenants had been dependent, and that the Steam Company was right in its contention. It is true also that the counsel for the Steam Company participated in this incomplete presentation of the facts. It is natural that the court should have felt surprise when it was later disclosed that the claims of the Steam Company were doubtful rather than clear; but the court below does not find, nor do we see any indication that there existed, any overreaching of the receiver by the Steam Company or any intent to deceive or to mislead the court. The receiver was a capable business man. He was advised by his counsel; at the worst, they made a mistake of law; and in good faith they stated to the court the conclusion which they had reached. Indeed, it is clear enough that, even if the original contract had been fully stated and the court had concluded that the Steam Company was wrong in its position, nevertheless it would have been prudent to approve a reasonable compromise and avoid delays and appeals. The utmost result reached by this view is that the compromise might have been at a figure somewhat more favorable to the receiver.

[3] Even from this aspect, we would hesitate to reverse the action of the court below in canceling the receiver's certificates, except that it is impossible upon such cancellation, to put the Steam Company back in statu quo. During the period after the settlement, the business was continued, the proceeds of the trucks sold were mingled and expended or reinvested, the material on hand used up, and, at the end, the machinery and other remaining assets which the Steam Company might have claimed, were united with other assets in one gross sale. It is impossible to trace the proceeds of this property converted during the receivership and impossible to tell what part of the final purchase price was realized from the disputed assets then remaining. Even if there had been a substituted right to proceed against the entire $12,500 fund, this is not the equivalent of a right to assert and litigate a $19,500 claim against $25,000 of property, and the latter right is what the Steam Company gave up. This consideration we think enough to turn the scale and to require that the certificates should be paid.

[4] 3. It is also said that the claim of the Steam Company, when it was procuring these certificates, was upon the theory that it had

a right to rescind the original contract, and it is urged—perhaps convincingly—that no such right of rescission existed. We think this interpretation misapprehends the real situation. The position of the Steam Company did not depend upon any right of rescission or theory of rescission. It was rather insisting upon specific performance. It did not propose to affect the executed portion of the contract. It did not suggest that the Findlay Company should give back the capital stock which it had purchased, or that the Steam Company should refund that part of the purchase price it had received. It only claimed that it should not be compelled to carry out the remainder of its contract and pay the rest of the Truck Company's debts, unless the Findlay Company would carry out the remainder of its contract and furnish the money it had agreed to furnish which could then be devoted to paying these debts. It is, of course, obvious that the right to discontinue further performance of a contract and to disregard the same for the future is quite a different thing from the right to rescind. Both parties had partly performed, and each had stopped further performance. They adjusted and compromised their executory obligations. There was no fraud and no gross unfairness. Both have acted upon the agreed basis, and one cannot be restored to his former position.

The order appealed from is reversed, and the case remanded for proceedings in accordance with this opinion.

MISSOURI VALLEY BRIDGE & IRON CO. v. BLAKE.

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

No. 1387.

1. CORPORATIONS ⟸668(14)—PROCESS—CONSTRUCTIVE SERVICE—ATTACHMENT AND PUBLICATION.

Under Code W. Va. 1913, c. 124, § 11 (sec. 4747), a state court acquired jurisdiction in an action against a foreign corporation, though it was a nonresident of the state and had no officer or agent within the county upon whom process could be served, by a levy under an attachment, and the execution of an order of publication.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2624, 2625; Dec. Dig. ⟸668(14).]

2. REMOVAL OF CAUSES ⟸11—EFFECT OF REMOVAL—JURISDICTION.

Where a state court had acquired jurisdiction of an action against a nonresident foreign corporation having no officer or agent in the county, by a levy under an attachment and the execution of an order of publication, the jurisdiction was not lost by the removal of the cause to a federal court, though that court could not have acquired original jurisdiction by attachment and publication.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29–31; Dec. Dig. ⟸11.]

3. EXEMPTIONS ⟸118—PROPERTY SUBJECT TO ATTACHMENT—PERSONS ENTITLED TO ASSERT IMMUNITY.

Rev. St. § 3753 (Comp. St. 1913, § 6950), provides that, whenever any property in which the United States have or claim an interest shall be

attached for the satisfaction of any claim against it, the Secretary of the Treasury may direct the Solicitor of the Treasury to cause a stipulation to be entered into by the proper district attorney for its discharge from such attachment, but that nothing therein contained shall be construed as recognizing or conceding any right to enforce by attachment any claim against any property held or owned or employed by the United States. *Held*, that the statute is designed for the protection of the government, and can be invoked only by it, and, assuming that the United States had an interest in the property of a contractor employed on a contract with the United States, the immunity from attachment could be asserted only by the government, and not by the contractor, in an action against it.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 139; Dec. Dig. ⊜118.]

4. MASTER AND SERVANT ⊜256(1)—ACTIONS FOR INJURIES—SUFFICIENCY OF DECLARATION.

Where, in an employé's action for injuries, though there was some lack of particularity in the averments of the declaration, and it possibly failed to locate with precision and certainty the negligent act which caused the injury, it was sufficiently definite to apprise the defendant of the ground upon which it was claimed to be liable, and to permit the introduction of testimony as to all the pertinent facts connected with the accident, a demurrer was properly overruled.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 809; Dec. Dig. ⊜256(1).]

5. APPEAL AND ERROR ⊜1050(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Conceding that it is the general rule that the admission of opinion testimony as to the incompetency of a defendant's employé is reversible error, it was not reversible error to permit a witness to give his opinion that defendant's engineer was incompetent, where he made a disclosure of facts, independent of the opinion, from which the jury might have found that the engineer was not competent, and the opinion expressed was rather a summing up of impressions derived from what he had seen and learned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⊜1050(1).]

6. MASTER AND SERVANT ⊜270(14)—ACTIONS FOR INJURIES—ADMISSION OF EVIDENCE.

While it is the general rule that negligence on the part of an employer cannot be predicated upon the use of a particular appliance, by merely showing that there are other appliances which are believed to be better or less dangerous, this rule was not violated where a witness merely stated that upon going to work for the employer he observed a difference between its method and the methods of a former employer which attracted his attention.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 924; Dec. Dig. ⊜270(14).]

7. APPEAL AND ERROR ⊜1050(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Every theoretical error in the course of a trial in the admission of evidence is not ground for reversal, and mistakes which do not involve injustice should ordinarily be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⊜1050(1).]

8. TRIAL ⊜260(1)—INSTRUCTIONS COVERED BY THOSE GIVEN.

Where the trial judge delivered a general charge, which might justly be regarded as an adequate and impartial statement of the issues and evi-

dence, it was not error to refuse requested instructions, which, so far as they were correct and material, were embraced in the general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⊂⊃260(1).]

9. MASTER AND SERVANT ⊂⊃265(8)—ACTIONS FOR INJURIES—RES IPSA LOQUITUR.

An employer was building a dam, and was about to pump the water out of a cofferdam. A discharge box or flume, one end of which rested on the outer edge of the dam was being raised up and placed under a discharge pipe through which the water was to be pumped, but the arm of the derrick used in placing it was not long enough to swing it into position beneath the pipe, and plaintiff and another employé went under the raised end to attach another cable, and while there the discharge box eased down, injuring plaintiff. The cable or rope in use did not break or slip, but the spool or drum around which it was wrapped revolved slightly. The engine was not dogged, and there was testimony that, if it had been dogged, the accident could not have happened. *Held* that the maxim, "res ipsa loquitur," was applicable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 898, 955; Dec. Dig. ⊂⊃265(8).]

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

Action by Charles Blake against the Missouri Valley Bridge & Iron Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles McCamic, of Wheeling, W. Va. (J. M. Clarke and McCamic & Clarke, all of Wheeling, W. Va., on the brief), for plaintiff in error.

T. S. Riley, of Wheeling, W. Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. This is a negligence action of familiar type, and the facts in outline appear to be these:

Plaintiff in error, defendant below and hereinafter so called, was building a dam for the United States government across the Ohio river near Woodland, W. Va., and Blake, who brings the suit, was a common laborer employed in that work. A large cofferdam had been constructed, extending up and down the river, and the general purpose of the work in hand at the time of the accident was to pump the water out of the cofferdam. Blake was engaged with several others in placing a heavy discharge box or flume in such position that one end would be raised up and placed under the discharge pipe, through which the water was to be pumped from the cofferdam, and the other end remain on the outer edge of the dam, so that the water would be carried down into the river. The pump barge which supported the discharge pipe was inside the cofferdam, while outside in the river was the derrick boat on which were the engine and hoist used in placing the discharge box. The width of the top of the cofferdam was about 16 feet. It was found that the arm of the derrick was not long enough to swing the discharge box into position beneath the pipe, and it became necessary to attach another cable to the box in order to haul it into place by means of a block and tackle. The inner end of the

box was elevated, the other end resting on the outer edge of the cofferdam wall, and Blake with another man went under the raised end to attach a sling or cable which was to be used in pulling the box into place with the block and tackle moved by the engine on the derrick boat. While Blake was making this attachment, and from some cause not certainly disclosed by the evidence, the discharge box "eased down" about 6 feet, and he was struck and badly injured. The cable or rope in use did not break, nor did it slip along the discharge box; but it appears that the spool or drum around which the rope was wrapped near the engine revolved a little, so that the rope slackened or unwound, with the result that the discharge box was suddenly lowered and hit the plaintiff as it descended. It is admitted that the engine was not "dogged," and there was testimony to the effect that if it had been dogged the accident could not have happened. Blake testified that before going under the discharge box for the purpose mentioned he asked Corliss, defendant's general superintendent who was there directing the work, whether the load was dogged, and Corliss answered: "It is all right; go ahead."

There are 39 assignments of error, but the questions raised, many of which appear to be highly technical, fall into three or four groups and may be discussed without separate mention.

[1-3] First is a question of jurisdiction. Defendant is a Kansas corporation. The suit was begun in the circuit court of Marshall county, W. Va., where the plaintiff resides. The record does not show that any officer or agent of defendant upon whom process could be served was found in that country. Upon an affidavit that defendant was a foreign corporation and nonresident of the state, an order of attachment was issued under which certain machinery and property, used by defendant in constructing the dam, was levied upon by the sheriff, and constructive service obtained, or sought to be obtained, by publication under the provisions of the West Virginia Code (Code 1913, c. 124, § 11 [sec. 4747]). Shortly after the attachment was executed the defendant gave a bond and the property was released. Later a plea in abatement was filed against the order of attachment on the ground that defendant was constructing a work of internal improvement for the United States; that the property seized was necessary for the performance of that work, and therefore, under section 3753 of the Revised Statutes (Comp. St. 1913, § 6950), not subject to attachment. Afterwards the case was removed into the United States District Court on the ground of diverse citizenship. That court sustained plaintiff's demurrer to the plea in abatement and also overruled defendant's demurrer to the declaration.

We are of opinion that the state court had acquired jurisdiction by the levy under the attachment and the execution of the order of publication. This jurisdiction was not lost by removal to the federal court, although the latter court could not have acquired original jurisdiction by attachment and publication. Craddock v. Fulton (C. C.) 140 Fed. 426; Courtney v. Pradt, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. Ed. 398. Moreover, the ground upon which the attachment was sought to be set aside is untenable. Even if it be granted that the

United States had an "interest" in the property seized, within the meaning of the statute, which seems to us extremely doubtful, it is evident that the statute is designed for the protection of the government and can be invoked, as its provisions plainly indicate, only by the United States. In other words, the immunity from seizure in a case like this can be asserted by the government, but not by the contractor. The demurrer to the plea in abatement was properly sustained.

[4] The declaration alleges negligence in three respects: (1) Negligence in carrying on the work and in the employment of incompetent servants; (2) negligence in not adopting the proper method of doing the work and thereby furnishing an unsafe place to work; and (3) negligence resulting from the use of defective machinery. The sufficiency of the allegations is challenged on the ground, first, that the negligence complained of was operative negligence and therefore the facts averred do not make out a case of liability; second, that the declaration fails to show that the accident was caused by the negligent acts of incompetent servants; and, third, that it does not show that the alleged faulty method of doing the work was the cause of the accident. We deem it unnecessary to enter upon a discussion of these propositions and content ourselves with expressing the opinion that the declaration states a cause of action. There may be some lack of particularity in the averments, and the pleading perhaps fails to locate with precision and certainty the negligent act which caused the plaintiff's injury, but it was sufficiently definite to apprise the defendant of the grounds upon which it was claimed to be liable and to permit the introduction of testimony as to all the pertinent facts connected with the accident. We have examined the authorities cited by defendant and are satisfied that they do not sustain its contention. In our judgment the court below did not err in overruling the demurrer to the declaration.

[5] The next 20 assignments are based upon exceptions to the admission or exclusion of testimony. Some of these objections were made on the ground of alleged inadmissibility under the declaration; but this point was involved in overruling the demurrer and need not be further discussed. Of other objections it is enough to say that the rulings challenged were not incorrect or were quite immaterial and harmless. With reference to the alleged incompetency of defendant's servants, and particularly the incompetency of the engineer, Wortham, it is urged as ground for reversal that plaintiff's witness was allowed to give his opinion that the engineer was incompetent, and decisions are cited which hold that the admission of such opinion testimony is reversible error. This rule of evidence may be conceded, but it does not apply in this case because the witness on this point, taking his entire testimony into account and the fair import of his statements, appears to have made a disclosure of facts, independent of any expressed opinion, from which the jury might have found that the engineer was not competent to perform the service in which he was then engaged. In other words, what is charged as inadmissible opinion was rather a summing up of impressions derived from what

had been seen and learned. In 17 Cyc. 60, where numerous authorities are cited, the rule is stated as follows:

"If a statement of inference, conclusion, or judgment is accompanied by an enumeration of the facts on which it is based, the error, if any, is usually harmless; as the jury can estimate the true probative value of the statement. Thus, where a witness states, merely by way of summary or introduction, his mental induction or deduction from facts which he gives in detail, the error does not furnish cause for reversing a judgment."

[6] Much the same may be said of the testimony offered to show that an improper method was adopted for placing the discharge box in position. The general rule appears to be that negligence cannot be predicated upon the use of a particular appliance by merely showing that there are other appliances which are believed to be better or less dangerous. We are of opinion that this rule was not disregarded. The witness to whose testimony objection was made did not compare defendant's methods with those of the employer for whom he had formerly worked, nor did he say that this employer's methods were better; he only said that upon coming to work for defendant he observed a difference which attracted his attention.

[7] In the trial of a case of this kind it is hardly to be expected that some question will not be asked or reply made, which, taken by itself, would be open to objection; and if every theoretical error led to reversal there would be no end to litigation. But the verdict of a jury is not to be lightly set aside, and mistakes which do not involve injustice should ordinarily be disregarded.

[8] The remaining assignments of error are based upon the refusal of numerous instructions requested by defendant, including the direction of a verdict in its favor. We have carefully examined these exceptions and are satisfied to dispose of them without particular mention. The learned trial judge delivered a general charge to the jury, as he had the undoubted right to do, and this charge may justly be regarded as an adequate and impartial statement of the issues and evidence. The propositions of law laid down are not open to serious criticism and they cover all the important questions presented by the testimony. Of the specific instructions refused, except those which are mere statements of abstract principles, it suffices to say that so far as they are correct and material they appear to be embraced in the general charge. The exceptions here considered must therefore be held not well taken, under the familiar rule which the Supreme Court has stated as follows:

"When the court instructs the jury in a manner sufficiently clear and sound as to the rules applicable to the case, it is not bound to give other instructions asked by counsel on the same subject, whether they are correct or not." Iron Silver Mining Co. v. Cheesman, 116 U. S. 530, 6 Sup. Ct. 481, 29 L. Ed. 712.

"If, in regard to any particular subject or point pertinent to the case the court has laid down the law correctly, and so fully as to cover all that is proper to be said on the subject, it is not bound to repeat this instruction in terms varied to suit the wishes of either party." N. W. Insurance Co. v. Muskegon Bank, 122 U. S. 502, 7 Sup. Ct. 1221, 30 L. Ed. 1100.

[9] The principal question is raised by the motion for an instructed verdict. It may be admitted that the proof of negligence is not altogether convincing, but we think enough was shown to warrant submission to the jury. It is obviously a case where somebody blundered, and "res ipsa loquitur" seems an applicable maxim. We find no sufficient reason for disturbing the verdict.

Affirmed.

THE KENNEBEC.

(Circuit Court of Appeals, Fifth Circuit. March 22, 1916. Rehearing Denied April 19, 1916.)

No. 2880.

1. SALVAGE ⊂=36—AMOUNT OF COMPENSATION—CONTRACT.
A contract by one party to pay at all events, and by the other to receive, a fixed compensation for a salvage service to be rendered, is valid and conclusive of the amount recoverable therefor.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 85–91; Dec. Dig. ⊂=36.]

2. SALVAGE ⊂=36—CONTRACT AS TO COMPENSATION—VALIDITY.
A contract by the owner of a tug to go to the assistance of a steamship aground and in a position of some danger at a stated sum per day from the time the tug left port until her return *held* not deprived of binding effect because the representative of the steamship stated that the service required was "not a salvage job, but a towing proposition," where the fact that the vessel was aground and her position were also stated, although the service actually rendered was a salvage service.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 85–91; Dec. Dig. ⊂=36.]

3. SALVAGE ⊂=1—NATURE OF "SALVAGE SERVICE."
A "salvage service" is a service voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger, either present or to be reasonably apprehended.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 1, 3, 4; Dec. Dig. ⊂=1.

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

4. TOWAGE ⊂=1—NATURE OF "TOWAGE SERVICE."
A "towage service" is one that is rendered to a vessel for the mere purpose of expediting her voyage, without reference to any circumstance of danger.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 1; Dec. Dig. ⊂=1.

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

Pardee, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Suit in admiralty for salvage by the Steele Towing & Wrecking Com-

pany against the Seaboard & Gulf Steamship Company, owner of the steamship Kennebec. From the decree, libelant appeals. Affirmed.

W. T. Armstrong, of Galveston, Tex., for appellant.

Ballinger Mills, of Galveston, Tex. (Barry, Wainright, Thacher & Symmers, of New York City, and Terry, Cavin & Mills, of Galveston, Tex., on the brief), for appellee.

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

WALKER, Circuit Judge. The steamship Kennebec grounded at the mouth of the Brazos river near the jetties, about 40 miles from Galveston. S. E. Paul, the agent of the owner of the vessel, from Brazos Port, a place on shore near by, had a conversation over the long-distance telephone with Mr. Stoneburner, an officer of the owner of the steam tug, Senator Bailey, at Galveston, with reference to getting that tug to render the assistance required to get the Kennebec afloat. The result of that conversation was that Mr. Stoneburner, for his company, the libelant, agreed to furnish the services of the tug and equipment for $250 per day from the time she left Galveston until she returned. Following the making of that agreement the tug on the same day went to the mouth of the Brazos, reaching there after dark, and the next morning pulled the Kennebec from where it was aground.

[1] If the contract made by Mr. Stoneburner and Mr. Paul was a binding one, and the service mentioned was rendered in pursuance of it, though it was a salvage service, the only compensation recoverable for it is the one which was stipulated for, $250 per day, which was awarded by the decree appealed from. A valid contract by one party to pay at all events, and by the other to receive a fixed compensation for a salvage service, is as conclusive as any other valid contract. The Elfrida, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413; Elphicke v. White Line Towing Company, 106 Fed. 945, 46 C. C. A. 56.

[2] But it is insisted in behalf of the appellant that a binding contract was not made for the service which was rendered. Much stress is laid upon the facts that in the conversation between Mr. Paul and Mr. Stoneburner the former stated that the service desired was not a salvage or wrecking job, but was a towing proposition, while the service rendered was a salvage one. In view of the facts which were known to Mr. Stoneburner when he made the agreement and when he sent the tug in pursuance of it, we are not of opinion that the agreement was deprived of binding effect by the statement of Mr. Paul that the service required was a towing proposition, and not a salvage or wrecking job, though what was required and what was done was in fact a salvage service. At the time the agreement was made Mr. Stoneburner was distinctly informed that the Kennebec was aground at the mouth of the Brazos and needed assistance to get her off. When the conversation mentioned occurred, and for several weeks prior to that time, it was well known in Galveston that the Brazos river was in a swollen condition. It is not to be supposed that one engaged, as Mr. Stoneburner was, in doing towing and salvage work with a steam

tug operating from Galveston, was in ignorance of the fact that the current at the mouth of the Brazos then was such as to add to the peril of a vessel there aground, and to make the task of rendering necessary assistance to a vessel so situated more difficult than otherwise it might have been. At any rate, there was no misstatement or misrepresentation of the conditions prevailing at the mouth of the Brazos when the mentioned conversation occurred.

[3, 4] Though Mr. Paul stated that the service to be rendered was a towing proposition, what was desired and what Mr. Stoneburner agreed that the tug should do was so described that it was plainly disclosed to him that the service to be rendered was of a kind which the law declares to be a salvage one. "A salvage service is a service voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger." McConnochie v. Kerr (D. C.) 9 Fed. 52, 53; The Flottbek, 118 Fed. 954, 55 C. C. A. 448. That the tug, the master of which received his orders from Mr. Stoneburner, was started from Galveston to render a salvage service, is shown by this entry on its log:

"Got orders to leave for Brazos to assist a steamer ashore. Left Galveston 2:50 p. m."

The next morning, when the situation was fully disclosed, without the master of the tug intimating that the service found to be required was in any respect different from the one the tug was sent to render, it proceeded to render the required assistance to the "steamer ashore." In the absence of any misrepresentation or fraudulent concealment of a material fact, the contract as made was not deprived of binding effect by an expression by Mr. Paul of an opinion as to the nature of the service stipulated for or the assertion by him of an erroneous legal conclusion. Mutual Life Insurance Company v. Phinney, 178 U. S. 327, 343, 20 Sup. Ct. 906, 44 L. Ed. 1088; Johansson v. Stephanson, 154 U. S. 625, appx., 14 Sup. Ct. 1180, 23 L. Ed. 1009; Upton, Assignee, v. Tribilcock, 91 U. S. 45, 50, 23 L. Ed. 203. He misstated, not the facts, which as a matter of law determine the nature of the service desired, but merely the name of it. We are not of opinion that it was made to appear that there was any such misstatement or fraudulent concealment of a material fact as to deprive the agreement which was made of its binding effect or to make it inapplicable to the service which was rendered.

In the case of The Flottbek, supra, it was held that a provision in a contract between the owner of a tug and the owner of a ship that the former would, during the period covered by the contract, render any towage required by the latter at specified rates, did not govern the compensation for a salvage service rendered by the tug. The decision in that case is not opposed to the conclusion reached in the case at bar that a contract for a service known by both the parties to be of a kind which the law denominates a salvage service is not vitiated by the fact

that the party procuring the rendition of it stated to the other party that it was a towage service.

The decree appealed from is affirmed.

PARDEE, Circuit Judge (dissenting). The services rendered by the steam wrecking tug Senator Bailey to the steamship Kennebec are conceded to have been salvage services, and they were not adequately compensated by an allowance of $250 per day for two days. Under the alleged parol contract, which the court construes as covering salvage services, the services of the Bailey were expressly limited to towage services, and said contract ought not to control, so as to deprive the appellant from recovering for the salvage services undoubtedly rendered.

The Senator Bailey is a large, heavy wrecking tug, about 125 feet long, and draws from 15 to 16 feet of water, and her beam is 26 to 27 feet and equipped with large automatic towing machinery, 800 actual horse power, and carrying a full line of wrecking equipment, worth $100,000. The contract was made over long-distance telephone between Paul, the managing agent for the owners of the Kennebec, and Stoneburner, agent for the Bailey. Paul's version of the alleged contract is:

"I got Mr. Stoneburner on the telephone and told him that the Kennebec was ashore on a lump at the mouth of the Brazos jetties, and I told him it was not a salvage job, but a towing proposition, and I wanted a flat rate per day; he asked me to wait a minute, and he went off, and came back, and said he would name us a flat rate of $250 per day, from the time the towboat left Galveston until she returned, and I asked him what constituted a day, and he said 24 hours. Q. What did you say? A. I said, 'Let her come.'"

Stoneburner's version is:

"About 10 o'clock on Saturday morning, May 1st, long-distance telephone rang and called for Mr. Stoneburner, and I answered the phone; and it was Mr. Paul, of Freeport, on the line, and he asked me about the Senator Bailey, where she was, and I told him, and he said the Kennebec had run onto a lump and needed a little pull to get her off, and I inquired whether the service was in the nature of salvage and wrecking or not, and he said the services were not in the nature of salvage or wrecking, that it was towing, and I said, 'Wait a minute,' and Mr. Steele was there, and I went into Mr. Steele's office and talked to him, and I went back to the telephone and told Mr. Paul that if it was not a wrecking service, but a towing proposition, that I would furnish the service of the tug and equipment on a charge of $250 per day from the time she left Galveston until she returned, and he said, 'Send the tug.'"

Paul and Stoneburner are equally credible, and if the court finds a contract proved it ought, considering that the burden of proof is on the claimant, to take Stoneburner's version as the correct one. At the time, Paul was on the ground at the mouth of the Brazos river, and had been for 24 hours, during which time he had fully acquainted himself with the situation, having been twice, at least, on board the Kennebec, and had learned of the soundings that had been made, and well knew that the ship Kennebec, after going aground, had shifted her position further inshore, and that he had attempted to get the Alex Brown, a towing tug of 450 horse power, to pull the Kennebec off, which, though authorized by the owners, was rejected by the master

of the Brown, alleging the inability of his tug, under the circumstances, which he fully investigated, to do the necessary work, all of which he suppressed and concealed in his communications with Stoneburner, particularly asserting, in answer to Stoneburner's inquiries, that the Kennebec had run on a lump and needed a little pull to get her off, and that it was a case of towage, and not of wreckage or salvage. Paul also knew of the extremely high water and swift current of the Brazos river, and that on account of said high water and the drifting logs therein services rendered in the pulling off from the shore and into the channel of the Kennebec would be very hazardous and extremely difficult.

At the time that the Bailey arrived on the ground Paul admits the ship had shifted her position further inshore at least 400 feet, and this alone is sufficient to render the contract for towage inapplicable. The master of the Bailey had only authority to carry out his owner's instructions to pull the Kennebec off, and he had no authority to modify or repudiate his owner's orders, nor to enter into any new contract. In The Flottbek, 118 Fed. 960, 55 C. C. A. 454, cited by my Brethren as supporting the maintenance of the contract for towage, the contract was:

"The party of the first part agrees to tow with reasonable and quick dispatch *all* the vessels owned and controlled by parties of the second part that may be in the waters of Straits of Juan de Fuca, Puget Sound, British Columbia, or vicinity, whether inside or outside of Cape Flattery, and that may require any towage service during the continuance of this agreement, at the rates specified below."

And the case shows that at the time the services were rendered the salved vessel was uninjured and afloat in 25 fathoms of water, and that all the services rendered were towage services, and the court disregarded the contract and held the services were salvage services by reason of the peril of the salved vessel. I think it is well settled that a ship aground on the Texas shore, shifting her position further inshore and unable to get afloat by her own exertions, is in decided peril.

The services rendered the Kennebec were very hazardous and difficult, and but for the great power and salvage appliances of the Bailey would have resulted in failure to rescue the Kennebec and in serious damage to the Bailey.

UNIONE AUSTRIACA DI NAVIGAZIONE, OF TRIESTE, AUSTRIA, et al. v. LEON G. TUJAGUE & CO. et al.

THE GERTY.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1916.)

No. 2853.

1. SHIPPING ⊂=127—DAMAGE TO CARGO—LIABILITY OF VESSEL.
A steamship with a cargo of lemons from Italy to New Orleans, stopping at Havana to discharge some cargo, submitted to fumigation by the

quarantine officers of the United States, by which the lemons were injured. She could have avoided the necessity of fumigation by discharging with lighters or at a rat-proof wharf, which her Havana agent knew or she could have proceeded and submitted to fumigation at New Orleans, either before or after discharging. *Held*, on the evidence, that the master had reason to and did in fact apprehend danger of injury to the cargo, and that it was negligence on his part not to protect it by one of the means open to him, which rendered the ship liable for the damage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 465, 466; Dec. Dig. ⊂⊃127.]

2. SHIPPING ⊂⊃142—DAMAGE TO CARGO—NOTICE OF CLAIM.

A provision in bills of lading requiring notice of any claim for damage to cargo before removal of the goods, construed as meaning before removal from the wharf, is reasonable and enforceable, where the consignee had knowledge of the damage before such removal.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 496; Dec. Dig. ⊂⊃142.]

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

Suit in admiralty by Leon G. Tujague & Co. and others against the steamship Gerty; Unione Austriaca di Navigazione of Trieste, Austria, claimant. Decree for libelants, and claimant appeals. Modified and affirmed.

The appellees, Leon G. Tujague & Co., libeled the steamship Gerty, alleging damage to a consignment of lemons shipped from Palermo to New Orleans on that steamship, caused by fumigation of the ship at Havana by the quarantine authorities of the United States. The other appellees intervened with like claims against the ship for damage to other consignments of lemons alleged to have been due to the same cause. The appellant, through the master of the Gerty, filed a claim to the ship. The court below rendered a decree in favor of the libelant and each of the interveners for differing amounts, assessed as the damage to each shipment, by the special master, to whom the matter was referred, and from this decree the claimants of the ship have taken this appeal.

George Denegre, Victor Leovy, and Henry H. Chaffe, all of New Orleans, La., for appellant.

William Grant and William B. Grant, both of New Orleans, La., for appellees.

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

GRUBB, District Judge (after stating the facts as above). [1] The appellant denies liability for the damage alleged to have been done the lemons upon two grounds. It contends that the fumigation alleged to have caused the injury was done by public authority and under compulsion, and that it was not known at the time the master submitted to fumigation that injury to the lemons would probably result therefrom, and that such injury could not have been reasonably apprehended by the master, and, as negligence was essential to libelants' right of recovery, there could be none where injury to the lemons could not have been reasonably apprehended by the master from the fumigation.

It is clear that, if the ship submitted to fumigation because of a

paramount public authority commanding it and was guilty of no negligence, there would be no liability. As the ship had cargo for the port of Havana, it cannot be said to have been guilty of negligence in stopping there to discharge cargo. Austrian Union S. S. Co. v. Calafiore, 194 Fed. 377, 114 C. C. A. 295. It is in evidence that if the ship had discharged her cargo from the Havana harbor in lighters, or from a rat-proof wharf, no fumigation would have been required by the quarantine officers. It is also clear that the only result of the ship's not submitting to fumigation at Havana was that she be fumigated on her arrival in New Orleans, either before or after discharging cargo. Under these circumstances, the principle of immunity to a carrier for injury done by paramount public authority has no application.

The government quarantine officials in Havana had no extraterritorial jurisdiction to enforce fumigation. The only penalty they could exact of the ship was the necessity of submitting to it in New Orleans, if not administered in Havana. Even this penalty could have been avoided by discharging the cargo from the harbor at Havana or at a rat-proof wharf. Under these conditions, if injury to the cargo was so probable a result of fumigation as to make the submitting to it by the master negligence, the ship would be liable for any injury to the cargo thereby caused. Submission under such circumstances would be voluntary and not compelled by paramount public authority. The question resolves itself into the inquiry as to whether the master should have reasonably apprehended injury to the lemons from fumigation when he submitted his ship to it. The appellant's agents in Havana had notice before the ship's arrival of the quarantine regulations, and of the necessity for discharging from the harbor or at a rat-proof wharf, in order to escape the necessity of fumigation either at Havana or at New Orleans.

The evidence is in conflict as to whether the condition of the lemons, as testified to, upon arrival in New Orleans, was due to the fumigation at Havana. We think it reasonably appears that fumigation was the cause, in view of the undisputed evidence that they were received by the ship at Palermo in good condition, and would have withstood the voyage without impairment of condition in the absence of unusual treatment on the ship, and the absence of any showing of anything unusual on the voyage except the fumigation.

The appellant contends that the injurious effect of fumigation on lemons, if it existed, was unknown prior to the incident in Havana, both to scientists and seafaring men, and that the master of the Gerty was not negligent in failing to foresee such likelihood of injury when he submitted the ship to fumigation. The history of fumigation, in its effects on fruit, is a disputed question as shown by the record. In the absence of any evidence as to the master's state of mind with reference to this subject, we might be in doubt as to whether to attribute negligence to him in failing to anticipate injury. The record, however, shows that upon his arrival in Havana, and upon his being informed of the necessity of fumigation, he protested and upon the ground of probable injury to his cargo of lemons. It is true the evidence shows that the Havana quarantine officer reassured him; but

the officer admits he had no information other than absence of complaints against previous fumigation of fruit cargoes brought to his notice.

We think the record shows that the master of the Gerty did, in fact, apprehend danger of injury to his cargo from fumigation. It then became his duty to protect his cargo against such injury. If it was then too late for him to have escaped fumigation, by discharging from the harbor in Havana or at a rat-proof wharf there, he still had it in his power to decline fumigation at Havana altogether, and submit to it only upon his arrival in New Orleans, where the period between fumigation and discharge of his cargo would have been less, if he was required to fumigate before discharging his cargo. Upon his next trip, he pursued this course, and was permitted to discharge his cargo in New Orleans before being fumigated. The agents of the ship at Havana should have notified the master of the quarantine requirements before he tied to the wharf, and in time to have enabled him to escape fumigation. We think the record sustains the District Judge in his conclusion that the ship was liable for the damage to the lemons.

[2] The bill of lading contains a stipulation that the ship should not be liable "for any claim of which notice is not given before removal of the goods." The reasonableness of such a stipulation has been sustained, upon a construction that by "removal" is intended removal from the dock, in the cases of The Persiana, 185 Fed. 396, 107 C. C. A. 416, The Westminster, 127 Fed. 680, 62 C. C. A. 406, and The St. Hubert, 107 Fed. 727, 46 C. C. A. 603, by the Courts of Appeal of the Second and Third Circuits. In the last two cases writs of certiorari were denied by the Supreme Court. The case of The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419, does not conflict with those cited, but makes the reasonableness of the stipulation depend upon the particular facts of each case. In this case, it is clear the libelants and interveners were fully aware of the damage and its approximate extent before any of the lemons were removed from the dock, since their damages are predicated upon the reduced prices obtained for the lemons at a public sale at which they were present, had while the lemons were at the dock. They were unloaded from the ship not later than January 29th. Notice was first given on January 31st. Some of the lemons were removed by the purchasers from the dock on January 29th, and some on January 30th. No notice of claim had been served on the ship up to January 31st. In view of the knowledge on the part of the consignees of the condition of the lemons before their removal from the dock, we think the stipulation as to notice was reasonable as to them, and should be enforced, as to all lemons, which had been removed from the dock, prior to January 31st, when the notice was given.

Criticism is made of the character of proof submitted by the libelants and interveners as to the market price of lemons when those on the Gerty were sold. There is some evidence offered by the libelants and interveners as to the market price, and what there is is not contradicted. We therefore assume the figures of the master as the basis of assessment of the damage on each box, reducing the decree in favor

of each libelant and intervener by the amount of the damages, assessed on this basis, which the master's report shows were removed from the dock prior to January 31st, the date of the notice of the claim. This would result in a decree in favor of Leon G. Tujague & Co., the libelants, in the sum of $1,758.90; in favor of J. Cusimano in the sum of $1,778.40; in favor of Salvatore Calafiore in the sum of $678.60; in favor of G. Cuccia in the sum of $1,699.10; in favor of the New Orleans Fruit Importing Company in the sum of $169; and in favor of Benedetto Intravaja for $114.66. The costs of appeal are taxed against the appellees.

As so modified, the decree of the District Court is affirmed.

WHITNEY-CENTRAL TRUST & SAVINGS BANK v. LUCK et al.

(Circuit Court of Appeals, Fifth Circuit. March 13, 1916. Rehearing Denied April 19, 1916.)

No. 2855.

1. MECHANICS' LIENS ⟸136(1)—RECORDING—LOUISIANA STATUTE.

Civ. Code La. art. 3249, gives a lien or privilege to contractors, laborers, etc., upon "the building, improvement or other work erected," and upon the lot of ground upon which it stands, not exceeding one acre. Articles 3272 and 3274 provide for the recording of such privileges "in the manner required by law in the parish where the property to be affected is situated," and that "a privilege shall confer no preference on the creditor who holds it over creditors who have acquired a mortgage," unless so recorded. Article 3348, relating to the recording of mortgages, provides that "in all cases of special privileges the property subject to such privileges must also be described." *Held*, that the latter article applies to a mechanic's lien or privilege given by article 3249, which is a special privilege, and that the recording by a contractor of the contract under which he performed work on a building, which contained no description of the building or ground, was insufficient to give him a privilege as against a prior mortgagee.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 213; Dec. Dig. ⟸136(1).]

2. LIENS ⟸11—LOUISIANA STATUTES—"GENERAL PRIVILEGE"—"SPECIAL PRIVILEGE."

Under the Civil Code of Louisiana, as construed by the state courts, a "special privilege" may exist as to immovables as well as to movables; the difference between a general and a special privilege being that the former affects all of the debtor's property of the class to which it relates, while the latter is limited to particular property.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 2, 3; Dec. Dig. ⟸ 11.]

3. FIXTURES ⟸20—BETWEEN MORTGAGEE AND SELLER—LIEN FOR PURCHASE PRICE—LOUISIANA STATUTE.

Under Civ. Code La. art. 3227, which provides that "he who has sold any movable property, which is not paid for, has a preference on the price of his property over other creditors of the purchaser * * * if the property still remains in the possession of the purchaser," such privilege continues to exist, although the thing sold has been incorporated into a build-

ing or other immovable, if it can be detached or removed without injury to the soil or structure.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 44–46; Dec. Dig. ⊂=20.]

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

Suit in equity by the Erie City Iron Works against the Cecilia Sugar Company, Limited; the Whitney-Central Trust & Savings Bank, as trustee, and William P. Luck and others, as interveners. From a decree giving preference to the claims of Luck and others, the Trust & Savings Bank appeals. Reversed in part.

Charles F. Borah, of New Orleans, La. (Borah, Himel, Bloch & Borah, of Franklin, on the brief), for appellant.

Nelson S. Wooddy, James E. Zunts, R. E. Milling, Solomon Wolff, D. B. H. Chaffe, and Andrew M. Buchmann, all of New Orleans, for appellees.

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

WALKER, Circuit Judge. Under a bill filed by the Erie City Iron Works, claiming to be entitled to a lien or privilege on property of the Cecilia Sugar Company, Limited, a receiver of the property of the latter company was appointed. The Whitney-Central Trust & Savings Bank, claiming as trustee under a mortgage or deed of trust made by the Sugar Company, and other parties who claimed to have liens or privileges on the property of that company, intervened in that suit and asserted their claims therein. Appeals from decrees in favor of several of the interveners, namely, W. P. Luck, the Wilmot Machinery Company, Alex Dussel Iron Works, Koretke Brass & Manufacturing Company, and the Boland Machine & Manufacturing Company, were submitted together. The several interventions will be considered separately, except where in two or more of them the same questions are presented.

Intervention of W. P. Luck.

[1] W. P. Luck claimed that there was a balance due him under a written contract with the Cecilia Sugar Company, Limited, for work on its sugar house, and that for that amount he was entitled to a privilege on that structure and the acre of land upon which it is situated. The privilege claimed is one provided for by article 3249 of the Civil Code of Louisiana, which, being part of a chapter entitled "Of Privileges on Immovables," provides that:

"* * * Contractors, subcontractors, * * * laborers, cartmen and other workmen employed in constructing, rebuilding or repairing houses, buildings, or making other works * * * shall have a lien and privilege upon the building, improvement or other work erected, and upon the lot of ground not exceeding one acre, upon which the building, improvement or other work shall be erected."

Another chapter of the same Code, entitled "How Privileges are Preserved and Recorded," contains the following provisions:

"Art. 3272. Architects, * * * contractors, subcontractors, * * * laborers, cartmen, masons and other workmen employed in constructing, rebuilding or repairing houses, buildings, or making other works; * * * preserve their privileges, only in so far as they have recorded, with the recorder of mortgages in the parish where the property is situated, the act containing the bargains they have made, or a detailed statement of the amount due, attested under the oath of the party doing or having the work done, or acknowledgment of what is due to them by the debtor."

"Art. 3274. No privilege shall have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded within seven days from the date of the act or obligation of indebtedness, when the registry is required to be made in the parish where the act was passed or the indebtedness originated and within fifteen days if the registry is required to be made in any other parish of this State."

In the same Code, under the heading "Of the Mode and Effect of Recording Mortgages," is found the following:

"Art. 3348. Any person entitled to a mortgage or privilege on the property of another person, must cause the evidence of such mortgage or privilege to be recorded in the mortgage book of the parish where the property is situated. * * * In all cases of special privileges the property subject to such privileges must also be described."

It was disclosed by the evidence that the mortgage or deed of trust to the Whitney-Central Trust & Savings Bank, which was made on June 1, 1912, and which embraced the tract of land, containing 15.73 arpents, more or less, in the parish of St. Martin, on which the Cecilia Sugar Company's sugar house was located, was recorded in the Book of Mortgages of that parish on June 3, 1912, and that on July 1, 1912, the following instrument was recorded in the same book:

"William P. Luck, Southern Representative.
"Office 308 Godchaux Bldg.

"New Orleans, La., June 15, 1912.

"The Cecilia Sugar Co., Ltd., New Orleans, La.—Gentlemen: With reference to one lot of steel tanks, to be furnished your company by the Erie City Iron Works under another contract, and upon delivery of the above-mentioned material, amounting to approximately 220,000 pounds, to Cecilia, La., I propose to furnish all the necessary skilled and common labor to unload same from the cars and erect the different tanks upon foundations furnished and located by you; upon erection the tanks will be tested and made tight, you supplying the water for testing and also furnishing such scaffolding as is on the place. The price for all of the above work, including freight paid by you, to be thirty-three hundred dollars ($3,300.00), payable as follows:

"You are to pay the freight on all material from New Orleans to Cecilia, La., and in addition thereto you are to pay me weekly in cash, sufficient amounts for the weekly pay rolls, these pay rolls to be furnished and approved by my representative in charge of the work. These several pay rolls and freights are not to exceed the amount of this contract. On completion of the erection of the various tanks, you are to pay me in cash such balance as may remain between the cash paid by you and the amount of the contract price. You are to furnish suitable board and lodging for such men as I employ for the erection of the tanks, for which I agree to pay you the sum of fifty cents (50 cts.) per day per man on vouchers approved by my representative, to be deducted from such balance as above stated.

"I further agree to commence erection on the arrival of the first cars of material and furnish ample force for the erection so that the various tanks will be ready for use on or before October 15, 1912, providing I am not delayed by circumstances beyond my control. [Signed] Wm. P. Luck.
"Accepted this 25th day of June, 1912.
"The Cecilia Sugar Co., Ltd.,
"By I. Hechinger, Pr."

Nothing else that referred to Luck's contract or claim was recorded in that book. Nothing contained in the recorded contract between Luck and the Cecilia Sugar Company, Limited, furnishes any support for the contention that that instrument describes the property upon which a lien or privilege in favor of Luck is claimed. That instrument does not even mention the kind or locality of the structure upon which the work contracted for was to be done. If the provision of article 3348 of the Code that "in all cases of special privileges the property subject to such privileges must be described" is applicable, it is apparent that that was not done with reference to the claim of Luck, which by article 3274 of the Code is required to confer a preference over a creditor who had acquired a mortgage.

[2] But it is contended that that provision is not applicable. This contention is sought to be supported by the suggestion that special privileges on immovables are unknown to the laws of Louisiana. The provision of article 3190 of the Code that "privileges are either general or special on certain movables" has been referred to in argument as the only recognition found in the Code of a distinction between general and special privileges, and as having the effect of making the distinction or classification inapplicable to privileges on immovables. The untenableness of this proposition is apparent in view of the express mention made in article 3269 of the Code of "special privileges which exist on immovables." While the words "general" and "special," as used with reference to privileges, are not defined by the Code, they, like many other terms made use of, but not defined therein, have a well-settled meaning and from an early date have figured in the legal parlance of Louisiana. A general privilege affects all the debtor's movables or immovables, according as it is given on the one or the other kind of property; while a special privilege subjects particular property, which may be either movable or immovable. 3 Hennen's Digest, pp. 1239, 1241, 1244.

That the record of the contract between Luck and the Cecilia Sugar Company, unaccompanied as it was by any description of the immovable upon which he claims a privilege, did not amount to what was required to confer on him a preference over the Whitney-Central Trust & Savings Bank, which previously had acquired a mortgage on the same immovable, we think is made plain by statutory provisions above quoted, which have been authoritatively interpreted. Shreveport National Bank v. Maples, 119 La. 42, 43 South. 905; Hibernia Bank & Trust Co. v. C. F. Knoll Planting & Mfg. Co., 133 La. 698, 63 South. 288; Carlin v. Gordy, 32 La. Ann. 1285. It is not made to appear that a result of the requirement that the property sought to be subjected to a privilege be described was to put it beyond the power of Luck to do what was required to give him a preference. The statutes

make provision for one situated as he was acquiring "a lien and privilege upon the building, improvement or other work erected, and upon the lot of ground, not exceeding one acre, upon which the building, improvement or other work shall be erected." It is not to be supposed that one who had done, or contracted to do, work on a particular structure, was without means of furnishing a description of that structure which, if recorded, would enable one searching the record to learn therefrom that a privilege on that structure was claimed. What would have been a sufficient description to make the privilege attach, not only to the structure worked upon, but also to a particular acre of ground out of a larger tract upon which the structure was erected, is a question not presented for decision, as there was no pretense of a description of any ground. 27 Cyc. 159, 160.

The conclusion is that the decree in favor of W. P. Luck is not sustainable.

Other Interventions.

[3] Each of the other decrees appealed from was in favor of a vendor of movable property, who was recognized as having the right conferred by article 3227 of the Civil Code of Louisiana, which provides that:

"He who has sold any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remain in the possession of the purchaser."

The vendor's privilege here provided for continues to exist, though the thing sold has been incorporated into a building or other immovable, if it can be detached or removed without injury to the soil or structure. In re Receivership of Augusta Sugar Co., 134 La. 971, 64 South. 870; Pratt Engineering & Machine Co. v. Cecilia Sugar Co., Limited, 135 La. 179, 65 South. 100; Walburn-Swenson Co. v. Darrell, 49 La. Ann. 1044, 22 South. 310.

The principal contentions in behalf of the appellant are that the things sold had been so incorporated in the sugar house that they were not detachable without injury to the structure, or that they were mere materials for the price of which a materialman's lien on the structure, and not a vendor's lien or privilege on the thing sold, was claimable. We are not of opinion that either of these contentions is supported by the record. The evidence warranted the findings that the things sold were detachable without injury to the building or the soil, and that in each instance what was sold was not mere material, but was a device or machine; the fact that in some instances the vendor's statement of his claim for the price of what was sold showed the parts as separate items not preventing one familiar with sugar house machinery from recognizing the whole as constituting a separate or separable device or machine "knocked down."

From the conclusions above stated, it follows that the decree in favor of W. P. Luck should be reversed, and that the other decrees appealed from should be affirmed; and it is so ordered.

PANAMA R. CO. v. BECKFORD.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1916.)

No. 2881.

1. COURTS ⇐356—FEDERAL COURTS—PROPER MODE OF REVIEW—STATUTE.
Under Panama Act Aug. 24, 1912, c. 390, § 9, 37 Stat. 565 (Comp. St. 1913, § 10045), authorizing the Circuit Court of Appeals for the Fifth Circuit to review certain judgments of the District Court of the Canal Zone, and providing that such appellate jurisdiction may be exercised under the same regulations and by the same procedure as nearly as practicable as is done in reviewing final judgments of the District Court of the United States, an action at law in the District Court of the Canal Zone can only be reviewed on writ of error, and a suit at equity only by appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⇐356.]

2. APPEAL AND ERROR ⇐989—REVIEW—FINDINGS BY COURT.
In civil cases at law tried without a jury, where the finding is general, the review extends only to errors arising in the course of the trial; but where there is a special finding of facts, or an agreed statement, the appellate court can inquire whether the facts support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3897; Dec. Dig. ⇐989.]

3. APPEAL AND ERROR ⇐1070(2)—HARMLESS ERROR—DELAY IN MAKING FINDING.
The failure of the court to make special findings of fact before judgment, or to make its subsequent findings as of the day of the trial, is not prejudicial to plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4232, 4233; Dec. Dig. ⇐1070(2).]

4. APPEAL AND ERROR ⇐1012(1)—REVIEW—FINDINGS—SUFFICIENCY OF EVIDENCE.
On error to a judgment after trial based on specific findings by the trial court, the weight of the evidence cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990–3992; Dec. Dig. ⇐1012(1).]

In Error to and Appeal from the District Court of the Canal Zone; William H. Jackson, Judge.

Action by James Beckford against the Panama Railroad Company. Judgment for plaintiff, and defendant brings error and appeals. Affirmed on the writ of error, and appeal dismissed.

James Beckford, an employé of the Panama Railroad Company, was injured by one of the company's engines while engaged in his work of track oiler and repairer in the Cristobal yards. He instituted suit to recover damages in the District Court of the Canal Zone against the company, and recovered damages in the sum of $2,500. The court held that he was free from negligence and that his injuries resulted from the company's negligence. It was found by the court that at the time plaintiff was injured he was 47 years of age and earned 10 cents per hour, working 10 hours per day; that as a result of his injury his left arm was amputated at or near the shoulder; that he also received an incised scalp wound in the frontal region; that he remained in the Colon Hospital for a period of five months, suffering pain and agony, and since he was discharged therefrom he has been unable to engage in manual work, and has suffered a substantial diminution of his permanent earning capacity for the future.

The case is brought to this court by appeal, as well as on writ of error, because, as averred, the counsel for the plaintiff in error are in doubt respecting the applicability of the one or the other of the two methods of review. The record shows that on October 6, 1915, the court rendered the following judgment:

"James Beckford v. The Panama Railroad Company.

"No. 53, Civil Damages.

"This cause being regularly called for trial, parties are in open court in person and by their respective attorneys and announce ready for trial. The defendant objects to the admission of certain photographs for the purpose of showing the physical situation at the point where the plaintiff was injured, on the ground that they are not competent. Objection is overruled and exceptions noted. Plaintiff objects to the testimony of Ralph Sartor on behalf of the defendant on the ground that he should have retired under the rule. Objection overruled and exceptions taken. Plaintiff objects to the deposition of Mr. Mitchell of Chicago in its entirety. Sustained as to question No. 7, and overruled as to balance. Exceptions noted. And the court, having heard all the evidence adduced and the arguments of counsel, finds the issues in favor of the plaintiff and assesses his damages in the sum of two thousand five hundred ($2,500.00) dollars, and—

"It is ordered that the said plaintiff, James Beckford, do have and recover of and from the said Panama Railroad Company, the sum of two thousand five hundred dollars ($2,500.00) and his lawful costs herein incurred and expended."

Thereafter, on the 16th day of October, counsel for plaintiff in error filed a motion praying that the court file a finding of facts and conclusions of law nunc pro tunc as of the day of the trial of this cause as a basis for the judgment rendered by the court, and therein specially praying that the finding of facts and conclusions of law should cover the following points: The negligence of the defendant company; the nonnegligence of the plaintiff; the contributory negligence of the plaintiff; the damages to which plaintiff is entitled by reason of his physical and mental pain and suffering; loss of earnings as a result of his injuries; and the permanent diminution of the plaintiff's earning capacity. And thereafter, on the 27th day of October, 1915, the court filed a finding of facts and conclusions of law as of the said 27th day of October, 1915, but refused to find said finding of facts and conclusions of law as of the day of the trial, to wit, October 6, 1915, which finding is in words and figures as follows:

"1. That the plaintiff, James Beckford, was on or about April 2, 1913, at work in the yards of the Panama Railroad at Cristobal as a track walker; that he had been so employed for a period of about 18 months prior to his having received the injuries complained of.

"2. That on or about the morning of April 12, 1913, the plaintiff received instructions from the Panama Railroad yardmaster at Cristobal to repair certain defects at a switch on the main line at a point opposite from the colored schoolhouse on the Mt. Hope road, and to have said repairs completed before the passing at this point of the passenger train leaving Colon for Panama at 10:25 a. m.

"3. That the aforementioned instructions were received by plaintiff at about 10 a. m. on the date mentioned; that plaintiff commenced work on the switch indicated at 10:05 or 10:10 a. m., and that plaintiff had been at work for about ten or fifteen minutes at the time he was injured.

"4. That during the time plaintiff was at work on the said switch at the point indicated plaintiff had his face in the direction of Colon, for the reason that in that position he could perform his duties with greater alacrity and for the further reason that he expected a train on the main line track on which he was at work, only from the direction of Colon, which train was the passenger train which left the Colon station for Panama at 10:25 a. m.

"5. That, notwithstanding the fact that he expected no train due north on the main line on which he was at work, plaintiff turned around and looked south in the direction of Panama on three different occasions, the last being about three minutes before he was injured.

"6. That for a long time previous it had been the rule of the Panama Railroad that the engine which pulled the passenger train from Colon to Panama leaving Colon at 10:25 a. m. to leave the roundhouse at the southern end of the Cristobal yards at 10 a. m., proceeding thence north to the Panama Railroad station, where it coupled up with the passenger train, and that on the morning in question engine 655, which injured the plaintiff, had been assigned to pull the aforementioned passenger train from Colon to Panama.

"7. That at the point in the Cristobal yards at which Beckford was at work there are three parallel tracks; that the main track is the one nearest and is parallel to the Mt. Hope road; that Beckford at the time of receiving his injuries was working on the rail nearest the Mt. Hope road; that the ground between the main track and the Mt. Hope road is level and unobstructed, and on the day in question was level and unobstructed.

"8. That at the moment Beckford was run down by the engine 655, which was going north toward Colon depot from the roundhouse in the upper end of the Cristobal yards, engine 656, which was pulling a train of empty western dump cars south from dock 9, was then at a point on the middle track immediately parallel with the point on the main track at which plaintiff was at work.

"9. That engine 656, on the center track, was ringing its bell, and that the train of empty cars which engine 656 was pulling was making the usual noise of a train of empty western dump cars in motion.

"10. At the time plaintiff was injured engine 655, going north, and 656, with its train of empty western dump cars, going south, were the only engines in the immediate vicinity of the place where plaintiff was at work.

"11. That engine 655, on leaving the roundhouse for the Colon depot, had a clear and unobstructed track of a length of 950 feet from the curve to the point at which plaintiff was at work, and that it was easily possible for both engineer and fireman on said engine 655 to have seen plaintiff at his place of work on said switch, as well as it was possible for plaintiff to have seen engine 655 approaching at the said distance of 950 feet, but for the fact that the plaintiff at the time was engrossed in the performance of his work on said switch, with his face toward Colon and his back toward said approaching engine 655.

"12. That at the point 200 feet beyond the point at which Beckford was at work (in the direction of Colon) there was a crossing, and at a point 50 feet beyond said crossing there was situated a semaphore at the left-hand side of the tracks.

"13. That the engineer and fireman on engine 655, as they came within range of vision of plaintiff, noticed the 'block' was against them as indicated by the semaphore, which semaphore was situated 250 feet beyond the point at which Beckford was at work; this necessitated the stopping of engine 655 for one minute at a distance of 930 feet from the point at which Beckford was at work and the blowing of four short blasts of the whistle; that thereafter, the condition as to the track being the same, the same engine 655 proceeded backing on said track, north-bound, at the rate of 7 to 10 miles per hour, without observing the presence of the plaintiff at work on the track, and injured him by running over him, crushing his left arm off at the shoulder, and causing other injuries to his head and sight; that the bell of engine 655 was during this time ringing.

"14. That prior to and at the time engine 655 left the stopping point 930 feet from where plaintiff was at work, up to the moment he was struck by said engine, there was a clear and unobstructed view of the plaintiff to both the engineer and fireman of the said engine 655; that in spite of this favorable condition as to the vision, neither the engineer nor the fireman of the said engine 655 saw the plaintiff at work on the track ahead of them, nor were they aware of the fact that they had injured plaintiff on the track, until they were so informed on their arrival at the Colon depot by the police department; that the engineer and fireman were at the time watching a crossing some distance beyond the plaintiff.

"15. That the plaintiff, Beckford, because of the fact that engine 656 with its train of empty western dump cars was passing south-bound ringing its

bell and creating other incidental noises, and was at a point parallel with the plaintiff at the moment he was injured, and because plaintiff was engrossed in the work, and also because of the fact that while at work on the said switch he was in a stooping position, with his back in the direction of the approaching engine 655, he did not hear nor see the approaching of the said engine 655, and was run down and injured by the said engine.

"16. That at the time plaintiff was injured he was 47 years of age and earned 10 cents per hour, working 10 hours per day; that as a result of his injury his left arm was amputated at or near the shoulder; that he also received an incised scalp wound in the frontal region; that he remained in the Colon Hospital for a period of 5 months, suffering excruciating pain and agony, and that since his discharge therefrom, a period of 2 years, he has been unable to engage in manual labor; that he has suffered a substantial diminution of his permanent earning capacity for the future.

"As conclusions of law, the court finds: (1) That the defendant was guilty of negligence in failing to observe the presence of the plaintiff at work upon the track and in failing to take the proper precautions to observe the presence of plaintiff and to stop the engine in time to avoid the injury. (2) That the plaintiff was free from contributory negligence on his part."

On the 29th of October following the plaintiff in error made a motion for a new trial, largely predicated upon errors in said finding, which motion for a new trial being overruled, the plaintiff sued out a writ of error and took an appeal.

Frank Feuille and Walter F. Van Dame, both of Ancon, Canal Zone, for plaintiff in error and appellant.

William C. Todd, of Colon, Canal Zone, Van Gladston de Suze, of Cristobal, Canal Zone, and Donalson Caffery and Lamar C. Quintero, both of New Orleans, La., for defendant in error and appellee.

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

PARDEE, Circuit Judge (after stating the facts as above). [1] Section 9 of the Panama Act (Act Aug. 24, 1912, c. 390, 37 Stat. 565 [Comp. St. 1913, § 10045]), conferring jurisdiction upon this court, is as follows:

"The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments and decrees of the District Court of the Canal Zone and to render such judgment as in the opinion of said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States, is involved and a right thereunder denied, and in cases in which the value in controversy exceeds one thousand dollars, to be ascertained by the oath of either party, or by other competent evidence, and also in criminal cases wherein the offense charged is punishable as a felony. And such appellate jurisdiction, subject to the right of review by, or appeal to the Supreme Court of the United States, as in other cases authorized by law, may be exercised by said Circuit Court of Appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the District Courts of the United States."

The statute is clear that our jurisdiction is to be exercised in the same manner and under the same regulations and by the same procedure, as nearly as practicable, as is done in reviewing the final judgments and decrees of the District Courts of the United States. In the

procedure of the Circuit Courts of Appeal in reviewing final judgments and decrees of the District Courts, the distinction between cases at law and cases in equity is fully recognized, and it is well settled that cases at law can only be reviewed on writs of error, and cases in equity on an appeal. As the present is a case at law, the proper mode to review the same is by writ of error.

[2] In civil cases at law, tried without a jury, when the finding of the court below is a general one, our jurisdiction to review extends only to errors arising in the course of the trial. If in the trial court there is a special finding of facts, or an agreed statement of facts, then the court can inquire further as to whether or not the facts as found or agreed to support the judgment complained of. In this case, after rendering a general finding and judgment, the court made a specific finding of facts as requested, both of which findings fully support the judgment rendered.

[3] The plaintiff in error complains that the court erred in not filing findings of fact prior to rendering judgment, and also erred in overruling the motion to file the same nunc pro tunc as of the day of the trial and prior to the rendition of judgment; but this, we think, if error at all, was error without injury.

[4] In the assignments of error there is no complaint as to any rulings of the court in the progress of the trial; but the burden of them all is the complaint that the court did not find the facts in the case as the plaintiff in error claimed the evidence required. Our only inquiry in regard to them can be as to whether the facts as found support the judgment rendered, and as to that we have no doubt.

The appeal in this case is dismissed, and on the writ of error the judgment of the trial court is affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. (and three other cases).

In re METROPOLITAN ST. RY. CO.

(Circuit Court of Appeals, Second Circuit. February 9, 1916.)

No. 141.

RECEIVERS ⊜75—CLAIMS—SET-OFF AND COUNTERCLAIM.

Where, at the time the C. Co. became insolvent, it did not own notes of the M. Co., which long afterwards were delivered to its receiver, in settlement of a suit against a third party, the receiver could not use them as a set-off against a claim of the M. Co., also in the hands of a receiver, but could only prove them against the estate of the M. Co.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 136; Dec. Dig. ⊜75.]

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

Receivership suits by the Pennsylvania Steel Company and others against the New York City Railway Company and others, with three

other cases. From a decree (217 Fed. 423) modifying and confirming a master's report in the matter of the claim of the Metropolitan Street Railway Company (No. 512) against the New York City Railway Company, the receiver of the New York City Railway Company and others appeal. Modified and affirmed.

B. S. Catchings, of New York City, for tort creditors committee.
A. H. Masten, of New York City, for Robinson, as receiver.
M. C. Fleming, of New York City, for Ladd, as receiver.
R. R. Rogers, of New York City, for New York Rys. Co.
Brainard Tolles, of New York City, for Guaranty Trust Co.
James Byrne, of New York City, for Pennsylvania Steel Co.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. We shall do no more than indicate the single particular in which we differ from the court below.

The receivers of the City Company brought a suit in equity and also an action at law upon two entirely different causes of action against defendants, who were largely the same in each case. They obtained judgment in the action at law, and thereafter, July 8, 1910, the parties settled both claims by the payment of $5,500,000 cash and the delivery of four collateral notes of the Metropolitan Company for $1,000,000 each. This property was apportioned between the suit in equity and the judgment at law in accordance with the holding of this court in the Apportionment Case, 198 Fed. 778, 117 C. C. A. 560. The action at law grew out of advances made by the City Company to the Metropolitan Company of some $8,000,000. This court did recognize an equitable interest in the notes in the City Company so far as they might be necessary to reimburse it for these advances. It was not found necessary because the advances had been repaid in full and it is conceded that the Metropolitan Company is entitled to a balance of the cash and to the notes which were apportioned to the action at law. There remain in the hands of the receiver of the City Company the notes which were apportioned to the equity suit aggregating the sum of about $2,000,000. The question is whether he can set these off against claims of the Metropolitan Company against the City Company or whether he can only prove them against the Metropolitan Company's estate.

We think it quite clear that at the time of its admitted insolvency September 24, 1907, the City Company did not own the notes or any of them. When its receiver subsequently obtained judgment in the action at law he did not thereby get title to the notes or any of them, his only claim against the defendants being the judgment recovered. He first got title when the settlement was made of both the cases long after the insolvency and therefore he could not, on familiar principles use them as a set-off against any claim of the Metropolitan estate, his only right being to prove them as a claim.

Thus we construe the answer of Judge Lacombe to the third question addressed to the special master in the Apportionment Case:

" 'Question 3. Is the receiver of New York City Railway Company entitled to use, and, if so, to what extent, four certain 5 per cent. improvement notes

of Metropolitan Street Railway Company, of the face value of one million dollars ($1,000,000) each, and now in his possession, as a set-off or counterclaim in respect to the claim of the Metropolitan Street Railway Company, or its receivers, to such part of said proceeds?

" 'Answer. If the receiver of the City Company shall ultimately secure and retain from the distributive share of the action at law the various items enumerated as deductions in the answer to question 2, he shall not be entitled to use the proportion assigned to the suit in equity of the four 5 per cent. collateral improvement notes of the Metropolitan Company, described in the aforesaid findings of fact, as a set-off or counterclaim to the claim of the Metropolitan Company, or its receivers for the distributive share apportioned to the action at law. If, however, the receiver of the City Company shall not ultimately secure and retain such deductions, the said distributive share of said notes apportioned to the suit in equity may be by him used as such set-off or counterclaim. Said notes were not surrendered to the receiver of the City Company for cancellation only.'

"This answer is approved; the deductions mentioned being those contained in subdivisions (1) and (2) of that question."

We said as to this answer:

"It follows that so much of the money and notes received by the receivers of the City Company in settlement as is apportionable to the judgment in the action at law (after deducting the expenses of realizing the same) must be applied for the benefit of the Metropolitan Company. The court below, however, rightly held that the receivers of the City Company were first entitled to deduct whatever they or the City Company had paid out on account of this fund of $8,000,000 for permanent betterments of the Metropolitan Company's property, and for any balance not paid out of the cash they were entitled to hold their share of the notes, so far as needed to reimburse them, the notes and any balance of cash not needed for that purpose to be turned over to the receivers of the Metropolitan Company. On the other hand, the share of the notes apportioned to the equity suit may be proved by the receivers of the City Company against the estate of the Metropolitan Company."

As there is no dispute about the amount, the decree may allow it as a general claim against the estate of the Metropolitan Company, without the formality of submitting it first to the special master.

The decree, so modified, is affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. (and three other cases).

In re THIRD AVE. RY. CO.

(Circuit Court of Appeals, Second Circuit. February 9, 1916.)

No. 206.

1. STREET RAILROADS ⊂=58—LEASES—RENT—RIGHTS OF LESSOR'S STOCKHOLDERS.

Rents due under a lease of a street railway company's lines belonged to it, and passed to its receivers, and not to its stockholders, where the lease contained no guaranty by the lessee of payment to the stockholders, though it gave the lessee a right to make such a guaranty in the future.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. ⊂=58.]

2. STREET RAILROADS ⊂=58—RECEIVERSHIPS—ASSIGNMENT OF CLAIMS.

Though a street railway mortgage, under which a receiver was appointed, expressly covered rents of property then owned or thereafter ac-

quired, a claim for rent, which fell due before the receiver took possession, did not go to him as against general creditors of the company, and was not transferred by his assignment of claims against the lessee which covered only claims within the mortgage.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. ⊂=58.]

3. RECEIVERS ⊂=67—ASSIGNMENT OF CLAIMS.

Rent falling due one day after such receiver took possession did go to him, subject to the deduction of anything paid for the use and occupation of the premises, and passed under such assignment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 117–122; Dec. Dig. ⊂=67.]

4. RECEIVERS ⊂=163—ASSIGNMENT OF CLAIMS.

Where the same persons were appointed general receivers of a corporation and receivers of its property, covered by certain mortgages, and a party having a claim against the company assigned it to the receivers, as receivers of the mortgaged property, they, as receivers of the mortgaged property, were entitled to the allowance of the claim in full, without deduction of the amount paid by them to the claimant for the assignment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 312–316; Dec. Dig. ⊂=163.]

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

Receivership suits by the Pennsylvania Steel Company and others against the New York City Railway Company and others, with three other cases. From a decree (225 Fed. 96) in the matter of the claim of the Third Avenue Railroad Company against the Metropolitan Street Railway Company (No. 44), arising out of the failure of the Metropolitan Company to comply with provisions of a lease to it of the roads of the Third Avenue Company, which claim was, under the agreement of December 29, 1911, assigned to Douglas Robinson and another, as receivers of the mortgaged property of the Metropolitan Company (they being also general receivers of that company), Robinson, as receiver of the mortgaged property, and others appeal. Modified and affirmed.

Bronson Winthrop and W. M. Chadbourne, both of New York City, for Robinson, as receiver.

M. C. Fleming, of New York City, for Ladd, as receiver.

B. S. Catchings, of New York City, for tort creditors committee.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. It will only be necessary to state the particulars in which we think the decree of the court below should be modified.

[1] The claim for rent due by the Metropolitan Company, October 13, 1907, belonged to the Third Avenue Company and not to its stockholders. The lease of the Metropolitan Company to the New York City Company which we had under consideration in 198 Fed. 761, 117 C. C. A. 503, contained an express guaranty by the City Company to the stockholders of the Metropolitan Company for which reason we held that the stockholders had a right of action. The lease under consideration, however, contains no such guaranty to the stockholders

of the Third Avenue Company and though it does give the Metropolitan Company a right to make such a guaranty in the future the company has never done so.

[2] The Third Avenue Company's consolidated mortgage under which Frederick W. Whitridge was appointed receiver expressly covers rents growing out of property now owned or hereafter acquired by the company, but the claim for rent which fell due October 13, 1907, before he took possession as receiver does not go to him as against the general creditors of the company. Gilman v. Ill. & Miss. Tel. Co., 91 U. S. 603, 23 L. Ed. 405; American Bridge Co. v. Heidelbach, 94 U. S. 798, 24 L. Ed. 144; N. Y. Security & Trust Co. v. Saratoga Gas Co., 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132. It was covered by the claim filed by the Third Avenue Company by leave of the court February 1, 1908, and goes to the general creditors of that company. It was not transferred by the Third Avenue Company's assignment of February 1, 1912, which covered only claims within the Third Avenue Company's consolidated mortgage.

[3] On the other hand the claim for rent due the Third Avenue Company January 13, 1908, falling due one day after Mr. Whitridge took possession as receiver, did go to him, subject to the deduction of anything paid for the use and occupation of the premises, and by his assignment of February 1, 1912, went to Douglas Robinson as surviving receiver of the mortgaged property of the Metropolitan Company, and belongs to him.

[4] The claim for interest on the consolidated mortgage 4 per cent. bonds, January 1, 1907–January 12, 1908, must be allowed in full to Mr. Robinson as surviving receiver of the mortgaged property of the Metropolitan Company without the deduction of the $200,000 paid under the agreement of December 29, 1911, to Mr. Whitridge as mortgage receiver.

The decree may be modified in accordance with this opinion, and, as so modified, is affirmed.

In re NEW YORK COMMERCIAL CO.

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

No. 125.

BANKRUPTCY ⊂=368—TRUSTEE'S COMMISSIONS—AMOUNT DISBURSED.

A bankrupt had purchased quantities of rubber and had contracted to sell it to its customers. As part of the arrangement it had contracted to procure letters of credit to enable the seller to pay for rubber it had contracted to purchase. Rubber having fallen in price, the bankrupt would have been liable to damages if the contracts were not fulfilled. The contracts with the bankrupt's customers were therefore assigned to the seller under an agreement that it would ship the rubber to the customers and account for profits to the bankrupt; but the seller became unable to supply the necessary funds, and an arrangement was entered into under which the contracts with customers were assigned to New York banks which agreed to furnish letters of credit. To induce this arrangement the bankrupt's trustees deposited $50,000 with the banks, and they were to repay this advance and the further sum of $50,000 as a liquidated profit. Though the trustees attended to the delivery of the rubber, they never received the proceeds, and the trial court found that they handled the rubber as agents of the seller and the banks. *Held* that, under Bankr. Act July 1, 1898, c. 541, § 48a, 30 Stat. 557 (Comp. St. 1913, § 9632), providing that trustees shall receive commissions on moneys disbursed by them, not exceeding those therein specified, and section 72 (section 9656), providing that the trustee shall not in any form receive any other or further compensation than that expressly authorized and prescribed by that act, the trustees were entitled to commissions only on the $50,000 profit; that being the only amount disbursed by them, though the volume of business transacted was about $900,000.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ⊂=368.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the New York Commercial Company. On petition to revise an order modifying an allowance of commissions to the trustee. Order affirmed.

This case comes here on petition to revise an order of the District Court which reversed an order of the referee in bankruptcy allowing the trustees the sum of $10,000 as commissions upon the proceeds of a sale of rubber which resulted in a profit of $50,000 upon the volume of business transacted, which was about $900,000. The District Judge based his award upon the profits actually realized and limited the allowance to the statutory percentages upon $50,000.

The following is the opinion of Augustus N. Hand, District Judge, in the court below:

I should greatly prefer to affirm the referee, for I consider the trustees performed a most meritorious service, made a profit for the estate, and by their resourceful work saved it perhaps from an almost overwhelming loss. In my opinion, however, the statute upon the particular facts shown forbids, and they must be limited for the service in question to the commission upon $50,000, though the large sum of $900,000 was involved in the transaction as a whole.

The bankrupt had purchased from A. W. Alden & Co., Limited, an English company, large quantities of rubber, and had in turn contracted to sell the rubber in New York. The English company had itself contracted for this merchandise. Rubber had fallen in price, so if the contracts were not fulfilled the English company would have been liable for damages which it could have claimed against the bankrupt estate, said to amount to several hundred thousand dollars. As part of the arrangement between the English company and the bankrupt, the latter had contracted to procure the issue of letters of credit to enable the English company to pay for the rubber it had contracted to purchase. When the New York company became insolvent and unable to supply these letters of credit, the receiver of the latter was authorized to assign the contracts with its American customers to the English company under an agreement by which the English company was to raise the money direct, ship the rubber to the customers, and account for the profits to the New York company, which was a holding company of the English company. Thus the business proceeded until the English company became financially embarrassed and was unable to supply the funds to pay for the rubber it had purchased. Then, owing to the fall in the price of rubber, the peril was very great, and the New York company, through its trustees in bankruptcy, the English company, and three New York banks, entered into an arrangement to finance these importations of rubber, the terms of which become important. The English company assigned to the banks the contracts with the American customers (which it had received by assignment from the bankrupt estate), and the banks agreed to furnish the English company with letters of credit aggregating about £120,000 to finance the importations. The English company agreed to ship the rubber through the banks who were to receive the entire proceeds. To induce the banks to do this, the trustees under order of court deposited $50,000 with the banks. From the proceeds of the sales, the banks, after paying their own commissions and charges, were to repay the trustee their advance of $50,000 and the further sum of $50,000 as a liquidated profit.

While the trustees attended to the delivery of the rubber, they never received or were entitled to the proceeds, nor, as it seems to me, ever handled the rubber, except as agents of the English company and the banks, who with the English company and aided by the guaranty furnished by the deposit of $50,000 by the trustees, had actually done the financing, nor had the trustees ever contracted to purchase the rubber. The analogy mentioned by the referee to an issue of receivers' certificates is not, I think, sound. The trustees bound their estate no farther than the deposit of $50,000, were under no general liability by reason of the advances of the banks, had no title to the rubber, and never were in the position of even constructive possessors of a fund as in the case of In re Columbia Cotton Oil, etc., Co., 210 Fed. 824, 127 C. C. A. 374. Nor do I agree with the counsel for the trustees that the method of financing the transaction in question was the same as the bankrupt practiced before the failure. Then, if I am not mistaken, the New York Commercial Company would have borrowed from the banks, pledged its credit, had title to the shipments, and thus actually or constructively wholly controlled them. Here it had nothing but an equity in the profits, no general obligation to pay for the rubber, no title, and no possession on its own account. The English company was bound to ship the rubber to the American customers and to pay for the rubber, and the banks were, in the language of the contract, "to receive * * * the entire proceeds of all shipments." The storage of a portion of the rubber in the warehouse of the bankrupt, for which regular charges were paid to the estate, and the attention to delivery to the customers by one of the trustees, Mr. De Long, for which he was paid by the English company without objection by any of the parties, has, I think, no bearing upon the case, and was no part of the duty of the trustees as such.

In spite, therefore, of the careful report of the referee, who has evidently given this case most studious consideration, I must hold that the commissions are limited to the statutory percentage upon $50,000 and an order should be entered accordingly allowing such sum and disallowing the award of $10,000 made by the referee.

John W. Ingram, of New York City, for appellants.
Edwin T. Rice and Cornelius W. Wickersham, both of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. There is no question that the trustees performed valuable services for the estate which resulted in a profit of $50,000. The question here is one of power—had the referee the right, under the provisions of the Bankruptcy Act, to make the award of $10,000 in question?

Section 48a provides what the trustees' compensation shall be. It is based on all moneys disbursed or turned over to any person, including lienholders, by the trustees. The percentage is such as may be allowed by the courts, not to exceed 6 per centum on the first $500, 4 per centum on moneys in excess of that sum, etc., etc. If there be three trustees the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to. If other payments are made to the trustee for his services, authority for such payments must be found outside of the act for there is certainly nothing in the act authorizing additional payments. The courts are wholly controlled by the provisions of the act. As was said by the court in Re Breakwater, 224 Fed. 333, 140 C. C. A. 19:

"Congress intended by the amendments to section 40a and section 48a to provide what it considered ample compensation for services to be rendered by referees and trustees, and by section 72, to relieve the courts of the necessity of determining what constitutes legal compensation for those officers."

Section 72 is as follows:

"That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and perscribed in this act."

The facts are stated in the opinion of Judge Augustus N. Hand and need not be repeated here. We agree with him that it cannot be said that the trustees disbursed the money received from the sale of the rubber except as to the $50,000 profit upon which commissions were allowed.

The order is affirmed.

CRESTA et al. v. MAXWELL et al.

In re GHIRADELLI'S ESTATE et al.

(Circuit Court of Appeals, Ninth Circuit. March 27, 1916.)

No. 2597.

BANKRUPTCY ⟸439—REVIEW OF PROCEEDINGS—PETITIONS TO REVISE—JURISDICTION.

Act June 7, 1878, c. 160, 20 Stat. 99, repealing Bankr. Act March 2, 1867, c. 176, 14 Stat. 517, provided that such repeal should not invalidate or affect any pending cause in bankruptcy, but that as to all such pending cases and all future proceedings therein, and in respect to all rights of debtors and creditors, except the right of commencing original proceedings, the acts thereby repealed should continue in full force and effect until the same should be fully disposed of, as if such acts had not been repealed. *Held*, that Bankr. Act July 1, 1898, c. 541, 30 Stat. 553, § 24b (Comp. St. 1913, § 9608), giving Circuit Courts of Appeals jurisdiction to superintend and revise in matters of law the proceedings of inferior courts of bankruptcy within their jurisdiction, gives a Circuit Court of Appeals no jurisdiction of a petition to revise an order denying a petition to require assignees under the act of 1867 to pay certain dividends to the petitioners.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⟸439.]

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

In the matter of the estate of Domingo Ghiradelli and another, copartners as D. Ghiradelli & Co., and individually, bankrupts. On petition by Frank Cresta and others to revise an order denying certain relief against T. V. Maxwell and others, assignees. Petition dismissed.

T. Z. Blakeman, of San Francisco, Cal., for petitioners.

E. J. Pringle, of San Francisco, Cal., for respondents.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This is a petition for revision under and by virtue of subdivision "b" of section 24 of the Bankruptcy Act of July 1, 1898, giving to the several Circuit Courts of Appeal—

"jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

The proceedings in the court below so sought to be revised were had in the matter of parties adjudged to be bankrupts under and by virtue of the Bankruptcy Law approved March 2, 1867, and the money claimed by the petitioner is a portion of two dividends declared in the course of the administration of that bankrupt estate, one for $252, and the other for $78.75, for which respective dividends checks were drawn by the assignees of the estate in favor of the creditor of record in the proceedings, one Tomaso Cresta, and which checks were paid by the bank having custody of the bankrupt estate; the petitioner contending, however, to the wrong persons, Cresta being then dead.

We are precluded from deciding or considering the points made in argument on behalf of the petitioner, for the reason that this court is without any jurisdiction in the matter. The Act of Congress of June 7, 1878, c. 160 (20 Stat. p. 99), in repealing the Bankruptcy Law of 1867 and its amended and supplemental act, expressly provided:

"That such repeal shall in no manner invalidate or affect any case in bankruptcy instituted and pending in any court prior to the day when this act shall take effect; but as to all such pending cases and all future proceedings therein, and in respect of all pains, penalties, and forfeitures which shall have been incurred under any of said acts prior to the day when this act takes effect, or which may be thereafter incurred, under any of those provisions of any of said acts which, for the purposes named in this act, are kept in force, and all penal actions and criminal proceedings for a violation of any of said acts, whether then pending or thereafter instituted, and in respect of all rights of debtors and creditors (except the right of commencing original proceedings in bankruptcy), and all rights of, and suits by, or against assignees, under any, or all of said acts, in any matter or case which shall have arisen prior to the day when this act takes effect (which shall be on the first day of September, Anno Domini eighteen hundred and seventy-eight), or in any matter or case which shall arise after this act takes effect, in respect of any matter of bankruptcy authorized by this act to be proceeded with after said last-named day, the acts hereby repealed shall continue in full force and effect until the same shall be fully disposed of, in the same manner as if said acts had not been repealed."

The petition for revision is dismissed, at petitioner's cost.

In re ROSENTHAL.

Appeal of AMERICAN WOOLEN CO.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 38.

BANKRUPTCY ⊂=384—COMPOSITION—CONFIRMATION—DESTRUCTION OF BOOKS.

Where the books of a bankrupt, who could neither read nor write, were kept by his daughter, who destroyed the books each year after she had opened a new set and transferred to them the unclosed items, such destruction was not fraudulent, so as to be within Bankr. Act July 1, 1898, c. 541, § 14b(2), 30 Stat. 550 (Comp. St. 1913, § 9598), which authorizes denial of discharge where the bankrupt, with intent to conceal his financial condition, destroyed or failed to keep books of account, and therefore did not authorize a refusal to confirm the composition with creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590–592; Dec. Dig. ⊂=384.]

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

In the matter of Samuel Rosenthal, trading as S. Rosenthal & Co., bankrupt. From an order confirming a composition offered by the alleged bankrupt prior to adjudication, the American Woolen Company of New York appeals. Affirmed.

Hays, Hershfield & Wolf, of New York City (Henry H. Kaufman, Charles H. Broas, and Albert Falck, all of New York City, of counsel), for appellant.

Maurice S. Hyman, of New York City, for respondent.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. This is an appeal from an order confirming a composition offered by the alleged bankrupt prior to adjudication. The confirmation was opposed by creditors on the ground that the bankrupt destroyed books of account from which his financial condition might be ascertained. Section 14b (2) of the act. The situation is sui generis. The bankrupt can neither read nor write. He knew nothing about the modern methods of bookkeeping and intrusted all the bookkeeping to his daughter who had been in the habit of opening a new set of books each year—for a period of six years. After all items had been closed or transferred to the new books she destroyed the old set. The books were destroyed in circumstances which precluded any inference that fraud or concealment was intended. The mere destruction is not prohibited unless it be done with guilty intent, and here there is no such proof and no pretense that a fraud was perpetrated. The law was not intended to punish ignorance but it was intended to punish fraud, and this element is wholly lacking from the proof.

No creditor has been actually injured by what took place and it would be placing a highly technical and unnecessarily harsh construction on the act to punish a man not shown to be dishonest because of his ignorance of the proper way to keep his accounts.

The order confirming the composition is affirmed.

ARTHUR ACKERMAN LIGHTERAGE CO. v. CITY OF NEW YORK.

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

No. 157.

COLLISION ⊂⊃71(3)—SUBMERGED CATAMARAN—FAILURE TO GIVE WARNING.

The owner of a catamaran, so loaded with piles that some of them extended beyond the others into a slip under the water, *held* liable for injury to a tug by striking the same without notice or knowledge of the obstruction.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⊂⊃71(3).]

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

Suit in admiralty for collision by the Arthur Ackerman Lighterage Company against the City of New York. Decree for libelant, and respondent appeals. Affirmed.

On appeal from awarding damages to the libelant for injuries sustained by its tugboat, Peter L. Colon, occasioned by a collision with the submerged portion of a catamaran belonging to the city of New York.

Lamar Hardy, of New York City (Terence Farley, E. Crosby Kindleberger, and George P. Nicholson; all of New York City, of counsel), for appellant.

Frederick W. Park, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. A misleading and imperfect map of the locus in quo is found in the record which, after being altered by consent of counsel, sufficiently shows the place of collision and the reason therefor. The tugboat Colon was proceeding up the East River on a strong flood tide destined for her slip south of Pier No. 36. In order to make the turn safely it was necessary to go a short distance above the slip. While rounding to and before she got straightened out she struck the submerged portion of a loaded catamaran which was lying on the south side of the pier about 80 feet from the end. It is evident that the catamaran was so loaded that the ends of some of the submerged piles extended outwardly and that they very materially circumscribed the theater of operation. They made dangerous a part of the slip which, apparently, was free from danger. This being so, it was clearly the duty of the city to have some one at the pier to warn entering vessels of the danger, or, at least, it should have placed a signal there for that purpose. We are unable to find any negligence in the navigation of the Colon. Her master seeing nothing above the water to indicate that there was hidden danger beneath it, proceeded to enter in the ordinary way and struck a hidden object—unquestionably a projecting pile—of which he had received no notice and the presence of which he had no reason to suspect. The usual length of these logs is about 50 feet, but it appears that there were about 20 logs on this catamaran which were 70 feet long. These logs would, even if loaded properly, project about 10 feet from the bulk of the cargo. There was nothing, however, to warn the master of the tug of these projections. The damage was done because he was given no warning of a submerged obstruction when he was clearly entitled to such notice.

The decree is affirmed with interest and costs.

THE CHISWICK.

(Circuit Court of Appeals, Fifth Circuit. March 11, 1916. Amendment of Decree, May 3, 1916.)

No. 2873.

ADMIRALTY ⊜21—JURISDICTION—ENFORCING STATE STATUTE—SUIT FOR WRONGFUL DEATH—"MARITIME TORT."

The injury of a stevedore, while employed in discharging a vessel, through a defective appliance furnished by the ship, constitutes a "maritime tort"; and where death resulted after his removal from the ship a remedy given by the state statute may be enforced and relief given in admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 218–220; Dec. Dig. ⊜21.

For other definitions, see Words and Phrases, First Series, Maritime Tort.]

Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Suit in admiralty by Mary A. Clarke against the Britain Steamship Company, Limited, owner of the British steamship Chiswick, and others. Decree for libelant, and respondents appeal. Affirmed.

Charles R. Hickox and Kirlin, Woolsey & Hickox, all of New York City, and John C. Avery, of Pensacola, Fla., for appellants.

W. A. Blount, Jr., of Pensacola, Fla., for appellee.

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

PER CURIAM. A majority of the judges are of opinion that the proximate cause of the injury resulting in the death of James C. Clarke was the defective topping lift, for which the ship was responsible, and that James C. Clarke was not chargeable with contributory negligence in the matter of his injury.

All the judges agree that the cause of action arising on the steamship Chiswick was a maritime tort, and as it resulted in the death of said Clarke within 20 to 30 minutes after his removal from the ship, the right to recover damages for such tort given by section 3145, Gen. St. Fla. 1906, could be enforced, and relief given in admiralty.

As the lower judge rendered no written opinion, we are not informed as to the basis upon which he calculated and assessed the damages allowed in the decree rendered. We infer that he followed the rule of damages as given in article 3146, Gen. St. Fla. 1906. From our examination and consideration of the evidence, we are not prepared to say that the damages awarded respondent were excessive.

No one of the assignments of error being well taken, the decree appealed from is affirmed.

Amendment of Decree.

On further consideration of this case, the decree heretofore rendered is amended so as to provide that the costs, including costs of transcript, shall be divided equally between the appellants and appellees.

PERLMAN v. STANDARD WELDING CO.

(District Court, S. D. New York. August 18, 1915.)

1. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—DEMOUNTABLE RIMS FOR WHEELS.

The Perlman patent, No. 1,052,270, for a demountable rim for carrying the tire of automobile wheels, which may be readily and speedily removed and replaced, with means for locking it on a fixed rim and the felly of the wheel, was not anticipated and discloses invention. Claims 8, 11, 12, and 13 construed, and *held* infringed.

2. PATENTS ⊂⊃73—ANTICIPATION—PRIOR PATENTS.

A patent is not anticipated by a prior patent, where the patentee carries the date of his invention back to a time prior to the issuance and publication of the alleged anticipating patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 64; Dec. Dig. ⊂⊃73.]

In Equity. Suit by Louis H. Perlman against the Standard Welding Company. On final hearing. Decree for complainant.

Decree affirmed 231 Fed. 734, — C. C. A. —.

Daniel J. Mooney, of New York City (Melville Church and Edgar M. Kitchin, both of Washington, D. C., of counsel), for plaintiff.

Fish, Richardson, Herrick & Neave, of New York City (Fay & Oberlin, of Cleveland, Ohio, of counsel), for defendant.

HUNT, Circuit Judge. Suit for infringement of letters patent No. 1,052,270, issued to the plaintiff on an application filed June 29, 1906, which was the continuation of, and the substitute for, an application filed May 21, 1906. The wheel made by defendant is alleged to contain and embody plaintiff's invention as in claims 8, 11, 12, and 13. The defendant denies (a) infringement; (b) that plaintiff was the original and first inventor of the alleged improvement in wheels contained in said patent; and (c) that it was not known and used by others before its alleged invention by plaintiff. It avers that the subject-matter of the patent had been, prior to its alleged invention or discovery by Perlman, or more than two years prior to his application, patented or described in certain named letters and in printed publications, and that, in view of the state of the art, the subject-matter of the patent did not involve any invention whatsoever.

[1] Plaintiff's patent relates to improvements in wheels, and more particularly to the demountable rim type. It is stated that the object is to provide a demountable rim, sustaining a tire capable of ready application to, and removal from, a fixed rim and felly of a wheel; the demountable rim being so constructed as to facilitate the application and removal of a shoe. Means are provided for firmly and rigidly retaining the demountable rim on the fixed felly and rim while in use. The fixed rim has an annular flange on one edge. There are threaded apertures in the body of the fixed rim, intermediate at its edges, through which are threaded bolts formed with a frusto-conical entering end. The demountable rim, which is slid axially onto the

fixed rim from the flangeless end of the latter, has conical or frusto-conical apertures into which these bolts enter and lock the demountable rim firmly in place. Locking nuts prevent loosening of the bolts. The bolts serve as connectors between the wheel body and the demountable rim, and are adapted to exert outward radial pressure on the latter. The demountable, or tire-carrying, rim is made in two sections, each of which is cut away for a portion of its thickness, forming an annular shoulder, and one of which overlaps the other for the width of the cut-away portion, with the free edge of each lapping portion engaging the shoulder of the other. These sections are secured together by screws. Each section has at its outer edge a clencher flange, curved to produce an annular groove to receive the annular beads of a tire shoe. The demountable rim has an aperture for the valve stem, and the fixed rim and felly have a notch into which the stem enters. Short-stem lugs, designed for use in connection with a detachable operating tool, are employed to engage the tire shoe and press it into position, with its beads in the grooves of the flanged edges of the rim. The tire-carrying rim is of such diameter as to be easily slipped over the fixed rim; the valve stem as it enters the notch in the fixed rim and felly serving as a guide for the proper positioning of the demountable rim on the fixed rim. When the radial bolts are screwed into the conical openings and the nuts are tightened, the demountable rim is fast on the wheel. The bolts cause the demountable rim to be moved radially away from the fixed rim and also laterally against the annular flange of the fixed rim. A witness for the plaintiff testified that the bolts also serve to prevent the demountable rim from creeping or rotating upon the body of the wheel.

The claims sued on, 8, 11, 12, and 13, read as follows:

"8. The combination of a demountable rim having radially disposed clencher flanges, a tire shoe having beads engaging said flanges, a wedge-shaped clamping plate bearing against said beads and adapted when moved to force said beads against said flanges, and means accessible from the inside of the rim for drawing the clamping plate radially toward the rim."

"11. The combination, with a wheel body, of a demountable rim therefor, a locking element, having a tapering portion, that is adapted to be moved radially and to thereby exert pressure against the rim outwardly radially of the wheel body, and to act as a wedge laterally, said locking element having an engagement with the wheel body whereby it may be moved radially of the wheel body.

"12. The combination with a wheel and its felly of a demountable rim therefor, a locking element having a tapering end that is adapted to be moved radially and to thereby act as a wedge laterally and exert pressure against said rim radially of the wheel, said locking element having a threaded engagement with the wheel structure whereby it may be moved radially of the wheel.

"13. The combination, with a wheel body, of a demountable rim therefor, and a locking element, having a tapering portion, that is adapted to be moved to exert pressure against the rim outwardly radially of the wheel body, and to act as a wedge laterally, said locking element having an engagement with the wheel body."

Plaintiff contends that each of his locking elements consists of a wedge acting against an inclined face of the demountable rim and driven by a power element which anchors the wedge to the wheel; that the fact that the inclined face is that of a conical opening is merely an in-

cident, not altering the dual action of the locking element; that the wedge is the tapered end of a bolt, and the bolt itself the power means; that the locking means consist of a series of wedges, and that the bolts which carry the wedges are the actuators; that each bolt in defendant's device is threaded through the wood felly and fixed rim, and has a movable nut which actuates the wedge, and that there is but a reversal of parts, with the same functions attained in the same way as with the movable bolt in a fixed nut actuating a wedge; that the immediate actuator of the wedge in defendant's device is a nut threaded on the bolt, and that there is no substantial distinction between moving a wedge by threading a bolt through a stationary nut, as in plaintiff's device, and moving a wedge by threading a nut along a stationary bolt, as in defendant's device.

The defendant contends that in 1906 and 1907, along with a number of other manufacturers of automobile wheels and rims in this country, it began to make what is known as the "Old Style Continental Demountable Rim," the characteristic features of which are substantially those of the exhibit introduced by the plaintiff as the defendant's wheel, and that the construction of this wheel was an adaptation of a wheel that had been previously introduced commercially to the trade in Europe, and particularly in France, where it was known as the Vinet demountable wheel, after the name of the presumed inventor, one Gaston Vinet, of Paris, France. Defendant's wheel has the ordinary spokes and wood felly and a fixed metal felly band, with an upturned flange on the inner side. There is an opening in the felly and band to receive the valve stem of a pneumatic tire. The demountable rim is of the clincher type, and is provided with a block which fits between two plates on the fixed rim, so that it will not creep. It is provided with a series of holes for nuts for short-stem lugs, and also with a hole for the valve stem. The locking devices, of which there are eight, consist of a bolt and a metal wedge. The bolts pass axially through the wood felly, and each has a head on its inner end, so shaped as to prevent its rotation. There is a nut on the outside end of each bolt. The wedges go between the demountable rim and the fixed rim, and exert an inclined pressure upon the demountable rim radially away from the wheel body, spacing it from the fixed rim, and also press it laterally against the flange at the other end of the fixed rim. The wedges used by the defendant are propelled by means of threaded bolts, the immediate actuators being 8 nuts threaded on the bolts.

The same result is accomplished in both devices; a demountable rim is supported on a small amount of surface, and is capable of ready application and removal, and yet is firmly locked on the fixed rim while in use. While in the case of one there is a bolt, with a frustoconical end which enters a conical cavity in the demountable rim, and in the other (a) a bolt which enters the felly axially, and (b) a wedge plate, in each there is produced this effect: Radial pressure outward from the wheel body, and lateral pressure against the curved flange of the fixed rim, is exerted on the demountable rim. The demountable rim of the defendant, like that of the plaintiff, is of rolled sheet metal, comparatively thin, capable of an amount of distortion, yet sufficiently

rigid to carry the full load between the points of support. Again, the demountable rim of the defendant is cylindrical, like plaintiff's, and is made so as to have certain spaced inclined surfaces engaged and locked by small wedges like plaintiff's, and provided with locking wedges for engaging the rim at spaced points; the wedges being constructed to present the least amount of surface in contact with the rim.

I can perceive no distinction in function between the two wheels, and as a fact the question that presents itself is whether or not such a similarity exists between the patented device and the defendant's wheel as will sustain the claim of infringement.

A feature of plaintiff's invention is the means of anchoring the pneumatic casing to the demountable rim, such means being a short-stem lug. Before Perlman invented, lugs known as long-stem ones were in common use for the purpose of keeping the beads from working out of engagement with the flanges; the same being long enough for all purposes of working the tire. There had been difficulty in using short-stem lugs because of the impossibility of applying the tire beads in place while the lug was in place. It was customary to push the lug radially outward on the body of the tire while the outer bead was being positioned. In seeking a practical short-stem lug, the difficulty to be overcome was the positioning of the lug. Perlman, however, conceived the idea of providing a detachable handle whereby the short-stem lug was made possible, since the capacity for positioning the short-stem lug enabled its use and so enabled its existence. The short-stem lug shown by plaintiff and by the defendant, when compared, disclose identity in structure and function.

Defendant has cited many references. Relating to the prior art, the more important point for consideration is whether, considering the demountable rim in itself, the wheel and locking means co-operate to tension the demountable rim while in use and to allow the rim to fall off after the locking means are released. References to inventions describing removable tire-carrying rims which had to be forced off while they were still held rigid are not very helpful, in view of the fact that the rims of plaintiff and defendant are rigidly mounted in use, but are never removed while they are rigidly mounted. It is unnecessary to prolong the discussion by entering upon detailed examination of the references cited by defendant. It is sufficient to say that Perlman's invention was disclosed to the public, and especially to officials of the defendant, and in its principles became useful and popular. The device of Perlman was a practical solution of the problem of replacing a deflated automobile tire in a quick and easy way.

Patents issued subsequent to the invention, which was completed by Perlman in the summer of 1903, and which under the evidence must be found was first publicly used by Perlman on a Royal car in August, 1904, are not decisive. Patents, however, of a date prior to August, 1904, should be considered. Patent to Edenborough, No. 695,805, disclosed a rim bolted by radial bolts incapable of use where a rubber tire was applied to the metal rim, unless the idea of permanency of mounting was of prime consideration. The tightening wedge blocks

do not act as locking means, and the metallic rim is not demountable. Patents No. 4,447, 1846, and No. 405,710, 1889, showing railway car wheel structures with rims intended for being mounted permanently, ought not to be regarded as fairly in the prior art under examination. It strikes me that such structures apply to a foreign art. But, if I am wrong in so regarding them, still they could not be claimed to disclose a solution of a problem in the art of automobile wheels. In the car wheel art the object was to get the rim on just as tight as it could be put on and to mount it nearly with permanency, and in doing so the greatest amount of contact surface was provided between the rim and the wheel body of the car wheel. The British patent to Burnet, 1902, and United States patents to Gerstner, No. 631,294, 1899, and to Grier, No. 746,693, 1903, and Munger, No. 638,590, 1899, relate to structures involving demountable rims held tight upon their wheel bodies by conical fit or bolts pulling the rim down against the wheel bodies. Such a structure appears to have been found of little use, owing to the fact that the rim becomes so attached to the wheel body that it requires much more labor to remove it than to take the tire from the rim.

The Q. D. rims, as they are referred to, are those where a ring or section of the channel or bed for the tire may be removed for releasing the tire, so that it can easily be taken off and a new tire replaced. It is necessary, however, under the patents for such rims, that the replaced tire must be applied and the work performed on the road, including pumping up, which makes replacement much more laborious than the mounting of a demountable rim carrying an already inflated tire. Patents on the Q. D. rims include those issued to Tillinghast, No. 689,247, December, 1901, Latimer, No. 624,590, May, 1899, and Smith, No. 633,917, 1899. I am far from satisfied that under any figure in the Tillinghast patent there can be added size and capacity to be load-carrying and stress-distributing in a way to make a demountable rim. Tillinghast shows a solid tire and core which does not stretch. He did not describe his figure as a demountable rim and, as I understand the drawing, the tire channel shown in the drawing of the Tillinghast patent is for a complete contact throughout its circumference. And what is true of Tillinghast is in a sense to be said of the others relied upon, for in all there is some form of side plate or section of the bed for the tire which has to be removed laterally, so that the tire can come off to be replaced by a new one, without provision being made against need of inflating the new tire after mounting. Q. D. rim devices relied upon are based upon having a close, continuous bearing contact with all possible surface of the tire against the bed, whereas the principle applied in the demountable rim art is just the reverse. Obviously rims for solid tires, when considered with relation to the permanence of solid tires, would be of little practical value in the use of pneumatic tires, where there is the lack of stability which characterizes the solid tires.

The French patent to Vinet, No. 347,651, November 4, 1904, was considered by the Patent Office examiner, who referred to it in his letter of September 14, 1908, and cited it on December 10, 1908. Complying with rule 75 of the Patent Office rules of practice, Perlman

made a showing sufficient to overcome the Vinet reference, and thereafter the examiner in the Patent Office abandoned Vinet. Perlman showed prior invention. Thereafter the Commissioner of Patents granted Perlman's claim 13, which read on the Vinet showing. As to claims 11 and 12, Vinet is not pertinent. As I understand it he shows a complete ring, not cross-cut or split, as appears in defendant's evidence, and fails to show a ring capable of expanding and moving radially. It is in evidence that claims 11 and 12 of the patent in suit being confined to a locking element capable of radial movement Vinet does not present a reference pertinent to them.

[2] But upon a broader ground the plaintiff should not be defeated by reference to the Vinet patent, because the evidence convinces the court that plaintiff has proved his invention as antedating the foreign publication of date March 18, 1905. Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000; Westinghouse Elec. Mfg. Co. v. Roberts (C. C.) 125 Fed. 9; Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521; Hunnicutt Co. v. Gaston Co., 218 Fed. 176, 134 C. C. A. 56; Brooks v. Sacks, 81 Fed. 403, 26 C. C. A. 456; Emerson & Norris v. Simpson Bros. Corp., 202 Fed. 747, 121 C. C. A. 113; Westinghouse Co. v. Stanley Co., 133 Fed. 167, 68 C. C. A. 523; Westinghouse Elec. & Mfg. Co. v. Saranac Lake Elec. Light Co. (C. C.) 108 Fed. 221. The evidence satisfies me that in 1903 plaintiff completed, and in 1904 in a successful way operated, his invention. It was not until 1904 that he put it into use in his automobile, but entirely credible witnesses have established the fact beyond dispute that in 1903 plaintiff had reduced his invention to actual, tangible, physical shape. The testimony offered upon the issue of the early production of the invention of the patent in suit was very carefully considered and weighed as the witnesses testified upon the stand. The need for very clear proof was well in mind ; yet, after sifting and analyzing, the evidence impels the conclusion that plaintiff has established beyond a reasonable doubt the use of his invention on the Royal car in 1904. Documents sustain the oral proof and make the whole evidence convincing. For years, beginning back in 1900, the activities of plaintiff were applied to work upon the repairing of tires, always with a view of inventing means to avoid the delays incident to such repairs on the road. Men of unquestioned responsibility and character have told of experiences in 1903 where plaintiff dilated upon possible means of overcoming tire troubles. Not that such evidence establishes early invention, but it does prove the existence of facts showing conditions out of which invention might well be forthcoming. There can be no successful dispute of the documents which show that in 1903 plaintiff was working on material exhibits offered in evidence, and plainly evidence of things which led up to the production of the wheel offered in evidence must have preceded the work on the wheel itself, and the mental conception was there.

After many unsuccessful attempts to carry out his idea, Perlman procured two automobile wheels, took them to a shop, and had a certain wheel produced, which was afterwards taken to his house in New York. Documents show that one of such wheels was finished some

time before July 1, 1903, and that he paid a bill to the manufacturing company before July 16, 1903. The factory people recall having done the work for Perlman, and distinguish the work done prior to July 1, 1903, from that put upon the second wheel, with lugs or stops at the back. The record discloses that tests were made after the delivery of the wheel to Perlman at his residence in the spring of 1903. These tests were made in the house, and it was not until August, 1904, that the plaintiff bought a Royal car and applied to it his invention. Another wheel was made before May 1, 1904. In October, 1904, he put his wheels on a Welsh car and used it. The invention was satisfactory to the inventor, and the methods of mounting the demountable rim and the short-stem lug for securing the tire on the rim were perfect and complete. A number of witnesses say they went riding with Perlman in the summer and fall of 1904; one witness particularly recalling that he went with Perlman in the Welsh car to attend the first Vanderbilt Cup race, the date of which was the fall of 1904. Some of the witnesses for the plaintiff were men without mechanical training, but they have described in a general way the construction and operation of plaintiff's devices, and have stated enough to show that the structure which Perlman employed was a conical recess and was operated as Perlman says it was operated.

Perlman delayed filing a patent application, and it may be that in this he imperiled his rights. But his explanation impressed me as entirely credible. He said that, while the tests of his invention had proved satisfactory, yet, as the work of changing tires in the garage after the demountable rim had been brought in with a ruptured tire was considerable, he undertook to solve the problem presented by such conditions before filing his patent application for his completed invention. In 1905 he made a split rim, or demountable Q. D. rim. He consulted counsel and then took steps to obtain a patent. He filed two applications within the two years allowed by the statute in which to file an application after public use of an invention. In doing this I should say that he complied with the law and was rightfully allowed the claims in suit over the patent to Vinet, as well as over other references adverted to by the defendant in this suit.

Claim 12 of the patent in suit was introduced subsequent to a decision by the Court of Appeals for the District of Columbia, but is not inconsistent with an order of the Commissioner of Patents made prior to the sending of the record in litigation which found its way to the Court of Appeals of the District of Columbia. Claims 11 and 13 were added without reference to previous proceedings, and subsequent to the decision of the Court of Appeals, affirming a decision by the Commissioner of Patents refusing certain claims made by the applicant. No claim on which the patent in suit issued was ever presented or acted upon which was limited to a locking element acting in two directions, both in a radial and lateral way, and it would seem to follow no claim was ever canceled on the record, which is to be considered as a concession that the patentee is not entitled to the protection afforded by claims 11, 12, and 13. I do not believe that the Court of Appeals of the District of Columbia by any mandate precluded, or in-

tended to preclude, the Commissioner from granting claims 11 and 13 of the patent in suit, for the opinion of the court refers the matter to the consideration of the Commissioner. In re Perlman, 39 App. D. C. 447.

Passing to the file wrapper, we find that Perlman appears to have believed that he invented more than he really did. This is shown by his application, serial No. 318,075, presented in the Patent Office, wherein he claimed the broad idea of a tire-carrying demountable rim, without limitation as to its method of mounting or means of retention. While his first application was pending, when he filed his application No. 324,045, he did not present claims in the second case covering the same ground as those which had been included in the first case. In his first application, No. 318,075, claim 1, he used this language:

"In a device of the class described, the combination, with a tire, of means connected therewith for enabling the application thereof directly to a wheel in either an inflated or a deflated condition."

It may be that the inventor did not wholly understand the claim of wedges and means for actuating those wedges for effecting locking action at that time. But in claim 8 of his original application, No. 324,045, he clearly and expressly did use language referring to a wedge action and to wedges for effecting locking action. Defendant asks a construction which would limit the original idea to wedging a rim circumferentially, but I think the statement in the application that the rim was to be wedged for adjusting the rim to its proper position on the felly refutes a limitation as contended for. More reasonable does it appear to regard the wedges actuated by the radial bolts as meant for and used as means for making a tight fit of the demountable rim upon the annular stop flange. An error by the draftsman failed to show the wedges in the application No. 318,075, and the inventor merged that case in the application on which the patent in suit was issued. Application No. 324,045 was followed by persistent efforts on the part of plaintiff to obtain recognition. Merger was had. The claims were modified in response to the status of the art. Many claims were presented, and many canceled, and yet I find no claim of the same scope as the claims of the patent, and none which, being conceded to be nonpatentable, can be construed as an estoppel against Perlman's right of protection against infringement by a rim wheel, demountable, embodying locking elements placed to press the demountable rim radially outward and thrust it at right angles to the radial action in the final or operative position and to lock there tensioned during use, but capable of being readily released from tension, allowing the rim to assume a loose position before it starts to move off of the wheel. Hess Bright Mfg. Co. and D. W. & M. Co. v. Fichtel & Sachs, 219 Fed. 723, 135 C. C. A. 421.

I find claims 11, 12, and 13, of patent No. 1,052,270, which are directed to the demountable rim locking means and the combination thereof with a wheel body and its demountable rim, are infringed.

Claim 8, relating to the wedge-shaped clamping plate for clamping the clincher bead of a tire, and the combination therein set forth, is for a device used with defendant's structure when the apertures and recesses of defendant's demountable rim are made use of at all. The

evidence shows that the depressed portions in the median line of defendant's demountable rim, each of which is apertured centrally, are of no utility except when employed for receiving the nut of a short-stem lug with the stem of the lug extending through the aperture, and the apertures are used in no way other than to receive a short-stem lug. The combination set forth in claim 8 is present in the parts furnished by the defendant, as if the complete combination were sold by it.

Finally, Perlman's patent shows invention, completed by him in 1903. Two distinct features mark the invention: (1) The demountable rim combination, with its locking means; and (2) the short-stem lug combination, for clamping the tire to the demountable rim. The invention claimed was based upon a provision for a demountable rim, which is loose on the wheel when applied, but is locked by locking means, which may be unlocked and thereby may restore the loose condition before commencing removal. This same combination has been adopted by defendant, and the same combination as disclosed and claimed in the patent in suit has been taken. Plaintiff disclosed to the defendant the patented invention before the defendant began to manufacture demountable rims.

The evidence requires the finding of infringement and the granting of an injunction and accounting in usual form.

UNITED STATES v. SALOMON.

(District Court, E. D. Louisiana. January 29, 1916.)

No. 15210.

1. ALIENS ⟸68—NATURALIZATION—PROCEDURE—DISCRETION OF COURT.

Act June 29, 1906, c. 3592, § 6, 34 Stat. 598 (Comp. St. 1913, § 4354), provides that final action on petitions for naturalization shall be had only on stated days, to be fixed by rule of court, and that in no case shall final action be had upon a petition until at least 90 days have elapsed after filing and posting the notice of such petition. The amendment of June 25, 1910 (36 Stat. 830, c. 401 [Comp. St. 1913, § 4352]), authorizing the naturalization without a previous declaration of intention of persons exercising the rights or duties of citizens under the impression that they are citizens, because of misinformation, provides that such applicant shall comply in all other respects with the law relative to the issuance of final papers of naturalization. *Held*, that the provisions for posting of notice of the petition and for hearing on stated days after 90 days' posting are directory, at least when applied to persons applying under special acts, and may be disregarded in the sound discretion of the court; and hence it was within the discretion of the court to naturalize, without the posting of the petition, a person known to the judge to be patriotic, honorable, and law-abiding, who had been appointed to a position to which he was ineligible unless a citizen, where the public interest, as well as his own, required his immediate naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

2. ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATES—"ILLEGALITY"—"IRREGULARITY."

Conceding that it was error to naturalize an applicant, where notice of his petition had not been posted for 90 days, the error was not ground

for canceling the certificate, under Act June 29, 1906, § 15 (Comp. St. 1913, § 4374), authorizing the cancellation of certificates for fraud or illegality, as it was only an "irregularity," which is a want of adherence to some prescribed rule or mode of proceeding, and not an "illegality," which denotes a radical defect (citing Words and Phrases, Illegality).

3. EQUITY ⊂=450—BILL OF REVIEW—GROUNDS.

A bill of review will not lie unless the party is aggrieved by the decree, and it makes no difference that he might have insisted on the error at the original hearing or on appeal.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1095; Dec. Dig. ⊂=450.]

In Equity. Suit by the United States against Oscar Ernst Moritz Salomon to cancel a certificate of naturalization. Bill dismissed.

Walter Guion, U. S. Atty., of New Orleans, La.

John P. Sullivan, Arthur Landry, and Edward M. Heath, all of New Orleans, La., for defendant.

FOSTER, District Judge. This is a bill to cancel a certificate of naturalization. The facts are set out in the bill and answer, and are not disputed. They are as follows:

On July 21, 1914, the defendant applied for naturalization under the provisions of the act of Congress of June 25, 1910, and was naturalized by order of court the same day. In support of his application he filed his affidavit, setting up the following facts as justifying his belief that he was a citizen and showing he had exercised the rights and performed the duties of a citizen:

"In April, 1876, I was informed by Dr. Paul Goddard that I was a citizen of the United States, having, prior to that time, filed my declaration of intention as prescribed by law then in vogue in Philadelphia, Pa., with the court of common pleas of Philadelphia, Pa., corner of Sixth and Chestnut streets, in said city and state. My papers for said naturalization I thought lost, having, in 1876, lost my trunk, which contained all of my papers and my supposed naturalization paper, together with my winter clothing. I have exercised the following rights and duties of a citizen of the United States: I have been voting in New Orleans, La., since 1884 to the present date. I have served as a petit juror in the criminal district court for the parish of Orleans. I have served as a member of the United States Public Health and Marine Hospital Service in 1905; have served as special officer in New Orleans, La., during the 'Charles riot,' to protect negro schools. During three recent epidemics in New Orleans, La., I served as general manager of the Third Ward Sanitary Association."

[1] It is admitted by the government that the petition was filed in good faith, that the applicant was guilty of no fraud and was entitled to be naturalized under the provisions of the act of 1910; but the point is raised that as notice of the petition for naturalization had not been posted for 90 days before the decree was entered, in accordance with section 6 of the act of Congress of June 29, 1906, the order admitting the defendant to citizenship is illegal and void. As supporting its contention, the United States relies particularly on the cases of United States v. Peterson, 182 Fed. 289, 104 C. C. A. 571, and In re Schrape (D. C.) 217 Fed. 143. These cases are undoubtedly in point, but are not of controlling authority, and I do not find them

persuasive, as it has been the settled policy of this court to waive the posting of the application in cases coming under the special acts, when its enforcement would work a hardship and there is no doubt of the good faith and eligibility of the applicant.

In the administration of the naturalization laws the courts are vested with large discretion, and this is particularly true of the amendment of 1910. It is a familiar rule that statutes are to be given a reasonable construction, so as to avoid hardship, injustice, and even great inconvenience. In construing the amendment of 1910, it is inconceivable to my mind that Congress should have intended that a man who believed himself to be a citizen and had been honestly and patriotically acting as a citizen on that assumption, while relieved of the delay incident to filing a declaration of intention, should be held up for 90 days, or perhaps longer, when it might be vitally important to him that there be no hiatus in his status as a citizen, and to no good purpose. In the exercise of what I considered sound discretion, I have immediately naturalized honorably discharged sailors and soldiers of the United States who were seeking re-enlistment, a member of the bar who was a candidate for public office, a director of a national bank, and many others similarly situated. The defendant in this case is well known to me to be a patriotic, honorable, law-abiding man. At the time he applied for naturalization he had been appointed by the board of health to aid in the eradication of bubonic plague in New Orleans and was ineligible unless a citizen. I considered, as I did with regard to the others, that the public interest, as well as his own, required his immediate naturalization.

The government relies, however, on the concluding clause of the act in question, to wit:

"* * * But such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens."

This clause but shows Congress must have considered that without it an applicant coming within the terms of the act would be subject to none of the provisions of the general law. It, of course, applies to anything required to be done by the applicant, such as renouncing allegiance, swearing to defend the Constitution, proving good character, etc. The posting of the application, however, is the duty of the clerk, not of the applicant, and the provision for hearing on stated days, after 90 days' posting, as required by section 6 of the original act, is addressed only to the court. In my opinion these provisions are directory, and not mandatory, at least when applied to persons applying under special acts, and may be disregarded in the sound discretion of the court. It is not to be presumed the court will knowingly admit to citizenship an unworthy person. If it does so, the United States has the remedy sought to be pursued in this case.

[2, 3] But conceding, for the sake of argument, that I am wrong in these views, there is another aspect of the case equally fatal to the government's right of action. By virtue of section 15 of the act of 1906 the United States may sue to cancel a certificate of naturalization on the ground of fraud or illegality. It is conceded there was no

fraud in this case, and the only illegality complained of is the failure to post the application for 90 days. The posting of the application is clearly a part of the procedure, and at most an irregularity. Irregularity is not synonymous with illegality. Illegality denotes a radical defect, while irregularity is a want of adherence to some prescribed rule or mode of proceeding. See Words and Phrases, vol. 4, p. 3389, verbo Illegality. The statute gives no right of action to cancel a certificate of naturalization for irregularity, and aside from that fact the proceeding is in the nature of a bill of review, and will not lie because of mere irregularity in procedure. U. S. Bank v. White, 8 Pet. 262, 8 L. Ed. 938. Furthermore, the bill will not lie unless the party is aggrieved by the decree, and it makes no difference that he might have insisted on the error at the original hearing or on appeal. Whiting v. U. S. Bank, 13 Pet. 6, 10 L. Ed. 33; Burley v. Flint, 105 U. S. 247, 26 L. Ed. 986.

There is not the slightest doubt that, if the government should prevail in this proceeding, the defendant could immediately file a new petition and be naturalized at the end of 90 days. The only possible damage the government could claim to have suffered would be the violation of its public policy. This apparently was the main ground on which the decision in the Peterson Case, supra, rested; but that ground is no longer tenable, for Congress, in passing the Naval Appropriation Act of June 30, 1914 (38 Stat. 395, c. 130), perhaps to overcome the effect of that decision, has provided for the immediate naturalization of honorably discharged members of the Navy, Marine Corps, and Revenue Cutter Service. It is well known that until quite recently sailors of the United States were popularly and officially considered to be citizens by the mere fact of their enlistment and service, and, but for a decision of the Comptroller denying them increased pay on re-enlistment unless regularly naturalized, it is doubtful that any special naturalization legislation would have been adopted in their favor. There is no difference as to desirability between sailors and civilians of the same class as the defendant and a public policy that would admit one to immediate naturalization may well be invoked in behalf of the other.

On the whole, the bill is without equity, and will be dismissed.

In re McGUIGAN.

In re SMITH.

(District Court, N. D. New York. March 24, 1916.)

MARSHALING ASSETS AND SECURITIES ⇐4—BANKRUPTCY—PROCEEDINGS—DISTRIBUTION OF PROPERTY.

A bankrupt, who had already mortgaged his residence, acquired other property subject to mortgages, payment of which he assumed. Thereafter he gave a second mortgage on his residence to the mortgagee of the last-acquired property, subsequently selling such property to third persons, who agreed to pay the several mortgages, including the second one on

his dwelling. *Held*, that on his bankruptcy, the bankruptcy court, being one of equity, would not, on foreclosure of the first mortgage on the bankrupt's dwelling, apply the surplus to the payment of the second mortgage, which had been assumed by the bankrupt's grantees, although after foreclosure by the second mortgagee, on failure of the grantees to discharge the mortgage, such surplus would be subject to payment of any deficiency.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. § 4; Dec. Dig. ⟸4.]

In Bankruptcy. In the matter of the bankruptcy of Patrick F. McGuigan. Application by Edward L. Smith, as trustee of the bankrupt, to continue an injunction against sale on foreclosure of property owned by the bankrupt, and, on the other hand, to vacate the injunction absolutely and allow a sale on foreclosure. Injunction ordered on condition.

This is an application on the one hand by Edward L. Smith as trustee in bankruptcy of the above-named bankrupt to continue an injunction against the sale on foreclosure of certain property owned by the bankrupt situate in the city of Utica, and on the other hand to vacate the injunction absolutely and allow a sale in foreclosure.

Henry F. & James Coupe, of Utica, N. Y., for holder of mortgage.
P. H. Fitzgerald, of Utica, N. Y., for trustee in bankruptcy.

RAY, District Judge. There is a slight difference between the trustee in bankruptcy and the owner of the mortgage now in process of foreclosure as to the amount due thereon, but there is no dispute as to the validity of the mortgage. The owner of the mortgage claims that the amount due is about $3,400 while the trustee asserts that the amount due is only about $3,200. There are some unpaid taxes, but this is included in the amount above stated.

The mortgaged property situate in Utica and covered by this mortgage sought to be foreclosed is concededly worth at least $5,000. The holder of this mortgage James H. McLoughlin as administrator, etc., of Mary F. McLoughlin, deceased, assignee of the mortgage, which was given to one Rosa F. Baechle July 17, 1905, to secure the sum of $3,000 is therefore perfectly secure and in no danger of loss. The mortgage is due, and he is entitled to his money at an early day. The trustee in bankruptcy can sell this property free and clear of all incumbrances under an order of this court and give a perfect title. The disposition of the surplus can await further proceedings. There are other facts and circumstances, however, which have a bearing on what ought to be done in the premises.

September 26, 1911, one Herbert E. Carter was the owner of a hotel property situate in the village of Chittenango, Madison county, N. Y., and on that day he conveyed same to Margaret McGarry and William H. McGarry, her husband, and they gave to Carter on that day a mortgage thereon for the sum of $2,000 which mortgage is past due. On the same day the McGarrys gave to the West End Brewing Company another mortgage, covering the same property, and also certain real estate in Utica, Oneida county, N. Y. (not that being foreclosed) to secure the payment of the sum of $3,000. This mortgage is past

due. November 11, 1912, the West End Brewing Company, in consideration of the sum of $500, released from the lien of said $3,000 mortgage the property situate in Oneida county, but the consideration received, $500, was not applied on the mortgage, but to the payment of an account for beer sold and delivered to the McGarrys. This was done by agreement between the West End Brewing Company and the McGarrys. On the 6th day of November, 1912, Margaret McGarry, then the owner of this hotel property in Chittenango, conveyed the same to Patrick McGuigan, now bankrupt, in consideration of the sum of $1, as recited in the deed, and McGuigan, in such conveyance, assumed and covenanted and agreed to pay with interest thereon from November 15, 1912, the said mortgage of $2,000, given to Carter and also assumed and covenanted to pay, with interest thereon from November 15, 1912, the said mortgage for $3,000, given to the West End Brewing Company. The assumption of these two mortgages by Patrick McGuigan was a part of the consideration for the conveyance to him. On the same day Patrick McGuigan gave to the West End Brewing Company a further mortgage of $2,000, covering not only the hotel property in Chittenango, but his house and lot in Utica, described in and covered by the mortgage to Rosa F. Baechle, and now owned by James McLoughlin, as administrator aforesaid. This mortgage of $2,000, given by McGuigan to the Brewing Company, thus became a second mortgage on the property in Utica owned by McGuigan, and also described in the Baechle mortgage now being foreclosed. There is a dispute and contest as to the amounts due on the $2,000 mortgage and the $3,000 mortgage given by the McGarrys, and there is no satisfactory proof as to the present value of the hotel property in Chittenango.

On the 4th day of November, 1914, said Patrick F. McGuigan, now bankrupt, contracted to sell the said hotel premises situate in Chittenango to Nelson Abbott and Ella B. Abbott, parties of the second part, in consideration of the sum of $8,000, which the Abbotts agreed to pay, and the agreement provided that the sale and conveyance was made subject to the mortgage for $2,000, given by the McGarrys to Carter, then held by a Dr. Jenkins of Auburn, N. Y., and also subject to the mortgage for $3,000, given by the McGarrys to the West End Brewing Company, and also subject to the mortgage of $2,000, given by McGuigan and wife to the West End Brewing Company. The Abbotts agreed to assume the payment of the said three mortgages, then amounting to $7,000, principal. Subsequently and January 2, 1915, a deed was given of this hotel property in Chittenango by the McGuigans to the Abbotts, and they now own, occupy, and possess the same In such deed the Abbotts assumed and covenanted and agreed to pay the said three mortgages as part of the consideration of the conveyance. The language of the assumption of the payment of these mortgages is:

"The parties of the second part [Abbotts] hereby assume and agree to pay, as part of the purchase price of said premises, the mortgages of $2,000.00 and $3,000.00 and $2,000.00."

Abbott and wife paid at that time $1,000, and the West End Brewing Company received it. The Abbotts have paid about $600 on these mortgages. The first mortgage on the Chittenango property is now held by Frank X. Matt, the president of the West End Brewing Company, and the other two mortgages for $3,000 and $2,000, respectively, are owned by that company. Abbott says he has paid about $200 on the principal of the mortgages assumed by him and his wife.

In equity and justice the Abbotts are to pay the $2,000 mortgage, which is now a lien on the house and lot in Utica, and which the plaintiff in the foreclosure action is now seeking to sell. If the Abbotts pay, or are held to pay as they ought, then this house and lot in Utica will be released from the lien of the $2,000 mortgage and the surplus over and above the mortgage now being foreclosed will go to the creditors of McGuigan. This ought to be the result, and this result ought to be brought about. Just how it shall be done and ought to be done it is not now necessary to determine, but it is perfectly plain that no part of the value of this house and lot in Utica should be eaten up in costs, and it is also evident that the trustee in bankruptcy should have the control of the sale thereof; the sale being fair and open and on due notice to all concerned. The surplus after paying the mortgage held by McLoughlin and the taxes should be deposited in court subject to the determination of the rights of the parties including the trustee in bankruptcy thereto. Clearly the West End Brewing Company should not have it applied on their mortgage at present for the benefit of the Abbotts and to the exclusion and injury of the creditors of McGuigan. Without so deciding it would seem but just and equitable that the West End Brewing Company should pursue its remedy by foreclosure against the Abbotts. If that company fails there, the surplus arising from a sale of the Utica property will be applicable to the payment of the balance of their claim. The court in bankruptcy is a court in equity, and so far as possible should do equity. It cannot exercise jurisdiction over the Chittenango hotel property, but it can protect the creditors of McGuigan to an extent at least.

Unless the trustee in bankruptcy stipulates the amount due on the mortgage held by McLoughlin as administrator and now in process of foreclosure, the foreclosure suit pending may proceed to judgment for the purpose of ascertaining and determining the amount due on such mortgage. If such stipulation is made so that there is no dispute between the trustee in bankruptcy and the administrator, then the plaintiff in the foreclosure action is absolutely enjoined and restrained from taking further proceedings in such foreclosure, but the trustee in bankruptcy is directed to at once advertise the Utica property so mortgaged for sale on 10 days' or two weeks' notice to be extensively given and to sell the same free and clear of all liens and incumbrances, and from the proceeds pay to the plaintiff in the pending foreclosure action the amount due on such mortgage, with interest to the date of payment, and from the proceeds of sale he will also pay all taxes due and unpaid assessed thereon. The question of the payment of costs in the foreclosure up to this date is reserved for further consideration. The

balance of the proceeds of such sale will be deposited in one of the depositories of this court by the said trustee in a special fund, taking the place of the real estate sold and the rights of the parties therein, and thereto will be hereafter settled and determined.

There will be an order accordingly.

LINCOLN COUNTY v. COAST BRIDGE CO. et al.

(District Court, D. Montana. March 31, 1916.)

No. 395.

1. BRIDGES ⟸20(4)—LIABILITY OF CONTRACTOR—UNDERMINED PIER—CONJECTURAL DEPTH.

Where, in an action by a county against the contractor and its surety to recover for the loss of a bridge, alleged to have collapsed through the failure of the contractor to build the center pier according to contract, it was established that the pier was undermined by the current and fell because of the failure to drive the piles to refusal, defendant could not escape liability on the ground that, the undermining having refilled, its extent could not be definitely known, and that therefore, for all that appeared, the piles might have been undermined if sunk to any depth; such theory being mere conjecture.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. ⟸20(4).]

2. EVIDENCE ⟸69—BRIDGE CONTRACT—LAWFUL PERFORMANCE—PRESUMPTION.

In an action against a bridge contractor and its surety to recover for the loss of the bridge through improper construction, defendant surety could not escape liability on the ground that, the bridge being across a navigable stream, and there being no proof of the approval of the plans and specifications by the Secretary of War, as required by the act authorizing the bridge, the contract did not take effect, but the bridge was unlawfully built, excusing the surety from liability, since the necessary approval will be presumed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 90; Dec. Dig. ⟸69.]

3. PRINCIPAL AND SURETY ⟸90—CONTRACT—UNLAWFUL PERFORMANCE—DISCHARGE.

Assuming that the contractor had unlawfully built such bridge without securing the necessary approval of the Secretary of War, his surety would not be thereby discharged in the absence of acquiescence by the county in such illegal performance, since a surety engages that the principal will lawfully perform.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 140; Dec. Dig. ⟸90.]

4. PRINCIPAL AND SURETY ⟸159—CONTRACT—UNLAWFUL PERFORMANCE—ACQUIESCENCE—BURDEN OF PROOF.

The burden of proof was on such surety to show that the county acquiesced in the unlawful act of the contractor in building the bridge without the approval of the Secretary of War.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 428–435; Dec. Dig. ⟸159.]

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5. PRINCIPAL AND SURETY ⟸161—CONTRACTOR'S BOND—ILLEGAL PAYMENTS—DISCHARGE.

The fact that the county made payments to the contractor out of order, or that such payments were anticipated, did not in itself show a substantial departure from the contract discharging the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 85, 439–441; Dec. Dig. ⟸161.]

6. BRIDGES ⟸20(5)—ACCEPTING BRIDGE—DEFECTS—WAIVER.

The acceptance of such bridge by the county waived all the contractor's defaults discoverable by reasonable inspection, but not defects not so discoverable.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸20(5).]

7. BRIDGES ⟸20(6)—BREACH OF CONTRACT—LOSS OF BRIDGE.

Where the collapse of such bridge left standing only the shore pier and approaches, the loss was total, entitling the county to the contract price paid for the bridge, and it was not the county's duty to incorporate such remaining portions into a new bridge in mitigation of damages.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 46; Dec. Dig. ⟸20(6).]

At Law. Action by the County of Lincoln against the Coast Bridge Company, a corporation, and another. Judgment for plaintiff.

J. B. Poindexter, Atty. Gen., W. H. Poorman, Asst. Atty. Gen., Jas. M. Blackford, Co. Atty., of Libby, Mont., and Sidney M. Logan, of Kalispell, Mont., for plaintiff.

Gunn, Rasch & Hall, of Helena, Mont., for defendants.

BOURQUIN, District Judge. Action by a builder of a bridge against the contractor's surety. Defendants' objection to any evidence "for the purpose of the record, * * * simply a formal matter," no defect in the complaint being pointed out, was overruled as of a class disfavored, in that it tends to defeat justice rather than to promote it, the court stating if the complaint was defective, amendment would be allowed. If necessary, amendment is deemed made to conform to proof.

The complaint is that the contractor, the Coast Bridge Company, failed to perform its contract, in that it did not drive the center pier piles as required by specifications, and because of which the pier undermined and with the bridge fell. The answer is of denials only. The structure was a highway bridge of 18-foot floor width and two 220-foot spans, supported by a center pier. It was at Rexford, Mont., and over the Kootenai river, a swift mountain stream over 400 feet wide, the water stages varying in depth from 12 to 30 feet.

The contractor agreed to provide "all material, labor and other things of every description" to build the bridge "in good workmanlike and substantial manner * * * so as to make it a perfect bridge according to the plans and specifications" furnished by it. These plans were indefinite in the matter of the depth of the center pier, extent of concrete, and whether or not piles would be used therein, the contractor leaving "that open to be determined after" excavation.

The specifications provided that all piers would "be sunk to the elevation called for on the plans," and "piles shall be driven inside if so ordered by the engineer"; that piles would be round, not less than 12 inches at the larger end and 9 at the smaller, and of the "length called for on the plans," though the contract, of which the specifications were a part, stated the length "shall be specified and determined by the county or its representative"; and that the piles would be shod and ringed if necessary, and driven with a hammer of not less than 2,000 pounds, and under the last blow falling 20 feet, the penetration not to exceed one-half inch.

References to "the engineer" are ambiguous, save in one instance to "the local engineer." If construed to import the builder's engineer (though these were the contractor's specifications), there was no stipulation obligating the builder to secure an engineer. It was optional, and the builder secured none. For the center pier the contractor excavated about 8½ feet deep in sand and gravel. Its superintendent testified the bottom was then tested with an inch pipe and a maul and by four piles 8 inches square, which were driven until destroyed, "probably 4 feet" deep. He ordered like piles 22 feet long, and 62 of them were driven, it would seem, to depths varying from 3 feet 5 inches to 3 feet 11 inches.

When the driving commenced the water was about 18 feet deep, and gradually rose, each pile being driven until its top was practically at water level. They were not ringed nor shod, and broomed little, if any. Around and upon them the concrete center pier was constructed. About six months later the water undermined the pier, so that it overturned and the bridge fell. A diver found that about 16 piles at the downstream end of the pier were intact, the others having been sheared off. Without further detailing the evidence and conflicts in facts and opinions, the finding is that the piles were not driven in accordance with the contract and to refusal, and that because thereof the pier and bridge fell.

[1] It is probable as urged by defendant that these smaller piles would not endure driving strictly as specified. But for all that appears the builder did not order them, and their use was the contractor's choice. Even if maintainable that the builder had knowledge and acquiesced, in that one of its board of commissioners at least saw the piles after they were driven, it had no knowledge that they were not driven as nearly as possible in accordance with specifications and to refusal. And this view of the piles was from the falsework, nothing appearing that it sufficed to and did disclose smaller piles had been driven. Furthermore, the board member was in substance told by the contractor's superintendent that the piles had been driven 7 feet and to refusal, and so satisfied. Since the undermining refilled and its extent is not definitely known, it is urged that it may have been so great that in any event the result would have been the same. The failure to drive the piles to refusal is a sufficient and reasonable cause for the destruction of the bridge. It is clear the undermining was so great that these piles could not resist it. That it might also have been so great that these piles, driven to whatever unknown depth, would

have been refusal could not have resisted it is mere conjecture and not permissible.

Curiously enough, defendant introduced evidence, and contends that the excavation for the pier should have been deeper and no piles used; that the damage is due to defective plans and poor engineering. To concede it would not seem to better defendant's case, for the contractor was responsible for both plans and engineering. And if necessary, the complaint would be deemed amended to conform to this contention and proof, involving no change in the cause of action, but only in the particulars thereof.

[2–4] The contract provided it would not take effect until Congress authorized the bridge, and the War Department approved the plans and specifications. Congress authorized the bridge (see 37 Stat. 71) to be built in accordance with Act March 23, 1906, c. 1130, 34 Stat. 84 (Comp. St. 1913, §§ 9961–9968). This latter act provides that a bridge over navigable waters authorized by Congress, shall not be built until the plans and specifications have been approved by the Secretary of War and the Chief of Engineers. Violation of the act is a misdemeanor punishable by fines, and the bridge may be removed.

For the purposes of this case the contract and acts of the parties suffice to establish that Kootenai river is navigable. There is neither allegation nor direct evidence that the approval aforesaid was secured. Because thereof defendant urges that the contract did not take effect, that the bridge was built unlawfully, and that the surety is not liable. The contract was lawful; and, since it has been performed, it must be presumed it was, as it could be, lawfully performed—that the contingency happened (the necessary approval) upon which it was to become effective. Then, too, so far as this action is concerned, the obligation to secure such approval, if not more, was as much the contractor's as the builder's. The former could not lawfully perform its contract prior to approval. A surety engages its principal will lawfully perform. And if the latter unlawfully performs its contract, the surety is not discharged unless the builder knew of and acquiesced in such unlawful performance. And upon the surety is the burden to prove this.

[5] It is admitted payments were made to the contractor "out of the order" of the contract, and were "anticipated"; but this does not serve to show that substantial departure from the contract which alone may discharge a surety in that it may injure him. If the payments were made out of the order stipulated, it may be the contingencies upon which payments were due happened out of the order anticipated, and that the payments were properly made. Again, county warrants seem to have been referred to as payments, and it does not appear when the money was paid or the warrants even delivered.

[6, 7] The builder accepted the bridge. This waived all the contractor's defaults discoverable by reasonable inspection, like failure to paint the completed bridge (which, however, does not appear to have been of the contract), but not those not so discoverable, like the defective piles. For the latter, but not the former, the surety is liable.

There remains but the amount of damages. The contract price paid

was $29,345.40. The bond is in the sum of $30,000. Of the bridge the shore piers and approaches alone remain. The county has not rebuilt. It may not. It would not seem bound to do so and to incorporate these remnants to mitigate damages. Under the circumstances, such action well may be imprudent and impracticable. Its right is to refrain or to build of a new design and materials. See U. S. v. Fidelity Co., 236 U. S. 526, 35 Sup. Ct. 298, 59 L. Ed. 696; 3 Suth. Damages, § 699. The loss is total. Any salvage is the contractor's.

Plaintiff does not claim or suggest it is entitled to interest, and the judgment will be for the contract price paid and costs.

CONSTANTINE & PICKERING S. S. CO. v. WEST INDIA S. S. CO. et al.

(District Court, S. D. New York. July 14, 1914.)

1. SHIPPING ⟸58(3)—TIME CHARTER—DELAY IN REDELIVERY—DAMAGES.
Where there is delay in redelivery of a ship after the expiration of a time charter in assessing damages, the owner is entitled to the best going rate from the place of delivery. That rate, however, is not necessarily the highest that could have been obtained for an outbound cargo; but, as affecting such rate, it is proper to take into consideration the position in which the ship would be left at the end of the outward voyage with respect to securing another cargo.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. ⟸58(3).]

2. SHIPPING ⟸58(3)—INJURY TO VESSEL BY CHARTERER—DAMAGES.
Findings of a commissioner as to damages recoverable by the owner of a vessel for injury by grounding, due to the fault of a charterer, reviewed.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. ⟸58(3).]

In Admiralty. Suit by the Constantine & Pickering Steamship Company, owner of the steamship Kingswood, against the West India Steamship Company for breach of charter, impleaded with the S. W. Bonsall Timber Properties. On exceptions to commissioner's report awarding damages. Exceptions overruled.

For prior decision, see 199 Fed. 964.

The steamship Kingswood was chartered from her owners, Constantine & Pickering Steamship Company, by the West India Steamship Company at the rate of £650 per calendar month. The charter provided for redelivery at a United States Atlantic or Gulf port. The term of hire ended at 7 p. m. on April 10, 1912, and the vessel was not redelivered to the owners in a United States port until 3 p. m. on May 9th following. She was used by the West India Steamship Company during this overlap period of 28 days and 20 hours in the West India trade, in which trade she had been employed by the charterer. The market rate for steamers had risen since the charter was made, and the market rate for the Kingswood during these 28 days and 20 hours, if employed in the West India trade with redelivery in a United States, Atlantic or Gulf port, was £875 per month. If the steamship were employed on a voyage from a United States port to an English port the charter party rate was £1,175 per month. The reason for this difference was that substantially the entire profit in a trip to Europe lay in the voyage eastward; the testimony being undisputed that vessels were frequently brought back from

Europe in ballast. Consequently a rate to Europe was exacted sufficiently large to cover the expense of bringing the vessel back in ballast.

John M. Woolsey, of New York City, for libelant.

Clarence Bishop Smith, of New York City, for respondent West India S. S. Co.

LEARNED HAND, District Judge (after stating the facts as above. [1] Upon the damages for delay the point is this: Where there is delay in the surrender of the ship at the end of a time charter, or an "overlap," so-called, whether in assessing damages the best going rates of hire may be taken at the place of delivery without regard to the position in which the ship would have left at the termination of the fixture. Freights were very high, going eastward, at the time of delivery required in the charter, owing to an English coal strike; but they were low coming west. The commissioner declined to give as damages the high eastward hire, without considering the position of the ship when she arrived in England, but thought that the low rates upon a return more than offset the advantage, even on the libelant's figures of the profitable voyage eastward. He consequently concluded that the best offerings available at the time fixed for delivery were in the West India trade, and he assessed damages on that basis.

Two points arise: Is the principle right? Was its application correct? Damages, are, of course, meant to make whole the party injured. The effort here should be to produce, so far as money can, the same result as though the Kingswood had been delivered at 7 p. m. on April 10, 1912, instead of May 9th, at any United States Atlantic, or Gulf port, excluding Key West. The owners could in that case have employed her upon several kinds of ventures, European and West Indian, and it is fair to allow them the most profitable. Damages based upon any particular employment, however, presuppose that it is reasonably certain which of all possible employments would have been chosen. Hence it involves a consideration of the motives which would have operated at that time and place to determine the choice between open possibilities. It is, therefore, not only proper, but inevitably necessary, that the negative considerations should be regarded as well as the positive. If the owners were seeking for the most profitable employment, it is, of course, at once apparent that their choice would have been influenced by the position of the ship when the first voyage was completed. It was asked: How far may this inquiry go? The answer is that the court, in deciding what would have been the owner's choice between offerings, must extend its view just so far as, and no further than, the owners might be reasonably expected to forecast the future.

The principle being correct, it remains to apply it. Upon the libelant's own figures the profit upon an eastward voyage was £29.9.5 per diem. The time rate in the United Kingdom was 4/6 on a dead weight basis, which made a net profit of £8.14.9 per diem. On a calculation (Exhibit JJ) of a voyage from Norfolk to London River and thence on time charter to a South American port, the total being 86 days, Cox, the respondent's witness, puts the net at £1,496.9.5, a little less than if she had been employed in the West India trade for the same

time on the basis allowed by the commissioner and at going rates. The libelant also mentions fixtures for rate charters out of the United Kingdom, some to South American ports, ranging from 8/3 to 15/9; but these mean nothing, without some calculation of the time which they would take, and offer no basis for comparison. Indeed, if Cox is to be believed, it was cheaper in January, 1913, to bring over a ship in ballast than to accept any of the rate charters offering at the time for South American ports, though these were in every case higher than the offerings in May, 1912 (Exhibit FF). Thus I may safely lay out of consideration the rate charter offerings altogether, upon the uncontradicted testimony. Yet it is not necessary to prove that the ship must have come back in ballast, notwithstanding the rate charters. The point is that the libelant did not show that the coal voyage would have been more profitable from the owner's standpoint than the West India trade. As we have no basis of comparison but the 4/6 time charter in dead weight, and as that results to the slight advantage of the commissioner's basis, I can see no reason to suppose that he was mistaken. The owner's actual decision to accept a coal charter is, of course, not conclusive.

I do not understand that the finding of the commissioner as to the probable earnings in the West India trade are questioned. This matter I have therefore not considered. The exceptions are overruled.

Grounding Damages.

[2] On the other hand, it seems to me that in the matter of the grounding damages the commissioner has placed upon the libelant a burden of proof rather too severe. The testimony is uncontradicted, which was, to be sure, to be expected, and it has been already found that the ship took the ground for 24 hours from the evening of November 7th. During a part anyway of this time it was blowing heavily, and there is some testimony that the ship rocked as she lay. The officers all found her injured in the bilge tanks when she got off. The two surveyors who examined her four months later corroborated their conclusions. Each thought the bilge keel and fore foot damage was caused by grounding, and I agree with them. I find it very hard to see how any ice to be found in the Hudson river could damage the fore foot and bilge keel of such a vessel, eight feet under water. As there is no such ice, one must assume that she rode it down under her as she forced her way through. There are Newfoundland boats built to ride upon ice this way, like Great South Bay "scooters"; but the lines of an ordinary vessel would not, I should suppose, permit it. In any case, the uncontradicted testimony of disinterested experts ought not, I think, to be disregarded, even though Murray was not so positive as he might have been upon his cross-examination.

The rudder damages are most perplexing. The officers seemed to think that the damages came from the bending of the pintles while she was aground. The surveyors' theory was that sand had got in, which had cut and worn the bushings, which made a tight journal or bearing for the pintles. This was the reason for the repairs. The testimony is very uncertain as to whether any sand actually did get in; apparently

nearly anything might get in, and it would seem pretty obvious that mere friction must in time wear down the bushings. There is no evidence that any sand actually did get in, and, as I have said, the officers' theory contradicts that source of injury. I remain, after going over the testimony twice, in some doubt as to the cause of the rudder damage. I think, as the commissioner saw the surveyors and may have been controlled in part by their apppearance, that I should not disturb his findings upon that item.

The next item is for hauling the shaft and one day's dry-docking, at eight cents. The shaft hauling may have been for examination of the grounding damage, but when hauled a new tail shaft was put in, and I cannot think it is fair to give the ship the benefit of that outlay when it went to the renewal of a worn-out part. The total expense would have been about $378, but it was reduced to $325. The hauling represents, as I figure it, about $195, leaving $130 for dry-docking. On this the grounding repairs as I have found them may fairly carry $40. The commissioner's findings appear fair enough for the other items, making $452 in all, together with the overlay charges. As I have not allowed for the rudder repairs, it may change the time which should be allowed. Presumably the repairs to the rudder went on with those to the bottom, and, if so, no deduction should be made, and the allowance will be $665.18; but the time taken for the bottom repairs will control, and the item must be left open pro tanto for agreement. Interest will be allowed on the total allowance, when fixed, from the date of payment.

BROWN BROS. CO., Limited, v. SMITH BROS. CO., Limited.

(District Court, E. D. Louisiana. January 17, 1916.)

No. 1806.

1. BANKRUPTCY ⟸210—JURISDICTION OF COURT—LIEN ON FUND.

A court of bankruptcy has jurisdiction over a claim of a lien on the fund in the possession of the court, and the proper remedy is by ancillary bill filed in the bankruptcy proceedings, not by separate suit.

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

2. BANKRUPTCY ⟸188(3)—LIENS—TRUST EX MALEFICIO.

Where the bankrupt had transferred to a bank, as collateral security for a note, an account against the buyer of coffee shipped on an open bill of lading, which, together with the invoice, was delivered to the bank, and by it transferred to the buyer, with a request to remit directly to the bank, but the buyer by mistake remitted to the bankrupt, which, then being insolvent converted the money to its own use, a trust ex maleficio was created, which gave the bank a lien on all of the assets of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 295; Dec. Dig. ⟸188(3).]

3. BANKRUPTCY ⟸188(1)—LIENS—PARTICULAR FUNDS.

The fact that the bankrupt deposited the particular money received from the buyer in another bank and checked it all out before the trustees were appointed, so that none of it came into their hands, does not defeat the

bank's right to a lien on the other assets, which did come into the trustee's hands, and which were more than sufficient to pay the claim.

[Ed. Note.—For other cases, se Bankruptcy, Cent. Dig. §§ 286–289, 291, 293, 294; Dec. Dig. ⊂⊃188(1).]

4. BANKRUPTCY ⊂⊃188(1)—LIEN OF TRUSTEES—PROPERTY OF THIRD PERSONS.

Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), giving the trustees the lien of a creditor holding an unsatisfied judgment, does not defeat the lien of the bank, since such creditor could not attach the property of third persons accidentally coming into the debtor's hands.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286–289, 291, 293, 294; Dec. Dig. ⊂⊃188(1).]

5. BANKRUPTCY ⊂⊃364—LIEN—ESTOPPEL—RECEIPT OF DIVIDEND.

The receipt, by one having a lien on the funds in the hands of trustees in bankruptcy, of a dividend on a claim including that for which the lien is claimed, does not estop the claimant from thereafter asserting its lien, subject to deduction for any dividend received on the amount of the claim secured by the lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 485, 504; Dec. Dig. ⊂⊃364.]

6. CARRIERS ⊂⊃56—BILL OF LADING—TRANSFER—COLLATERAL SECURITY.

Where a seller, as collateral security for a note, transferred to the holder the bill of lading and invoice for goods sold, to enable it to receive the purchase price thereof, the account was transferred absolutely; the seller retaining no contingent interest in it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 168; Dec. Dig. ⊂⊃56.]

7. CARRIERS ⊂⊃58—BILL OF LADING—PLEDGE OF ACCOUNT—NOTICE.

A notice given by a bank, to which the seller had transferred a bill of lading and invoice, to the buyer that remittance was to be made directly to the bank, is substantially the same as notice to the buyer that the account had been pledged.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179–190; Dec. Dig. ⊂⊃58.]

In Bankruptcy. Proceeding by the Brown Bros. Company, Limited, against the Smith Bros. Company, Limited. On exceptions by the trustees to a report of the master granting the petition of the Commercial-Germania Trust & Savings Bank to require the trustees to turn over to it a fund in their possession. Exceptions overruled, and judgment for petitioner.

Merrick, Gensler & Schwarz, of New Orleans, La., for appellants.
Charleton R. Beattie, of New Orleans, La., for appellees.

FOSTER, District Judge. In this matter the Commercial-Germania Trust & Savings Bank filed a petition, praying that the trustees turn over to it a fund of $4,153. Issue was joined, and the matter was referred to Hon. William A. Bell, referee, as special master. There was an exception to the jurisdiction of the court, on the theory that petitioner should file a plenary suit, and could not intervene in the bankruptcy proceedings. By waiver and agreement the question of jurisdiction was also submitted to the master. In due course the master filed his report, stating the case and reviewing the law, and found in favor of the petitioner on the question of jurisdiction and

also on the merits. The trustees have excepted specifically to his findings, but I do not consider it necessary for the disposition of the case to review the exceptions in detail.

[1] The exception to the jurisdiction is not well taken and was properly overruled. The fund upon which the petitioner claims a lien is in the possession of the court, and it would for that reason alone have jurisdiction, and the proper and most convenient method is by ancillary bill filed in the bankruptcy proceedings.

[2, 3] The facts are substantially as follows: On May 28, 1913, the bankrupt executed a demand note, and as collateral security assigned to the petitioner an account against J. S. Brown & Bro. Mercantile Company, of Denver, Colo., arising from the sale of 263 bags of coffee. The coffee was shipped on an open bill of lading, which, together with the invoice, was turned over to the bank and transferred by it to the purchasers, with request to remit direct to the bank. When the bill became due, Brown & Bro. Company by mistake remitted the amount of the invoice direct to the bankrupt, which was even then insolvent. The bankrupt received the remittance, said nothing about it to the bank, and deposited it in another bank. The same day it was checked out and used to pay the debts of the bankrupt, causing an overdraft in that bank. At the time of bankruptcy there were no funds in that particular bank to the credit of the bankrupt, but, on the contrary, there was a debit. The trustees therefore contend that the fund never came into their possession. It is shown, however, that large assets, of which the cash alone was $177,143.15, more than ample to pay the claim, came into the possession of the trustees after their election.

In my opinion, it is immaterial whether the identical money received from Brown & Bro. Company actually went into the possession of the trustees; the fund was clearly traced into the possession of the bankrupt, and there was an ample amount of other moneys to make it good. The bankrupt, when it parted with the coffee, received the value thereof, and there was no change in amount of assets. When it received payment direct from Brown & Bro. Company, and wrongfully converted the money to its own use, this amount entered into and became part of the assets subsequently passing to the trustees, and a trust ex maleficio was thereby created, by virtue of which the petitioner has a lien on all of the assets of the bankrupt, whether money or other property.

[4] The trustees further contend that by virtue of the amendment of 1910 (section 47a), giving them the lien of a creditor holding an unsatisfied judgment, they are in a superior position to the bankrupt itself with regard to the fund, in the event it should be held they received it into their possession. With regard to this, it is of course clear that a creditor holding an unsatisfied execution could not attach the property of a third person accidentally in the possession of the bankrupt, and therefore it is equally clear that with regard to this fund the trustees take nothing by the amendment.

[5] It is also urged that, as petitioner has received a dividend as a creditor on a claim including this debt, with other accounts, and

the sum has been paid out of assets including the fund herein claimed, it is estopped to set up any right or title to the said fund. The trustees have lost nothing by the other claim. Petitioner should not be estopped by any action on its part in receiving dividends as a creditor, though of course there should be a deduction of any dividend based on the amount herein claimed.

[6, 7] The trustees make the point that petitioner sets out that it purchased the invoice, while the facts show that the account was pledged as collateral security of a note. They also say that as a pledge it is technically defective for want of notice of the pledge to the debtor. Under the facts of the case, there could be no doubt that the account was transferred to the bank absolutely and irrevocably, the bankrupt retained no contingent interest in it, and it was not contemplated the note would be taken up, except by the remittance from the debtor. The notice given to the debtor that the remittance was to be made direct to the bank was substantially the same as notifying it that the account had been pledged.

The exceptions to the master's report will be overruled, and there will be judgment in favor of the petitioner in accordance with these views.

EQUITABLE TRUST CO. of NEW YORK v. WESTERN PAC. RY. CO.

(District Court, N. D. California, Second Division. February 21, 1916.)

No. 169, In Equity.

1. COURTS ⟸526—PRIORITY OF JURISDICTION OF SUBJECT-MATTER—PROTECTION BY INJUNCTION.

A court of equity may always control the parties of whom it has acquired jurisdiction in a suit before it for the purpose of protecting its jurisdiction of the subject-matter of the controversy from being in any wise interfered with or jeopardized, and an order to that end, although it may indirectly arrest, through a party, the prosecution of an action in another court, is not an invasion or interference with the jurisdiction of the latter tribunal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1449; Dec. Dig. ⟸526.]

2. COURTS ⟸526—PRIORITY OF JURISDICTION—PROTECTION BY INJUNCTION.

A court of equity which has, through its receivers, taken possession of the property of an insolvent corporation at suit of creditors has the right, and it is its duty, to retain and protect its prior jurisdiction for the determination of all matters essential to the full, final, and complete administration of the property and rights involved, and will to that end enjoin any party before it from proceeding in another jurisdiction to try any question so connected with the controversy, or involving any of the rights concerned in such way as to interfere with its primary jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1449; Dec. Dig. ⟸526.]

3. COURTS ⟸526—PRIORITY OF JURISDICTION—PROTECTION BY INJUNCTION.

Defendant railroad company entered into a number of contracts to which the Denver & Rio Grande Railroad Company and other railroad companies were parties. These contracts contained provisions by which advances were to be made to defendant for the completion and equipment

of its road, in consideration of reciprocal covenants and mutual traffic agreements which the parties, respectively, were given the right to specifically enforce. The Denver Company agreed to advance money necessary, in addition to defendant's net earnings, to meet interest and sinking fund payments on its bonds. At the same time a mortgage was executed by defendant securing the bonds which covered the contracts, and the trustee was authorized to enforce the same for the benefit of the bondholders. The trustee brought suit to foreclose the mortgage, and receivers were appointed for all of the mortgaged property. *Held* that, the mortgage and contracts, having been executed at the same time and as parts of the same transaction, were to be construed together; that the foreclosure suit brought all of the contracts within the jurisdiction of the court for the determination of the reciprocal rights of the parties thereunder; that complainant would be enjoined from maintaining a suit in another jurisdiction to enforce separately the agreement of the Denver Company to make advances for interest and sinking fund payments, and incidentally to require an accounting of earnings by defendant, but that complainant would have leave to bring into the suit as parties all parties to the contracts whose interests might be affected.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1449; Dec. Dig. ⊂=526.]

In Equity. Suit by the Equitable Trust Company of New York against the Western Pacific Railway Company. On order to show cause why complainant should not be restrained from further prosecuting a dependent suit in the District Court for the Southern District of New York. Order of injunction granted.

The matter before the court grows out of an order heretofore made in the above cause, requiring the plaintiff herein to show cause why it should not be restrained from further prosecuting a certain action brought by it in the District Court for the Southern District of New York.

The record is voluminous, but the material facts underlying the order may be thus summarized: The plaintiff heretofore, in March, 1915, in its capacity as successor to the Bowling Green Trust Company, the original trustee under a first mortgage or deed of trust made by the defendant, a California corporation, to secure an issue by it of $50,000,000 in bonds, filed its bill in this court, alleging the insolvency of the defendant and its default in the payment of interest on its bonds, and praying a foreclosure and sale of the mortgaged property, and the appointment of a receiver to take charge of the road pending litigation and the marshaling of the assets of the insolvent. Thereupon the court made its order appointing two receivers to jointly take possession of the property of the corporation, consisting of its railroad and other property of every character, including all contracts, choses in action, accounts, claims, etc., with full and ample powers to operate the road, manage, conserve, and realize on its property, and to that end to sue for and enforce any and all rights existing or arising thereon, or flowing therefrom, and to defend any actions brought involving said property, or any part thereof, and restraining any and all persons from in any wise disturbing or interfering with the possession or control of the receivers in any way. Under this order, the receivers at once qualified and took possession and control of the property, entered upon its management, and have since continued to operate it under the direction and supervision of this court.

Of the property of the defendant thus committed to the care and control of the receivers were a large number of contracts and obligations theretofore entered into by and on behalf of the defendant, and still subsisting, between it and other corporations, including the Denver & Rio Grande Railroad Company, the Rio Grande Western Railway Company (and its successor), the Salt Lake City Union Depot & Railroad Company, the Missouri Pacific Railway Company, the Utah Fuel Company, and certain trust companies, such contracts involving intricate and complicated relations between the contracting parties and affecting the management, operation, and control of the property of this

defendant, and that of the other parties thereto as a result of the reciprocal covenants and mutual obligations and duties created by their terms.

Three of these contracts, known in the annals of the defendant and in these proceedings as contracts A, B, and C, were, in pursuance of a preliminary contract entered into between the Denver & Rio Grande, the Rio Grande Western, and this defendant, executed contemporaneously with the mortgage in suit, and, by the terms of the latter instrument, and those of the several contracts as well, were pledged and conveyed under the mortgage with the physical properties of the defendant as security for the bonds which it was given to secure.

As evidencing the nature of the consideration moving the execution of these particular contracts, and the relations and obligations created by their mutual covenants, their several provisions may be generally stated, especially as they bear more or less directly upon the matter presented for consideration. Contract A was between the Rio Grande Western and this defendant as first and second parties, respectively, and the trustee under the mortgage as third party. It recites the fact that the Western Pacific was then under construction, "and will be of great advantage and benefit" to both first and second parties "as a part of a main artery of transportation for Pacific Coast traffic between San Francisco and points in Colorado and east thereof," and that the first party "for the purposes of this agreement, controls substantially all of the capital stock" of second party, the Western Pacific. It then provides that first party shall have the right to use the main line of the Western Pacific as long as the latter's first mortgage bonds are outstanding and unpaid; that all the stock of the latter shall be held by the trustee under the mortgage; that its capital stock shall be increased from $50,000,000 to $75,000,000, the additional stock to be taken by first party and pledged under the first mortgage in like manner; that the Western Pacific is to create an issue of second mortgage bonds in the sum of $25,000,000, which will be purchased by first party at 75 per cent., to the extent necessary to complete and equip the Western Pacific, after the sum realized from the first mortgage bonds shall be exhausted. It also guarantees the equipment of the Western Pacific with rolling stock in accordance with a schedule attached thereto. This is its substance. The Denver & Rio Grande Railroad has succeeded to the rights and assumed all the obligations of the Rio Grande Western under this contract.

Contract B was between the Denver & Rio Grande, designated therein as the "Denver Company," and the Rio Grande Western, designated the "Western Company," as parties of the first part, the Western Pacific, designated the "Pacific Company," as second party, and Bowling Green Trust Company, as trustee under the mortgage in suit, designated as "Trustee," party of the third part. In its fullness, contract B is a voluminous document, with many and very elaborate provisions in great detail for exchange of traffic, furnishing of equipment, operation of through trains, and other matters relating to the physical operation of the properties of the contracting parties in various respects. As to most of these provisions, it will be sufficient to state their purport.

It recites that the Denver Company had no outlet to the Pacific Coast not controlled by a competitor, and that the Western Pacific, when completed, would, with the Denver Company, constitute a through line as a main artery of traffic from Pueblo, Colo., to San Francisco, Cal. By its terms, the Denver Company agrees to deliver to the Western Pacific all its west-bound traffic, whether originating on its own lines or not; to furnish to the Western Pacific sufficient freight cars to handle its tonnage; to purchase semiannually promissory notes of the Western Pacific sufficient in amount to make up any deficiency in operating expenses, taxes, and interest and sinking fund on its first mortgage bonds, and any other expenses necessary to insure the continued and efficient operation of the Western Pacific. In return for these considerations, the Western Pacific agrees to turn over to the Denver all its east-bound traffic so far as lawful; makes provision for a through passenger service over the contracting roads, together with an express grant to the Denver Company of the right to use the main line of the Western Pacific for through passenger trains each way daily. The Western Pacific covenants and guarantees that it will apply all its gross earnings and income to the payment of

its operating expenses, taxes, interest on first mortgage bonds, sinking fund and any other expense necessary to insure the continued and efficient operation of the road, and to faithfully apply any surplus of its earnings after making such payments to the satisfaction, in order of priority, of the advancements made to it by the Denver Company. The contract by its terms expressly provides for the enforcement of any and all of its provisions, either by the Western Pacific Company or the trustee or both, and it further provides that its provisions and obligations shall "run with the railways" of each of the contracting parties, and be binding upon them into whosesoever hands they may come. Certain of the provisions of the contract thus stated generally, constituting what have been denominated in argument as the "financial provisions" or "guaranty clauses," being more material to present consideration, will be found stated in the margin in the language of the contract, since it is these features of contract B which have given rise to the immediate controversy before the court.

By virtue of its succession to the rights of the Bowling Green Trust Company, original trustee under the mortgage in suit, the plaintiff here has succeeded that corporation as trustee under this contract; and the Denver & Rio Grande Railroad Company has, by merger, succeeded to the rights and assumed the obligations under this contract of the original parties of the first part thereto.

Contract C, briefly stated, is an agreement entered into between the Missouri Pacific Railway Company (called the "Missouri Company"), as party of the first part, and the Denver & Rio Grande Railroad Company (called the "Denver Company"), as party of the second part; but it recites that it is made for the benefit of the Western Pacific, and the latter company is expressly therein given the right to enforce specific performance of its provisions. In effect, it establishes the Denver Company, the Missouri Company, and the Western Pacific as one continuous through line from east of the Mississippi to the Pacific Coast, the recital being that "the railway lines of the parties to this agreement, and especially their main east and west lines, together form a through line of connected railway, constituting a main artery of traffic between points on the east of the Mississippi river on the one hand and points in and west of the state of Utah, and it is greatly to the advantage of each and both of the parties hereto that their lines connecting as aforesaid should be operated under close traffic relations as a joint through line," etc. It incorporates the provisions of contract B, and gives the Missouri Company the right specifically to enforce the traffic arrangements therein provided for, both as against the Denver Company and the Western Pacific.

On the 19th day of May, 1915, the receivers filed in this court a petition, setting forth copies of all the contracts and obligations above referred to, including contract B, and also a second mortgage for $25,000,000, given by defendant to the Central Trust Company of New York. In this petition they state that since their appointment they have been, and are now, "diligently investigating all matters and things in connection with said contracts, and particularly the relations now and heretofore existing between said Western Pacific Railway Company and said the Denver & Rio Grande Railroad Company. That said investigation requires the solution of numerous and difficult questions of law, and likewise questions with regard to whether or not all of said contracts are to the best interests of the property and business of said Western Pacific Railway Company committed to the charge of your receivers, and that the same likewise requires an investigation of existing complicated facts, figures, and records, and that your receivers are therefore unable to state at the present time to what extent said contracts should be ratified and affirmed, or what the full duty of your receivers is in regard to the same. * * * That your receivers desire to carry out and enforce the said contracts to the fullest extent necessary, in order to preserve the best interests of all persons interested in or having claims against the said Western Pacific Railway Company, and that, therefore, your receivers desire the advice of said honorable court with relation thereto, at such time as your receivers may be in position to fully present all facts with relation thereto to said court, and that in particular your receivers desire the advice and direction of this court to enable them to take all proceedings necessary and proper, to the end that the

value of the bonds issued under the first mortgage or deed of trust hereinbefore mentioned may not be in any wise lessened or impaired, and that your receivers are of the opinion that it will require a period of approximately six months to complete their investigations and make their report thereon."

The prayer of the petition was for a grant of the time indicated for the purposes of the necessary investigation, and that upon its completion the receivers be directed "to present to this court all matters and things in connection with said contracts, and all other arrangements, agreements, conventions, and modifications in connection with the said relations of said Western Pacific Railway Company with said the Denver & Rio Grande Railroad Company and said Missouri Pacific Railway Company, and that upon the presentation of said facts, the court set a day for the hearing thereof, and direct that due and ample notice be given thereof."

Upon the filing of this petition, the court made its order directing that the same be heard on the 14th day of June, 1915, and that notice of such hearing be served on the parties to this action and all corporations parties to any of the contracts involved, which order was duly complied with.

On the 26th day of May, 1915, the plaintiff herein filed in the United States District Court for the Southern District of New York its ancillary bill, the same in all respects as the bill filed in this court, and an order was therein made, appointing as receivers in that district the same persons appointed receivers here. On the next day, May 27, 1915, the plaintiff filed in said last-named court its bill entitled as of the ancillary bill in that court, with the subtitle of "Ancillary Dependent Action in Equity," and naming as defendants therein the Denver & Rio Grande Railroad Company, the Western Pacific Railway Company, the defendant herein, and two fictitious defendants. Both the ancillary bill and said dependent bill were filed without application to or leave of this court, and without its knowledge.

This dependent bill, after alleging the execution and delivery to its predecessor of the mortgage deed in suit, a copy of which is attached to the bill, alleges the making and pledging of contract B thereunder; states the terms of the latter, and particularly so far as they relate to the obligation of the Denver Company thereunder to pay "such sum of money as should be necessary in addition to the earnings of the Western Pacific Company and other moneys actually and lawfully appropriated by it for the purpose, to meet the interest and sinking fund payments upon the issue of bonds secured by the said first mortgage and provided for therein"; alleges that the obligation of the parties under the contract run with the railroads of the parties; and then proceeds to allege various defaults of the Denver Company under the contract and a failure on the part of the Western Pacific as well to comply with its terms. In this respect it is alleged, among other things: "That as your orator is informed and believes, and therefore avers, the Western Pacific Company has, at various times and during various periods since March 1, 1908, made and received earnings and other income which might properly have been lawfully appropriated and paid by it to the mortgage trustee on account of one or both of the said classes of payments, to wit, sinking fund payments and interest payments, as aforesaid, but the amount thereof is unknown to your orator, save as your orator is informed and believes and therefore avers that the same was insufficient upon the maturity of each semiannual payment due to the sinking fund, as aforesaid, and upon the maturity of each semiannual installment of interest, as aforesaid, to pay or meet the whole thereof; and that, under the provisions of the said contract B, a liability and obligation arose on the part of the defendant the New Denver Company upon the occasion of the maturity of each such semiannual installment of interest and upon the occasion of the maturity of each such semiannual payment due to the sinking fund, to pay to the said mortgage trustee a sum which, together with any income theretofore actually paid by the Western Pacific Company to the mortgage trustee for that purpose, should make up the whole sum then due for a sinking fund payment or interest payment, as aforesaid, but the exact amount of such deficiency or such liability is to your orator unknown."

The bill then sets out the proceedings in this court, as a court of primary jurisdiction, and the ancillary suit brought in New York; alleges that it is the intention of plaintiff to shortly declare the principal due, and obtain a de-

cree of foreclosure and sale; and avers that the amount realized will probably be less than the face of the bonds. It then proceeds: "That by reason of the uncertainty, as hereinbefore set forth, as to the amount of earnings of the Western Pacific Company from time to time heretobefore or hereafter applicable to said sinking fund payments or hereafter to said interest installments, your orator is not informed as to the exact amount for which the defendant the New Denver Company is liable under the terms of said contract B, in respect either of payments due from time to time to the said sinking fund or for said installments of interest or by reason of the breach of said contract as a whole. That the true amount thus due and the true amount of such liability can appear only upon an accounting, to be had under the direction of this honorable court, ascertaining the amount of such earnings so applicable and the amount of deficiency therein for which the defendant the New Denver Company is liable as aforesaid, and that also, in view and because of the various defaults of the New Denver Company, hereinbefore set forth, that company is liable to your orator for a total or gross sum in liquidation of its total future liability under said contract B, and also under the said guaranties, but such total or gross sum can only be ascertained and fixed by an accounting and adjudication by this honorable court proceeding in due course upon equitable principles. That your orator is informed and believes that adverse claims in respect of the amount earned and the amount due are made by the defendant the Western Pacific Company and the defendant the New Denver Company, which can be resolved and determined only on such an accounting as aforesaid, to which both of the said companies shall be parties, and that the defendant the New Denver Company is liable herein for the amount of the deficiency appearing upon such an accounting in respect of the said sinking fund payments, of the said interest payments, and the amount fixed in respect to the future liability of said defendant."

The bill prays for a determination of the meaning of contract B, particularly as to its interest and sinking fund provisions; for an accounting against the Western Pacific and a determination of the amount which will remain due after the foreclosure sale; for a determination whether contract B constitutes a lien on the railroads of the parties; for a receiver of the Denver & Rio Grande, and the application of its property to the lien of contract B; and for an injunction against the fictitious defendants.

Upon knowledge of the filing of the said ancillary and dependent bills coming to the receivers, they brought the matter to the attention of this court by a petition setting forth the facts as to the filing of said bills and the status of the litigation in this court, and asking instructions as to their duty in the premises, and whether a suit to enforce the provisions of contract B should not be brought in this court. As a result of the hearing of this petition, the court made the order in question, requiring that the plaintiff show cause in this court on June 21, 1915, why it should not be enjoined from further prosecuting said dependent bill, and in the meantime that it refrain from taking any further step therein until the further order of the court; and the hearing on the first petition of the receivers set for June 14th was thereupon continued to be heard at the same time.

At the hearing of the order to show cause, the plaintiff presented an answer, challenging the jurisdiction of this court to issue an injunction restraining the dependent suit as an invasion of the jurisdiction of the New York court, alleging that plaintiff is the only person authorized to enforce contract B, and that an injunction preventing it will violate the "due process" clause of the Constitution; that the suit is properly cognizable in the District Court of the Southern District of New York; that the Denver & Rio Grande Railroad Company is not subject to the jurisdiction of this court; and that the plaintiff, in so far as its rights under contract B are concerned, is not subject to the jurisdiction of this court; and some other matters which have not been pressed and need not be noticed. The answer is accompanied by the affidavits of the president of the plaintiff and the attorney for the bondholders' committee. They disclose facts tending to show the actuating motive in bringing the dependent suit, and why, in the judgment of the plaintiff, it is made desirable for the purpose of enjoining suits against the Denver Company on its independent guaranty, stamped on certain of the bonds of defendant, that

the suit be permitted to proceed in New York, and that it was so requested and desired by the bondholders' committee; but they state no facts affecting the legal aspects of the question involved, and call for no extended statement of their contents.

There was also submitted at the hearing the petition of the receivers of May 18, 1915, and an affidavit by the attorney for the receivers which together laid before the court the entire body of contracts and obligations heretofore referred to as coming to the hands of the receivers.

This statement comprises the material facts bearing on the present controversy.

Jared How, of San Francisco, Cal., and Murray, Prentice & Howland, of New York City, for plaintiff.

John S. Partridge and Garret W. McEnerney, both of San Francisco, Cal., for receivers.

Byrne & Cutcheon, of New York City, and Charles S. Wheeler and John F. Bowie, both of San Francisco, Cal., for bondholders' committee.

Charles W. Slack, of San Francisco, Cal., Amicus Curiæ.

VAN FLEET, District Judge (after stating the facts as above). While the facts are, as suggested, somewhat voluminous, and the arguments and briefs in keeping, I am unable to regard the questions which I deem necessary to be decided as involving anything of great magnitude, and although of importance as affecting the jurisdiction of this court, the orderly administration of justice, and the rights of the parties, they involve little novelty. The argument, however, has taken a wide range, and it may be well to suggest at the threshold that I do not feel called upon to follow it in all its ramifications, or even to notice some of the contentions advanced.

Much has been made, for instance, of the question raised by the dependent bill, whether the so-called guaranty or financial provisions of contract B, stipulated to "run with the railways" of the contracting parties, constitute a lien for the benefit of the bondholders of defendant on the road of the Denver Company; and the fears of the latter company have been excited to the point of having its counsel appear (amicus) to combat that proposition. But while I so far agree with the theory prompting the bringing of the dependent suit that, before the assets of the defendant can be adequately marshaled and the rights of the bondholders and the creditors fully protected, it will be necessary to construe that contract and have its effect determined in the respect suggested—if not, indeed, in all others—manifestly, as objected by both counsel for plaintiff and the bondholders' committee, that question cannot competently be decided—

"in any proceeding to which neither the Denver & Rio Grande Railroad Company nor the trustees of the deeds of trust securing the adjustment or refunding bonds of that company are parties, because no binding adjudication can be rendered in their absence."

The question is much too important, not alone to the holders of obligations of the Denver Company, but to the bondholders under both the first and second mortgages of the defendant and the holders of other obligations of defendant as well, to admit of its being complicated by any mere moot or inconclusive consideration. Moreover, the

question is one which, as intimated, is in no wise essential to the determination of the real question now before the court. It may therefore be laid to one side.

[1] As to the objection raised by the answer, which has been suggested rather than urged at bar, that the court, in restraining plaintiff from prosecuting the dependent suit, will be invading the jurisdiction of the New York court, I doubt if it is seriously made; but it is without merit. A court of equity may always control the parties of whom it has acquired jurisdiction in a suit before it, for the purpose of protecting its jurisdiction of the subject-matter of the controversy from being in any wise interfered with or jeopardized; and an order to that end, although it may indirectly arrest, through a party, the prosecution of an action in another court, is not, in the sense of the objection, an invasion or interference with the jurisdiction of the latter tribunal. The objection was sufficiently answered by the court at the argument in referring to the limitations of its order, when it stated:

"This court has no power over the court in New York, and would not assume for a moment that it could dictate to it in any wise. It is perfectly competent to take care of itself. The court has, however, I think, plenary and complete jurisdiction of the plaintiff in this case. Whether the plaintiff has transgressed its rights under the order heretofore made by this court in proceeding to bring that action without the advice of this court, or without authority first had, is a different question. * * * The plaintiff in that suit is unquestionably within the jurisdiction of this court because it has submitted itself to this court."

Obviously, there was and is no purpose to interfere in any direct or positive way with the jurisdiction of the sister court, nor does the order have any such effect.

[2] As disclosed by the facts, the substantive question presented, and from which all subsidiary considerations flow, is this: Does the so-called dependent suit involve a subject-matter previously submitted by the plaintiff in that action to the jurisdiction of this court in the main suit, and which is essential to a full, complete, and orderly adjudication of the rights of the parties involved in the controversy presented by the bill filed here? If it does, no question can seriously be made as to the right of this court to interfere through its coercive power over the plaintiff to stop the further prosecution of that suit. It is too thoroughly settled to call for any extended consideration that the court which first takes jurisdiction of a controversy such as that submitted by the bill filed in this court, seizes upon the property of the insolvent through its receivers, and proceeds to marshal and realize upon the assets for the benefit of all concerned, has not only the right, but it is its duty, to retain and protect such jurisdiction for the determination of all matters essential to the full, final, and complete administration of the property rights involved, and should and will to that end enjoin any party before it from proceeding in another jurisdiction to try any question so connected with the controversy or involving any of the property rights concerned in such way as to interfere with such primary jurisdiction. The rule is thus stated in Wabash v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court, during the continuance of its possession, has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property."

And in Alderson on Receivers, § 4, the cognate principle, fully sustained by the authorities, is thus stated:

"A court, by appointing a receiver, takes the subject-matter of the litigation out of the control of the parties and into its own hands, and holds it pending the proceeding and until the final disposal of all questions, legal or equitable, involved in the action. Since the receiver's possession is that of the court appointing him, any attempt to disturb it without leave of the court is a contempt of court and may be punished accordingly."

See, also, French v. Hay, 22 Wall. 250, 22 L. Ed. 854; Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497; Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981.

And this control of a party extends to acts done beyond, equally with those done within, the territorial jurisdiction of the court. Thus, in French v. Hay, 22 Wall. 250, 22 L. Ed. 854, the Supreme Court say:

"The court, having jurisdiction in personam, had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory."

See, also, Watts v. Waddle, 6 Pet. 391, 8 L. Ed. 437; Lewis v. Darling, 16 How. 1, 14 L. Ed. 819.

[3] It is not questioned that ordinarily a piece of collateral like contract B, constituting a part of the mortgaged property, would, by the filing of the bill to foreclose, be fully subjected to the jurisdiction of the court, and such without doubt was the result in this instance, unless it is avoided by plaintiff's claim as to the effect of particular terms of that contract. Indeed, the court had not only taken general jurisdiction under the bill, but the specific subject-matter of that contract and all others affecting the property and rights of the defendant had been specifically submitted to it by the petition of the receivers of May 18, 1915. There can be no doubt, therefore, that the court, in the absence of some special or exceptional consideration, had been clothed with full jurisdiction to adjudicate on this particular piece of property before the dependent bill was filed.

The theory advanced by the plaintiff, however, and upon which it is claimed the dependent bill was filed in another jurisdiction, is embodied in the contention that the provisions of contract B, set forth in the margin,[1] whereby the Denver Company covenants to pay to the trustee sufficient funds to meet the semiannual interest on the defendant's first mortgage bond issue and the sinking fund provided for

[1] See note at end of case.

therein, constitute a separate and distinct contract, wholly apart from that created by the other provisions of that instrument relating to traffic and other matters; that, while the latter are for the benefit of the Western Pacific and were fully submitted by the bill to this court, and are wholly within its jurisdiction to construe and adjudicate, it is not so with the former; that the interest and sinking fund provisions create rights which are solely for the benefit of the plaintiff as trustee and the bondholders whom it represents, and that, by a proper construction of those provisions, the trustee must be held vested with the independent right to enforce those provisions whensoever and wheresoever it may choose, and without interference by this court in any way; that this arises from the terms of the guaranty itself, which renders the obligation to pay interest and sinking fund nonassignable and not subject to sale, and the fund to be produced thereunder inviolate for the one purpose; and, further, that these provisions were specially excepted by the bill from the jurisdiction of this court by reserving the rights there given from the prayer for the sale of the other property.

This, in substance, fairly represents the attitude of the plaintiff. There are some minor contentions growing out of it which may be noticed as we proceed. There are several respects vital to this contention as to which I am satisfied it cannot be sustained.

In the first place, to say that the provisions of contract B involved in this contention may be construed separately and apart from the other provisions of that contract and as creating rights solely for the benefit of the trustee and bondholders is to ignore the history of that contract and what it was designed to accomplish. That purpose is to be gathered, not alone from the terms of contract B, but from the contemporaneous contracts A and C, and the deed of trust as well. They were all, as we have seen, executed at the same time, and constituted one transaction; and accordingly, in looking for the purpose sought to be accomplished, they must be construed together. When so construed, it will readily be perceived that the purpose was to carry out an enterprise conceived and intended primarily for the benefit and advantage of the contracting railroads, and that the protection and benefit of the bondholders was merely a means to the main end—to make the bonds of the defendant sufficiently attractive as an investment to induce their ready sale, by which to procure funds for carrying out the completion of the defendant's road. That this is so is plainly apparent from the recitals and provisions of those several instruments. Indeed, it is perhaps sufficiently apparent from the terms of contract B itself. But it is enough to say that, in looking for the consideration which moved the several parties to those contracts to their execution and the incorporation therein of the mutual covenants and obligations created by their terms, we are permitted, and indeed bound, to consider and construe them as a whole. When so construed, it is plain that they were intended to accomplish one main purpose, and the means adopted to that end, and what that end was, is to be gathered from the terms of all.

To say, then, that isolated provisions of this contract can be con-

strued separately and independently of the reciprocal covenants running to the Denver Company is to violate the most elementary principles of construction. Nor did those provisions create "independent rights," as that term has been used in argument, either in the trustee or the bondholders. As to the former, it is given such powers and duties as are ordinarily incident to the capacity in which it served, and those powers came to it solely by reason of its succession to the trusteeship under the mortgage. They were in no respect personal to the trustee, and vested no right in it as an individual. Nor are they free from the ordinary consequences which flow from proceedings to foreclose such instruments—that they are thereafter subject to the direction and control of the court.

As to the rights of the bondholders under these provisions, it is not essential at this time, as above indicated, to definitely inquire, further than to answer the contention now presented. The question gives rise to some interesting considerations which may best be left until that contract comes up for construction with all the parties concerned before the court. The provisions for their protection were evidently intended to be of a character which would inspire the greatest degree of confidence in the security of the bonds as an investment, and hence the guaranty is made irrevocable until all and singular the bonds, principal, and interest, are fully paid; that is, until the obligation of each individual bond has been satisfied. But while these provisions are thus strong and intended so to be, so far as securing the payment of the obligations is concerned, they do not pretend to reserve in the bondholders nor in the trustees representing them, any right upon foreclosure to choose the tribunal or the party that shall enforce them. To the contrary, the contract expressly provides that all its provisions, including those under consideration, may be enforced, either by the trustee, or the Western Pacific, or by both; and, of course, any rights in that regard running to the defendant are now vested in its receivers.

It may be conceded that, under contract B, the trustee, prior to the foreclosure, could have proceeded independently against the Denver Company, and perhaps against the defendant as well, in any proper tribunal of its choice to compel a compliance with these provisions. But when it sought the aid of this court and brought its burden here, it surrendered any such liberty of action and subjected itself to the controlling hand of the court whose jurisdiction it thus invoked.

But assuming, even, that there is to be found in this contract warrant for the contention that the trustee has the right, notwithstanding the foreclosure proceedings, to independently enforce the particular provisions in question, having invested this court with the jurisdiction of the main controversy, any such ancillary action must be brought here. Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145. This is essential for the protection, not only of the jurisdiction of the court, but of the rights of the parties, from the possibility of costly and "unseemly conflicts between courts whose jurisdiction em-

braces the same subjects and persons." Farmers' Loan Co. v. R. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667.

Nor does it make any difference in this respect that the instrument upon which the dependent suit is based has not been physically surrendered to the receivers. It is in the hands of the plaintiff as trustee, and the latter is within the jurisdiction of the court. Farmers' Loan Co. v. R. R. Co., supra; Central Bank v. Stevens, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399.

Enough has been said, I think, to show that plaintiff's contention, upon which it seeks to sustain its right to maintain the dependent action, cannot be upheld. But there is another and conclusive consideration against allowing it to proceed with that action. It is established from the principles above stated that the court of primary jurisdiction in a case of this impression is vested with full, complete, and exclusive jurisdiction to marshal the assets and pass upon all controversies arising from conflicting claims or liens thereon; and especially is this true as to any and all suits or proceedings which require anything in the nature of an accounting affecting those assets. It is equally obvious from what has been said that the rights sought to be enforced in the dependent suit cannot be had without a construction of contract B and an accounting thereunder as between the Denver Company and the defendant, and the dependent bill fully recognizes this necessity. While plaintiff's counsel has contended on this hearing that no accounting is necessary, but that a simple action at law would lie, and that the dependent bill in that respect proceeds upon an erroneous theory, I am satisfied that this view involves a clear misapprehension of the effect of that contract, and that the bill is founded upon a correct conception as to the form of action required. Moreover, the accounting there asked for and requisite to determine the rights of the parties will necessarily include, not only a right on the part of the Denver Company to an inquiry into any diverted earnings prior to the foreclosure, but a full accounting from the receivers of the earnings of the road while it has been under their control, since, as fully recognized by the dependent bill, the liability of the Denver Company under this contract is not absolute but contingent. This being so, it is clear, under the authorities, that the inquiry and relief there sought can only be had at the hands of this court.

It is obvious, I think, under the facts and principles above stated, that the Denver Company, by reason of its right and obligations under contract B, independently of any others it may hold, should have been originally made a party defendant to the bill in this court, and, not having been so made, that it should now be brought in, that the rights of the parties arising under the terms of that contract may be definitely determined by this court, with all parties in interest before it. For like reasons, the Missouri Pacific Railway Company should be made a defendant herein, and required to set up the rights claimed by it, if any, under the mortgage or under contract B. By the terms of contract C, that corporation is given a definite interest in at least some of the provisions of contract B, with a right to require specific perform-

ance thereof. This corporation should therefore be before the court when the effect of that contract is determined. As to the power of the court to bring in necessary parties and require them to interplead, notwithstanding they may be nonresidents of the district, I entertain no doubt. Compton v. Jesup, 68 Fed. 263, 15 C. C. A. 397, and authorities there cited.

As a result of these considerations, I am of opinion that the plaintiff should be definitely restrained from further proceeding with the present dependent bill, and from bringing any other action or proceeding involving contract B in any jurisdiction other than that of this court, or from taking any other step that might, in any wise, impair or affect the obligation of that contract or any of its provisions without first procuring the sanction of this court.

An order may accordingly be entered to that effect, and providing for the bringing in, as parties defendant to the bill, both the Denver & Rio Grande Railroad Company and the Missouri Pacific Railway Company, with the requirement that within 30 days from the date of the service upon them of such order those corporations interplead herein and set up any and all rights they, or either of them, may have or claim against this defendant under the mortgage in suit, or any of the contracts pledged thereunder, or otherwise. The order may also provide for the granting of such further time to the receivers as may be deemed necessary for them for the purposes specified in their petition of May 18, 1915.

NOTE.—The provisions from contract B, referred to in the opinion, are as follows:

Article II.

4. (a) The Denver Company and the Western Company, parties of the first part aforesaid, jointly and severally covenant and agree to purchase semi-annually, beginning with the date hereof except as otherwise expressly stated, and to pay therefor, dollar for dollar in cash, at the dates and in the manner hereinafter provided, promissory notes of the Pacific Company, bearing interest at the rate of five per cent. (5%) per annum and payable upon demand, to the amount face value, by which the gross earnings and income of the Pacific Company during the preceding fiscal half year shall be insufficient to meet the sum of the following:

(1) Its operating expenses, including rentals payable under leases and, particularly, any lease of terminals at Salt Lake City, also current payments upon claims for damages to persons or property, and its ordinary, including all necessary, expenses of maintenance;

(2) Its taxes, including all assessments and other governmental charges against it or that may become a lien upon any of its property;

(3) From and after the first day of September, 1908, or the earlier acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City, all interest falling due during the then current calendar half year upon the Pacific Company's fifty million dollars ($50,000,000), face value, of first mortgage five per cent. thirty-year gold bonds;

(4) The Pacific Company's annual contribution to the sinking fund provided for in its said first mortgage, if the same be payable during the then current calendar half year;

(5) Any other charge or expense that it may be necessary that the Pacific Company shall pay, in order to assure the continued and efficient operation of its property and to protect unimpaired the lien and priority of its said first mortgage;

(6) Any tax or taxes which the Pacific Company may be required by law or permitted to pay upon or deduct from the principal or interest of its said

first mortgage bonds, so that the holders of such bonds shall, under all circumstances, receive the principal and interest thereof without deduction for any tax or taxes;

(7) All interest for such current calendar half year upon all indebtedness of the Pacific Company, other than its said first mortgage bonds.

Provided, however, that any payments made to the Trustee, as provided in paragraph (b) of this article, shall be deemed to constitute and shall be credited as payments of the purchase price of promissory notes of the Pacific Company to be purchased by the parties of the first part, pursuant to the foregoing terms of this paragraph (a).

(b) The Denver Company and the Western Company further jointly and severally covenant and agree semiannually, at the dates and in the manner hereinafter provided, out of the purchase price of the notes to be purchased by them as provided in paragraph (a) of this section, to pay unto the Trustee:

(1) From and after September 1, 1908, or the earlier acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City, such amount as will, together with the amount actually and lawfully appropriated by the Pacific Company out of its earnings and other income and by it paid over to its fiscal agent in the city of New York (which may be the Trustee) or its fiscal agent in the city of San Francisco, or both of them, for the purpose of paying the interest to fall due during the then current calendar half year upon the Pacific Company's said first mortgage bonds upon which interest shall be payable, be sufficient to pay all such semiannual installments of interest;

(2) Such amount as will, together with the amount actually and lawfully appropriated by the Pacific Company out of its earnings and other income and by it paid over to the Trustee for the purpose of meeting the sinking fund payment, if any, required by said mortgage to be made by the Pacific Company during the then current calendar half year, be sufficient to meet such sinking fund payment.

(c) The parties of the first part will, on or before the 26th day of February in each year during which this agreement shall be in force, pay or cause to be paid to the Pacific Company or to whomsoever the same should be paid hereunder the amount required to be paid by them, as provided in clauses (1), (2), (5), (6), and (7) of paragraph (a) of this section, on account of the fiscal half year expiring on December 31st of the preceding year, and on or before the 29th day of August in each such year will pay or cause to be paid unto the Pacific Company or to whomsoever the same should be paid hereunder the amount required by said clauses of said paragraph (a) to be paid on account of the fiscal half year expiring on the 30th day of June, next preceding.

(d) The parties of the first part, on or before the 26th day of February and on or before the 29th day of August in each year, beginning with February, 1909, or with the February or August prior thereto next succeeding the acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City, will pay to the Trustee under said first mortgage of the Pacific Company, the amount required to be paid by them pursuant to the provisions of paragraph (b) of this section, to supply, with the amounts then already paid by the Pacific Company to its said fiscal agents or to either of them, the amount necessary to pay the semiannual interest upon the first mortgage bonds of said company to fall due upon the first day of the next succeeding month, and they will on or before the 29th day of August in each year, from and after and commencing with the year 1911, pay or cause to be paid unto said Trustee under said first mortgage such additional amount as will, together with the amount then already paid unto the Trustee by the Pacific Company, for that purpose, constitute and make up the full amount of the payment for the benefit of the sinking fund to be made by the Pacific Company for the then current year in accordance with the terms of its said first mortgage.

All amounts paid or payable to the Trustee under this agreement for the purpose of providing for the payment of interest shall constitute a trust fund for the payment of interest due or thereafter to become due upon the Pacific Company's first mortgage bonds and shall be by the Trustee made available at the fiscal agencies of the Pacific Company as hereinafter provided, but

only for the payment of interest upon said bonds then due or thereafter to fall due as the same shall mature and payment thereof shall be demanded. Neither the Pacific Company nor any one claiming under it, save only such persons or corporations as may be entitled to receive the interest upon said first mortgage bonds, shall be entitled to or possess any interest in, lien upon or claim to said fund, or any part thereof.

(e) The Denver Company and the Western Company, parties of the first part aforesaid, hereby waive, and each of them hereby waives, any right which they or either of them might otherwise have to demand the delivery of any of the promissory notes to be purchased by them as provided in paragraph (a) of this section before or coincidently with the payment by them of the purchase price of any such notes as provided in paragraphs (a), (b), (c) and (d), of this section, and the said parties of the first part and each of them will promptly pay the purchase price of all notes that they or either of them shall be under obligation to take hereunder at the times and in the manner herein provided, although the Pacific Company shall not at the time of any such payment have ready for delivery or shall not have taken the steps necessary to authorize the delivery of, or for any other reason shall fail to deliver, any of such promissory notes; but neither of the parties of the first part shall be deemed by reason of the making of any payment prior to the receipt of the notes thereby paid for or by reason of anything in this paragraph contained, to have waived or otherwise prejudiced the right of said parties or either of them to receive or to enforce the delivery by the Pacific Company of such or any notes that the parties of the first part or either of them shall pay for or shall have paid for hereunder.

(f) The parties of the first part further, jointly and severally, covenant and agree that in case the Pacific Company, at any time when by the terms of this agreement the parties of the first part are under obligation to purchase from it any promissory note or notes, shall not be authorized to issue such note or notes by reason of the fact that its capital stock, outstanding and subscribed, shall not be sufficient in amount to authorize the issuance by the Pacific Company of such note or notes, the parties of the first part, or one of them, will subscribe for an amount of the unissued capital stock of the Pacific Company sufficient to render the issuance of such note or notes of the Pacific Company authorized and lawful.

5. The parties of the first part further jointly and severally covenant and agree that they will pay or cause to be paid, otherwise than by the Pacific Company, any tax or taxes that the Pacific Company may be required by law or permitted to pay upon or to deduct from the principal or interest of any of its first mortgage bonds, as such tax or taxes shall become due or payable, except such tax or taxes as the mortgage securing said bonds shall lawfully require the Pacific Company itself to pay, but nothing contained in this paragraph shall require the parties of the first part, or either of them, to pay any such tax so long as the validity thereof shall, in good faith, be contested by the Pacific Company or by any one in its behalf; but in case of any such contest, the parties of the first part jointly and severally agree, if required so to do by the Trustee, to pay or cause to be paid to the Trustee, the amount of the tax or taxes that the Pacific Company shall be so required to pay or deduct; and the amount so paid shall constitute a trust fund in the hands of the Trustee, and shall by it be held and applied to the sole purpose of discharging said taxes in case the same shall eventually be decided to be payable, and, in case said taxes, or any part thereof, shall eventually be decided not to be payable, shall be returned, to the extent that such taxes shall have been annulled, to the party or parties that shall have paid the same to the Trustee.

Article III.

* * * * * * * * * *

4. The Pacific Company will, simultaneously with the payment by the parties of the first part, or either of them, of any amount required to be paid by them by the terms of section 4, of article II hereof, execute and deliver to the party of the first part making such payment its promissory note or notes bearing interest from the date thereof at the rate of five per cent. (5%) per

annum and payable upon demand, in an amount in the aggregate equal to the amount of such payment, and in case it shall be impossible for any reason for the Pacific Company at the date of the making of any such payment to execute and deliver valid promissory notes as above provided, it will execute and deliver such note or notes as soon thereafter as the same shall be legally possible, and the Pacific Company expressly covenants and agrees that it will, in ample season to permit the execution and delivery of said notes as the same shall be required, take any and every corporate action that shall be required to give validity thereto.

5. The Pacific Company, party of the second part, hereby covenants and agrees that it will faithfully apply all of its gross earnings and income, as the same shall accrue, to the following purposes and in the following order of priority:

(1) To the payment of its operating expenses, including rentals under leases and, particularly, any lease of terminals at Salt Lake City, also claims for damage to persons or property, and its ordinary, including all necessary, expenses of maintenance, except amounts due to the parties of the first part, or either of them on account of advances made under this agreement.

(2) To the payment of its taxes, assessments and other governmental charges against it or that may become a lien upon any of its property.

(3) To the payment of all interest as it shall accrue from time to time upon the Pacific Company's fifty million dollars ($50,000,000), face value, of first mortgage five per cent. thirty-year gold bonds, from and after the first day of September, 1908, or the earlier acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City.

(4) To the payment of the Pacific Company's annual contribution to the sinking fund provided for in its said first mortgage.

(5) To the payment of any other charge or expense that the Pacific Company may be obliged to pay, in order to assure the continued and efficient operation of its property and to protect unimpaired the lien thereon of its said first mortgage.

(6) In so far as it may lawfully agree to pay and may lawfully pay the same, to the payment of any tax or taxes which the Pacific Company may be required by law or permitted to pay upon or deduct from the principal or interest of its said first mortgage bonds, so that the holders of such bonds shall receive the principal and interest thereof without deduction for any tax or taxes.

(7) To the payment of all interest that shall have accrued upon any other indebtedness of the Pacific Company.

(8) To the payment pro rata to the parties of the first part of the amounts due to them, respectively, upon the promissory notes held by them and received under the provisions of section 4, of article II hereof, and of all amounts that they or either of them shall have paid to the Pacific Company or the trustee pursuant to the provisions of said section, notes wherefor shall have been demanded but shall not have been delivered; but, except as provided in section 5 of article II hereof with respect of taxes contested and annulled, nothing herein contained shall require the Pacific Company or any one to repay to the parties of the first part, or either of them, any moneys that they or either of them shall have paid on account of any tax or taxes that the Pacific Company shall have been required by law or permitted to pay upon or deduct from the principal or interest of its said first mortgage bonds, unless by the terms of the Pacific Company's said first mortgage the Pacific Company, itself, shall be lawfully required to pay such tax or taxes.

6. The Pacific Company further expressly covenants and agrees that it will, not later than the 20th day of February and not later than the 23d day of August in each year, commencing with February, 1909, or with the February or August prior thereto next succeeding the acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City, actually pay over to its fiscal agents in the city of New York and the city of San Francisco, or to one of them, the amount to be paid by it for the purpose of paying the installment of interest to fall due upon the first day of the following month upon its said first mortgage bonds, and that it will not thereafter permit any of the funds so paid over to be used for any purpose other

than the payment of such installment of interest, and that it will cause the fiscal agents or fiscal agent to which such payment shall be made forthwith to notify the Trustee of the making of such payment and of the amount thereof and likewise to permit the Trustee, or any representative of the trustee, to examine all the books and accounts of each of said fiscal agents so far as the same concern any such payment or the payment or nonpayment of any interest upon any of said first mortgage bonds, and will likewise cause said fiscal agents or fiscal agent forthwith to notify the auditor acting as provided in section 6, article VI hereof, both by letter and telegram, of such payment and of the amount thereof.

The Pacific Company further expressly covenants and agrees that it will, not later than the 23d day of August in each year, commencing with the year 1911, actually pay over to the Trustee the amount to be paid by it for the purpose of making the sinking fund payment to fall due during the year expiring upon the last day of the then current month, as required by the Pacific Company's said first mortgage.

7. The Pacific Company further agrees that as soon as and whenever the gross earnings of the Pacific Company yield a surplus above the expenses and charges enumerated in paragraphs (1) to (7) of section 5 of this article, all traffic balances due to the Pacific Company accruing in the hands of either of the parties of the first part may be by such party applied in payment and discharge pro tanto of the claims of such party of the first part on account of payments (subject to repayment) made by it pursuant to the provisions of article II hereof or otherwise, and such party of the first part may apply such balances to the discharge of claims upon open accounts or upon promissory notes of the Pacific Company, or of both classes of claims, as it may elect.

Article V.

The Trustee hereby covenants and agrees that it will hold all moneys received by it pursuant to the provisions of this instrument in trust for, and will apply the same or cause the same to be applied at the times and in the manner herein provided to the uses and purposes herein prescribed with respect of such moneys, or, in the absence of any provision hereof with reference to the application of any such moneys, to the uses and purposes provided with respect thereof in said first mortgage of the Pacific Company; and that it will, from time to time, upon the request of any holder or holders of bonds secured by said first mortgage of the Pacific Company and being satisfactorily indemnified against the expense of so doing, acting either alone or with the Pacific Company, take steps to enforce by a suit or suits in equity or at law or by other proper proceedings to be prosecuted or taken in its own name or in the name of the Pacific Company, or in the name of both, all the terms and provisions of article II hereof that require any payments to be made to the Trustee by the parties of the first part or either of them, and, upon the request of the holder or holders of twenty per cent. (20%) in amount of said bonds at the time being outstanding, will likewise enforce any and all other provisions of this agreement, and likewise of all modified agreements, if any, substituted therefor, as provided in section 14 of article I hereof.

Article VI.

* * * * * * * * * *

10. The refusal, neglect or other failure of the Pacific Company to perform any or all of the covenants, agreements or conditions herein contained by it to be performed shall not constitute ground for the rescission of or refusal to perform or delay in performing this contract by the parties of the first part, or either of them; but in event of any such refusal, neglect or other failure, the party or parties of the first part aggrieved thereby may have resort to such remedy by suit for specific performance or action for damages as may be appropriate. But nothing herein contained shall be taken to authorize any action that shall have the effect of impairing in any manner or to any extent the lien or security of the first mortgage of the Pacific Company, or of preventing, obstructing or interfering with the exercise of any of the remedies thereby granted to the Trustee. Time is strictly of the essence of each and all

the covenants and agreements to be performed by the parties of the first part, or either of them, and contained in sections 4 and 5 of article II hereof.

* * * * * * * * *

13. This agreement shall, except as hereinafter provided, continue in full force and effect, and be binding upon all the parties hereto, from the date hereof until all of said $50,000,000, face value, of first mortgage five per cent. thirty-year gold bonds of the Pacific Company shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided in the first mortgage of the Pacific Company, and shall run with the railways of the said several railway companies, parties thereto, into whosoever hands the same may come; and this agreement and the provisions thereof shall be so construed that any person or persons, corporation or corporations, which may at any time acquire in any manner any of the said several railways of the parties hereto shall be held and be deemed to have expressly agreed by virtue of the act or acts, deed or deeds, or other instrument or transaction by or through which the said person or persons, corporation or corporations, may immediately or indirectly have acquired the said several railways, or any thereof, to and with each and every of the parties hereto to observe and perform all of the terms required by this agreement to be performed or to be observed by the party hereto from whom, immediately or indirectly, the said person or persons, corporation or corporations, may have acquired the said railways or railway, and the said person or persons, corporation or corporations, shall be held to be bound by an express contract with the parties hereto and by and upon an express trust to perform and observe as aforesaid all the terms hereof, including all acts and things that may be necessary to preserve in full force the several obligations and agreements herein established or contained for the full term hereof; and the obligations and provisions of this agreement shall be deemed to be part of the consideration of any contract or contracts, of whatever form or nature the same may be, and of any other transaction by which any person or persons, corporation or corporations, may acquire or undertake to acquire the said several railways or any of them. Each of said railway companies parties hereto further covenants and agrees with all the other parties hereto that if it shall at any time during the continuance of this agreement, by lease, sale, consolidation or otherwise, convey or in any manner transfer its property or its rights and franchises in or to all or any of the premises affected hereby, then any instrument containing or setting out any such lease, sale, consolidation or other conveyance, shall contain a covenant that the same is made subject to all the provisions of this instrument, and that its lessee, grantee, successor or other transferee, as the case may be, and any and every person or corporation claiming under any such lessee, grantee, successor or other transferee, shall, by the acceptance of such instrument and by the acceptance of such lease, grant, consolidation or other conveyance, become bound to perform and observe all of the terms hereby required to be performed or observed by the party making such lease, grant, consolidation or other conveyance, including all acts and things that may be necessary to preserve in full force the several obligations and agreements herein established or contained for the full term hereof.

14. Notwithstanding anything herein contained or anything contained in said first mortgage of the Pacific Company, neither the obligation of the parties of the first part nor the obligation of either of them to make any of the payments provided for in paragraphs 4 and 5 of article II of this agreement, as and at the times herein provided, shall be abrogated or in any manner modified until all of the bonds secured by the Pacific Company's first mortgage shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made for payment thereof in full, principal and interest, as provided for in the first mortgage of the Pacific Company, and this agreement shall not, prior to such time, be abrogated or modified as to any other provision or in any other respect in any manner, nor shall the rights of any of the parties hereunder be changed in any other respect (save after default by the Pacific Company as hereinafter provided), except by written agreement whereto the Trustee shall be a party and which shall have been approved in writing by the holders of outstanding bonds, being two-thirds in amount of the bonds authorized to be issued under the Pacific Company's first mortgage,

such writing being executed and authenticated in substantially the manner provided in section 15 of article five of said mortgage; but any of the provisions of this agreement, save those contained in paragraphs 4 and 5, of article II hereof, and such provisions as may be supplementary thereto, may be abrogated or modified by a written agreement between all the parties hereto, including the Trustee, provided the same shall have been approved in writing by the holders of the amount of said bonds aforesaid, such writing being executed and authenticated in the manner aforesaid. In case the Pacific Company, or any of its successors or assigns, shall make default in the due payment of the principal of or interest agreed to be paid upon its bonds to be issued under its said first mortgage, according to the tenor and effect of said bonds and the interest coupons pertaining thereto, or in event of any default in the covenants or conditions of said first mortgage whereby a right of foreclosure shall thereunder accrue to the Trustee or the holders of the bonds secured thereby, the Trustee shall have and shall forthwith become vested with the right, upon the written request of the holders of two-thirds in amount of the bonds outstanding and secured by said mortgage executed and authenticated in the manner aforesaid, to, and upon any such request, the Trustee shall terminate this agreement, save and excepting always the provisions for payments in interest, sinking fund contributions and taxes contained in paragraphs 4 and 5 of article II hereof, and, as well, any and all other agreements, if any there shall be, to which the railway companies parties hereto, or either thereof, or any of their successors or assigns, are parties, whereby the parties of the first part, or either of them, or any of their successors or assigns, shall or may have or claim to have any rights in or to the use or possession of any of the lines of railway or of the property or franchises or income of the Pacific Company, by a notice in writing to that effect, addressed and mailed to the Denver Company and to the Western Company at Denver, Colorado, and to the Pacific Company at San Francisco, California; and upon the expiration of thirty (30) days from and after the mailing of such notice this agreement and all other agreements such as aforesaid, anything herein or therein or in said first mortgage to the contrary notwithstanding, shall terminate except as aforesaid, and all rights of the parties of the first part, their successors or assigns, or either or any of them, to possession of any of the lines of railway or of the property, franchises or income of the Pacific Company shall thereupon cease; but such termination of this agreement shall not be deemed to and shall not release, nor shall anything else done hereunder release, the rights of the Trustee or of the holders of the first mortgage bonds of the Pacific Company to the benefits of the agreements of the Railway Companies, parties of the first part, to make the payments provided for in paragraphs 4 and 5 of article II hereof, or upon or against any fund derived or constituted as provided in any of said paragraphs. Nothing herein contained shall be taken to authorize or to result in the termination of this agreement in any event or contingency (prior to the payment or provision for payment of all of said first mortgage bonds, principal and interest, as aforesaid), except upon the election of the Trustee made with the written approval of the holders of two-thirds in amount of the outstanding bonds secured by the Pacific Company's first mortgage given and evidenced in manner and form as above provided; but, on the contrary, at all times prior to such termination thereof, whether before or after default as aforesaid, the Trustee as well as the Pacific Company, its successors and assigns, shall be entitled to specific performance of the same and of any agreement substituted therefor and to enforce the same by suits in equity or actions at law or otherwise, as may be appropriate.

HORNBLOWER et al. v. CITY OF PIERRE.

(District Court, D. South Dakota, C. D. February 18, 1916.)

1. MUNICIPAL CORPORATIONS ⟸902—WARRANTS—NEGOTIABILITY AND TRANSFER—"NEGOTIABLE INSTRUMENT."

City warrants, while negotiable in form, so as to be transferable by indorsement and delivery, are not negotiable instruments in the sense of

the law merchant, and are subject in the hands of a bona fide holder to any defense existing between the original parties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1887; Dec. Dig. ⟸902.

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

2. MUNICIPAL CORPORATIONS ⟸902—VALIDITY OF WARRANTS—RECITALS.

A city cannot be bound by a false recital in a resolution of its council ordering an issue of warrants of the purpose for which they were issued, where they were in fact issued and used for a wholly unauthorized purpose, which fact was known to the payee.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1887; Dec. Dig. ⟸902.]

3. EVIDENCE ⟸83(1)—PUBLIC RECORD—PRESUMPTION.

An erasure and alteration in a record made by a public officer, in the absence of evidence to the contrary, will be presumed to have been lawfully made at the time the record was written.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. ⟸83(1).]

4. MUNICIPAL CORPORATIONS ⟸898—WARRANTS—ESTOPPEL OF CITY.

Where the Constitution and statutes of a state prohibited a city from incurring any indebtedness in excess of 5 per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, and made it the duty of the county auditor to keep the record of such assessment, a purchaser of warrants issued by the city was charged with notice of the assessed valuation of its property as shown by the auditor's books, and the city cannot be estopped from showing that the warrants were in excess of the legal limit of indebtedness by the fact that the city auditor, who had nothing to do with such records, falsely certified to a larger assessed valuation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1883; Dec. Dig. ⟸898.]

5. MUNICIPAL CORPORATIONS ⟸898—VALIDITY OF WARRANTS—RATIFICATION OR ESTOPPEL.

Where city warrants were void in their inception for lack of power to issue them, neither representations by its officers nor the payment of interest thereon by the city can operate as an estoppel or a ratification.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1883; Dec. Dig. ⟸898.]

At Law. Action by Henry Hornblower and John W. Weeks against the City of Pierre. Trial to court. Judgment for defendant.

Gardner, Fairbank & Churchill, of Huron, S. D., for plaintiffs.
Karl Goldsmith, City Atty., of Pierre, S. D., for defendant.

ELLIOTT, District Judge. This is an action brought by the plaintiffs against the defendant upon 10 certain city warrants of the city of Pierre, for $1,000 each, dated July 29, 1890, consecutively numbered from 3614 to 3623, inclusive, and also upon 10 warrants of the said city of Pierre, dated July 29, 1890, for the sum of $500 each, numbered consecutively from 3591 to 3600, inclusive, and judgment is demanded for the sum of $15,000, with interest thereon at 7 per cent. per annum. Upon a stipulation in writing, waiving a jury, the case was tried by the court, without a jury.

Upon a careful review of the testimony, I find little dispute upon

the facts material to the issues. I find, from the evidence, that under date of July 28, 1890, the city council of the city of Pierre passed a resolution, as follows:

"It was moved that the sum of $25,000 for public improvements be appropriated and warrants ordered drawn for the same, payable to Coe I. Crawford, and upon motion the roll was called and the members answered their names and voted as follows: Alderman Coy voted aye, Hilger, aye, Haugen, aye, Meade, who voted aye, McNamina, who voted aye, Robinson, who voted aye. Absent and not voting, Alderman Kleiner. So the motion was carried and the warrants ordered drawn."

The warrants in question were issued pursuant to said action by said city council. The undisputed testimony is: That thereafter the city auditor presented said warrants to Coe I. Crawford, in whose favor they were drawn, and he thereupon, at the request of such city auditor, indorsed each of these warrants without recourse.

The said city auditor did not deliver said warrants to said Crawford, or leave them in his possession, but took them away with him, and thereafter delivered said warrants to the National Bank of Commerce at Pierre, S. D., for the use of a committee of citizens of the city of Pierre, known as the "Capitol Campaign Committee," of which John Sutherland was the chairman or president, intending that the proceeds of all said warrants were to be used for the purpose of defraying the expenses of said capitol campaign, and thereafter B. J. Templeton, who at that time was mayor of the city of Pierre, and president of the said bank, negotiated the sale of said warrants to plaintiffs. That the National Bank of Commerce, or B. J. Templeton, paid nothing for said warrants, either to said Crawford or to the said city of Pierre. That said Templeton, president of said bank, went to the city of Boston, and interviewed plaintiffs, and arranged for the sale of these warrants for the use and benefit of said Capitol Campaign Committee; the arrangement not being entirely consummated and being subject to further investigation on behalf of plaintiffs. That plaintiffs, for the purpose of determining the financial condition of the city, made inquiry of the city officials, and in addition to the representations which had been made by Templeton, orally, to the plaintiffs at Boston, Mass., a certificate was made by the city auditor, under the seal of the city, and sent to the plaintiffs, which was introduced in evidence and is referred to as Exhibit A, as follows:

"Exhibit A (Copy).

Statement of the Financial Condition of the City of Pierre This 22d day of July, 1890:

Assessed valuation		$ 3,154,965
Real valuation (estimate)		10,000,000
Total bonded debt:		
Fire bonds	$ 5,000 00	
Park bonds	15,000 00	
Funding	25,000 00	$ 45,000
Total outstanding warrants		120,000
Total city debt		$165,000

"I certify that the foregoing statement is correct.

"H. E. Dewey, City Auditor.

"[Seal of the City of Pierre.]"

It further appears that upon receipt of this communication, the plaintiffs wrote a letter, Exhibit B, as follows:

"Exhibit B (Copy).

"B. J. Templeton, Esq., Pierre, So. Dakota—Dear Sir: The papers which we asked for when you were in Boston arrived this morning, and seem to be, with two exceptions, what was required. In the first place, the city auditor, in his valuation of the city, gives it $3,154,965, outstanding bonds $45,000, total outstanding warrants $120,000, and a total city debt of $165,000. This is about $9,000 more than assessed valuation allows, 5 per cent. Doubtless there is some explanation of this which we do not know. Of course, these warrants, issued over and above 5 per cent., would not be legal, unless there is something about it which we do not understand. We also inclose certificates of legality of warrants, which we wish you would ask the city attorney and Mr. Johnston to sign, and return to us. The certificate of legality which they have sent on does not mention any issue of warrants, but reads as if all warrants issued by the city council were legal.

"Yours truly, [Signed] Hornblower & Weeks."

And the president of the National Bank of Commerce wrote, upon the stationery of said bank, a letter, Exhibit C, as follows:

"Exhibit C (Copy).

"B. J. Templeton, "President.	Adolph Ewert, Cashier.	A. P. Farr, Ass't. Cashier.

"The National Bank of Commerce,

"Capital, $75,000.00

"Notice: Holders of City of Pierre warrants Nos. 2592 to 2601, inclusive, and 2661 to 2738, inclusive, will present the same for payment. Interest on the said warrants will stop from Aug. 1, 1890.

"H. E. Cutting, City Treasurer."

"Pierre, South Dakota, July 30, 1890.

"Hornblower & Weeks, Boston, Mass.—Gentlemen: I arrived home all O. K., 'top side up with care,' and am wading through about a foot deep of letters, including yours of the 26th inst. The auditor, in making his statement to you, was in error in this: He gave the bonded indebtedness as $45,000, and warrants $120,000. The fact is the funding bonds of $26,000, which I sold to S. A. Kean & Co., Chicago, were part of the $45,000 item, and the proceeds take up so many of the outstanding warrants, as you will by the inclosed notice from the city treasurer, so that the statement should read:

Bonds	$ 45,000
Warrants	95,000
Total debt	$140,000

—which is within the limit, and in addition our tax levy just made will yield us about $70,000, and we have called an election to vote bonds to take up all outstanding warrants, as I explained to you. The warrants were not issued until my return, owing to the fact that the president of the city council was out of town and there was no one authorized to sign them until I got home. I notice also that the auditor on several other matters a little mixed, but on the whole it was substantially correct.

"The warrants, $25,000, were shipped you by our cashier yesterday by Am. Express, with instructions as to remittances. Thanking you for favors, and trusting this explanation will prove all satisfactory.

"Yours truly, [Signed] B. J. Templeton.

"P. S.—Inclosed certificate of city attorney and A. W. Johnston, lawyer, as requested"

—and inclosed therewith a certificate of the city attorney and of A. W. Johnston, lawyer, as requested by the plaintiffs, which were not

offered in evidence, they having been lost; but the evidence in the case shows that plaintiffs testified that they in effect stated that the warrants were regularly issued and were legal obligations of the defendant city.

The evidence discloses that, in compliance with the terms of the last paragraph of this letter, the warrants in suit were included in the $25,000 shipped to plaintiffs by the cashier of the National Bank of Commerce by American Express. It further appears from the evidence that thereupon, under date of August 8, 1890, the plaintiffs wrote to Templeton, who was the president of said bank, advising that plaintiffs had deposited with the National Bank of Deposit of New York City draft for $23,500, the proceeds of $25,000 in warrants, advising him that the remaining $12,500 would be forwarded later. It further appears from the testimony of one of the plaintiffs, and I find the fact to be, that the money referred to as being deposited in the National Bank of Deposit of New York in payment of these warrants in suit was deposited for and to the credit of the National Bank of Commerce, Pierre, S. D.

I find that the testimony with reference to this transaction, whereby the plaintiffs purchased the warrants in suit, is entirely consistent with and supports the allegation of the amended complaint of the plaintiffs herein, and I therefore find the fact to be that the plaintiffs did not participate in or have any knowledge of the manner in which the said warrants were issued, or the purpose for which the money was to be used, and "that said National Bank of Commerce immediately thereafter sold said warrants to the plaintiffs in this action, in the regular course of business, for value, and delivered each of the said warrants to these plaintiffs, and that these plaintiffs are now the owners and holders of said warrants," as set forth in paragraph 3 of the amended complaint herein. I further find that the plaintiffs never paid the city of Pierre any consideration for these warrants, and the city and none of its officers received any part of the proceeds of the sale of said warrants.

Under the undisputed record of the circumstances attending the issuance of these warrants and the indorsement by Coe I. Crawford, the payee, viewed in the light of the reasonable inferences that must be drawn therefrom, with a reasonable interpretation of his testimony, I find that he knew, at the time of the indorsement of said warrants, the purpose for which these warrants had been issued, and the intent and purpose to use the proceeds thereof by the said Capitol Campaign Committee; that the record shows no inquiry or investigation to determine what was the assessed valuation of the defendant city, or the amount of its outstanding indebtedness, except inquiry of Templeton, and the statements made by him and the certificates furnished in the manner above set forth. The only testimony in the record as to the use of the proceeds of these warrants is to the effect that they were used for capitol campaign purposes by this Capitol Campaign Committee.

The record in the county auditor's office of the county of Hughes, which is the county in which the city of Pierre is situated, shows the assessed valuation of the city of Pierre for the year 1889 was the sum

of $971,068, and the amount of cash on hand in the city treasury of the city of Pierre, as shown by the records of the said city, was at that time the sum of $1,359.22. There were erasures in the records in the county auditor's office showing the assessed valuation of the city for the year 1889, and the substituted figures were clearly in the handwriting of Sebree, the then county auditor of Hughes county. The records of said county auditor also showed, in addition to the assessed valuation of the property of the city of Pierre, for the year 1889, the amount of taxes levied, to wit, $17,619.44.

I also find that at the time of incurring this indebtedness and the issuance of these warrants the property of the city of Pierre had not been equalized for the assessment for the year 1890, and that the assessment for the year 1889 was the last complete assessment that had been made prior to the date of the issuance of said warrants. I find that no such public improvements as specified in the warrants in suit were made in the city of Pierre, by Crawford or any other person, and that Crawford at no time performed any service for the city of Pierre, or furnished any materials of any kind to the city of Pierre, and that the city of Pierre was never indebted to him in any sum for any cause at the time of the issuance of said warrants. I find that the city council of the city of Pierre made no appropriations to cover the expenditures ordered by the said warrants, or for any public improvements of any kind or character for the years 1889 and 1890.

It further appears that the annual appropriation of said city for the fiscal year beginning September 1, 1889, and ending August 31, 1890, was as follows: $16,000 for general purposes, and $1,600 for interest and sinking fund—and that the same had been fully expended prior to the 29th day of July, 1890, when said warrants were issued; that no further appropriations were made by the said city during the said fiscal year, and there was no provision made or attempted for the collection of an annual tax sufficient to pay the interest and principal of the debt evidenced by these warrants in suit, when due.

I further find: That the indebtedness of said city of Pierre, upon the date of issuance of said warrants, amounted to the sum of $218,875.52, and upon that date exceeded 5 per cent. of the assessed valuation of the property within the corporate limits of said city of Pierre. That at the time the plaintiffs' warrants were issued, and at all times since, this indebtedness of the said city has appeared upon the records of the proceedings of the city council of said city of Pierre, kept as required by law as a public record, including the proceedings of the board of equalization for the city of Pierre, and also the public record of the board of the county of Hughes, and the board of equalization of the state of South Dakota, kept by the city auditor, the auditor of the county of Hughes, and the auditor of the state of South Dakota, respectively, as required by statute, and that all of said records are and at all times have been open to inspection. That at the time of the alleged indebtedness represented by the warrants of the plaintiffs herein the prior registered warrants, after subtracting all of the money then in the city treasury from the total amount, exceeded the total amount of taxes levied to pay the expenses of the city of Pierre

during the fiscal year in which the said warrants were issued, together with the moneys received from fines and licenses, and the plaintiffs' warrants are not drawn against any fund to create which a tax had theretofore been levied, and they were not drawn against any anticipated fund to be collected from a levy of tax made by the council of the city of Pierre to pay such indebtedness evidenced by said warrants. Plaintiffs' warrants were not drawn against any fund levied to pay the current expenses of the city of Pierre for any year, but were drawn generally upon the funds of said treasury of the city of Pierre. That this alleged indebtedness accrued July 29, 1890, and payments of interest due thereon were made semiannually until October 29, 1895, since which time no payments have been made.

The foregoing findings dispose of the contentions of the parties respectively, so far as questions of fact are concerned. The plaintiffs insist earnestly that there is a total absence of any evidence in the record to show that either Coe I. Crawford, the payee in the warrants, or the plaintiffs, participated in, or had any knowledge of, any conspiracy, as alleged in the answer, and insist that the evidence shows a fraud attempted to be perpetrated by the city officials and by the citizens of Pierre, through their citizens' committee, for the purpose of securing the funds of these plaintiffs.

The foregoing finding as to the knowledge of Coe I. Crawford disposes of that issue in so far as it is dependent upon his knowledge. There is an affirmative finding, however, that the plaintiffs did not participate in or have any knowledge of the manner in which the warrants were issued or the purpose for which the money was to be used, and that leaves the simple question of the extent to which the plaintiffs are bound by the knowledge of Crawford, or the National Bank of Commerce.

[1] These warrants are not negotiable instruments, such as to exclude an inquiry as to the legality of their issue, even in the hands of a bona fide holder, or to preclude defenses which are available as against the original payee. The statutes of South Dakota do not, either expressly or by implication, enable the holder of warrants to exclude inquiry as to legality. A municipal corporation cannot invest such instrument with the character of commercial paper, so as to give it immunity in the hands of a bona fide holder from any defenses existing between the immediate parties. These were ordinary orders, warrants, certificates of indebtedness, and obligations to pay, issued by the city of Pierre, and as such enable the holders, the plaintiffs, to sue in their own name, but are not negotiable instruments, so as to exclude inquiry into the legality of their issue or preclude defenses available against the original payee. Hubbell v. Town of Custer, 15 S. D. 55, 87 N. W. 520; Gilman v. Township of Gilby, 8 N. D. 627, 80 N. W. 889, 73 Am. St. Rep. 791; Goose River Bank v. Willow Creek School District, 1 N. D. 26, 44 N. W. 1002, 26 Am. St. Rep. 605.

The rule that obtains in this circuit, was declared by Judge Caldwell in Watson v. City of Huron, 97 Fed 449, 38 C. C. A. 264, wherein it is declared:

"Such instruments are not subject to the rules of the law merchant or in any manner to be treated like negotiable bonds. Whatever differences of

opinion may have existed among the courts 50 years ago as to the negotiability of such warrants, the courts are now unanimous that, while such warrants establish prima facie the validity of the claims allowed and authorize their payment, they have no other effect; that they are in form negotiable, and transferable by delivery, so far as to authorize the holder to maintain in his own name an action on them, but they are not negotiable instruments, in the sense of a law merchant, so that, when held by a bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded."

Under this rule, now universally recognized, these plaintiffs occupy no better position than the original payee, who had notice of the object for which the warrants were issued.

[2] The fact that the resolution of the city council of the city of Pierre, ordering these warrants to be issued, falsely and fraudulently recited that they were intended for public improvements, cannot aid the plaintiffs, nor can a defense by the plaintiffs be predicated upon a reliance by plaintiffs upon such records or upon such records and statements of the officers of the defendant. Coe I. Crawford, the payee, paid absolutely no consideration for these warrants; the city was not indebted to him in any manner; he performed no service, furnished no material, for which these warrants were given in payment; he had no claim of any kind or character against the city; no consideration was ever received by the city for the warrants, either from Crawford or from the Capitol Campaign Committee, or the National Bank of Commerce.

These plaintiffs, with reference to the above findings upon these subjects, stand in no better position than Coe I. Crawford, the National Bank of Commerce, or the Capitol Campaign Committee. The Constitution of the state of South Dakota (article 10, § 2) provides that:

"No tax or assessment shall be levied or collected, or debts contracted by municipal corporations, except in pursuance of law, for public purposes specified by law. * * *"

The campaign for the location of the capitol at Pierre was entirely foreign to the purposes and objects of the corporate existence of the city of Pierre, and its officers were not authorized to burden the municipality with debts incurred in furtherance of this campaign. The city and its officers were entirely powerless to issue the warrants in suit therefor. These plaintiffs, in the purchase of these warrants, and all others dealing with the officers of the municipality, or its warrants, had notice and were charged with a knowledge of the law under which no liability could be created or incurred against the city of Pierre for capitol campaign purposes.

[3] In the foregoing findings, reference is made to the fact that the public records of the county auditor's office, showing the assessment for the year 1889, showed upon their face that they had been altered—that there were erasures, and figures inserted after such erasures were made. It is insisted by the plaintiffs that such public records have no probative force. The Supreme Court of the state of South Dakota has, in a number of decisions, held that, in the absence of other evidence to the contrary, the erasure of an instrument is pre-

sumed to be made prior to or contemporaneous with the execution of the instrument. Moddie v. Breiland, 9 S. D. 507, 70 N. W. 637; Bank v. Feeney, 12 S. D. 156, 80 N. W. 186, 46 L. R. A. 732, 76 Am. St. Rep. 594; Cosgrove v. Fanebust, 10 S. D. 213, 72 N. W. 1040. This presumption is stronger where the instrument is an act of a public officer, who is presumed to act lawfully and to do his duty, and who has no personal interest in the transaction. Northwestern Mortgage Trust Co. v. Levtzow et al., 23 S. D. 562–564, 122 N. W. 600.

Though there is some conflict as to the general rule as to presumptions to which courts are committed, there is practically universal agreement that an alteration in an instrument which is the act of a public officer, will be presumed to have been made before execution, at least if it has since been in his custody or the alteration is in his hand. A public officer is presumed to act lawfully and to do his duty, and he usually has no personal interest in the transaction. There is a compilation of decisions of various states of the Union to be found in Tharp v. Jamison, note 2, at page 114, 39 L. R. A. (N. S.).

The court's attention was called especially to the clear, precise handwriting of Mr. Sebree, the auditor at the time the entries were originally made, and it then seemed clear, and the court has entered its finding, that the entries over the erasures were in his handwriting. The fact that the erasures and changes were made when the record was being made up and before the duplicate was filed in the county treasurer's office was evidenced by testimony introduced, showing that the records in the office of the county treasurer, without erasures, the same being duplicates of the original under consideration, show that the assessed valuation and the amount of taxes to be collected for the year 1889 are the same as those shown in the record containing the erasures. In the absence of any testimony impeaching these records, I am of the opinion that this contention of the plaintiffs cannot be sustained.

[4] But it is said by plaintiffs that this presumption has, in this record, been overcome by proof of statements made under the official signature and seal of the city at the time the transactions in question took place. This exception has reference to the certificates made by the city auditor, furnished the plaintiffs at the time the warrants were sold, and referred to in the foregoing findings. This brings us to a consideration of the effect of this statement of this officer, as to the important fact of the amount of the assessed valuation of the property of the city of Pierre.

It is conceded that, under the statutes of the state of South Dakota, the public record of the assessed valuation of the property of the city of Pierre, provided for by the statutes of the state, were records of the county auditor's office of the county of Hughes, in which the city of Pierre was situated. It has been held that a recital of facts which the corporate officers had no authority, by statute, to determine or certify, does not estop the corporation. National Life Ins. Co. of Montpelier, Vt., v. Mead, Treasurer, 13 S. D. 37, 82 N. W. 78, 48 L. R. A. 785, 79 Am. St. Rep. 876; Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360. And the purchasers of these warrants

of this municipality, which was subject to constitutional and statutory provisions limiting its indebtedness to a certain percentage of its assessed valuation, were bound to ascertain, at their peril, from the proper public records, the amount of such valuation. St. Lawrence Township v. Furman, 171 Fed. 400, 96 C. C. A. 356, 17 Ann. Cas. 1244.

The Constitution of the state of South Dakota (article 13, § 4) in effect at the date of the incurring of the indebtedness represented by said warrants, provided that:

"The debt of any county, city, town, school district, * * * or other subdivision, shall never exceed five per centum upon the assessed valuation of the taxable property therein."

Pursuant to this provision of the Constitution, the Legislature of the state of South Dakota provided a law, relating to the incorporation of cities, that the city council should have power—

"to borrow money on the credit of the corporation for corporate purposes, and to issue bonds therefor, in such amounts and forms, and on such conditions as it shall prescribe, *but shall not become indebted in any manner for any purposes to any amount including the existing indebtedness in an aggregate to exceed five per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness.*" Session Laws 1890, p. 69, art. 5, § 1, subd. 5.

It will be noted that the statute expressly provides that the value of the taxable property is *"to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness."* The question whether these warrants exceeded the constitutional or statutory limitation was not left to the municipal officers of the defendant city, but instead the facts from which the question was to be determined were, by statute, required to be made a matter of public record in the county auditor's office of said county of Hughes, open to the inspection of all persons, which records disclosed the extent of the issue, and therefore no estoppel can be predicated upon recitals by said city auditor or other officers of the city, to the contrary. Under these circumstances, these plaintiffs were charged with the duty of examining the records, provided by statute, in order to ascertain whether the warrants increased the indebtedness of the municipality beyond the limit. National Life Ins. Co. of Montpelier, Vt., v. Mead, Treasurer, 13 S. D. 37, 82 N. W. 78, 48 L. R. A. 785, 79 Am. St. Rep. 876; St. Lawrence Township v. Furman, supra.

Plaintiffs themselves testified that they made no inquiry in this case to ascertain the amount of this assessment from the county auditor's office, and the certificate of the city auditor, or other officers of the city, cannot be considered by the court to contradict the public record of the county auditor's office, kept in the manner provided by statute, open to examination of the public, from which the true amount of the assessed valuation could be obtained.

An examination by the plaintiffs of the record in the county auditor's office of the county of Hughes, where the public record provided by the statute above referred to, was to be found by the public, would

have disclosed that the assessed valuation of the city of Pierre, for state and county purposes, for the year 1889, was the sum of $971,068, and an examination of the records of the city would have disclosed the fact that the amount of cash on hand in the city treasury at the time of the issue of said warrants was $1,359.22. The latter records would have also disclosed an existing indebtedness of the city of Pierre, in the sum of $218,875.52, which indebtedness, upon that date, exceeded the constitutional and statutory 5 per cent. limit of indebtedness, and therefore that the officers of the city were without power to incur the indebtedness represented by the warrants in suit.

[5] The next contention of the plaintiffs is that the defendant, by reason of the acts and representations of its officers, charged with the duty of managing the city's affairs, and the payment of interest in accordance with the findings herein, ratified the acts of the officers in the issuance of said warrants, and thereby established their validity, and that the city of Pierre is therefore estopped to question the validity of the warrants in suit, or to allege and prove the fraud attempted to be perpetrated upon the plaintiffs by the city and its officials. This objection of the plaintiff is involved in the foregoing and determined against the plaintiffs.

I may add, however, that in the case at bar there was a total lack of power to issue the warrants originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions. Therefore the doctrine of ratification or estoppel by reason of the payment of interest on the warrants, or by reason of recitals in the public records or certificates by officers, has no application as against this defendant, the city of Pierre. Parkersburg v. Brown, 106 U. S. 487–501, 1 Sup. Ct. 442, 27 L. Ed. 238. These municipal warrants were void in their inception for want of power to issue same, and not merely because of irregularities in their issue. Therefore the payment of interest thereon by the municipality, however long continued, does not amount to a ratification which estops the municipality from pleading their invalidity. Clarke v. Town of Northampton, 120 Fed. 661, 57 C. C. A. 123. A municipal corporation cannot ratify or be estopped by an act void in its inception and wholly ultra vires. Bogart v. Township of Lamotte, 79 Mich. 294, 44 N. W. 612.

The officers of the city of Pierre were not authorized, either by the Constitution or the laws of the state, and were not appointed a tribunal to decide the fact which constitutes the condition, in the case at bar, the constitutional and statutory limitation. Therefore any action by these officers, whether by certificate or otherwise, will not be accepted as a substitute for the truth that would have been revealed by an examination of the proper public record in the office of the county auditor of the county in which the city was situated. In other words, in order to estop the city of Pierre by the acts or certificates of its officers, it is necessary that such officers had authority to do the acts and make the recitals *and to make them conclusive.* The ground of the estoppel is the recitals of the officers, statements of those to whom the law refers the public for authentic and final information on the subject. Flagg v. School District No. 70, 4 N. D. 30, 58 N. W. 499-504,

25 L. R. A. 363. Applying this rule to the facts as they have been found in this record, the plaintiffs' position cannot be sustained.

Proper findings may be prepared in favor of the defendant and against the plaintiffs upon all of the issues in the case, and proper judgment in favor of the defendant and against the plaintiffs, dismissing the plaintiffs' complaint, and that it go hence without day, with its costs.

THE JOHN L. LAWRENCE.

(District Court, E. D. North Carolina. February 16, 1916.)

1. MARITIME LIENS ⇐40—SUPPLIES—AGREEMENT OF OWNER—WAIVER.

Four steamers belonging to the same owner were chartered for a common enterprise. The charterer, being without money or credit to buy necessary supplies, by agreement with the owner gave notes to libelants for supplies to be furnished on the credit of the vessels, each of which was named in the notes. The supplies were furnished to the charterer for the joint use of the vessels, to which they were distributed as needed. They were purchased and furnished in a foreign port, and were necessary. A suit having been brought against the steamers by others, libelants intervened, setting up one half their claims against the steamer Portland and the other half against the Lawrence. The vessels were sold, and the proceeds of the Portland were exhausted in the payment of prior claims by seamen; but from the proceeds of the Lawrence there was a surplus after paying all claims except that of a mortgagee. *Held*, that the transaction by which the supplies were obtained created, as was intended, a maritime lien on all the steamers jointly, which was superior to that of the mortgage; that libelants, by filing their libels against the Portland for a portion of their claim, did not waive their lien on the Lawrence, but might, on surrender of the notes, assert the same for the amount remaining due by an amended libel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 78-94; Dec. Dig. ⇐40.]

2. MARITIME LIENS ⇐43—SUPPLIES—WAIVER BY ACCEPTANCE OF NOTES.

The acceptance of notes for supplies furnished to a vessel, unless so intended, does not operate as a payment, nor as a waiver of the right to a lien.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 82; Dec. Dig. ⇐43.]

In Admiralty. Suit by the Weller Coal Company against the steamer John L. Lawrence. In the matter of the intervening libels and amended libels of E. V. White & Co., Incorporated, and the Robert P. Voight Company. On exceptions to report of special master. Exceptions sustained, with decree for intervening libelants.

Robert Ruark, of Wilmington, N. C., and Robert P. Ingram, of Norfolk, Va., for libelants.

Herbert McClammy, of Wilmington, N. C., for Astor Trust Co.

CONNOR, District Judge. The original libel herein was filed by the Weller Coal Company, and, upon process issued and decrees rendered in the cause, the steamer John L. Lawrence was sold by the marshal and the proceeds paid into court. A number of intervening

libels were filed, all of which, save those of E. V. White & Co., Incorporated, and the Robert P. Voight Company, have been disposed of by decrees. At the time the original libel was filed, other original and intervening libels were filed against the steamers Portland, Nat Strong, and Adroit. The said steamers, together with the John L. Lawrence, were owned by the Atlantic Phosphate & Oil Corporation, of New York, and were chartered by the Atlantic Coast Products Company, for the purpose of engaging, jointly, in fishing for menhaden on the coast of North Carolina. All of the steamers were sold under decrees of the court, and the proceeds, save that portion from the sale of the John L. Lawrence, now in court, were applied to the discharge of the claims established against them. The controversy between the intervening libelants, E. V. White & Co., Incorporated, and the R. P. Voight Company, and the Astor Trust Company of New York, holding a mortgage on the steamers, was referred to Eugene S. Martin, Esq., special master, who, after hearing the evidence, reported the following facts:

"Libelants are mercantile corporations of Norfolk, Va. J. F. Bussells, president of the Carolina Coast Products Company, needing supplies to operate the steamers and carry on the business in which they were engaged, and which he was unable to purchase in Wilmington, N. C., on credit, went to the city of Norfolk, Va., where he had friends, and saw the libelants, E. V. White & Co., Incorporated, and the Robert P. Voight Company, and stated to them that the steamers were in need of supplies, that he had no money or credit, and had come to Norfolk to do business with them. They seemed willing to do business with him, and, while they did not say that they doubted the credit of the Carolina Coast Products Company, they desired to hear from the owner of said steamers in New York before they delivered any supplies, as the said Bussells stated that he had no right to pledge the steamers.

"Thereupon the said Bussells and Mr. Robert P. Ingram (the secretary and treasurer of the Voight Company and attorney for White & Co.), on behalf of the said E. V. White & Co. and Robert P. Voight Company, went to New York and there interviewed Mr. Smitson, president of the Atlantic Phosphate & Oil Company, and Mr. Meadows, a part owner of the Carolina Coast Products Company, and chairman of the financial board and general manager of the Atlantic Phosphate & Oil Company, the owner of said steamers, and Capt. Bussells stated to them that Mr. Ingram was not satisfied with the financial condition of said companies, and it was then agreed between them that the Carolina Coast Products Company should execute notes to E. V. White & Co. and the R. P. Voight Company, respectively, for the supplies to be delivered by them to said steamers, said notes to bear the names of the said steamers, to wit, John L. Lawrence, Portland, Nat Strong, and Adroit, and to be indorsed by Mr. Meadows and Capt. Bussells. The notes, having been drawn in Norfolk and indorsed there by Bussells, were carried to New York and there indorsed by Meadows for the amount of supplies Capt. Bussells estimated the steamers would require. It was further agreed that, as the steamers would need supplies, the Atlantic Phosphate & Oil Company would make the steamers responsible for them, and, for this reason, the names of the steamers were put on said notes, and it was alone on this agreement that supplies were furnished on the credit of the steamers.

"Two notes were executed by the Carolina Coast Products Company, one for $1,800, payable to Robert P. Voight Company, and the other for $500, or $550, payable to E. V. White & Co., signed 'Carolina Coast Products Company, by J. J. Bussells, President,' for supplies furnished steamers John L. Lawrence, Portland, Nat Strong, and Adroit, and indorsed by Meadows and Bussells.

"Upon the execution of the notes, as aforesaid, Mr. Ingram and Capt. Bussells returned to Norfolk, when the notes were delivered by Capt. Bussells

to the Voight Company and White & Co., respectively, and they delivered the supplies, as called for by the Carolina Coast Products Company, at its factory, and said company distributed them to the several steamers. * * *"

The libelants, E. V. White & Co. and Robert P. Voight Company, filed intervening libels against the steamers John L. Lawrence, for $258.17, in favor of White & Co., and $819.33, being one half the amount due for the supplies, in favor of R. P. Voight Company, which amounts have been paid from the proceeds of the sale of said steamer. They filed libels for like amounts, being the other half of the amounts due for supplies furnished said steamers, as hereinbefore stated, against the steamer Portland. Decrees were rendered for the amounts claimed, but the proceeds of the sale of the steamer were exhausted in the payment of claims having priority.

A portion of the supplies furnished the steamers by libelants, were on hand, not having been consumed, at the time the libels were filed, which were turned over to the receiver of the Coast Products Company and sold by him. The supplies were invoiced to the several steamers by name, jointly, to be distributed between them by the officers and agents of the company. Libelants had no knowledge or notice that the supplies were not used as was intended by them. There is due libelants the amounts for which the intervening libel was filed. After the sale of the steamers and the payment of the claims against them, the libelants were, upon their application, permitted to amend their intervening libels against the steamer John L. Lawrence, by claiming from the proceeds of the sale, now in the possession of the court, the balance due them on account of the supplies furnished, as hereinbefore set forth; said amount being more than sufficient to pay said claims. The Astor Trust Company, having intervened for the purpose of asserting claim by virtue of the mortgage held by it upon the steamers, filed answer to the amended intervening libels. The libelants, since the hearing before the special master, have surrendered and filed with the clerk the notes executed as hereinbefore stated.

[1] The special master was of the opinion, and so reported, as a conclusion of law that:

"The agreement entered into by the Atlantic Phosphate & Oil Company, the Carolina Coast Products Company, Meadows, Ingram, and Bussells, and the transactions thereunder relative to the supplies furnished, constituted an unrecorded verbal mortgage of said steamers to secure the notes executed to E. V. White & Co. and the Voight Company, subject to the deed of trust or mortgage executed by the Atlantic Phosphate & Oil Company to the Astor Trust Company, but do not create, upon the facts found, a maritime lien on said steamers."

To this conclusion of law the libelants filed exceptions. It is insisted that, by reason of filing the libel against the Portland for one-half the amount due the intervening libelants, they elected to look to that steamer for that portion of their claim, and thereby waived any lien which they may have had against the John L. Lawrence therefor. The libelants introduced a letter received from the attorney for the bondholders' committee, November 23, 1914, at or about the time the steamers were sold, in which he wrote:

"Confirming our understanding, I beg to state that if you choose to assert the entire claims of Robert P. Voight Company and E. V. White & Co., Incorporated, against the steamer Lawrence, neither the bondholders' committee nor their attorney will make any objection on the ground that you are guilty of laches, or might have proved your claim against the steamer Portland, provided that your claims are in all respects, on the merits, properly provable against said steamer Lawrence."

While the libels and intervening libels by the seamen and other claimants were filed against the steamers, and they were sold separately and their proceeds applied to the claims so asserted, it is evident that they were all owned by the same corporation, chartered by Carolina Coast Products Company for, and engaged in, a common purpose and venture. Capt. Bussells was in control of them. The supplies were furnished upon their joint credit and for their joint use. The goods were invoiced to all of the steamers, treating them as engaged in a common enterprise. The distribution of the supplies among the steamers was left to Capt. Bussells or his employés. There is no question of the amount or price of the supplies; in the original intervening libel, these elements were found by the master, without any controversy on the part of complainants. There is no controversy in regard to the necessity for the supplies to enable the steamers to proceed on their voyage, or the enterprise for which they had been chartered by the Coast Products Company. I can perceive no valid reason why, unless for some other cause, the libelants are deprived of a maritime lien, they may not have filed their libel upon each of the steamers for the entire amount and recovered the whole amount out of either of them. There was no question, as between the libelants and the owners, charterers, or claimant, of separate liability. It turned out that, because the seamen on the separate steamers filed libels for wages against the one upon which they were engaged, the proceeds of the Portland were consumed in the payment of their wages, which were entitled to priority over the claim of the libelants for supplies. It was evidently in recognition of this condition, and this right of libelant, that the attorney, representing the bondholders' committee, the only persons who had any substantial interest in the matter, wrote the letter introduced by the libelants. I do not think that, by filing their libel for a portion of their claim against the Portland, the libelants waived their rights or lien, if any they had, on the steamer Lawrence, and this was the attitude of the attorney representing the bondholders.

We are thus brought to inquire whether, upon the facts found by the special master, the intervening libelants acquired a maritime lien on the steamers for the amounts due for the supplies furnished. The master construed the transaction as an attempt on the part of the owners to give the libelants "a verbal mortgage" on the steamers, which, as he very correctly held, was invalid as against the claimant Astor Trust Company. The steamers were in a foreign port; their home port being New York. The supplies were necessary, and were furnished upon the request of the master—the charterer and the owner. It would seem that, in the absence of a finding that the credit was given to the owners, and not the steamers, a maritime lien attached. The case which appears more nearly analogous to the conditions found

here is The Kalorama, 10 Wall. 204, 19 L. Ed. 941. There the vessel, being navigated between Baltimore and Charleston, by Prendergrast, under a contract with her owner, resident of New York, while in the port of Baltimore, was repaired by Prendergrast, on the request of the master and the owner, with the express understanding that the repairs were so made on the credit of the steamer; supplies were also furnished her under the same conditions. For the balance due, part of the amount having been paid, Prendergrast brought a common-law suit against the owners in the state court, and while the suit was pending filed a libel for the same repairs and supplies in the federal court on the admiralty side of the docket. Judge Clifford says:

"Where it appears that the repairs and supplies were necessary to preserve the ship in port, or to enable her to proceed on her voyage, and that they were made and furnished in good faith, the presumption is that the ship, as well as the master and owner, is responsible to those who made the necessary advances, and it is clear that the necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship, unless it is shown that the master had funds or that the owner had sufficient credit, and that the repairers, furnishers, or lenders of the money knew these facts, or one of them, * * * subject to those conditions, the master, in the absence of the owner, is vested with the authority to order necessary repairs and supplies; but it is no objection to his authority that he acted on the occasion under the express instructions of the owner, nor will the lien of those who made the repairs and furnished the supplies be defeated by the fact that his authority emanated from the owner, instead of being implied by law. When the owner is present, the implied authority of the master for that purpose ceases; but, if the owner gives direction to that effect, the master may still order necessary repairs and supplies, and if the ship is, at the time, in a foreign port, or in the port of a state other than that to which she belongs, those who made the advances will have a maritime lien, if they were made on the credit of the vessel. * * * Implied liens, it is said, can be created only by the master; but if it is meant by that proposition that the owner, or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the court cannot assent to the proposition, as the practice is constantly otherwise."

This decision is of controlling authority because of the fact that the court reversed the decision of Chief Justice Chase, sitting on the circuit, and, as he stated, against his own opinion, followed the decision of the Supreme Court in The Laura (Thomas v. Osborn) 19 How. 22, 15 L. Ed. 534, and The Sultana (Pratt v. Reed) 19 How. 359, 15 L. Ed. 660. So, in the Patapsco, 13 Wall. 329, 20 L. Ed. 696, Judge Davis says:

"If the credit was to the vessel there is a lien, and the burden of displacing it is on the claimant. He must show affirmatively that the credit was given to the company to the exclusion of a credit to the vessel. This he seeks to do by the form of charge in the libelant's journal and ledger. If it be conceded that these entries tend to support this position, they are far from being conclusive evidence on the subject. Entries in books are always explainable, and the truth of the transaction can be shown independent of them."

In Lower Coast Trans. Co. v. Gulf Refining Company, 211 Fed. 336, 128 C. C. A. 15, it is held that:

"One furnishing fuel to a vessel in a foreign port, under contract with a corporation operating the vessel on joint account for itself and the owner, is entitled to a maritime lien."

It is said:

"The fact that bills were made out to other parties connected with the management of the boat does not destroy the maritime lien for supplies furnished in a foreign port."

With all deference to the learned special master, I am unable to reach the conclusion that the parties—the libelants, the charterer and owner—intended to give a verbal mortgage on the steamers. This would have been very unusual and manifestly void as against the mortgage held by the Astor Trust Company. It seems that, upon a more reasonable construction, we should reach the conclusion that it was the purpose of libelants to make sure that, by having the concurrent consent or order of the owner and the charterer, the steamers would be subjected to a maritime lien for the supplies. The fact that the libelants were notified by Capt. Bussells that he had no money and could get no credit in Wilmington was conclusive evidence to them that the Coast Products Company was of doubtful credit; hence "they desired to hear from the owner of said steamers in New York before they delivered any supplies, as the said Bussells stated that he had no right to pledge the said steamers." When their attorney reached New York, Capt. Bussells stated to the owner and the charterer that Mr. Ingram was not satisfied with the financial condition of said companies, and it was then agreed that the companies were to execute notes for the supplies to be delivered by them to said steamers—said notes to bear the names of the steamers and to be indorsed by Mr. Meadows and Capt. Bussells, and that the Atlantic Phosphate & Oil Company would make the said steamers responsible for the supplies, etc., "and it was alone on this agreement that the supplies were furnished on the credit of said steamer."

[2] I am of the opinion that the reasonable interpretation of this transaction leads to the conclusion that the owner consented that the libelants should have a maritime lien for the supplies, which all parties conceded were necessary to enable the steamers to continue the work for which they had been chartered. The acceptance of the notes, unless so intended, did not operate as a payment of the account for the supplies, nor a waiver of the lien. In The Emily Souder, 17 Wall. 666, 21 L. Ed. 683, drafts were given by the master and accepted by the owner, they were protested for nonpayment, and the libels thereupon filed. Mr. Justice Field says:

"The drafts given by the captain upon the owners of the vessel in New York were not received by the libelants in discharge and satisfaction of the sums advanced. They were received only as conditional payments. Such would be the presumption of law in the absence of any direct evidence on the point; for by the general commercial law of the world a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment. It is treated everywhere, in the absence of express agreement or local usage to the contrary, as conditional payment only."

There, as here, the acceptances were produced on the trial and surrendered for cancellation. So, in The Kalorama, supra, it was held that the institution and pendency, at the time the libel was filed, of an action in the common-law courts against the owner for the sup-

plies, did not prevent the prosecution of the libel in admiralty. In The Emily Souder, supra, it is further said:

"The fact that the vessel was, at the time the advances were made, under mortgage to the claimants, does not subordinate the lien of the libelants to the claim of the mortgagees. * * * Advanced for the security and protection of the vessel, they were for the benefit of the mortgagees as well as of the owners. If liens created by the necessities of vessels in a foreign port could be subordinated to or displaced by mortgages to prior creditors at home, such liens would soon cease to be regarded as having any certain value, or as affording any reliable security."

The position that, by filing the libels against the Portland, the libelants waived the lien on the Lawrence, I do not think tenable. All of the vessels, engaged in the joint enterprise, were under mortgage to the Astor Trust Company. It was of no interest to that company whether the claims were paid from the proceeds of the sale of the Portland or the Lawrence; in either case, the value of its security was pro tanto reduced. In no respect was the attitude of claimants changed by reason of the course pursued by the libelants. This was recognized by the attorney for the bondholders.

Upon a careful consideration of the entire case, I am of the opinion that, in accordance with the principle of maritime law laid down and applied in the cases cited and the text-books, the libelants are entitled to a maritime lien on the steamer Lawrence. As the fund has been in the registry since the sale, and the delay was caused by the course pursued by libelants, no interest will be allowed, and the cost, including one-half the allowance to the special master, of the amended intervening libel, will be deducted from the recovery. The exceptions are sustained. A decree will be drawn directing the payment of the amount due libelants, subject to a deduction of the cost charged against them. As it appears that there are no other liens upon, or claims against, the funds in the registry, from the proceeds of the sale of the steamer John L. Lawrence, and that the claimant, Astor Trust Company, is entitled thereto, the decree will direct the payment of the amount, less any cost for which it may be liable, to said trust company, or to Herbert McClammy, Esq., counsel of record.

This decree is final.

In re THOMAS.

In re CHASE-HACKLEY PIANO CO.

(District Court, S. D. Georgia. March 20, 1916.)

1. SALES ⇐8—DELIVERY OF GOODS FOR SALE—CONSTRUCTION OF CONTRACT—BAILMENT OR "CONDITIONAL SALE."

A contract under which goods are delivered to another for sale, the receiver not being absolutely bound to pay for the same, is one of consignment, and a mere bailment; and the fact that the receiver of the goods may fix the selling price, or retain the difference between such price and the price at which they are billed to him, and is also required to pay

insurance, storage, freight, and other expenses, does not make the contract one of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 18, 19; Dec. Dig. ⊂⊃8.

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

2. SALES ⊂⊃8—DELIVERY OF GOODS FOR SALE—CONSTRUCTION OF CONTRACT.

A provision of such a contract, binding the receiver of the goods to pay for such as shall remain unsold for a certain length of time at the option of the other party, does not divest the contract of its character as a bailment or consignment, even as to goods which are unsold at the end of such time, unless the option has been exercised.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 18, 19; Dec. Dig. ⊂⊃8.]

3. BANKRUPTCY ⊂⊃140(1)—PROPERTY PASSING TO TRUSTEE—GOODS HELD ON CONSIGNMENT.

Under the law of Georgia, consignment contracts are not required to be recorded, and the fact that goods in possession of a bankrupt in that state at the time of his bankruptcy were held by him on consignment, and not as owner, does not operate as a fraud on his creditors, nor deprive the real owner of title, although the contract was not recorded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⊂⊃140(1).]

4. SALES ⊂⊃8—DELIVERY OF PROPERTY FOR SALE—CONSTRUCTION OF CONTRACT—BAILMENT OR CONDITIONAL SALE.

A contract under which pianos were delivered to a bankrupt for sale construed in its entirety, and *held* one of consignment, and not of conditional sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 18, 19; Dec. Dig. ⊂⊃8.]

5. CONTRACTS ⊂⊃170(1)—PRACTICAL CONSTRUCTION OF CONTRACT BY PARTIES.

Where, during the entire course of business between the parties to a contract, it was treated as one of consignment, and not of sale, their construction is entitled to consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. ⊂⊃170(1).]

In Bankruptcy. In the matter of A. A. Thomas, bankrupt. On review of order of referee dismissing petition of the Chase-Hackley Piano Company. Reversed.

The Chase-Hackley Piano Company filed its petition with the referee, in which it alleged that on January 27, 1914, it entered into a consignment contract with A. A. Thomas, the bankrupt, under which it shipped to him on February 2, 1914, 14 pianos, all of which were disposed of by said bankrupt before bankruptcy, except 4 (giving the numbers of same), and that said pianos were in the possession of the bankrupt at the time of his adjudication, and afterwards passed into the possession of Abram Levy, trustee of the bankrupt; "that during the entire period of the business between petitioner and said Thomas under the aforesaid contract, both parties always treated the goods as consigned goods, and they were dealt with as such"; that petitioner had demanded of the trustee possession of the said pianos, and that delivery thereof had been refused. Petitioner prayed for an order directing the trustee to deliver the pianos to it. Attached to the petition was a copy of the contract in question, the same being as follows:

"No alterations of this contract will be accepted.

"Chase-Hackley Piano Company, Muskegon, Mich.—Gentlemen: (1) In consideration of your furnishing us with pianos on consignment, we agree to sell

them in Augusta, Ga., and vicinity on the following conditions: All pianos that are now or shall hereafter be furnished us by you are to be held upon consignment and sold on such terms as you may direct.

"(2) All money, notes, or other property received on sale of any piano shall belong to you. Customers' notes or leases shall be made on blanks furnished by you, payable to your order, secured by lien on the instrument sold, and subject to your approval. All notes and leases shall bear interest at the rate of not less than 6 per cent. per annum, or we will pay the difference to that amount from our commission. We will indorse all such notes and leases, guarantee payment at maturity, and hereby waive protest and notice of protest on the same at your option.

"(3) We agree to sell all instruments within four months from date of shipment, or pay interest after that time at the rate of 6 per cent. per annum on the invoice price; but it is expressly understood that the charge of said interest and the payment thereof shall in no sense be construed as indicating a sale of said instrument to us. If any piano is unsold six months from date of shipment, I agree to pay for same at your option.

"(4) For the purpose of forming a basis upon which our compensation is to be fixed for the sale of said instruments, we direct you to bill same to us at the prices you have given us, and which prices and values we will account to you for; and we agree that our compensation and commission hereunder shall be such sum or sums as we may sell said instruments for in excess of the price at which they are billed as above. Our commission on cash sales shall be due and payable when you receive your pay for the instrument. On time sales, you to pay us all of first payment, provided it does not exceed $50 of our commission. It is further agreed that, when the first payment is less than $50, we are to retain the subsequent payments to the amount of $50, providing we collect the said $50 in four months from date of sale.

"(5) Balance of commission to be paid as you receive money from the purchaser, after you have received the invoice price of the piano in cash, together with the interest thereon, provided you have no claim against us for other indebtedness; it being understood and agreed, however, that you are to have in your possession collaterals of the face value of at least 25 per cent. more than the total net value of consigned goods which we may have sold at that time.

"(6) All instruments taken back from customers on account of default of payments, or for other causes, and all new or secondhand instruments taken in exchange, or in part payment for instruments consigned by you, are to be regarded the same as goods consigned, and to be accounted for in the same manner. We will send you a statement the 1st day of each and every month of all instruments received and sold, and remaining on hand unsold, and make prompt returns as sales are made.

"(7) Upon your demand, or that of your agent, we will deliver as you may direct, free of charge or expense of any kind to you, any and all of said goods remaining unsold at the time of said demand, including the original packing cases for same. All goods returned to you to be passed to our credit at 90 per cent. of original bill, the balance, 10 per cent. being deducted for depreciation and shop wear of goods, except instruments which have been taken in exchange or trade from customers for default in payment on notes or leases, such stock to be credited at a fair cash value, to be determined by you. We agree to pay all freight, taxes and expenses, including attorney's fees, court costs, and any other charges to which you may be put in taking possession of any instrument or making collections, and to insure all stock against loss by fire, loss payable to Chase-Hackley Piano Company.

"This agreement may be terminated at any time by either party, and any stock on hand will be subject to your order.

"[Signed] A. A. Thomas Piano Co.,
"A. A. Thomas.

"Sir: Your contract or proposal, as above, we accept.
"[Signed] Chase-Hackley Piano Co.,
"Per H. B. Bradley."

To this petition the trustee demurred on the following grounds: (1) That it is apparent from the petition that the Chase-Hackley Piano Company has no

title to the pianos in question; (2) that the transaction between the petitioner and the bankrupt was a conditional sale and the contract not having been recorded, petitioner cannot recover the pianos; and (3) that under the contract between the petitioner and the bankrupt the bankrupt became absolutely bound to pay for the unsold pianos at the expiration of six months.

The referee sustained the demurrer and dismissed the petition, and the Chase-Hackley Piano Company filed a petition to review this order of the referee.

W. H. Barrett, of Augusta, Ga., for Chase-Hackley Piano Co.
W. K. Miller and J. S. Bussey, Jr., both of Augusta, Ga., for trustee.

LAMBDIN, District Judge (after stating the facts as above). The case before me is upon a petition filed by the Chase-Hackley Piano Company for the review of an order of the referee dismissing upon general demurrer its intervention, wherein it asked that the trustee of the bankrupt be directed to surrender to it four pianos, which had been turned over to the trustee by the bankrupt upon his adjudication. The question turns upon the point whether the contract under which the Piano Company delivered the pianos in question to the bankrupt was a consignment contract or a contract of conditional sale. The referee held that on the face of the papers the contract in question was a contract of conditional sale, and that inasmuch as same had not been recorded, as provided by the laws of Georgia, the rights of the trustee in the pianos were superior to the rights of the Piano Company.

[1] 1. It is often quite difficult to determine whether a contract is one of agency or consignment, or whether it is one of conditional sale. In order to determine this question, it is always necessary to consider all the terms of the contract, so as to ascertain the intention of the parties. If it is intended and provided that the customer should be absolutely bound in all events to pay for the goods, the title being reserved in the vendor, then the contract is one of conditional sale. However, if the vendor merely delivers the goods to the customer for sale by him as the agent of the vendor, the customer not being absolutely bound by the contract to pay for the goods, then the contract is one of consignment for sale or an agency to sell; it is a mere bailment. 35 Cyc. 661. "The fact that such a contract provides that the receiver of the goods may fix the selling price and may retain the difference between this price and the price at which the goods are billed to him as his commission, and shall also pay insurance, storage, freight and other expenses, does not make the contract an agreement of sale." In re Columbus Buggy Co. (C. C. A. 8th Cir.) 143 Fed. 859, and cases cited on page 861, 74 C. C. A. 611; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Ludvigh, Trustee, v. American Woolen Co., 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345; National Bank v. Goodyear, 90 Ga. 711, 16 S. E. 962; In re Flanders, 134 Fed. 560, 67 C. C. A. 484.

[2] 2. Counsel for the trustee recognize the general doctrine above enunciated, but contend especially that under the concluding sentence in the third paragraph of the contract which is set out in full above, the contract is not one of bailment, but one of sale. This sentence is, as follows:

"If any piano is unsold six months from date of shipment, I [that is, A. A Thomas, the bankrupt] agree to pay for same at your option."

It is conceded that more than six months had elapsed before the adjudication was had. Counsel for the trustee contend that under this clause in the contract the Piano Company had the right at its option to compel the bankrupt to take and pay for the pianos at the expiration of six months from date of shipment, and that this provision made the contract one of sale instead of consignment. They also contend that such clause is a fraud on the creditors, giving the Piano Company a secret power to call the contract one of sale or one of consignment to meet the exigencies of the situation. The highest courts of this state have never decided this exact point. They have, however, recognized and enforced the distinction between consignment contracts and contracts of conditional sale, and have held that it is not necessary under the laws of Georgia for a consignment contract to be recorded. Furst v. Commercial Bank, 117 Ga. 474, 43 S. E. 728; Powell v. Brunner, 86 Ga. 532, 12 S. E. 744; Federal Rubber Co. v. King, 12 Ga. App. 261, 76 S. E. 1083; National Bank v. Goodyear (supra), 90 Ga. 711, 16 S. E. 962.

The Supreme Court of Georgia has held also that the converse of the proposition contained in the clause now under consideration, so as to give the consignee an option of purchase, is not inconsistent with a bailment or consignment until such option is actually exercised. Evans v. Napier, 111 Ga. 102, 36 S. E. 426; Wiggins v. Tumlin, 96 Ga. 753, 23 S. E. 75; Furst v. Commercial Bank, supra, 117 Ga. 474, 43 S. E. 728. Other courts elsewhere have also construed consignment contracts which contain a clause giving the consignee an option to buy the consigned goods, and have likewise held that this clause, before the option is exercised, does not divest the contract of its nature as a bailment or consignment, or convert it into a contract of sale. 35 Cyc. 655, and cases cited in note 60; In re Pierce (C. C. A. 8th Cir.) 157 Fed. 757, 85 C. C. A. 14.

We see no reason in law or equity why the rule should not work both ways. The question depends upon what the parties bind themselves to do under the terms of the contract in accordance with its original terms, and where one of the parties has to take some affirmative action, so as to change the effect and operation of the contract as it originally stood, we do not see how in the absence of such affirmative action the nature of the contract is changed. As stated by Judge Powell in the case of McKenzie v. Roper Wholesale Grocery Co., 9 Ga. App. 185, 70 S. E. 981:

"If the effect of the contract is that the property is delivered from the bailor to the bailee, with the understanding that the title is to remain in the bailor and the bailee does not assume initial responsibility to pay the purchase price, it is ordinarily not a conditional sale, but is a consignment, although the bailee may have the option of purchasing the goods themselves by paying a stipulated price, or may have a right to sell them to other persons upon accounting to the bailor for a stipulated sum, and though the bailee's compensation in the matter may depend upon such profit as he shall realize on the difference between the price at which the goods are consigned and the price at which they are sold, and though the bailee may be responsible to the bailor for the

value of such goods as he may sell on credit, whether he collects from the purchasers or not."

The Court of Appeals of Georgia in the case of Federal Rubber Co. v. King, 12 Ga. App. 261, 76 S. E. 1083, after quoting the above extract from Judge Powell's opinion in the McKenzie Case, adds:

"The whole question is whether the ostensible purchaser assumes liability for the purchase price at the time the goods are received. * * *"

Applying this rule to the case at bar, the question is, Whether the bankrupt assumed liability for the purchase price of the pianos at the time he received same. It is clear from reading the contract that the bankrupt did not assume this liability, but he was only to become liable for the pianos in the event the Piano Company at the end of six months exercised the option to require him to pay for same. This contingency never arose in this case, and therefore the pianos remained on consignment with the bankrupt at the time of his adjudication, and the trustee took them in the same plight.

As stated above, we see no reason why the rule should not work both ways. The highest courts of this state, in the decisions above cited, have held that the consignment nature of the contract is not changed because the consignee had an option to purchase the goods. Indeed, in bankruptcy matters, fraud on the part of the bankrupt is generally sought to be provided against, instead of fraud on the part of the person who owns the goods and has left them with the bankrupt. If the right of the bankrupt to exercise the option to buy the goods does not, under the decisions cited above, change the nature of the contract from one of bailment to one of sale, we see no good reason why a similar effect should not be given to a contract where this option is lodged with the owner of the property. It is in the interest of justice that a person should not be deprived of his property without his consent. This view of the law is sustained by other courts which have passed on the precise question here made, and those courts have held that such an option on the part of the consignor does not, before the option is exercised, convert the contract into one of sale. In re Galt (C. C. A. 7th Cir.) 120 Fed. 64, 56 C. C. A. 470; In re Reynolds (D. C.) 203 Fed. 162, and cases cited; Martin v. Stratton-White Co., 1 Ind. T. 394, 37 S. W. 833; Weir Plow Co. v. Porter, 82 Mo. 23; Lenz v. Harrison, 148 Ill. 598, 36 N. E. 567; Franklin v. Stoughton Wagon Co. (C. C. A. 8th Cir.) 168 Fed. 857, 94 C. C. A. 269.

In the Galt Case, cited above, the Circuit Court of Appeals thought that it was especially significant that the option to require payment was given to the consignor and not to the consignee, and gave that as one of its reasons for holding that the contract was one of bailment and not of sale. The language used by the court in that case was as follows:

"It was not contemplated that Galt should ever own these wagons. He was to sell them to others for the company; his commissions to be the amount which he might receive over the prices stated in the contract. The proceeds, whether in cash or in notes of the purchasers, were to be immediately returned to the company; the notes being guaranteed by Galt. This was a del credere commission, and not a sale. The company could compel a return of the goods not sold. Galt had not the option to pay for them in

money. Even with respect to the goods unsold within the 12 months, the option for their return or payment was with the company, and not with Galt; and nowhere in the agreement does the latter covenant to pay for these goods as in the case of a sale."

This case was quoted approvingly by the Circuit Court of Appeals of the Eighth Circuit in the case of John Deere Plow Co. v. M'David, 137 Fed. 802, and at middle of page 811, 70 C. C. A. 422. The Circuit Court of Appeals in the Galt Case stated that while the clause giving to the consignor the option to require the consignee to pay for the goods which were unsold at the expiration of a certain period might, if considered alone, tend to indicate a sale, yet, taking that clause with the entire contract, it was seemingly incorporated only so as to compel the agent promptly to sell and to report sales within the time stated.

[3] We do not think that this provision in the contract under consideration was any fraud on the creditors. The laws of Georgia, like the laws of other states, do not require consignment or bailment contracts to be recorded. Such contracts are upheld by the courts, although the consignee is clothed with all the indicia of apparent ownership, and although there is nothing on record to put creditors on notice as to the true ownership of the consigned goods. Such is the general policy of the law on the subject. Therefore, on reason and authority, we do not think that the clause in question should have the effect contended for.

3. The law requiring contracts of conditional sale to be recorded is to be found in section 3318 in the Georgia Code of 1910, which is in the following language:

"Whenever personal property is sold and delivered with the condition affixed in the sale that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale in order for the reservation of title to be valid as against third parties, shall be evidenced in writing and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves, the contract as made by them shall be valid and may be enforced, whether evidenced in writing or not."

The contract in question was not of the nature described in the section of the Georgia Code above quoted. Therefore it was not necessary for same to be recorded, as required by that section. Nor is there any other law in Georgia requiring contracts of the nature of the one under consideration to be recorded. Therefore the failure to record the contract in question did not deprive the Chase-Hackley Piano Company of its right to recover the pianos from the trustee.

[4] 4. It is apparent, from reading the entire contract between the parties, that same was intended to be a consignment contract. It is called a consignment throughout; the pianos were to be sold on such terms as the consignor might direct; all money, notes, or other property received in the sale of any piano should belong to the consignor; for all sales on time, notes or leases should be taken on blanks furnished by the consignor and payable to its order and subject to its approval, and consignee was to indorse such notes; the commission was to be paid by the consignor to the consignee; all pianos taken back

from customers or taken in exchange were to be regarded the same as goods consigned and to be accounted for in the same manner; the consignee was to send the Piano Company a statement on the 1st day of each month of all instruments received and sold and remaining on hand unsold and make prompt returns as sales were made; all pianos were to be returned to consignor on demand; and in conclusion it was agreed that the contract might be terminated at any time by either party, and that thereupon the pianos on hand should be subject to the order of the Piano Company. Considering the contract in its entirety, it is clear that the contract was one of consignment or bailment, and not a contract of conditional sale, and that the clause depended upon by counsel for the trustee to change the nature of the contract into one of sale was not effectual for such purpose. In this connection attention may be called to the opinion of the Supreme Court of the United States recently delivered in the case of J. F. Bailey, Trustee, v. Baker Ice Machine Company, 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. —, in which the failure of the vendor of certain machinery to exercise an option given in the contract was adverted to in the following language:

"Coming to the provision relating to a mechanic's lien, we think it did no more than reserve to the vendor a privilege or option to file and enforce such a lien. It well may be that the exercise of this privilege would have been inconsistent with a continued assertion of title by the vendor. William W. Bierce v. Hutchins, 205 U. S. 346, 27 Sup. Ct. 524, 51 L. Ed. 833. But the privilege was not exercised, and it hardly can be said that its mere reservation nullified the express words of the stipulation concerning the title. That it was not intended to do so seems manifest when the entire contract is considered."

[5] 5. Furthermore, it is stated in the intervention which the Piano Company filed with the referee that:

"During the entire period of business between the parties under said contract, both parties to the contract always treated the goods as consigned goods, and they were dealt with as such."

This course of conduct on the part of the parties to the contract, and the construction so put by them on same, is entitled to some consideration. The Circuit Court of Appeals of the Eighth Circuit in the case of Metropolitan National Bank v. Benedict Co., 74 Fed. 182, discussed this phase of the subject in the opinion at middle of page 185, 20 C. C. A. 377, at page 379, in the following language:

"Moreover, parties have the undoubted right to make their own contracts, and to put their own construction upon them, and to regulate their rights and liabilities thereunder. If the court 'leaves the parties to be governed by their understanding of their own language, it in effect enforces the contract as actually made. That they should be permitted to construe their own agreement accords with every principle of reason and justice.'"

6. Counsel for the trustee rely somewhat upon In re Roellich, 223 Fed. 687, in which the District Court of Oregon, in considering a contract similar to the one here involved, held that same was not a consignment contract, but was a contract of conditional sale. The court there says that where property is delivered to the vendee for sale in the usual course of business as a merchant, and the various provisions relating to the ownership and possession are mere contrivances to se-

cure the purchase price to the vendor, the transactions are fraudulent in law as against other creditors of the vendee, and it bases that decision upon another case decided by the same District Court of Oregon (In re Rasmussen's Estate, reported in 136 Fed. 704), in which it was held that, under the laws of Oregon, a conditional sale or a bailment of goods made by one person to another for the purpose of sale is inconsistent with ownership on the part of the vendor or consignor on account of the fact that the goods are to be resold. Those decisions, therefore, are based on the general policy of the law in the state of Oregon. This policy does not prevail in Georgia, because in this state it is lawful to deliver goods on conditional sale or on consignment for the purpose of resale by the vendee or consignee. Such transactions are also upheld by the decisions of the Supreme Court of the United States which are cited above.

An order will be taken, therefore, sustaining the petition for review filed by petitioner, and setting aside the order of the referee in the matter, and directing that the referee take further proceedings in the matter in accordance with this opinion.

GRIGSBY v. MILLER et al.

(District Court, D. Oregon. March 13, 1916.)

No. 1741.

1. PARTIES ⟸32—TO PLEADING—"INDISPENSABLE PARTY."

In suit by a deceased wife's administrator to set aside a deed given by her and her husband, the husband, though a proper and necessary, was not an "indispensable, party," one so necessary that a decree without his presence would prejudice his rights and leave the case contrary to equity and good conscience, a party whose interest in the subject-matter of the suit and the relief sought is so bound up with that of other parties that his legal presence as a party is an absolute necessity to the court's right to proceed, since, though the husband had an inchoate interest in the cause, in that, if plaintiff succeeded, he would be benefited by the litigation to the extent of having his title to the property potentially established, subject to the right of the administrator to subject it to the payment of the wife's debts, plaintiff administrator could proceed without such husband as a party and obtain all the relief to which he was entitled, without affecting the husband's interests or rights.

[Ed. Note.—For other cases, see Parties, Dec. Dig. ⟸32.

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

2. EXECUTORS AND ADMINISTRATORS ⟸438(8)—ACTION BY ADMINISTRATOR—HUSBAND OF DECEDENT AS PARTY PLAINTIFF.

In suit by a wife's administrator to set aside deeds, one given by decedent and husband to M., and one given by M. to another, the proper position of the husband as a party to the suit, was as a plaintiff, and not as a defendant, as a recovery by the administrator was in harmony with recovery by the husband, so that the federal court had no jurisdiction of the cause, on the ground of diversity of citizenship, where the husband was a resident of the same state as the defendants, in which the administrator was appointed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1777; Dec. Dig. ⟸438(8); Parties, Cent. Dig. §§ 17, 25, 37, 50.]

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3. JUDGMENT ⊂⊃233—PARTIES—ABSENCE OF PERSONS AFFECTED—GRANTING RELIEF.

Where the court can do justice to the parties to a suit without injuring persons not before it, it will do so, shaping its relief so as to preserve the rights of such absent persons, requiring, if necessary, dismissal of the bill as to them.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 412; Dec. Dig. ⊂⊃233.]

In Equity. Suit by Fenton E. Grigsby, as administrator, against Sarah E. Miller and others. On motions to dismiss the bill of complaint and the answer and cross-complaint of John Edward Stuart, a defendant. Motions sustained, with leave to complainant to move to dismiss as to defendant Stuart.

This is a suit to set aside two deeds, one given by Wana Miller Alexander Stuart and James Edward Stuart, her husband, to Sarah E. Miller, as being obtained through undue influence, and the other from Sarah E. Miller to J. O. Hayes, as being given in furtherance of a scheme to defraud Mrs. Stuart. Mrs. Stuart was the daughter of Sarah E. Miller, and was twice married—first to one Alexander, from whom she obtained a divorce, and then to Stuart, who survives her, and is her only heir at law. Fenton E. Grigsby, who brings this suit as administrator of the estate of Mrs. Stuart, was duly appointed such administrator by the county court of Marion county, Or., and, Mrs. Stuart having left debts to be paid, the county court by order authorized and directed the administrator to institute suit to set aside such deeds for the benefit of Mrs. Stuart's estate. Sarah E. Miller, John Edward Stuart (the widower of Wana Miller Alexander Stuart), and J. O. Hayes were made parties defendant. Grigsby is a citizen of this state, and the three defendants are citizens of the state of California. All the defendants appeared and filed answers to the complaint; Stuart admitting all the allegations and demanding like relief as the plaintiff. A little later Grigsby, by leave of the court, filed a supplemental bill, which seeks an accounting with Miller and Hayes touching matters arising out of the sale of lands in which Mrs. Stuart is alleged to have had an interest, other than the lands forming the subject of the principal bill. With the pleadings in this condition, the defendants Miller and Hayes interposed motions to dismiss the bill of complaint and the answer and cross-complaint of Stuart, on the ground that the court has not jurisdiction of the cause because of want of diversity of citizenship.

W. C. Bristol, of Portland, Or., for complainant and respondent Stuart.

Harry L. Raffety, of Portland, Or., for respondent Miller.

Almon E. Roth, of San Francisco, Cal., for respondent Hayes.

WOLVERTON, District Judge (after stating the facts as above). No question seems to be made as to the authority of the plaintiff in his representative capacity to maintain the suit.

The real question involved by the motions is whether the defendant Stuart is an indispensable party, and, if so, whether he should not be aligned with the plaintiff. If so aligned, defendants urge that the jurisdiction of the court would be ousted, because it would then appear that a citizen of one state would be suing citizens of the same state, and there would be lacking the requisite diversity of citizenship. Section 50 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. 1913, § 1032]) provides:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Rule 39, Federal Equity Rules (198 Fed. xxix, 115 C. C. A. xxix), provides:

"In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

The statute and the rule received consideration by the Supreme Court in a comparatively recent case, Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 48, 30 Sup. Ct. 10, 14 (54 L. Ed. 80), where it was said:

"This rule does not permit a federal court to proceed to a decree in that class of cases in which there is an absence of indispensable, as distinguished from proper, or even necessary parties, for neither the absence of formal, or such as are commonly termed necessary parties, will defeat the jurisdiction of the court: Provided, in the case of necessary parties, their interests are such and so far separable from those of parties before the court, that the decree can be so shaped that the rights of those actually before the court may be determined without necessarily affecting other persons not within the jurisdiction."

[1] Indispensable parties are such as are so necessary that a decree without their presence would prejudice their rights and leave the case in a shape contrary to equity and good conscience. Hughes' Federal Procedure (2d Ed.) 257. They have been otherwise described as parties whose interest in the subject-matter of the suit and the relief sought are so bound up with that of other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction. Barney v. Baltimore City, 6 Wall. 280, 18 L. Ed. 825.

Now, measured by this understanding as to what constitutes an indispensable party, may the defendant Stuart be so considered? While he has an inchoate interest in the cause, that is, such an interest that, if the plaintiff succeeds, he will be benefited by the litigation to the extent that his title to the property will be potentially established, subject to the right of the administrator to subject the realty to the payment of his decedent's debts, yet it is perfectly manifest that the plaintiff could proceed without him, and obtain all the relief to which plaintiff is entitled without in any way affecting his interests

or rights. Nor is it apparent that a decree so entered will prejudice any of the parties to the litigation, much less Stuart.

The case of Blacklock v. Small, 127 U. S. 96, 8 Sup. Ct. 1096, 32 L. Ed. 70, is illustrative as indicative of an indispensable party. That was a suit by two sisters against one Small, the alleged obligor under a bond, to recover the amount thereof. In their bill they joined another sister with Small as a defendant. All the sisters were joint owners of the bond, and it was held that the suit could not proceed without the presence of the third sister as a party plaintiff. So she was held to be an indispensable party. Of a like nature is Board of Trustees v. Blair (C. C.) 70 Fed. 414.

Waterman v. Canal-Louisiana Bank Co., supra, affords an illustration of a necessary, but not indispensable, party, in which it was held that the court might proceed without the presence of the necessary party. The case was a case against an executor for a decree concerning the right of complainant to recover because of the alleged lapse of a legacy to the Home for the Insane, and the consequent increase in the residuary portion of the estate to be distributed to the heirs of a Mrs. Tilton, because of the allegations contained in the bill. The Watermans and Davis were made parties to the bill, and it was sought to exclude them from a participation in the recovery because of the alleged renunciation of their rights in the succession to Mrs. Tilton. If it was found that they had not thus renounced their interest, and a decree was rendered for complainant, then they would be entitled to a recovery. It was said that they had no interest in common with the complainant, and the shares of complainant and other heirs were separate and distinct. The question was whether Davis was an indispensable party, and it was held that, while he was a necessary party, he was not an indispensable party, without whose presence a court of equity could not do justice between the parties before it, and whose interests would be so affected by any decree to be rendered as to oust the jurisdiction of the court.

I conclude, therefore, that Stuart, while a proper and necessary party, is not an indispensable party.

[2] But Stuart was not only made a party—he was brought into court, and has made his appearance by filing his answer and cross-complaint to the bill. The question has been presented whether he should not have been made a party plaintiff. His relief, if any he has, is against the other two defendants, and the complainant has no relief against him, except that, if recovery be had of the land, Stuart's interest shall be subordinated to the payment of the claims against his wife's estate. This is not controverted by Stuart, and, while their interests are not in common, a recovery by plaintiff would be perfectly in harmony with a recovery by Stuart. I am of the opinion, therefore, that Stuart should be aligned with the complainant, and not with the defendants. This, of course, ousts the court of jurisdiction, Stuart being a resident of the same state with Miller and Hayes, and the motions to dismiss must be sustained.

[3] It is a principle of law that, where the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the right of persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decree so as to do justice to those made parties without prejudice to such absent persons. Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260.

In the case of Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657, the lower court, finding there were present necessary, but not indispensable, parties whose presence was inimical to the jurisdiction of the court, and that the interests of such parties were severable from those of the other parties to the suit, and that a decree without prejudice to their rights could be made, directed in its final decree that the bill as to such defendants be dismissed, and retained jurisdiction. This was upheld by the Supreme Court as proper procedure, and that court upheld the action of the Circuit Court.

In Hicklin v. Marco, 56 Fed. 549, 6 C. C. A. 10 (this circuit), the objection that the presence of a party who was not an indispensable party ousted the court of jurisdiction was met and obviated by the trial court allowing complainant to amend his bill by dismissing as to such party. In view of this procedure, the order of the court will be that the motions of defendants be sustained, but with leave to the complainant to move to dismiss as to defendant Stuart; and, if such motion is made, it will be allowed, and the court will retain jurisdiction.

STUTSMAN v. OLINDA LAND CO. et al.

(District Court, S. D. California, S. D. February 5, 1916.)

No. A-113.

1. PUBLIC LANDS ⇐106(1)—DECISIONS OF LAND DEPARTMENT—COLLATERAL ATTACK.

Where land was public land of the United States and so subject to the jurisdiction of the Land Department at the time it was listed to a state under Rev. St. § 2449 (Comp. St. 1913, § 4870), as lieu land under a school land grant, the decision of the department that the land was nonmineral and of the character embraced in the grant, even if erroneous and voidable, is not void as against one who shows no connection with the land at the time it was so listed, and cannot be attacked by him.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301; Dec. Dig. ⇐106(1).]

2. PUBLIC LANDS ⇐53—LISTING—STATUTES—CONSTRUCTION—"VOID."

As against a collateral attack, the word "void," as used in Rev. St. § 2449 (Comp. St. 1913, § 4870), providing that the listing of lands to a state under a grant, which are not of the character embraced in the grant, shall be "perfectly null and void" is to be construed as "voidable."

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 143–145; Dec. Dig. ⇐53.

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

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3. PUBLIC LANDS ⊜53—GRANT FOR SCHOOL PURPOSES—SELECTION OF LIEU LANDS.

Under Rev. St. § 2275 (Comp. St. 1913, § 4860), which authorizes a state to select lands of equal acreage to compensate deficiencies where sections 16 or 36, granted for school purposes, "are fractional in quantity, or where one or both are wanting by reason of the township being fractional or from any natural cause whatever," the validity of a lieu selection is not affected by the fact that when survey was made, it was found that the section, or part of section, which was made the base of the selection would have been in the ocean and not a part of the public lands; it not appearing that the section or township was not fractional.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 143–145; Dec. Dig. ⊜53.]

4. PUBLIC LANDS ⊜54(3)—OFFICERS OF LAND DEPARTMENT—PURCHASE OF SCHOOL LAND FROM STATE.

Rev. St. § 452 (Comp. St. 1913, § 698), which prohibits the "officers, clerks and employés in the General Land Office" from purchasing or becoming interested in the purchase of public lands under penalty of removal from office, if construed to apply to a surveyor general for a state does not render void a purchase by him of school lands from the state.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 154, 157; Dec. Dig. ⊜54(3).]

In Equity. Suit by W. A. Stutsman against the Olinda Land Company, the Columbia Oil Producing Company, and others. On motion to dismiss bill. Motion sustained.

Stutsman & Stutsman, of Los Angeles, Cal., for plaintiff.

Trippet, Chapman & Biby, of Los Angeles, Cal., for defendant Olinda Land Co.

Lewis W. Andrews and Thos. O. Toland, both of Los Angeles, Cal., for defendant Columbia Oil Producing Co.

BLEDSOE, District Judge. This is a suit brought by the assignee of the locators of a placer claim upon supposedly public lands to quiet the title thereto, cancel a patent issued by the state of California to defendants' grantor, and for an accounting for gas and petroleum extracted by defendants. The lands affected are very valuable oil properties situate in the Fullerton oil fields. Defendants have moved to dismiss.

Originally the land was a part of the public domain, and was in 1868 listed, and thereby conveyed, to the state of California, as land in lieu of a certain thirty-sixth section given to the state under general grant for school purposes. The acts of Congress specially providing for, or relating to, such grant and listing to the state are indicated in the margin.[1]

Without going into the details of the matters set out in the bill of complaint, it may be said that plaintiff, whose assignors made their entry, location, and discovery on the land in question in 1913, complains that the land in 1868, at the time of its listing to the state, was mineral land, and was known to be such by the applicant therefor and

[1] Act of March 3, 1853, c. 143, 10 Stats. at Large, 244; Act of Aug. 3, 1854, c. 201, 10 Stat. 346, § 2449, Rev. Stats. (Comp. St. 1913, § 4870); Act July 23, 1866, c. 219, 14 Stats. at Large, 218; Act Feb. 26, 1859, c. 58, 11 Stats. at Large, 385 (Comp. St. 1913, §§ 4860, 4861).

by the United States surveyor general for California, to whom the application for such listing was made; that in spite of such fact and such knowledge the application was received and approved by the said surveyor general, and the lands were thereafter by the Commissioner of the General Land Office listed to the state of California as lieu lands granted in lieu of a certain specified thirty-sixth section.

The principal contention in the case is that, as mineral lands were reserved from grant to the state, either as primary or as lieu lands, the listing and grant to the state of such mineral lands, known to be mineral at the time both by the applicant therefor and by the United States surveyor general for the state, constituted such a fraud on the government so gross and palpable as to render absolutely void the conveyance thus sought to be effectuated.

[1] The mere degree or aggravated nature of the fraud permeating such a transaction, however, would not serve to render such a conveyance void, when it would be otherwise only voidable. Confessedly the land in question belonged to the United States at the time of its listing as aforesaid, and the Land Department of the government in consequence had jurisdiction over it—jurisdiction to determine whether it was mineral or nonmineral, whether it should be listed to the state as lieu land or not. Having such jurisdiction, it had jurisdiction in making the necessary determination to render an erroneous and voidable judgment. Possessing jurisdiction of the subject-matter, its judgment, no matter how grossly steeped in fraud, was not void; it was merely voidable. Under the decision in Burke v. Southern Pacific Railroad Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527, it is not competent for plaintiff, who showed no connection with the land at the time of its listing in 1868, to complain of the error and fraud charged. As to him, the listing, being merely voidable, constitutes a conclusive adjudication, not open or susceptible to any sort of attack.

But plaintiff, recognizing the force of the Burke Case, contends that the judgment of the Land Department was absolutely void under the decisions in Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844, and Sherman v. Buick, 93 U. S. 209, 23 L. Ed. 849. An examination discloses, however, that the land in both those cases was not subject to the jurisdiction of the Land Department at the time of its attempted disposition thereby; it had already passed out of the government and was owned by private parties; the asserted jurisdiction to deal with it was wanting, and in consequence, that fact being shown, any judgment rendered in virtue thereof was absolutely without support and void. The case is essentially different, however, when a jurisdiction does exist and a judgment within the competency of the tribunal is rendered. In such an event, mere error, however gross, and fraud, howsoever induced, cannot suffice to convert the proceeding into an absolute nullity; the judgment is still an adjudication entitled to respect until set aside by direct attack in some manner recognized by the law. Noble v. Union River Logging Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123. Since the Burke Case, supra, discussion as to the right of one in plaintiff's situation to have such an adjudication set aside is completely foreclosed.

[2] Plaintiff claims that the listing and consequent conveyance to the state were "null and void and of no effect" as distinguished from merely "voidable," because of the language of the act of August 3, 1854 (section 2449, Rev. Stats.), supra, which in terms does provide that where lands embraced in lists similar to the one herein referred to are not of the character embraced by the act of Congress and are not intended to be granted thereby, "the lists, so far as these lands are concerned, shall be perfectly null and void and no right, title, claim, or interest shall be conveyed thereby." It is obvious, however, that, considering the conclusiveness of the adjudication of the Land Department within the limits of its competency as defined by the decisions of the Supreme Court of the United States, many of which are noticed in the Burke Case, supra, the word "void," as used in the statute just referred to, must, in a proceeding of this character at least, be construed as "voidable." That there is plenary authority and abundant reason to justify such construction is evidenced by the discussion and cases cited in 40 Cyc. 214 to 217.

[3] It is alleged in the bill, in addition to the matters already referred to, that the lands in question and applied for in 1868 as hereinabove mentioned, were not legally located or listed to the state as lieu lands, in that the base lands, to which the lands in question were applied for as lieu lands, and being a portion of a certain designated thirty-sixth section, though at the time unsurveyed, were actually in and under the Pacific Ocean, and, not being in place were not lands contemplated within the grant of Congress to the state of California, and in fact were not public lands at all, in consequence of all of which it is asserted that such ocean and nonpublic lands could not be the basis for any lieu selections, and could not, and did not, therefore afford justification for the listing to the state of the lands in controversy herein.

The statute providing for lieu land selections (Act Feb. 26, 1859, 11 Stats. at Large, 385) makes provision for the listing of lieu lands to the state in cases wherein the sixteenth or thirty-sixth sections have been pre-empted and also—

"to compensate deficiencies for school purposes where said sections 16 or 36 are fractional in quantity or where one or both are wanting, by reason of the township being fractional, or from any natural cause whatever."

There is no allegation that the township in which the base lands above referred to were situate was not fractional, and in view of the allegation that the portion of the thirty-sixth section referred to in the complaint was in the Pacific Ocean, it is perfectly apparent that the section was either fractional or was entirely wanting; consequently the township must have been fractional. In either event, ample justification for the listing of the land in controversy as lieu land would have existed. In addition, in this, as in the matters referred to hereinabove, as to plaintiff, the judgment of the Land Department as to the necessity for a lieu land selection must be held conclusive.

[4] Plaintiff also complains, somewhat in amplification and aggravation of his charge of fraud, that one Shanklin was the surveyor general for California in 1868 when the fraudulent and erroneous ap-

plication and listing were made, and that he continued to be such surveyor general for some time thereafter; that while acting as such there was conveyed to him by one Hancock who, as a deputy United States mineral surveyor, had made the survey of the lands in question, and who himself knew of their mineral character, all his (Hancock's) interest in and to the lands, and that thereafter, in 1882, while he was still holding the office of surveyor general, Shanklin received a patent to said lands from the state of California.

In so far as these facts merely serve to emphasize and aggravate Shanklin's fraud as hereinabove referred to, they do not suffice to change the legal situation confronting plaintiff. In this connection, however, plaintiff contends that, in virtue of section 452 of the Revised Statutes (Comp. St. 1913, § 698), the conveyance to Shanklin, he being at the time United States surveyor general for California, was ipso facto null and void. The section relied upon reads as follows:

"The officers, clerks and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands; and any person who violates this section shall forthwith be removed from his office."

It is not clear that the section refers at all to the surveyor general for a state; there may be some doubt as to whether such officer is an employé "in the General Land Office." Passing that, however, neither that section, nor any other to which my attention has been called, purports to render void any purchase made under the interdicted circumstances. The only penalty prescribed is removal from office. The conveyance to Shanklin came from the state of California and not from the government, and the court should, I think, particularly as against third persons, be slow to adjudge such a conveyance absolutely void. Patents, either of state or federal origin, ought not to rest upon such an insecure basis.

The motions to dismiss are granted.

In re BERTHOUD.

(District Court, S. D. New York. March 3, 1916.)

1. BANKRUPTCY ⇐14—JURISDICTION OF COURTS OF BANKRUPTCY—ALIENS AS PARTIES.

Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 545, § 2 (Comp. St. 1913, § 9586), provides that courts of bankruptcy shall have jurisdiction to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for six months, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts without the United States and have property within their jurisdictions. *Held*, that whether an alleged bankrupt or his creditors, or both, are aliens, the United States courts have jurisdiction, provided there is property within their jurisdictions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⇐14.]

2. BANKRUPTCY ⟸14—JURISDICTION OF COURTS OF BANKRUPTCY—"PROPERTY" WITHIN THE DISTRICT.

The obligation of a bank within the district to a depositor, whether called a debt or a chose in action, is "property" and its situs is within the district within Bankruptcy Act, § 2, as to the jurisdiction of courts of bankruptcy, as the situs of personal property depends largely upon the question involved in its ownership, and Congress did not intend that there should be any fine distinctions, but intended a bankruptcy proceeding to be a kind of equitable attachment, reaching whatever assets any available judicial process can reach.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⟸14.

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

3. BANKRUPTCY ⟸61—"ACT OF BANKRUPTCY"—ADMISSION OF INSOLVENCY.

It is not an act of bankruptcy for an insolvent debtor to sign and publish a statement of his affairs, showing an excess of liabilities over assets.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸61.

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

4. BANKRUPTCY ⟸60—ACTS OF BANKRUPTCY—ASSIGNMENT FOR BENEFIT OF CREDITORS.

Under Bankruptcy Act, § 3a (Comp. St. 1913, § 9587), specifying as an act of bankruptcy the making of a general assignment for the benefit of creditors, it is immaterial whether such general assignment is made within or without the United States, and whether it is a voluntary assignment or a statutory assignment.

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

5. EVIDENCE ⟸37—JUDICIAL NOTICE—MATTERS OF WHICH NOTICE CAN BE TAKEN.

In a bankruptcy proceeding against an alien who had made an assignment for the benefit of creditors in England, where the petition did not show whether the assignment was a voluntary or a statutory assignment, the court could not take judicial notice as to which kind of an assignment it was, though counsel were apparently agreed that it was a statutory assignment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 52; Dec. Dig. ⟸37; Appeal and Error, Cent. Dig. § 2959.]

6. BANKRUPTCY ⟸14—JURISDICTION OF COURTS OF BANKRUPTCY—PROPERTY WITHIN DISTRICT.

An alien's bank deposit within a district was property in the district within Bankruptcy Act, § 2, as to the jurisdiction of courts of bankruptcy, though within four months prior to the filing of the petition, the alleged bankrupt had made an assignment for the benefit of creditors, as for the purposes of the statute a general assignment passes only what might be called a "defeasible title," good after four months, but defeated if, within four months, creditors proceed as pointed out by the statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⟸14.]

7. BANKRUPTCY ⟸79—ACTS OF BANKRUPTCY—TIME OF COMMISSION.

That an assignment for the benefit of creditors, asserted as an act of bankruptcy, was made in England, and that under the laws of England acts of bankruptcy must have occurred within three months, did not affect the right of creditors to invoke the jurisdiction of a United States court for the proper district at any time within four months.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸79.]

In Bankruptcy. In the matter of Alfred Edward Berthoud, trading and doing business as Coulon, Berthoud & Co., alleged bankrupt. On motion for an order of adjudication. Motion granted.

Carter, Ledyard & Milburn, of New York City (James N. Rosenberg, Edward D. Bechtel, and Samuel Kramer, all of New York City, of counsel), for petitioners.

Geller, Rolston & Horan, of New York City (James F. Horan, George S. Mittendorf, and Edward H. Blanc, all of New York City, of counsel), for Farmers' Loan & Trust Co.

MAYER, District Judge. This is a motion for an order of adjudication on the petition in bankruptcy, the answer of the Farmers' Loan & Trust Company, and the appearance and consent to adjudication by the bankrupt. The Farmers' Loan & Trust Company appears specially and solely for the purpose of challenging the jurisdiction of the court.

The petition was filed May 13, 1914, by James F. Fargo, as treasurer of the American Express Company, an unincorporated association consisting of more than seven members having its principal office and place of business at No. 65 Broadway, in the Borough of Manhattan, city of New York, and by one Jacottet and one Apthorp, both of London, England, and each by his attorney in fact.

On the face of the petition it appears that Berthoud did not have his principal place of business, nor did he reside, nor did he have his domicile, within the United States. Jurisdiction rests upon the assertion that the alleged bankrupt had property within the jurisdiction of the court, namely, an amount on deposit with the National Park Bank of the city of New York in excess of the sum of $30,000. Two acts of bankruptcy are alleged as follows:

"(1) That said Alfred Edward Berthoud, doing business as Coulon, Berthoud & Co., is insolvent, and that within four months next preceding the date of this petition the said Alfred Edward Berthoud, doing business as aforesaid, committed an act of bankruptcy, in that on the 3d day of February, 1914, said Alfred Edward Berthoud, doing business as aforesaid, signed and published a statement of his affairs, showing an excess of his liabilities over his assets in the amount of £31,962. 1s. 6d. (a copy of said statement, certified by a notary public of the city of London is hereto annexed and made part hereof); and (2) in that said Alfred Edward Berthoud, doing business as aforesaid, did thereafter, to wit, on the 9th day of February, 1914, make a general assignment for the benefit of creditors to Arthur Francis Whinney of No. 4 Fredericks Place, Old Jewry, London, E. C., Chartered Accountant."

From the answer it appears that the alleged bankrupt owed the Farmers' Loan & Trust Company $90,000 with interest, and that on February 7, 1914, an attachment was issued by the New York Supreme Court in an action brought by the Farmers' Loan & Trust Company against Berthoud, and that this attachment was duly levied on the deposit in the National Park Bank; that this deposit is $43,441.54, and less than the amount of the trust company's claim. From other allegations in the answer (which need not be repeated), the questions to be determined are: (1) Whether the alleged bankrupt had property within the jurisdiction and with the meaning of the Bankruptcy Law at

the time the petition was filed; and (2) whether the alleged bankrupt committed an act of bankruptcy.

At the outset it is desirable to dispose of the less important contentions. The petition does not contain any allegation that the petitioners are not entitled to priority of payment within the meaning of section 64b, or that the petitioners have not received a preference within the meaning of section 60ab, and the petition is inaptly drawn in some other formal respects. I think, however, it may fairly be construed that the petitioners were not within the classes of persons entitled to priority. However, I am quite in sympathy with those cases of which Green River Deposit Bank v. Craig (D. C.) 110 Fed. 137, Sabin v. Blake McFall Co., 223 Fed. 501, 139 C. C. A. 49, and In re Crenshaw (D. C.) 156 Fed. 638, are examples. We thus come to the vital questions in the case and the propositions which are urged in the brief and were developed on the argument in support of the attack on jurisdiction. These were: (1) That the act is not to be construed as comprehending aliens in involuntary proceedings; (2) that there was no property within this jurisdiction, because the situs of the property was England, both before and after the general assignment, and, in any event, that the general assignment transferred the title to the assignee (or trustee as he is called); (3) that the acts complained of were not acts of bankruptcy.

Fundamentally the Bankruptcy Law had two purposes: (1) To afford to honest debtors an opportunity of relief, and thereby of beginning their business life anew; and (2) to secure as near as may be an equal distribution to creditors of the bankrupt's property.

[1] The whole structure of the act indicates that under certain circumstances the proceeding was a sort of proceeding in rem. Under section 2 of the act, residence or domicile or the locus of the principal place of business is immaterial if there is property within the United States and the statute confers jurisdiction even in the case of those who have been adjudged bankrupts by courts of competent jurisdiction without the United States, provided that such persons have property within the jurisdictions of the United States.

In many other provisions of the statute the word "property" will be found; and it is apparent that Congress intended that the United States courts should deal with and administer the estates of bankrupts if property existed and was found within our borders. Starting with this premise, it logically follows that Congress did not mean to exclude from the operation of the act those persons who are aliens, whether living here or abroad, who have property within the United States.

While it is true that the beneficent features of the act may thus be availed of by aliens, yet, on the other hand, there is no reason why our own citizens should be discriminated against in the right to have their property laid hold of and administered under the act by reason of the mere fact that the owner of the property is not a citizen or resident of the United States; the word "resident" being used in its comprehensive meaning. This view is fortified by the provision which confers jurisdiction where property is here, even though the owner has been adjudged a bankrupt by foreign courts.

Realizing, of course, that the United States is engaged in a world-wide business, it is fair to assume, as matter of policy and comity, that Congress intended to give all persons, whether citizens, or residents, or neither, equal opportunity to share in the distribution of the property. It seems to me, therefore, that whether the alleged bankrupt is an alien, or his creditors are aliens, or both, the United States courts have jurisdiction, provided there is "property within their jurisdictions."

[2] Whether the obligation of the National Park Bank to pay its depositor, Berthoud, be called a debt or a chose in action, the result is the same. It is clearly property, and has been so considered in many cases involving a wide variety of questions as to the relation between a bank and its depositor; and, by a course of practical construction by courts of bankruptcy, a bank deposit, by whatever name called in law, has been regarded and treated as property.

In dealing with questions of personal property, situs largely depends upon the question involved in its ownership. Courts and Legislatures have placed the situs sometimes at the domicile of its owner, and sometimes at the place where the property is found. In cases where the property is a bank deposit or a chose in action of any kind, the situs may vary, as the case may be, by virtue of tax statutes, inheritance laws, statutes in respect of personal property, or business relations governed by the common law.

I think that Congress in the Bankruptcy Law did not intend that there should be any fine distinctions. The Bankruptcy Law has set up a comprehensive machinery, whereby property throughout the United States with the aid of ancillary jurisdiction may be gathered in by the original court.

I agree that the intent of this statute was to consider "property" as concisely stated by Judge Augustus N. Hand in Re San Antonio Land & Irrigation Co. (D. C.) 228 Fed. 990:

> "I will say that I think the meaning of the word 'property' under the Bankruptcy Act should be much the same as that under judicial decisions relating to matters of taxation and attachment. In other words, a bankruptcy proceeding is a kind of equitable attachment, which should be held to reach whatever assets any available judicial process can reach. Consequently the situs of property is not to be determined by general doctrines, such as 'mobilia sequuntur personam,' which may well be applicable in matters like the law of inheritance, but by power of efficient control. Such a view is advantageous, in order to protect creditors and safeguard the taxing power."

We have then a situation where property was in the Southern District on February 7, 1914, the date of the attachment of the trust company.

On February 9, 1914, Berthoud made his general assignment in England, and on May 13, 1914, the involuntary petition was filed. It will be noted that this occurred more than three months after the date of the assignment but within four months thereof.

[3, 4] Before discussing the general assignment, I may state that the allegation of paragraph third of the petition as to the signing and publishing by Berthoud of a statement of his affairs does not constitute an allegation of an act of bankruptcy. Section 3a provides:

"Acts of bankruptcy by a person shall consist of his having * * * (4) made a general assignment for the benefit of his creditors."

Obviously this was made an act of bankruptcy because the alleged bankrupt thereby placed the property for the time being beyond his control. It is therefore immaterial whether such a general assignment is made within or without the United States, and the statute evidently contemplated that wherever a person made such a general assignment, the act was an act of bankruptcy.

[5] From the petition it does not appear whether the assignment in England was a voluntary or a statutory assignment, although counsel on the argument were apparently agreed that it was a statutory assignment. However, this court cannot take judicial notice from the papers under consideration as to which kind of an assignment this was. But while the question might be simplified if it appeared that the assignment was a statutory assignment, the result would be the same whichever kind of an assignment took place.

[6] Counsel for the trust company argue with much ingenuity that title passed at once to the assignee in London, and therefore that there was no property in this jurisdiction when the petition was filed. It seems to me, however, that this is arguing in a circle. For the purposes of our statute a general assignment passes what might be called a "defeasible title," good after the expiration of four months, but defeated if, within four months, creditors proceed as pointed out by the statute. I do not fail to appreciate that the argument is made that the title to the property had already passed, and that the allegation of the act of bankruptcy cannot relate the situation back so as to create property where none existed. But it seems to me that the reasoning is that property was in this jurisdiction, and that the general assignment took it permanently out of this jurisdiction only and if the four months had elapsed without the filing of a petition in involuntary bankruptcy.

[7] While the English statute is not technically before me, yet to save time I may as well pass upon it. Under that statute a creditor is not entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy upon which the petition is granted has occurred within three months before the presentation of the petition. It seems quite clear to me that our jurisdiction cannot be concerned with this provision of the English statute. Congress has given to those who seek our jurisdiction four months within which to act, and nothing that any foreign jurisdiction can do in that regard can affect the rights of those seeking our courts. In addition to the fundamental question involved in this proposition, it is manifest that there would be lack of uniformity if we were to recognize a provision of this character in a foreign statute, for in one country the period might be two months, in another three months, and so on.

In arriving at the conclusions here stated, it must not be understood that the court will necessarily take jurisdiction if the creditors, as well as the alleged bankrupt, are all aliens residing abroad. It may very well be that the court would decline jurisdiction as in Belgenland v. Jensen, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152, and Watts,

Watts & Co. v. Unione Austriaca di Navigazione (D. C.) 224 Fed. 192, recently affirmed.

Whether the American Express Company, herein referred to, is a domestic corporation or a foreign corporation does not appear, and therefore that question is left open until such time as the fact does appear.

The motion for adjudication is granted, with leave, however, to the trust company to answer on the merits.

As some of the questions presented have not been passed on by the courts, so far as I am informed, all proceedings will be stayed pending review, if it is intended to review the order.

In re SPIES-ALPER CO.

(District Court, D. New Jersey. March 29, 1916.)

1. LANDLORD AND TENANT ⊜265(3)—LEASES—COVENANTS—RENT.

Where a lessee agreed to pay a fixed rent in monthly installments, together with the annual taxes assessed for each year during the term, the taxes to be paid on or before December 20th, such taxes, as well as water rates the tenant covenanted to pay, are rent, the agreement to pay them not being a mere personal one independent of the reservation of rent, and so the landlord might distrain for such sums.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1067; Dec. Dig. ⊜265(3).]

2. BANKRUPTCY ⊜345—PRIORITIES—RIGHT TO PRIORITY.

A tenant agreed to pay taxes and water rates assessed upon the premises. Landlord and Tenant Act N. J. § 4 (3 Comp. St. N. J. 1910, p. 3066), declares that no goods or chattels lying on the demised premises shall be liable to be taken by virtue of any execution against the tenant without payment to the landlord, before removing them, of all rent due at the time of the taking or which shall have accrued up to the day of removal, whether by the terms of the lease the day of payment shall have come or not. Bankr. Act July 1, 1898, c. 541, § 64b, cl. 5, 30 Stat. 563 (U. S. Comp. St. 1913, § 9648), declares that debts owing to any person who by the laws of the state or the United States is entitled to priority shall have priority on bankruptcy. Section 67f (section 9651), declares that all levies, judgments, attachments, or other liens obtained against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy, shall be deemed null and void. The lessee failed to pay rent and water rates as agreed, and was then adjudicated a bankrupt. *Held*, that as under the New Jersey statute the landlord has a mere right of priority and not a lien, and as until the landlord has asserted his lien by distress the tenant may dispose of or incumber his property, the landlord was not entitled to priority as to taxes which at the time of the adjudication in bankruptcy had not been assessed and could not be determined, for in such case an execution creditor would take the chattels free from the landlord's claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⊜345.]

3. LANDLORD AND TENANT ⊜247—RIGHTS OF LANDLORD—EXECUTION AGAINST LESSEE.

Under Landlord and Tenant Act N. J. § 4 (3 Comp. St. N. J. 1910, p. 3066), declaring that no goods or chattels lying on the demised premises shall be taken by virtue of any execution, attachment, or other process

against the tenant without payment to the landlord, before removing them from the demised premises, of all rent due at the time of taking or which shall have accrued up to the day of removal, whether due under the lease or not, an execution creditor of a lessee may take the lessee's property free from the claims of the landlord for taxes payable as rent, where at the time of execution the amount of the taxes was not ascertained; there having been no assessment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 985; Dec. Dig. ⟸247.]

4. BANKRUPTCY ⟸318(4)—CLAIMS—PROVABLE CLAIMS.

Bankr. Act, § 63a, cls. 1, 4 (Comp. St. 1913, § 9647), declares that debts of the bankrupt which are a fixed liability absolutely owing at the time of the filing of the petition may be proven and that debts founded on an open account or a contract express or implied may be proven. A tenant agreed as part of the rent to pay the taxes and water rates levied against the demised premises. At the time of his bankruptcy the taxes had not been assessed. *Held* that, while the landlord was not entitled to priority as to such taxes, which were part of the rent reserved, he might, when they had been assessed, prove the amount as a claim against the estate of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 482; Dec. Dig. ⟸318(4).]

In Bankruptcy. In the matter of the bankruptcy of the Spies-Alper Company. On petition to review an order of the referee disallowing two items of the claim filed by Joseph Oschwald. Referee's order affirmed in part, and reversed, with directions, in part.

Harry Campton, of Newark, N. J., for claimant.
Bilder & Bilder, of Newark, N. J., for trustee.

HAIGHT, District Judge. The claimant, Joseph Oschwald, filed a claim against the bankrupt estate for rent for certain premises in the city of Newark, which he had theretofore leased to and which had been occupied by the bankrupt. He claimed priority. The lease, which was dated January 30, 1911, and was for a term of ten years, provided for a yearly rental of $4,000, payable in equal monthly installments on the 1st day of each month in advance, "together with the annual taxes assessed for each year during said term of ten years, said taxes to be paid on or before the 20th day of December in each year," and also certain water rents. On June 25, 1913, the petition in bankruptcy was filed and a receiver appointed, who took possession of all the goods and chattels of the bankrupt then located on the demised premises. These were subsequently sold, and produced considerably more than enough to satisfy the landlord's claim. The claim consists of four distinct items, as follows: (1) The monthly installments for three months, which were due and in arrears at the time the petition in bankruptcy was filed; (2) certain water rents; (3) taxes assessed by the city of Newark against the demised premises for the year 1912; and (4) that proportion of the taxes assessed for the year 1913 which, it is claimed, had accrued up to the time of the filing of the petition. The referee allowed the first two items as a priority claim, but disallowed the latter two altogether. It is to review the latter action of the

referee that the matter is now before the court. The claimant's counsel, on the argument, abandoned his effort to have the order of the referee reversed, in so far as the disallowance of the third item is concerned.

[1] Although the taxes which the lease provided that the tenant should pay were uncertain in amount at the beginning of any contract or calendar year, they were sure to be made certain and definite before the time of payment would arrive; and the covenant to pay them was not a mere personal one, independent of the covenant reserving the rent, but was a part thereof. Undoubtedly, therefore, under the decisions in New Jersey they were rent and might be distrained for when they became due and payable. Central Bank of New Jersey v. Peterson, 24 N. J. Law, 668; Melick v. Benedict, 43 N. J. Law, 425; Ocean Grove Ass'n v. Sanders, 67 N. J. Law, 1, 50 Atl. 449, affirmed 68 N. J. Law, 631, 54 Atl. 448.

[2, 3] As the landlord could distrain for them when due, he would be entitled, at least as to such as were due, to the preference given by the fourth section of the New Jersey Landlord and Tenant Act (3 Comp. Stat. p. 3066). Central Bank of New Jersey v. Peterson, supra; Van Horn v. Goken, 41 N. J. Law, 499; Olden v. Mather, 73 N. J. Eq. 217, 67 Atl. 435. To this effect, also, is McCann v. Evans, 185 Fed. 93, 107 C. C. A. 313 (C. C. A. 3d Cir.), where it was held that, under the decisions of the state courts of Pennsylvania (which appear to be, in all respects material to this inquiry, the same as those of New Jersey), the provisions of a lease (not dissimilar to those of the lease in this case), which provided for the payment of taxes by the tenant, constituted such taxes rent, liable to be distrained for and entitled to the preference in payment given by the laws of that state. The New Jersey statute (section 4), before mentioned, provides that no goods or chattels lying on demised premises "shall be liable to be taken, by virtue of any execution, attachment or other process" without the payment to the landlord, before removing them off the demised premises, of all rent due at the time of the taking, "or which shall have accrued up to the day of the removal of the goods from off the said premises, whether by the terms of lease the day of payment shall have come or not," not, however, exceeding one year's rent. It has been sometimes urged that this statute, even though a distress warrant has not been issued, gives the landlord a lien which is not divested by the bankruptcy of the tenant, and which entitles him to be paid out of the proceeds of any sale of the tenant's goods and chattels on the demised premises, as any other lienholder, without the necessity of proving his claim and prior to any other debts mentioned in section 64b of the Bankruptcy Act. Such a construction was denied by Judge McPherson to the Pennsylvania statute, which is substantially the same as that of New Jersey, in the cases of Re Hayward, 130 Fed. 720 (D. C. E. D. Penn.), where the Pennsylvania statute is set forth in full; and in Re Consumers' Coffee Co., 151 Fed. 933 (D. C. E. D. Penn.). See, also, In Re Pittsburgh Drug Co., 164 Fed. 482 (D. C. W. D. Penn.).

Nor would such a construction conform, I think, to that which has been given to the New Jersey statute by the state courts of New Jer-

sey. Woodside v. Adams, 40 N. J. Law, 417; Wood v. Carriage Co., 49 N. J. Eq. 433, 24 Atl. 228. In both of these cases it was held that the statute left the tenant at perfect liberty to dispose of his goods and chattels absolutely, or to create liens thereon, and that any title or lien thus acquired before the issuance of a distress warrant would be superior to the right of the landlord. Manifestly, therefore, the statute gives the landlord no lien in the ordinary and proper sense. It gives him merely the right to a preference in payment, out of the tenant's goods and chattels on the demised premises, over other creditors, including those holding executions, who are not lienholders. It has been the practice in this district (although there appears to be no reported decision to that effect) to recognize and give effect to this preference in bankruptcy proceedings, by virtue of section 64b (5) of the Bankruptcy Act, and this may be considered as the rule in this district. It is supported both by reason and authority. A decision of Referee Adams to this effect, in the matter of Joseph C. Price, was affirmed, without opinion, by one of the judges of this court. This is also the rule which has been adopted by the federal courts in Pennsylvania. See In re Hayward, supra; In re Consumers' Coffee Co., supra; In re Pittsburgh Drug Co., supra; McCann v. Evans, supra; Wilson v. Penn. Trust Co., 114 Fed. 742, 52 C. C. A. 374 (C. C. A. 3d Cir.). And see, also, the other cases in the Pennsylvania districts, hereinafter cited under another point. It was held by the Supreme Court under the previous Bankruptcy Act that an assignee who took possession of the bankrupt tenant's goods, which were on demised premises, was within the intendment of the Pennsylvania statute. Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451. As that statute and the New Jersey statute are the same in all material respects, it follows that this decision is applicable to the latter. A landlord whose claim comes within the provisions of the New Jersey statute is therefore entitled to priority under section 64b (5) of the Bankruptcy Act. If the landlord has actually seized the tenant's goods by a distress warrant before the proceedings in bankruptcy are instituted, he would have a lien which would entitle him to be paid as other lienholders, without regard to the provisions of section 64b (5). In re West Side Paper Co., 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384 (C. C. A. 3d Cir.). And such a lien is not divested by section 67f of the Bankruptcy Act. Henderson v. Mayer, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233; In re West Side Paper Co., supra.

In the case at bar no distress warrant had been issued before the bankruptcy proceedings were instituted. Hence claimant's right to priority, if any, must rest upon section 64b (5). As this section grants priority only to those who, by the law of a state, are entitled thereto, it becomes necessary to determine whether the part of the claim now in question would have been entitled to any preference under the New Jersey statute, had not bankruptcy proceedings intervened. In the city of Newark taxes are assessed during the course of a fiscal year to cover that part of the year from January 1st which has then expired, and the remainder of the year; in other words, they are not assessed and payable wholly in advance, as in most of the other municipalities

of New Jersey. When the receiver took possession of the tenant's goods, the taxes for the year 1913 had not been assessed and the amount thereof could not, under the existing law, be ascertained with accuracy until several months thereafter, although, when assessed, they would be upon the value of the property as of May 20, 1913. I think, however, it may be fairly held that the taxes, although not payable until the latter part of the contract year (which was the time provided by law for the payment of taxes), were intended by the parties to be proportionately spread as rent over the whole year, the same as if there had been a fixed annual rental which was not payable until the end of the term, and that such proportion thereof as the part of the year which had expired, when the receiver took possession, bore to the whole year may be considered to have then accrued, within the meaning of the New Jersey statute. But at that time it would have been impossible for an execution creditor to determine what to pay the landlord in order to enable him to remove the goods from the demised premises, because the taxes for that year had not been assessed, and the part thereof which had then accrued would, consequently, have been incapable of ascertainment.

Does the New Jersey statute require that, in a case such as this, an execution creditor must wait, before he is able to satisfy his judgment from a tenant's goods on demised premises, until the municipal authorities have determined what the taxes to be assessed against the demised premises are to be? I cannot believe that such is the correct construction of the statute. Cases can readily be imagined where exceedingly unjust results would follow from such a construction. Although the state courts seem not to have passed on this question, I think the proper construction of the whole statute is that the execution creditor is required to pay the landlord, before removal of the tenant's goods, the rent which has accrued, but which is not then payable, only when it is then possible to ascertain the amount thereof. Section 5 of the act provides for the giving of a notice by the landlord to the officer seizing and removing the goods, within a certain time, of the amount of rent in arrears. How could he give such a notice, if it were impossible to ascertain the amount? Yet if he does not give such notice, it seems that the officer may sell. If it be suggested that this construction would, in cases such as this, work a hardship upon the landlord, the answer is that he can provide against such contingencies in the lease. It follows from this construction that the part in question of the claimant's claim would not have been entitled to any preference under the New Jersey statute as against an execution creditor, and, consequently, that it is not entitled to priority in payment under the Bankruptcy Act.

[4] It remains to consider whether it should have been allowed as a general claim. The answer to this question depends upon whether it was a provable claim in bankruptcy. The referee held that it was not, because, as he considered, it was for "rent to accrue after the filing of the petition in bankruptcy," which he held was not provable, on the authority of Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719 (C. C. A. 8th Cir.); In re Rubel, 166 Fed. 131 (D. C.

E. D. Wis.); and In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270 (C. C. A. 2d Cir.). In the first place, it should be noted that the doctrine of those cases has not prevailed in this circuit to its full extent. In re Pittsburgh Drug Co., supra; In re Caloris Mfg. Co., 179 Fed. 722 (D. C. E. D. Pa.); In re Keith-Gara Co., 203 Fed. 585 (D. C. E. D. Pa.), affirmed 213 Fed. 450, 130 C. C. A. 96 (C. C. A. 3d Cir.); In re Quality Shoe Shop, 212 Fed. 321 (D. C. E. D. Pa.).

It is unnecessary here to attempt to define the extent of the doctrine of the cases last cited, because, it seems to me, the claim was not for rent to accrue after the petition in bankruptcy was filed, but was for rent which had accrued up to that time, but which was not then payable and the exact amount of which was not then possible of ascertainment. A claim for taxes and water rents which, under the provisions of a lease, were to be paid as rent, but which had not been assessed at the time of the filing of the bankruptcy petition, was held in the Pittsburgh Drug Co. Case, supra, not to be provable as a general or unsecured claim. This ruling was based on the theory that, as the amount was not fixed and determined until after the filing of the petition, the claim did not constitute a fixed liability at the time of the filing of the petition, within the meaning of section 63a (1) of the Bankruptcy Act. No reference was made to section 63a (4), which Judge McPherson, who decided the other cases in this circuit before cited, and whose decision in the Keith-Gara Co. matter was affirmed by the Circuit Court of Appeals, held authorized the proving of a claim for rent for the part of the term which was unexpired at the time of the filing of the bankruptcy petition. See In re Caloris Mfg. Co., supra.

It will be noted that in the case at bar the amount of the tax had been fixed and determined by the municipal authorities before the claim in question was filed, and the tax may be considered as having been due under the provisions of the lease at that time. The liability of the bankrupt to pay the tax had been fixed by the lease. Thus all that was considered necessary, in the Caloris Mfg. Co. Case, to constitute a provable claim, is present. I think that the reason given for the conclusion before mentioned in the Pittsburgh Drug Co. Case is opposed to the general doctrine of the other cases in this circuit before cited, as well as that of the Circuit Court of Appeals of this circuit in Moch v. Market St. Nat. Bank, 107 Fed. 897, 47 C. C. A. 49. It is clear from those cases that the test as to whether a claim is provable under section 63a (4) does not depend upon whether the amount was fixed and determined at the time of the filing of the petition. I think therefore that the part of the claimant's claim in question was a provable debt, and, if in other respects proper, should be allowed as a general claim.

The referee's order will, accordingly, be affirmed in so far as it denies priority to this part of the claim, but will be reversed in so far as it disallows it as a general claim, with instructions to allow it as such, if in other respects proper.

CONEKIN v. LOCKWOOD.

(District Court, E. D. South Carolina. February 24, 1916.)

1. SALVAGE ⇐=38—SUIT BETWEEN SALVORS FOR APPORTIONMENT OF AWARD.
A suit in personam by the crew, or one member of the crew, of a salving vessel will lie against the master or owner, where the entire reward has been paid to the latter, or has otherwise come into his hands.
[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102; Dec. Dig. ⇐=38.]

2. SEAMEN ⇐=7—SALVAGE—VALIDITY OF CONTRACT BY SEAMEN FOR FIXED SUM.
A seaman is not bound by an agreement made in advance with the master or owner that he will accept one month's pay as his share in all cases of salvage, and especially under Rev. St. § 4535 (Comp. St. 1913, § 8324), which provides that "every stipulation by which any seaman consents to abandon * * * any right which he may have or obtain in the nature of salvage shall be wholly inoperative."
[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 19–24; Dec. Dig. ⇐=7.]

3. SALVAGE ⇐=38—APPORTIONMENT BETWEEN VESSEL AND CREW—DISCRETION OF COURT.
There is no fixed rule with respect to the apportionment of a salvage reward between the owners of the salving vessel and her officers and crew, but the distribution rests in the discretion of the court, and is governed largely by the peculiar circumstances of each case.
[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102; Dec. Dig. ⇐=38.]

4. SALVAGE ⇐=38—APPORTIONMENT—SHARE OF SEAMAN.
The engineer of a tug, having a crew of five men besides the master, which rendered a salvage service to a burning steamship, for which the owner received the net sum of $18,939.30, *held* entitled to recover $823.40 as his share of the 20 per cent. apportioned to the master and crew.
[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102; Dec. Dig. ⇐=38.]

In Admiralty. Suit by Dawson Conekin against Ella Ann Lockwood. Decree for libelant.

J. P. K. Bryan and F. M. Bryan, both of Charleston, S. C., for libelant.

Alfred Huger, of Charleston, S. C., for respondent.

SMITH, District Judge. This is a proceeding in personam in admiralty, filed December 30, 1915, by one salvor against another for distribution. The answer has been filed and the issues made up and the testimony taken and the cause heard upon the merits.

[1] There is no doubt that a suit will lie in personam by the crew, or one member of the crew, against the master or the owner of a salving vessel, where the entire reward has been paid to the latter, or has otherwise come into his hands. The proceedings in the present case are brought on behalf of the engineer of the tug Cecilia against the owner of the tug Cecilia for the former's distributive share of the salvage, the entire amount of which has been received by the owner.

The facts of the case, as appearing from the admissions in the pleadings and from the testimony, are that a large steamship called the Colorado, with a cargo of cotton on board, was, on or about the 27th day of October, 1915, on fire and abandoned by the master and the crew so as to be derelict on the high seas off Cape Romain on the coast of South Carolina, 20 or 30 miles from the port of Charleston. The tug Cecilia of which the libelant was the engineer, and the steam tug Waban, both of Charleston, S. C., hearing of the condition of the steamship Colorado, proceeded up the coast in search of her, and found her in the position stated, viz., on fire and abandoned and derelict. The weather was fair and the sea comparatively smooth, and the Cecilia, upon reaching the Colorado, proceeded near enough to her to pump water upon her bow so as to cool off her stem, and after so doing for some time, the mate and deck hand of the Cecilia were sent from the Cecilia, and with the aid of a ladder ascended the stem of the Colorado, so cooled, and fastened a hawser to it, protecting the hawser by a mattress. In like manner when the Waban came up her hawser was also fastened to the stem of the Colorado, and the two tugs proceeded to tow the burning steamship into the harbor of Charleston, where she was beached upon a shoal and the tugs then proceeded to pump her full of water in order to extinguish the fire. After this was done, they then proceeded to pump her out, aided by the pumps of the Colorado through connections made from the Cecilia to the steam pumps of the Colorado, apparently from the testimony principally by the labor of this libelant, who was engineer of the Cecilia, which enabled those pumps to work and continue the pumping, so that the Colorado could be pumped out and towed to a wharf, where her cargo was removed and the process of salving the vessel and cotton completed. As the engineer of the Cecilia the libelant seems to have labored for several days, more or less, continuously in his duties as engineer, both with regard to the propelling machinery of the Cecilia, as well as her pumping machinery. Subsequently, after the salving of the vessel, the master of the tug Cecilia offered to each of his crew, about the 1st of November, 1915, as their share of the salvage, one month's extra pay, which in the case of the engineer was $100. This the libelant refused. Subsequently the claim of the two tugs for salvage was settled by the owner and underwriters of the hull, cargo, and freight of the steamship Colorado, for the sum of $47,500, which amount was paid about the 17th December, 1915, and thereafter, on the 29th December, 1915, this libelant having instituted, or threatened to institute, proceedings against the owner of the tug Cecilia for his share of the salvage, he was discharged from further employment on the Cecilia. At the time of the Cecilia's salving of the Colorado her crew consisted of six individuals, viz., the captain, R. H. Lockwood, who was the husband of the owner of the vessel and whose wages were $100 per month; the engineer, the libelant herein, whose wages were $100 per month; a mate, the son of the captain, whose wages were $30 per month; one deck hand, whose wages were $20 per month; one fireman, whose wages were $30 per month; and one cook, whose wages were $25 per month, making an aggregate

monthly pay roll of $310. The owner of the vessel who had received the entire proceeds of the cargo refused to make any greater payment to the libelant than the sum of $100, or one month's extra pay. The answer of the defendant pleads, by way of defense in bar, that the libelant, as engineer of the tug Cecilia, had made an agreement that in all cases of salvage, he was to receive, as one of the crew of the tug, an amount equal to one month's wage, that this amount was $100, which had been duly tendered to him, and that he had refused to accept it, and that under his contract he was barred from any right to recover more. It further sets up, as matter of defense, that the libelant's services had not been as continuous as claimed by libelant in the libel. The amount received by the tugs Cecilia and Waban for their salvage of the Colorado was, as before stated, $47,500, which presumably was divided equally between them, giving to each tug and its crew $23,750. The answer of the defendant admits receiving as salvage $18,939.30. The difference between that and the amount actually paid of $23,750 is not explained. Possibly it was swallowed up in lawyers' fees and other expenses; and, in the absence of explanation in the testimony, the amount of salvage actually received, net, by the respondent will be placed, as stated, at the sum of $18,939.30. Upon the plea in bar, interposed, of the existence of an agreement to receive one month's extra pay in full for all compensation in all salvage cases, the two questions arise whether or not there ever was such an agreement, and, next, if there were such an agreement, is it binding in a case of salvage? The evidence as to the existence of the agreement is conflicting; the libelant denies that any such agreement was ever entered into, and the master of the tugboat, the husband of the respondent, insists that there was. From the evidence it appears that the libelant was, at first, engaged to hold a permanent position of engineer of the Cecilia at $100 per month; nothing at that time being said as to any release of salvage or acceptance of any fixed sum in all cases as the equivalent of libelant's share in the salvage. After libelant's engagement, and after he went to work, there does appear to have been a conversation at which the master of the tug stated to him that his rule was, in cases of salvage, to allow only an extra month's wage. There appears to have been no formal acceptance of this other than the acquiescence of silence, and in one salvage case, to wit, the salvage earned upon a boat named the Orion, the libelant did accept the sum of $100 in full of his share of the salvage in that case, but without stating in his written acceptance that it was in pursuance of any agreement, or that it represented what he was to receive in other cases. On the whole, from the testimony, it would scarcely appear that there was any finally accepted agreement entered into by the libelant to receive a month's extra pay in all cases of salvage, irrespective of the circumstances of any particular case.

[2] However this may be, in the opinion of the court, an agreement of this kind is not binding upon a seaman under the rule in admiralty, unless the agreement is one which the court would enforce as being reasonable and equitable, free from oppression and duress, and fairly and clearly entered into without compulsion. That is the general rule

with regard to contracts for salvage between the salvor and the salved. There is no reason why it should not apply as between the salvors themselves when they hold the positions of master and seaman. The engineer is like any other seaman who is on board of a boat. It is his duty to obey the orders of the master. If the master sees fit to imperil his vessel and the lives of his employés on board in the effort to effect a salvage, the seaman's duty is to assist. Salvage is an allowance, not made by one salvor to another, but allowed by the court directly; it proceeds directly from the court to the salvor, and is for the purpose of stimulating voluntary effort to assist in the rescue of life and property from destruction at sea. To hold, therefore, that the seaman who may be called upon unexpectedly and against his will to risk his life and to undergo greatly enhanced and exhaustive labors for the purpose of accomplishing salvage may, in advance, and before those services are performed, contract away his reward would appear to be contrary to the policy of the law, and the court so holds. The owner and crew may agree as to a distribution, but an inequitable agreement will not be enforced (The Enchantress, Lush, 93), and an agreement before the services rendered is not binding (The Louisa, 2 W. Rob, 22). The statute law would appear to enforce this principle. Section 4535 of the United States Revised Statutes (Comp. St. 1913, § 8324) provides that every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage shall be inoperative.

[3] The defense set up in bar, therefore, in this case under the circumstances of the present case must fail, and the only remaining question is, what proportion of the salvage should be received by the libelant? There appears to be no fixed rule with respect to the apportionment of the salvage reward between the owners of the salving vessel and her officers and crew. The distribution in all cases of this kind is a matter resting in the discretion of the court, and is governed largely by the peculiar circumstances of each individual case. As salvage is a reward for the encouragement of voluntary promptness, energy, efficiency, and heroic endeavor in saving life and property in peril on the seas, the claims of the master and crew who evince these qualities and undergo the perils are regarded with the most favorable consideration. In the days of sailing vessels, as the salvage depended more upon the individual efforts of the salving crew than the efficiency of the salving vessel, the position of the crew was much more favorably regarded, and the larger part of the salvage award was generally apportioned to the officers and crew. The use of steam, however, has largely changed this. Under the general use of steam it is really the vessel which conduces most to the effectuation of the salvage result, and salvage is largely now considered from the standpoint of a sufficient reward to induce salvors to keep ready and in position steam vessels efficiently equipped with pumps, tackle, etc., to render salvage service. It is more difficult to procure that there are kept on hand steam vessels possessing motive power and salvage equipment in an efficient position to render salvage services than it is to find individuals who would use inefficient attempts. The proportions, therefore,

have varied so as to allow a much larger proportion to the owner of the vessel. So, too, the master upon whom the responsibility of the direction and the determination to make the effort exists is allowed frequently a larger proportionate share than the rest of the crew, although an exception is made in the case of such members of the crew as may show exceptional effort and merit in their services. Sometimes the engineer may be allowed more than the master. In a number of cases the salvage has been apportioned at one-fourth for the crew and three-fourths for the owners. There is, however, no fixed binding rule of apportionment, and it should depend upon the circumstances of each case. In the case at bar, while the danger to the derelict vessel salved was very great, there appears to have been little danger to the salving vessels or their crews. The crews did little more than what they would have done ordinarily in the discharge of their duties. The really efficient instruments in the salvage were the tugs which could proceed to the scene of disaster on the high seas, tow the burning vessel to a harborage and there by their pumping equipment extinguish the fire.

[4] Under all the circumstances of the case the court is of the opinion that 80 per cent., or $\frac{4}{5}$ of the salvage, should go to the owner of the vessel and $\frac{1}{5}$, or 20 per cent., should go to the crew, and 20 per cent. of the salvage amount of $18,939.30 would be $3,787.86. The rule frequently followed is that the salvage allowed the crew should be divided among them in proportion to wages, but this is not always the case. The master's share may be increased, and is sometimes twice what his proportion would be under wages, although it may be reduced for dereliction of duty. In the present case the mate and deck hand seem to have been the parties who actually made most exertion in nearest proximity to the burning ship. While no other members of the crew except the present libelant are making any question, still their shares must be considered in order to arrive at what amount should be properly allowed to the libelant. In the present case, under the circumstances, the captain's should be fixed at twice the amount represented by his monthly wage, or say $200; the engineer at the proportion of $100; the mate at the proportion of $60; the deck hand at the proportion of $40; the fireman at the proportion of $35; the cook at the proportion of $25—making a total of $460, as including the proportions in which the salvage allowed the crew should be shared, of which the engineer would receive ten forty-sixths, or $823.40, for which amount a decree on behalf of the libelant against the respondent may be entered in this case.

UNITED STATES ex rel. ANDERSON v. HOWE.

(District Court, S. D. New York. March 31, 1916.)

1. CITIZENS ⟸13—EXPATRIATION—RIGHT TO CHANGE ALLEGIANCE.
A citizen may throw off his allegiance to this country if he desires, especially in view of Rev. St. § 1999 (Comp. St. 1913, § 3955), declaring that the right of expatriation is a natural and inherent right of all people.
[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 20–22; Dec. Dig. ⟸13.]

2. CITIZENS ⟸13—EXPATRIATION—RESIDENCE IN FOREIGN COUNTRY.
Mere residence in a foreign country, even by a naturalized American, has no effect upon such person's citizenship.
[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 20–22; Dec. Dig. ⟸13.]

3. CITIZENS ⟸13—EXPATRIATION—STATUTORY PROVISIONS.
Act March 2, 1907, c. 2534, § 2, 34 Stat. 1228 (Comp. St. 1913, § 3959), provides that when any naturalized citizen shall have resided for two years in the foreign state from which he came it shall be presumed that he has ceased to be an American citizen, provided that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States. *Held*, that it was within the power of Congress to lay down this rule even as applied to a naturalized citizen who had left the United States for the land of his birth before the act was passed.
[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 20–22; Dec. Dig. ⟸13.]

4. CITIZENS ⟸13—EXPATRIATION—STATUTORY PROVISIONS.
Act March 2, 1907, § 2, providing that when any naturalized citizen shall have resided for two years in the foreign state from which he came it shall be presumed that he has ceased to be an American citizen, provided that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer, does not refer only to the status of naturalized citizens while abroad, but applies when a naturalized citizen, after living abroad for the statutory period, returns to the United States; and, when such a person presents himself for admission to the country, the presumption is that he is no longer an American citizen, especially in view of the Naturalization Convention of 1869 with Sweden, providing that a naturalized citizen renewing his residence in Sweden without intent to return to America shall be held by the government of the United States to have renounced his American citizenship, and that the intent not to return may be held to exist when a person so naturalized resides more than two years in Sweden.
[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 20–22; Dec. Dig. ⟸13.]

5. CITIZENS ⟸13—EXPATRIATION—STATUTORY PROVISIONS.
The presumption, under Act March 2, 1907, § 2, that a naturalized citizen residing for two years in the foreign state from which he came has ceased to be American citizen, is rebuttable.
[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 20–22; Dec. Dig. ⟸13.]

6. TREATIES ⟸6—ABROGATION.
The Naturalization Convention of 1869 with Sweden and Norway is now in force notwithstanding the separation of those kingdoms in 1905.
[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 6; Dec. Dig. ⟸6.]

7. TREATIES ⟸11—OPERATION AND EFFECT.

The admission of aliens and the regulation of citizenship, as distinct from alienage, is peculiarly a matter of national concern, and, as to such matters, treaties are the supreme law of the land.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 11; Dec. Dig. ⟸11.]

Habeas corpus by the United States, on the relation of Carl Edward Anderson, against Frederick C. Howe, Commissioner, etc. On hearing. Writ discharged, and relator remanded.

Anderson is a Swede, who came to the United States in 1891, and appears to have remained here continuously until 1906. He left a wife and children in Sweden and never brought them to America. In 1905 he was duly naturalized, and in the year following returned to Sweden. There is no disinterested evidence as to his intent to remain or return at the time of his departure from the United States. He did continuously remain in Sweden, tilling a farm which he held under a 20-year lease, and owning the house wherein he lived upon said farm, and also paying taxes, until 1915, during which time he took no steps to register himself as an American citizen with any diplomatic or consular officer of this country. He did not bring with him on returning to America any member of his family. The farm he left in charge of his children. On arrival in New York the immigration authorities found him insane, also nearly penniless, and, so far as discoverable, without relatives or friends in this country. After detention at Ellis Island for a considerable time, he so far recovered his sanity as to testify before a board of special inquiry and substantially admitted the truth of all the foregoing facts, adding, however (in substance), that it had been his intention on returning to the United States to ultimately bring his family with him because he was "scared by the war." He denied any intention of abandoning his American citizenship and asserted that he had always had an intention to return at some time.

Having been held as an alien of the prohibited classes and ordered deported by the Secretary of Labor, this writ was taken.

Olav J. Schultz de Brun, for relator.

Harold A. Content, Asst. U. S. Atty., opposed.

HOUGH, District Judge. The questions raised by this proceeding are whether under section 2 of the Act of March 2, 1907 (U. S. Comp. Stat. § 3959), or under the treaty between the United States and Sweden and Norway of May 26, 1869 (Malloy's Treaties, Conventions, etc., between United States and other powers, vol. 2, pp. 1758–1761), Anderson is after more than ten years' residence in Sweden an alien or a citizen. The question of expatriation—the question whether one gains or loses citizenship by residence in or away from a country—is one that has been discussed as long as courts in the United States have spoken.

[1, 2] There is no doubt that a man may throw off his allegiance if he desires, and the right so to do is declared to be a natural and inherent one by U. S. Rev. Stat. § 1999 (Comp. St. 1913, § 3955), which statute is no more than the legislative expression of the doctrine laid down by Marshall, C. J., in The Venus, 8 Cranch, at 280, 3 L. Ed. 553. On the other hand it has been held with almost complete uniformity that mere residence in a foreign country, even by a naturalized American, has no effect upon such person's citizenship. Young v. Peck, 21 Wend. (N. Y.) 389; Peck v. Young, 26 Wend. (N. Y.) 613.

See, also, Ware v. Wisner (C. C.) 50 Fed. 310; State v. Adams, 45 Iowa, 99, 24 Am. Rep. 760; and Brown v. United States, 5 Ct. Cl. (U. S.) 571.

When the law was in such a state as to hold that a man could change his citizenship or allegiance at will, and yet foreign residence no matter how long continued did not per se affect the status of citizenship, the matter was certainly ripe for a statutory rule as to the inference of intent to be drawn from such residence, intent being pre-eminently a matter as to which presumptions are needed if any certainty is to be introduced into decisions.

Accordingly, the Act of June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. Stat. § 4374), makes a return to the native country of a naturalized citizen under certain circumstances "prima facie evidence of a lack of intention on the part of such alien" to become a citizen and lays him open to petition to set aside his certificate.

The Act of 1907 is upon its face in pari materia, for it declares that, when any "naturalized citizen shall have resided for two years in the foreign state from which he came," it shall be presumed that he has ceased to be an American citizen.

[3] Since the decision of the Supreme Court in Mackenzie v. Hare, 239 U. S. 299, 36 Sup. Ct. 106, 60 L. Ed. ——, discussion is useless as to the power of Congress to lay down this rule. The third section of the act under consideration relates to the effect of marriage with a foreigner upon an American woman. Mrs. Mackenzie was native born and had always resided in California. She there married a resident unnaturalized Englishman and was thereupon treated as an alien by the election authorities of that state. The case upholds their ruling, and it seems to need no argument that, if Congress by statute can attach the consequence of alienage to the marriage of a native born with a resident alien, it can entail the same consequences upon the long-continued nonresidence of a naturalized citizen.[1]

This decision also does away with all arguments that might have been founded upon the fact that the act was passed after Anderson left the United States for Sweden, for if the statute may conclusively hold a female citizen to have elected alienage by marriage, it is obvious that it may also hold a nonresident naturalized citizen to have elected alienage by his nonresidence. If there is no deprivation of liberty or property by one act under the statute, there is none by the other.

This is thought to be the first litigation of its kind under this statute, although the law has been upon the books for upwards of eight years. This is because of an opinion of the Attorney General rendered in 1910, and found in volume 28 of Opinions, at page 504.

[4] By referring to the history of the act as it passed through the Houses of Congress, and depending for interpretation upon the speeches of members, the conclusion was reached that the statute referred

[1] It cannot be said that Mackenzie v. Hare is but the recognition of an old common-law rule. It is thought that the statute (so far as considered in the decision) is no more than a statutory affirmance of the common law; but the court's opinion rests upon the statute and not on tradition.

only to the status of naturalized citizens abroad "when the conditions are apparently such as to indicate that they have no bona fide intention to return and reside in the United States. When a citizen returns to the United States the necessity for such protection no longer exists, and it is fair to assume that with the cessation of the necessity the presumption created by the act also ceases."

There is no such limitation in the act itself and no obscurity in the language of the section in question. The same style of interpretation was urged upon the Supreme Court in the Mackenzie Case and there rejected, and the action of the Department of Labor in respect of Anderson is the result of a belief that the Attorney General's opinion has been overruled by the decision of the Supreme Court. I share that view.

It follows that by force of the statute Anderson lately presented himself at the door of this country with a statutory presumption against him that he had ceased to be an American citizen by reason of his long-continued residence in the land of his birth.

[5] I think this is a rebuttable presumption, but am clearly of opinion that there is nothing in the evidence to sustain the rebutter. It follows that Anderson is an alien, and as such plainly to be excluded upon the facts duly found and shown in the return to the writ.

[6] While the statute is sufficient to dispose of this case, the treaty obligations between Sweden and the United States are likewise worthy of consideration. By the Naturalization Convention of 1869, supra, it was agreed that:

"If a Swede or Norwegian who has become a naturalized citizen of the United States renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship. The intent not to return to America may be held to exist when a person so naturalized resides more than two years in Sweden or Norway."

It is said that this treaty is not now in force because of the separation between those kingdoms which occurred in 1905. This is wholly erroneous. The collection of treaties above referred to is official, having been compiled under a resolution of the Senate of January 18, 1909, and the documents which continued in force as to each kingdom, the treaties made by the United Kingdom, may be seen as to Norway at page 1300, and as to Sweden at page 1724 of volume 2 of Malloy's compendium.

[7] Thus the treaty raises the same kind of presumption as does the statute. It is, however, further urged that, upon the construction of the statute contended for by the relator and justified by the opinion of the Attorney General, the act of Congress overrides the treaty. As above set forth, I cannot agree with this interpretation of the act; but, even if it were otherwise, the admission of aliens and the regulation of citizenship as distinct from alienage is peculiarly a matter of national concern. As to such matters there can be no doubt that treaties are the supreme law of the land, a subject treated of with great force in the address of Hon. F. B. Kellogg before the American Bar Association in 1913 (A. B. A. Reports, vol. 38).

The writ is discharged, and the relator remanded.

CHAPIN-SACKS MFG. CO. v. HENDLER CREAMERY CO. et al.

(District Court, D. Maryland. March 16, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⟸3(4)—MARKS SUBJECT OF OWNERSHIP —DESCRIPTIVE WORDS.

The words "the velvet kind," as applied to ice cream, *held* so far descriptive as not to be subject to exclusive appropriation as a trade-mark by one manufacturer, on evidence showing that the identical words had previously been used in the same trade by other manufacturers in various places in the United States as indicative of some desirable quality in their product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 7; Dec. Dig. ⟸3(4).]

2. TRADE-MARKS AND TRADE-NAMES ⟸70(1)—UNFAIR COMPETITION—IMITATION OF NAMES AND PACKAGES.

The adoption by defendant, an ice cream manufacturer of Baltimore, of the same brand, color of tubs and wagons, and style of advertising signs as those in previous use by complainant in Washington, *held* not legally objectionable, so long as their use was confined to Baltimore, where the complainant did no business, although defendants' product was inferior to complainant's, but to constitute unfair competition when used in other cities or towns, where the parties came into active competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟸70(1).]

In Equity. Suit by the Chapin-Sacks Manufacturing Company against the Hendler Creamery Company and L. Manuel Hendler. Decree for complainant.

Isaac Lobe Straus, of Baltimore, Md., and Walter A. Johnston and Edward G. Siggers, both of Washington, D. C., for plaintiff.

John Watson, Jr., and Jacob M. Moses, both of Baltimore, Md., for defendants.

ROSE, District Judge. The Chapin-Sacks Manufacturing Company is incorporated under the laws of Virginia. It will be called the plaintiff. One of the defendants is a citizen of Maryland. He will be referred to by his surname. The other is a Maryland corporation. It will be designated the Creamery Company. In March, 1912, it succeeded to Hendler's business. He is its president and the active man in its management.

[1] The plaintiff originally made ice. It thought it could profitably use some of its output in the manufacture of ice cream. It made up its mind to call its product "the velvet kind," because, as one of its officers testified, those words were in keeping with the kind of cream it intended to put upon the market. It began to make ice cream in the spring of 1905. In December of that year it filed an application which ultimately resulted in the registration under the federal law of the words "the velvet kind" as its trade-mark.

Defendants also call their ice cream "the velvet kind." Hendler did not begin the use of that phrase until some months after the plaintiff had adopted and extensively advertised it. It was, indeed, such use and advertisement that suggested it to him. In addition to a charge of unfair competition, to be considered subsequently, the plaintiff says

that defendant infringes its trade-mark. Defendant replies: The plaintiff has no trade-mark, because the words "the velvet kind," as applied to ice cream, are so far descriptive that they cannot be appropriated to the exclusive use of any one maker or dealer.

Plaintiff admits that the words "the velvet kind" are suggestive that the ice cream to which they are applied possesses a desirable quality, but it says that they are not so far descriptive that they may not be made a trade-mark. One may make a trade-mark out of a name or phrase which has some element of suggestion about it. "Ceresota" is a good trade-mark for flour, although perhaps it is made up by the addition to the name of the goddess of grain of the last two syllables of the three hard wheat states of Minnesota and the Dakotas. Northwestern Consolidated Milling Co. v. Mauser (C. C.) 162 Fed. 1004. But no one, by marking his flour "Splendid," could prevent others from describing theirs by the same word. Ex parte Stokes, 64 O. G. 437.

Such extreme cases are valuable only as illustrating the principle. They give little help when the question is as to words or phrases much nearer the line. No useful purpose would be served by an analysis of the cases cited by the plaintiff. The particular atmosphere of each case, and the personal equation of the judge who decided it, play their part. Some words which have been held descriptive will not appear to every one to be as much so as others which other judges have said were merely suggestive. Some cases on which the plaintiff relies, such as that of Consolidated Ice Co. v. Hygeia Distilled Water Co., 151 Fed. 10, 80 C. C. A. 506, are not in point, because the court there concluded that the word in dispute, viz. "Hygeia," had not found a place in our vocabulary as a word of descriptive or qualifying import. In the present case, the lexicographers and the evidence of the trade show that "velvet" had, long before its attempted appropriation by the plaintiff, been used as such a word. In one of its secondary meanings it had been recognized as a synonym for softness and smoothness. One of the cases cited is Albers Bros. Milling Co. v. Acme Mills Co. (C. C.) 171 Fed. 989. The court there stated that, while the word "cream" as applied to rolled oats did not seem descriptive, if in point of fact, before its adoption by the plaintiff as its trade-mark, the word had been regarded as descriptive by the trade, the plaintiff could not have acquired any exclusive right in it. The evidence is very clear that the ice cream trade, both before and since the spring of 1905, have considered the word "velvet" as descriptive of certain desirable qualities of ice cream. Before plaintiff tried to make a trade-mark out of the word "velvet," or the words "the velvet kind," the former had been used as descriptive of ice cream by the Detroit Creamery Company, the Peoria Wholesale Ice Cream Company, by a maker of ice cream in Marshfield, Wis., and by another at Erie, Pa.

Plaintiff says that it is not shown that any of those persons attached those words to the ice cream itself, or to the containers in which it was sold, and it therefore argues that such uses did not constitute valid anticipations of its mark. The evidence shows that before plaintiff called its cream "the velvet kind" the Detroit Creamery Company

affixed to the tubs in which it sold ice cream the words "velvet brand." The evidence is probably sufficient to show that the Peoria Wholesale Ice Cream Company did as much with the word "velvet." Nevertheless the acquirement of a valid trade-mark by an ice cream maker in Detroit and by another in Peoria would not, if their trade was strictly limited to those cities and surrounding territory, prevent the subsequent acquirement by the plaintiff of a good trade-mark in the same words for Washington and its vicinity. Hanover-Star Milling Co. v. D. D. Metcalf, 239 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. ——.

But that is not the question now under consideration. The use of the word by so many and by so widely scattered concerns in connection with ice cream is evidence that in the trade it was then understood and used as descriptive of a quality which was sought in that article. The general use before and since of the word for that purpose is abundantly brought out in the testimony. The evidence shows that, in addition to its use by the plaintiff and the defendants, it is or has been used in 41 different towns or cities, distributed over 20 states and one province, from New York to Texas, and from Manitoba and Wyoming to Florida. The word has now, to universal acceptation, become descriptive of ice cream. Few or none of the concerns which are using the word, however late their use of it began, are in any wise competing with the plaintiff, either fairly or unfairly. It has never attempted to sell its product where they sell theirs. If the record did not show, as it does, that in the ice cream trade the word "velvet" had become descriptive of certain kinds of ice cream before the plaintiff went into the ice cream business at all, nevertheless that word is now so. Plaintiff has known the trade usage in this respect, and has not attempted to check it. It is now too late for the plaintiff to assert exclusive rights, if it ever had any. Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60.

Plaintiff points out that the Patent Office has allowed some 60 registrations of the word "velvet" as a trade-mark for various things. In some, perhaps in the majority, of these cases there can be no question that the ruling was right. Where velvet is applied to grate bars, furniture casters, bricks, etc., it is scarcely suggestive. It is certainly not descriptive. In others of the cited cases, the question is a closer one. Registration actually was granted to this particular plaintiff for these very words. The Patent Office has great practical experience in dealing with such matters. Its conclusions are presumptively correct. They should not be lightly disregarded; but the evidence that in this particular trade, at least, the words had become so far descriptive before plaintiff sought to appropriate them that they could not be put to its exclusive use, is in my view so conclusive that it must override any presumption arising out of the action of the Patent Office.

The conclusions stated dispose of so much of plaintiff's case as rests upon its claim to the possession of a valid trade-mark. But that does not necessarily end the matter.

[2] Plaintiff charges that, irrespective of whether it has or has not a good trade-mark, defendants have unfairly competed with it. Hendler was living in Washington in 1905. His father had been in the dairy business in or near Baltimore. The words "the velvet kind," as

displayed by the plaintiff, attracted his attention. He seems to have appreciated their advertising value. He returned to Baltimore toward the close of the year named, and began preparations to go into the ice cream business. He made up his mind that his ice cream also should be called "the velvet kind," and when, at the opening of the season of 1906, he began to put ice cream on the market, he called it "the velvet kind," and he and the Creamery Company have continued to do so ever since. In the color of his tubs, in the painting of his wagons, the character of his signs, and the methods of his advertising he followed the plaintiff. The resemblance in all of these respects is close. Yet there is no reason to believe that when he first gave the name "the velvet kind" to his ice cream, or when he copied plaintiff's methods of advertising and marketing its wares, he was trying to filch its trade. He began his business in Baltimore, and in that city and its immediate suburbs he and his successor have always sold much more than nine-tenths of all the cream they made. Neither of them has ever sold, or ever tried to sell, any in Washington. On the other hand, plaintiff has never sought trade in Baltimore, and in point of fact has had none there. It may possibly, on a very few occasions, at the request of some individual in Baltimore, have shipped ice cream to him; but even so much is scarcely established, and, if it were, it would be one of those very small things of which the law proverbially takes no notice. Hendler followed plaintiff, not for the purpose of stealing plaintiff's trade, but merely because imitation was easier than invention.

It is scarcely possible to hold one guilty of unfair competition in markets in which there was no competition at all. It is true that the record shows that defendant's cream is even now poorer in quality than that of plaintiff. It still contains on an average of 10 per cent. less butter fat, and it is now admittedly of a better quality than it formerly was. Scientific tests of the two creams, moreover, show that as a result, doubtless, of more careful methods of manufacture, plaintiff's is a cleaner ice cream, and contains markedly fewer bacteria.

Plaintiff says that Baltimore and Washington are distant from each other but 40 miles in space, 45 minutes in time, and that the residents of one are frequently in the other, so that the reputation of its cream in Washington is impaired by the fact that a cream sold under the same name in Baltimore is an inferior article. Some such results are conceivable, but it hardly seems possible that they can be realized to an extent sufficient to make them of any practical importance. Defendant's cream is the poorer cream, yet in Baltimore it has a large and rapidly growing sale. Its defects, whatever they are, are not apparent to every one's taste, and in Annapolis, in which it will be presently seen the two creams come most sharply in competition, the largest retail dealer, and the one whose trade can best afford to be particular as to quality, sells defendant's exclusively. It must be remembered that, if plaintiff has not a trade-mark in the words "the velvet kind," it does not even claim to have any exclusive rights in the color of its tubs, the shape, color, and general appearance of its wagons, or its advertising signs. It is true it has the right that no man shall use any of these things to sell his goods to people who want its, but for any other purpose all the world is free to use any or all of them. In Balti-

more and everywhere else in which defendant sells its goods at all, except in Annapolis and Laurel, there is no chance of defendant taking any of plaintiff's trade, for plaintiff has never had any, and apparently never wanted any.

There has been competition in Annapolis and Laurel. Each of these places is about equally distant from Baltimore and from Washington. Did the defendants in them compete unfairly with the plaintiff? It is probable that Hendler's ice cream was sold in Annapolis before plaintiff's. It is possible that the tubs in which it was there shipped may have been marked "the velvet kind"; but, even if that much be admitted, Hendler's sales were insignificant in quantity, and there was at that time no advertisement of his cream as "the velvet kind." Plaintiff's business in Annapolis was the direct outcome of the high reputation for cleanliness and careful manufacture it had already established in Washington. It began in 1908. In that year it sold 1,005 gallons. The demand grew rapidly, and the sales of 1910 were nearly six times as great. In that year Hendler for the first time made any serious attempt to do business in the capital of Maryland. He then engaged a very capable and energetic agent. He sold 873 gallons. That was between one-sixth and one-seventh of plaintiff's sales the same year. In the next three years his and his successor's business grew so that in 1913 the latter sold 4,500 gallons more than he had three years before. In the same period plaintiff's sales increased 14,400 gallons.

At the beginning of 1914 plaintiff announced an increase of 15 cents a gallon in the price of its cream. Its customers, as those of the defendant, were retail dealers. Most of them refused to pay the increased price, when they could get another velvet kind for the old, and even, as it turned out, for less. The Creamery Company saw its opportunity. It put a delivery wagon on in Annapolis, offered to deliver, pack, ice, and salt its cream and keep it, while in the possession of the retailer, iced and salted, free of charge. This amounted to a reduction of some cents a gallon. It for the first time advertised its ice cream in the Annapolis papers as "the velvet kind." Plaintiff soon reduced its price to its former level, but the damage had been done. In 1914 it lost nearly two-thirds of its trade. The Creamery Company more than doubled its. In 1913 the plaintiff sold nearly four times as much as the Creamery Company; in 1914, but little more than one-half as much. Plaintiff's sales fell off 13,000 gallons. The Creamery Company's increased 8,300 gallons. Some, if not all, the difference between what the plaintiff lost and the Creamery Company gained went to swell the trade of other dealers, who did not call their ice cream "the velvet kind." In 1915 plaintiff recovered about two-fifths of the ground it had lost. The Creamery Company held the greater part, but not quite all that it had gained. In that year the sales of the two creams in Annapolis were nearly equal, the plaintiff having a little the best of it.

When Hendler began to press his sales in Annapolis, he was bound to remember that he had taken the name that plaintiff gave its cream, and had followed it more or less closely in the way of advertising and

marketing. He had the right to do so when there was no danger of thereby leading people who wanted plaintiff's cream to buy his. Under the conditions which prevailed in Baltimore, there was no occasion to take precautions against dangers that did not exist, but where he was in active competition with plaintiff, as at Annapolis, the situation was different. He had unnecessarily, and merely to save himself the trouble, so carried on his business that, in any locality in which both creams were sold, confusion with plaintiff's goods was highly probable, if not inevitable. He and his successor have found such confusion useful in taking trade away from plaintiff. Under such circumstances he was bound, at his peril, to prevent it. All experience shows that, in an article of this kind, the mere fact that he displayed his own name in connection with the ice cream was not sufficient to keep people from buying his wares when they wanted plaintiff's. Defendants, it is true, have a right to say their cream is "the velvet kind," precisely as they have the right to paint their tubs yellow, to use similar delivery wagons, to furnish their customers with cabinets which closely resemble those of plaintiff, and to display signs and banners which make almost the same impression on the eye as do those of the plaintiff; but they cannot do one, or all, or any, of these things for the purpose of confusing their goods with those of plaintiff's. This is especially true when their goods are to their knowledge inferior to its. If Hendler had taken the trouble originally to design an advertising scheme, instead of appropriating that of plaintiff, the defendants would not now be subject to any embarrassment. He did not, and they must submit to whatever is necessary to protect plaintiff from the annoyance and loss resulting from a confusion which they have caused.

Laurel apparently furnishes a much smaller market for ice cream than does Annapolis. Defendants' competition, while smaller in amount and less systematic in character, is carried on at Laurel in the same way as in Annapolis, and must fall under like condemnation.

The filing in one of the equity courts of the state of Maryland in 1910 of a bill against Hendler, charging trade-mark infringement, and a failure to press the case, so that the bill was dismissed for want of such prosecution, is not a bar to this suit; certainly not to the granting of the limited relief to which plaintiff has been found entitled.

A decree will be entered which will so restrain defendants in their ways of advertising, marking, and selling their cream in Annapolis, in Laurel, and in any other places in which the plaintiff, prior to the institution of this suit, was selling its cream, as will remove all reasonable danger of defendant's cream being sold as plaintiff's, or under the reputation acquired by plaintiff. The terms of such decree, if the parties cannot agree upon it, will be settled at an early date.

In view of the fact that the relief asked by plaintiff was much broader than that to which it has been found entitled, and that a considerable part of the costs were incurred in a contest over the claim of the plaintiff to that which has been denied, the decree will require each party to pay one-half the costs.

MERCHANTS' NAT. BANK OF RICHMOND v. NATIONAL BANK OF LILLINGTON.

(District Court, E. D. North Carolina. February 15, 1916.)

BANKS AND BANKING ⊂=281—NATIONAL BANKS—LIQUIDATION.

The action of the stockholders of a national bank in voting to go into voluntary liquidation and in appointing a liquidation agent, pursuant to Rev. St. §§ 5220, 5221 (Comp. St. 1913, §§ 9806, 9808), is equivalent to the appointment of a receiver by the Comptroller in its effect on the property and the rights of the creditors. The assets of the bank become a trust fund to be administered for the benefit of all creditors pro rata, and while the bank retains its corporate existence and may be sued, the effect of a judgment obtained against it by a creditor is only to fix the amount of the debt, and the judgment plaintiff can acquire no lien which will give him an advantage over other creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1075–1079; Dec. Dig. ⊂=281.]

In Equity. Suit by the Merchants' National Bank of Richmond against the National Bank of Lillington. On petition of John H. Boushall and R. B. Teague, receivers, for instructions.

W. H. Pace, of Raleigh, N. C., for receivers.
Clifford & Townsend, of Dunn, N. C., for judgment creditor.

CONNOR, District Judge. The facts appearing upon the record disclose this case: The stockholders of the National Bank of Lillington, on the 22d day of January, 1912, adopted a resolution, pursuant to the provisions of section 5220 of the National Banking Act, 5 Fed. Stat. Anno. 166, 167, to place the bank in liquidation, and appointing J. R. Baggott, Esq., liquidating agent, or liquidator. The resolution was duly certified to and approved by the Comptroller of the Currency. The liquidator qualified, took into his possession the assets of the bank, and proceeded to wind up its business in accordance with the provisions of the statute. Subsequent to the appointment and qualification of the liquidator, J. B. Lanier, to whom said bank was indebted, on account of a balance due him as a depositor, instituted an action against the bank in the superior court of Harnett county, securing service of the summons on the liquidator, and recovered judgment for the sum of $1,491.44, together with interest and cost, which judgment was docketed January 12, 1914, in the superior court of the county of Harnett and of the county of Lee. L. D. Burwell recovered judgment on February 2, 1914, against the bank in a justice's court for $120, which was duly docketed in said counties.

On the 20th day of February, 1914, a suit in equity was instituted in this court by the Merchants' National Bank of Richmond, in behalf of itself and all other creditors of the National Bank of Lillington, alleging that the bank was insolvent, and that its assets in the hands of the liquidator were not being properly administered, etc. A decree was passed, March 2, 1914, appointing John H. Boushall and R. B. Teague receivers, and directing the liquidator to turn over and de-

liver to them all of the moneys and property of said bank to be administered for the benefit of the creditors. In obedience to said decree, he turned over, among other property, to the receivers, one lot situated in the town of Lillington, N. C., Harnett county, and one lot situated in the town of Sandford, in the county of Lee, belonging to said bank. Pursuant to an order made in this cause, the receivers sold said lots free from liens, for the sum of $3,250, which sum they have, or will have, when collected, in hand, subject to be disbursed in accordance with the orders of the court and the rights of the creditors. The judgment creditors claim a lien upon the said lot, by virtue of the docketing of their judgments, prior to the appointment of the receivers. For the purpose of ascertaining their duty and the rights of the judgment creditors, the receivers, upon notice to the judgment creditors, filed a petition in the cause, asking the instruction of the court in the premises. The question presented for decision is whether, by obtaining judgments and docketing them, as prescribed by the statute (Revisal, § 574), against the bank subsequent to the appointment of the liquidator and prior to the appointment of the receivers, a lien was acquired upon the real estate owned by the bank in liquidation. The National Bank of Lillington, in appointing a liquidating agent, proceeded pursuant to R. S. §§ 5220, 5221, 5 Fed. Stat. Anno. 166, 167. The statute is silent in respect to details, but it would seem that the appointment of the liquidator has the same legal effect upon the assets and the rights of creditors and stockholders as the appointment of a receiver by the Comptroller of the Currency. It is held that the bank is not dissolved, nor its corporate existence destroyed, by being put in liquidation. The liquidator may sue for the recovery of debts due, or rights belonging to, it, or may be sued upon the debts owing by the bank, for the purpose of fixing their amount. In National Bank v. Insurance Co., 104 U. S. 54, 76, 26 L. Ed. 693, it is said:

"We see nothing in the act inconsistent with the continued existence of the bank as a corporation for the purposes of liquidation. Indeed, it seems to confirm the idea that for the purpose of being sued, in order judicially to determine the question of disputed liability, it continues to exist, and the remedy against the shareholders is added as a means of execution, in case the corporate assets have, in the meantime, been otherwise applied" or otherwise appropriated.

This case is cited with approval in Chemical Bank v. Hartford Deposit Co., 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595, in which a receiver had been appointed by the Comptroller. The conditions existing here are very similar to those in the case of Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. There, the bank had gone into voluntary liquidation and, pending the collection of the assets, a creditor filed a bill in equity, in behalf of himself and all other creditors, charging that the proceedings were not being properly conducted, asking for the appointment of a receiver, etc. The court permitted amendments to the bill by which the stockholders were brought in and a decree asked against them for unpaid subscriptions, etc. A number of exceptions were taken to the decrees of the court. Mr. Justice Mathews, in a very interesting discussion of the remedies

prescribed by the National Banking Act, and the equitable power of the court, says:

"By section 5220 it was also provided that 'any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.'"

He notes that no provision is made in the original act for enforcing the liability of individual stockholders when the bank goes into voluntary liquidation. After discussing the language of the act, he says:

"It can hardly be supposed that the omission in the statute to provide an express and specific course of proceeding, by way of judicial remedy, in case of voluntary liquidation, left the creditors of such an association in such circumstances without remedy against either a deficiency of assets or the results of a fraudulent maladministration."

He reaches the conclusion that by the statute the liquidation agent is to be likened to the receiver appointed by the Comptroller, in respect to his powers and duties, and that the suit in equity was a continuation of the process of liquidation. It is an elementary and universally recognized principle in equity jurisprudence that the assets of an insolvent corporation, or association, is a trust fund and, immediately upon the appointment of a receiver, becomes subject to the payment of its debts pro rata, preserving, however, all valid liens existing at the time the receiver is appointed, or the court has, by injunction or otherwise, assumed control of the property, and that thereafter no liens can be created, either by the corporation or the rendition of judgments. Clinchfield Fuel Co. v. Titus, 226 Fed. 574, — C. C. A. —. So, in George v. Wallace, 135 Fed. 286, 292, 68 C. C. A. 40, 46, Circuit Judge Hook says:

"The tangible assets of an insolvent national bank which is in the process of liquidation constitutes, in the hands of the liquidating agent, a trust fund for the primary benefit of creditors, and so of the liability of the shareholders of a bank similarly circumstanced."

The courts treat the action of the stockholders in appointing a liquidating agent, pursuant to the power conferred upon them by section 5220, as equivalent to and carrying all of the incidents in respect to the assets and the rights of creditors, as the making a voluntary deed of assignment would do. The bank ceases to be a "going concern." If it be solvent, the proceeds of the sale and collection of the assets are, under the direction of the Comptroller, applied to the payment of the debts, and the balance, if any, is distributed among the shareholders. It would be impossible to comply with the statute and effectuate its equitable purpose, if creditors were permitted to secure priorities, or liens by attachment, or recovering judgments constituting liens upon the property. 2 Morse on Banks and Banking, 1389.

Assuming that the duty of the liquidating agent and the rights of the creditors are analogous to those of a receiver appointed by the Comptroller, we find the method of proving and paying the debts of the bank prescribed by section 5236, R. S.; 5 Fed. Stat. Anno. 176 (Comp. St. 1913, § 9823). The Comptroller is required to make a ratable dividend of the money paid to him, after providing for the redemption of the notes of the bank, on all such claims as may have

been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, etc. White v. Knox, 111 U. S. 785, 4 Sup. Ct. 686, 28 L. Ed. 603. The only effect of the judgment was to fix the amount of the debt. The receivers appointed in this suit take the assets and property from the liquidating agent in the same plight and subject to the rights of creditors as they were held by him. As no lien could attach by virtue of the judgment recovered by the respondent, against the real estate of the bank, while in the hands of the liquidating agent, it follows none has attached since. The receivers will distribute the funds which come into their hands upon the principle prescribed by section 5236, R. S. This will be certified to the receivers.

THE OLSON & MAHONY.

(District Court, N. D. California, First Division. December 23, 1915.)

No. 15935.

ADMIRALTY ⇐56—GARNISHMENT—RELEASE OF GARNISHEE ON STIPULATION.

A garnishee in admiralty, who admittedly has a sum in his hands belonging to the respondent, the amount of which is not in dispute, may retain the same "to answer the exigency of the suit," as provided by admiralty rule 37 (29 Sup. Ct. xliii), or where permitted by a rule of court he may be released from further liability by giving a stipulation for the amount, to abide the further order of the court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 451; Dec. Dig. ⇐56.]

In Admiralty. Suit by W. P. Fuller & Co., a corporation, against the American steamship Olson & Mahony and others. On application by John Settle, garnishee, to be released from further liability on stipulation. Granted.

Andros & Hengstler and G. W. Bell, all of San Francisco, Cal., for libelant.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for garnishee Settle.

DOOLING, District Judge. In this action which is in personam as against the Empire Lumber Company, the marshal by virtue of process issued out of this court has attached all moneys, goods, credits, etc., in the hands of one John Settle belonging to any of the respondents herein. The said John Settle has answered that he has in his possession and belonging to the respondent Empire Lumber Company the sum of $10,397.59, and asks that he may be released from all further liability herein upon filing an admiralty stipulation in said amount, conditioned that he shall abide by and perform all orders and decrees, interlocutory or final, of this court or of any appellate court in relation thereto.

Respondent Empire Lumber Company cannot be found or served within this district, and libelant contends that, as the suit is for $35,000, the money in the hands of Settle cannot be released on stipulation by

him, unless such stipulation be for the full amount claimed. This contention is based upon admiralty rule 4 (29 Sup. Ct. xxxix), which provides that an attachment such as this may be dissolved—

"upon the defendant, whose property is so attached, giving a bond or stipulation, with sufficient sureties, to abide all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court."

In Pope v. Seckworth et al. (D. C.) 46 Fed. 858, it was held that under this rule a defendant could not obtain the release of a barge attached by giving a stipulation for the value of the barge which was less than the amount sued for, but to secure such release must give a stipulation or bond sufficient to cover the amount awarded by final decree. Here, however, the defendant is not seeking a release of his property, but a third party is seeking to be relieved from further responsibility by giving a stipulation for the amount of money held by him. The case seems to me to be covered by rule 37 (29 Sup. Ct. xliii) which provides:

"If he [the garnishee] admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit."

As I read this rule, it means that the garnishee shall hold the moneys in his hands, there to await the exigency of the suit. There is an old rule of this court, adopted in 1851, which provides:

"That a garnishee shall, on motion of the actor, pay into court such amount as he shall not claim or as may be ordered by the court, or give a stipulation with sufficient surety to abide the further order or decree of the court in relation thereto."

The most that could be required here would be a stipulation that Settle would abide the further order or decree of the court in relation to the $10,397.59 in his hands. I do not understand that there is any question raised as to the amount held by him and belonging to respondent Empire Lumber Company.

Settle may either hold the money under rule 37 of the Supreme Court, or give stipulation in the amount of $10,397.59 as provided by rule 29 of this court. In any event, he cannot be compelled to give a stipulation for more than the amount in his hands.

FINNEGAN v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1916.)

No. 2749.

1. POST OFFICE ⟸48(4)—OFFENSES—INDICTMENT—USE OF MAILS TO DEFRAUD.
An indictment under Penal Code (Act March 4, 1909, c. 321), § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), which charged that the scheme for which the mails were used was one to defraud divers ignorant persons in three named states, especially Austrians not familiar with business, without naming them or stating that their names were unknown to the grand jurors, is sufficient, since it shows that the scheme was to defraud, not an individual, or group of definite individuals, but a class, which was described as particularly as possible.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⟸48(4).]

2. INDICTMENT AND INFORMATION ⟸71—SUFFICIENCY—CERTAINTY.
The highest degree of certainty is not required in an indictment, but certainty to a common intent is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. ⟸71.]

3. POST OFFICE ⟸48(4)—OFFENSES—INDICTMENT—USE OF MAILS TO DEFRAUD.
An indictment charging the use of mails to defraud, which alleged that the plaintiff sold stock of a certain corporation, of which he was not the agent, and which stock he did not intend to deliver, and converted the amount paid therefor to his own use, and that the corporation had ceased to do business, and none of its stock was for sale, was not defective for failing to allege that the defendant had knowledge that the corporation had ceased to do business, since the fraud was complete if defendant agreed to sell the stock, intending to convert the money to his own use, and not to deliver the stock.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⟸48(4).]

4. INDICTMENT AND INFORMATION ⟸63—SUFFICIENCY—FORM OF AVERMENT—"AS AFORESAID."
Where an indictment for using the mails to defraud in the first two paragraphs set out the fraudulent scheme, and in the third paragraph alleged, "And so the grand jurors do further present as aforesaid," setting out the particular means whereby an individual was defrauded, the word "so" was surplusage, and the words "as aforesaid" refer to the manner in which the additional matter was presented, there being no invariable rule which refers those words to the last or any antecedent word or averment, and they did not render the indictment bad, as showing that the third paragraph was an argumentative conclusion by the grand jurors, and not a direct allegation.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 185; Dec. Dig. ⟸63.

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

5. INDICTMENT AND INFORMATION ⟸119—SUFFICIENCY—FORM OF AVERMENT—SURPLUSAGE.
If those words could not be so construed, they were surplusage, since no prior mention had been made of the fact charged in the third paragraph.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 311–314; Dec. Dig. ⟸119.]

6. POST OFFICE ⊂⊃48(4)—INDICTMENT—USE OF MAILS TO DEFRAUD—DESCRIPTION OF LETTER.

An indictment for the use of mails to defraud, which specified the sender of the particular letter charged to have been received in furtherance of the fraudulent scheme, the place of mailing, the contents, the amount of the post office order contained therein, the addressee and his post office address, the payee of the money order, and the date on which he took it from the post office, sufficiently described the letter; a post office money order being so well known as not to require a more particular description.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. ⊂⊃48(4).]

7. POST OFFICE ⊂⊃48(8)—VARIANCE—USE OF MAILS TO DEFRAUD—"LETTER."

There is no variance between an indictment under Penal Code, § 215, for using the mails to defraud, which charged that defendant took a "letter" from the post office, and proof that he took an envelope which contained only a post office money order, since "letter," as used in that statute, is a comprehensive term, and includes such a communication.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 78; Dec. Dig. ⊂⊃48(8).

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

8. POST OFFICE ⊂⊃49—OFFENSES—EVIDENCE—TAKING FROM POST OFFICE.

In a prosecution for taking from the post office a letter in furtherance of a scheme to defraud, contrary to Penal Code, § 215, evidence that an envelope containing a post office money order duly stamped and addressed to defendant was deposited in a post office and forwarded in the mails, and that on the following day the same money order was presented by defendant at the post office to which the letter had been addressed and payment therefor receipted by him, is sufficient to show that he took the letter from the post office.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂⊃49.]

9. CRIMINAL LAW ⊂⊃730(3)—MISCONDUCT OF PROSECUTOR—EVIDENCE BY DEFENDANT—CURE BY COURT.

Where the prosecuting attorney, in a prosecution for using the mails with intent to defraud, offered in evidence all of defendant's letters to his agent prior to the termination of the agency, whereupon the defendant asked that the subsequent letters be introduced also, the remark of the prosecuting attorney that he would do so if the defense would produce the letters the prosecution had asked them for was not erroneous, as seeking to compel the defendant to produce as evidence against himself the letter charged to have been received in furtherance of the scheme to defraud, where the court, on defendant's exception to the remark, negatived such inference.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. ⊂⊃730(3).]

10. POST OFFICE ⊂⊃49—OFFENSES—EVIDENCE—USE OF MAILS TO DEFRAUD—INTENT.

In a prosecution for the use of the mails in furtherance of a fraudulent scheme to contract to sell corporate stock with intent to convert the proceeds and not to deliver the stock, evidence *held* sufficient to warrant the jury in finding that defendant did not intend to purchase the stock in the market and deliver, and did not by mistake offer that stock for sale, instead of stock which he or his wife then owned.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂⊃49.]

11. CRIMINAL LAW ⊂⊃1169(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where defendant was charged with using the mails in furtherance of a fraudulent scheme to sell stock of a mining corporation which had ceased

to do business, and there was proof that the defendant had represented that there was such a corporation, the admission of parol evidence to establish the existence of that corporation was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. ⊂⊃1169(1).]

12. CRIMINAL LAW ⊂⊃670—ERROR—PRESENTING QUESTIONS BELOW—OFFER OF EVIDENCE.

Error cannot be predicated on the refusal of the court to admit evidence in a prosecution for using the mails in furtherance of a fraudulent scheme to sell stock not owned by defendant and to convert the proceeds, because in response to a question by defendant's counsel whether the court would permit defendant's brother-in-law to testify to conversations with defendant relative to a sale of stock by him, or his intention in that respect, the court replied that he would not, since the proposition submitted to the court was too indefinite.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 757, 1593–1596; Dec. Dig. ⊂⊃670.]

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

P. H. Finnegan was convicted of using the mails to defraud, and he brings error. Affirmed.

W. Knox Haynes and Michael Feinberg, both of Chicago, Ill., for plaintiff in error.

Myron H. Walker, U. S. Atty., and H. Dale Souter, Asst. U. S. Atty., both of Grand Rapids, Mich.

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

SATER, District Judge. Finnegan, the defendant below, was indicted, convicted and sentenced under section 215 of the Penal Code, for using the mails to defraud. He prosecutes error to obtain a reversal of the judgment against him.

The first paragraph of the first count, the only one on which he was convicted, charges that, on or about January 31, 1911, at Calumet, Mich., he devised the following scheme to defraud "divers other persons": He and his agents personally and through the mails and by printed circulars and other advertising matter would falsely and fraudulently represent to "such persons" in various localities in Michigan, Wisconsin and Minnesota that he was the agent of the Kelvin-Arizona Copper Company, the owner of a rich and valuable copper mine near Kelvin, Ariz., duly authorized to sell and deliver its stock, and that he and his agents would solicit orders for the stock "among ignorant persons, especially Austrians not familiar with business," would receive and accept orders from "such persons" for stock, enter into written contracts with "such persons" for its purchase and for the delivery of certificates therefor in six months from the date of such contracts, would secure from "such persons" the money in payment for the same, and would solicit and induce "such persons" to open correspondence with him at Calumet and forward to him there through the mails money orders for the purchase of such stock and remittances for the same, merely intending to get possession of the moneys to be sent to

him and to convert the same to his own use, without giving anything of value therefor, and without delivering to "such persons" any certificates of stock of such company or of any other mining corporation, and thereby to defraud the "said persons" who should send and pay money to him. The second paragraph of the count alleges that the Kelvin-Arizona Copper Company was not engaged in business in 1910, having practically withdrawn therefrom in 1907, and had no stock for sale; that Finnegan was not its agent, was without power or authority to sell or deliver its stock, and did not intend to deliver certificates for the same, but intended to convert and did convert to his own use "the moneys received from persons with whom he made contracts" and intended to defraud and did defraud "said persons" out of the same by means of his scheme. The third paragraph alleges, "And so the grand jurors do further present as aforesaid" that on or about the date named the defendant, in the execution of his scheme to defraud, took from the post office at Calumet a certain letter addressed to him at that place, sent by mail from Rumely, Mich., by Jacob Pesek, which letter contained a post office money order for the sum of $7 payable to the defendant at Calumet, "contrary to the form of the statute," etc.

[1] The several grounds on which the count was assailed by demurrer are pressed on the court with great earnestness. It is not defective, as claimed, in averring a scheme to defraud "divers other persons," without naming or describing the persons whom it was intended to defraud, or giving a lawful reason for not so doing, or stating that the names of such divers other persons are to the grand jurors unknown. The indictment differs from that considered in Larkin v. United States, 107 Fed. 697, 46 C. C. A. 588 (C. C. A. 7th Cir.), on which case the defendant mainly relies. In that case the scheme alleged in the indictment was to defraud "divers other persons" by inducing "those persons severally" to send to the accused divers valuable articles to defraud "the several persons" who should send the same, which scheme and artifice he intended to effect by opening correspondence and communication with "the several persons" so intended to be defrauded and by inciting "those persons" to open communication with him. The court rightfully said:

"These expressions clearly import an intention to defraud different individuals, with whom it was intended to open correspondence, and who, therefore, by the settled rule of pleading, should have been described by name in the indictment, or a good and true reason given for the omission."

[2] In the instant case, the names of the parties to be injured were not known to the defendant when his scheme was originated and were not capable of definite ascertainment by the pleader. The purpose was to defraud a class—"ignorant persons and especially those of Austrian nationality, not familiar with business," who might be found in any of the three states named. The case therefore falls under the rule stated in the Larkin Case that, where the charge is a scheme to defraud a class, not resolvable into individuals, it is evident that the persons intended to be injured were not known and no necessity therefore existed for an averment to that effect. A pleading is not faulty

whose form of allegation is unavoidable. The highest degree of certainty is not required, certainty to a common intent being sufficient, and no rule ought to prevail which would only serve to shield the guilty, instead of protecting the innocent. Bishop, New Crim. Proc., §§ 493, 497; Stoughton v. State, 2 Ohio St. 562, 564.

[3] We are further of the opinion that there is no merit in the insistence that the count did not charge the defendant with knowledge that the Kelvin-Arizona Copper Company practically ceased to do business in 1907 and was doing none at all in 1910. The second paragraph of the count is in part a repetition of what is elsewhere well pleaded and the residue is superfluous. Its entire omission would not weaken the government's position. If, as charged, the defendant intended to get possession of the moneys paid to him and convert them to his own use without giving anything of value in return, it is altogether unnecessary to aver that the company had gone out of business practically or entirely and that he had knowledge of that fact. If such purpose existed, the criminality of the scheme was present, whether he was the agent of the company or not, and regardless of whether it was in or out of business, or had or had not stock for sale and delivery.

[4, 5] The contention that the third paragraph of the indictment, by reason of the presence of the words "so" and "as aforesaid" occurring in the expression, "And so the grand jurors do further present as aforesaid," is a mere recital and an argumentative conclusion that, from the preceding averments, the defendant is guilty of the crime named in the recital, and is not an affirmative averment of the use of the post office establishment—a constituent element of the offense—and that therefore the count is void and does not support the jurisdiction of the court, is not sound. The presence of those words in the count does not vitiate it. "As aforesaid" is an adverbial referential expression, meaning "in the manner aforesaid," "in like manner," and indicates the manner in which the grand jury further presents an additional element of the offense. Stroud's Jud. Dict. vol. 1, p. 52. If the alleged vitiating words "as aforesaid" be retained and be not treated as surplusage, and their equivalent be used and the clearly superfluous word "so" be rejected, the opening statement of the third paragraph becomes reasonably clear, and the same as if it averred that the grand jurors do further present, in the aforesaid manner, or in the same manner as they have heretofore presented given facts, certain other facts, naming them. Following such opening statement are allegations of fact not previously made, the affirmative character of which allegations and the context must be considered. There is no invariable rule which refers the words "aforesaid" or "as aforesaid" to the last or any antecedent word or averment, if so to apply them would be at variance with the context (Anderson's Law Dict. 913; Healy v. Healy, 9 Irish Rep. Eq. 418 [1875]), and they may be wholly rejected as surplusage (Campbell v. Bouskell, 22 Beav. 325; Commonwealth v. O'Hearn, 132 Mass. 553, 555). In the Campbell Case, the word "aforesaid," occurring in the expression "aforesaid nephews and nieces," none having been previously named, was re-

jected. So in the present instance, no prior mention having been made of the facts charged in the third paragraph, the words "as aforesaid" should be rejected as surplusage, and thus we prefer to dispose of the objection to the count based on their use. Without them the paragraph distinctly charges an essential element of the offense. Rightfully interpreted, it thus charges with them present.

[6] Nor is the count defective for want of a sufficiently particular description of the letter taken by the defendant from the Calumet post office. It specifies the sender, the place of mailing, the contents, the amount of the post office money order, the addressee and his post office address, the payee, and the date on which he took the letter from the post office. So well known, even among the laity, are such money orders, that a more detailed description of the money order in question would have been superfluous. The count adequately apprised the defendant of the nature and cause of his accusation and sufficiently conforms to the rules of criminal pleading to withstand successfully the assaults made upon it.

[7] It is urged that proof that the defendant received an envelope sent through the mails, as charged, containing the money order in question is not proof that he took a letter from the mail; that is to say, that an envelope containing a money order only is not a letter. The court charged to the contrary. Section 215 was designed for the instruction and protection of the common people. The word "letter" occurring in the statute is a comprehensive term. An envelope properly stamped and directed, containing a money order only, payable to the addressee, is, according to the popular understanding and in law a letter. It may be written or printed, or partly written and partly printed, as is usually the case with money orders. The post office money order was quite as much an epistolary communication, and quite as well understood by the defendant as it would have been, had the sender specifically written that a post office money order was inclosed. There was no variance in the proof, as claimed, or error in the charge of the court in the respect mentioned.

[8] The evidence shows that on January 30, 1911, Jacob Pesek bought at Rumely a money order for $7, payable to the defendant at Calumet. He inclosed it in a stamped envelope, which had previously been furnished by and was addressed to the defendant, and returned it in that condition to the postmaster, who put it in the mail box. The mail from such box was subsequently taken up and sent on its course. On the day following that same money order was presented at the post office at Calumet by the defendant, at which time he receipted for its payment and received the money on it. Pesek had bought of the defendant on September 30, 1910, 100 shares of stock of the Kelvin-Arizona Copper Company (par value $1 per share) for $35, of which $7 were paid in cash, and the residue was to be paid in four equal monthly installments of $7 each. A certificate for the stock purchased was to be delivered by the terms of the contract within six months from its date, or as soon thereafter as payment in full was made. Pesek had been instructed to transmit money for the unpaid installments as they matured, by money order, registered letter, or

express money order, to the defendant at Calumet. He never had any transaction with the defendant, other than the purchase of the stock. In view of the foregoing facts the asserted variance in the proof as to the receipt by the defendant of the letter named in the indictment does not exist. His possession of the money order and his realizing and receipting for its full value support the conclusion that he took from the post office at Calumet the letter which was mailed at Rumely and transmitted through the mails to the former place.

[9] The defendant in September, 1910, employed Louis Lustick as his agent to assist him in the sale of stock. The relation of principal and agent was maintained until about April 1, 1911, within which period of employment many letters relating to the sale of stock and the business in hand passed between them. The district attorney undertook to offer in evidence all of the defendant's letters to Lustick, believed to be relevant, down to the last-named date, regarding, however, all letters subsequent to that date as immaterial. On cross-examination of the post office inspector, it appeared that certain letters written after April 2d had not been produced or offered by the government. Defendant's counsel thereupon requested the production of all such letters, with which request the district attorney offered to comply, providing the defendant's counsel would produce "the letters we have asked you for." Exception was taken to this response on the ground that the district attorney had made "a demand in the presence of the jury upon this defendant to produce evidence," an inference which the court promptly negatived. The district attorney then remarked that he had served notice upon his opposing counsel "to produce certain letters," to which the defendant excepted. Subsequently the defendant's counsel again asked that the government's counsel produce all letters in his possession written after April 2d. They were then produced, and all letters subsequent to that date that passed between the defendant and Lustick were submitted by the defendant to the jury. The defendant, who did not take the witness stand, charges that reversible error exists, in that the jury might have reasonably inferred that the letter or letters mentioned in the discussion were taken by him from the post office and were in his possession, and that a demand was made on him in the presence of the jury to produce evidence to be used against himself. This contention cannot be sustained. The subsequent admission of all these letters at the defendant's instance devitalizes his exception, if it ever possessed merit. The trial judge understood, and we think made it clear to the jury, and the record shows, that the letters mentioned did not include the one named in the indictment, or any of an incriminatory character, and were only those written after Lustick's employment had fully terminated, and after the alleged offense charged in the indictment had been fully consummated. The defendant's position is no better than that of the respective defendants in Foster v. United States, 178 Fed. 165, 173, 101 C. C. A. 485, and Bettman v. United States, 224 Fed. 819, 823, 140 C. C. A. 265, both of which cases were decided by this court.

[10] Notwithstanding the defendant's assertions to the contrary, we are not prepared to say that the government failed to prove its case. He employed Lustick, an Austrian who could speak and write English,

to assist in effecting sales to his fellow countrymen. Together they visited camps and localities in the states named in the count where Austrians were assembled, many of whom could use no language other than that of their native country. At other times Lustick was sent alone to such places to make sales. No particular individuals were in contemplation, but Austrians as a class were sought out and solicited. Evidence was given to them as to the ownership of the mine by the company, the company's freedom from debt, the great quantity and richness of its ore (a sample being displayed for that purpose), the mine developments in progress, the limited number of shares for sale, the quite positive representation that the shares which he sold at first at 35 cents and later at a higher price would in a short time sell for $1 and would even be worth $2 each, and the delivery of stock to purchasers about May 1, 1911. Purchasers were invited to communicate with him by mail, and were furnished for that purpose with envelopes having his name printed thereon. On different occasions at different places affirmatively by word of mouth, and in other instances by necessary implication arising from circulars distributed by mail and otherwise, he represented, when effecting or attempting to effect sales, that he was selling stock for the Kelvin-Arizona Copper Company, or in other fitting language held himself out as its agent for such purpose. The applications for stock in evidence signed by purchasers recite the purchase of stock of that company. No instance is cited, and we find none, in which he stated that he was selling stock for himself. The applications which purchasers signed recite, it is true, that they purchased stock from defendant, and on his letter heads beneath his name were the words "Stocks, Bonds and Securities," but these things were not necessarily inconsistent with his declared existence of an agency and the jury were at liberty so to find. His sales of stock were in small blocks and aggregated about 20,000 shares. He was never agent for and never owned any stock of the Kelvin-Arizona Copper Company and could not sell any of its stock for himself, for the reason that it was never sold on the market and was owned exclusively by the few persons who in or about Los Angeles, Cal., promoted the company. It practically ceased to do business in 1907 and was doing none whatever in 1910. He never delivered or attempted to deliver even so much as a single share to any one of his purchasers.

In so far as the record indicates, he owned but 41 shares of mining stock, and that was in the Sultana-Arizona Copper Company and of the face value of $5 per share. He exhibited his certificate for these shares sometimes, at least, in his efforts to obtain purchasers. His wife owned about 2,366 shares in the same company. He had been agent for that company, but on April 28, 1910, it went out of business and its property was taken over by the newly organized Arizona-Sultana Copper Company, notice of which reorganization and of the change of corporate name was given to every stockholder of the old company at that time. The new company gave 5 shares of its stock, of the face value of $1 each, for each of the shares of its predecessor company (excepting about 9,000 shares held in small lots which were not turned in for exchange), withdrew from the market the stock so given in exchange, and escrowed it until May, 1911, and, on account

of extensions to November, 1911, May, 1912, and November, 1912, did not release its stock, until the last-named date. The defendant knew of the exchange of stocks and of the escrowing of that of the new company. It is not shown what he did with the money he received from sales, or that he purchased, or took any steps towards purchasing for delivery, any of the stock of the new company, or any stock of its predecessor for the purpose of exchanging it and of delivering the stock received in exchange, or that he exercised any dominion over the stock held by his wife, or attempted or intended to utilize it in making stock deliveries. The stock held by him and his wife was other than that of the Kelvin-Arizona Copper Company and was in the aggregate much less than the quantity he sold. The greater part, perhaps all, of his wife's stock later passed into the possession of others, subsequent to the reorganization of April 28, 1910, and of the notice given of the same. He was in possession of blank applications for the purchase of stock of the Kelvin-Arizona Company, as early as June, 1910. The use of such blanks in making sales continued down to March 18, 1911.

But there is also evidence to show that at some time within the period of Lustick's employment—it may have been December, 1910—the defendant caused blank applications to be printed and subsequently used them in part for the sale of the stock of the newly organized company. He was not, however, at any time its agent. He also exhibited in soliciting subscriptions a plat of the Sultana-Arizona Copper Company, the representation being made that the property shown on it was that of the Kelvin-Arizona Company, that the name shown on it was that of the old company, and that the name of the mine whose stock he was selling was Kelvin-Sultana. He also gave out letters containing somewhat glowing accounts of the last-named mine, its rich deposits of ore, its progressing developments, and its excellent prospects of great profits to those who invested in its stock. The Diamond Joe shaft, a cut of which was exhibited, was represented to be on the property of all of the three companies.

A more extended résumé of the evidence would unduly prolong this opinion. Enough has been shown to indicate its trend and some of the problems with which the jury had to wrestle. It was claimed for the defendant below, as here, that he intended no wrongdoing, that he was confused as to the names of the companies, that the use of the name of the Kelvin-Arizona Copper Company was merely an error which he attempted to correct, and that it was his purpose at that time to deliver the stock which he in fact intended to sell, but improperly designated. On the other hand, the government has at all times claimed that he was not a novice in the handling of stocks, that the use of the name of the newly organized company and that of its predecessor was an afterthought, designed to impair the force, and afford escape from the consequences, of his wrongful use of the name of the Kelvin-Arizona Copper Company, and that if he intended to correct a mistake he would have wholly abandoned the use of the blanks he first employed and notified his purchasers of his original error. The jury adopted the government's theory. It must have considered that he sold, and, with knowledge of the correct names of all of the companies mentioned,

continued to sell, the stock of a company which he never represented, of which stock he never owned and never could acquire a single share. There was presented also the improbability of his taking orders and receiving payment for stock at a price much less than he would be required to pay for shares to meet his contract, if his representations as to the future value were true or believed to be true, and if he intended to substitute or furnish for the stock he sold that of another company—a thing which he could not do without the consent of the purchasers. Considering the evidence as a whole and the presentation of the case to the jury in the charge of the court, in which we find no hurtful error, if there be any at all, we are not prepared to say that the scheme to defraud was not proved as alleged or that the jury obtained the wrong result.

[11] We do not regard the introduction of parol evidence as to the corporate existence of the Kelvin-Arizona Copper Company as prejudicial error. Such existence was not in issue. The allegation is and the proof shows that the defendant represented that there was such a corporation. The evidence of a competent and informed witness discloses that there was a concern of that name which undertook to develop mining property at Kelvin, Ariz., and that its enterprise failed. Whether that concern was a corporation real or de facto, or some other sort of entity, is immaterial.

[12] Error is assigned to the exclusion of evidence, especially that of the witness Walsh, a brother of the defendant's wife, which it is claimed was offered to show the absence of a wrongful intent. There is no evidence in the record to warrant the claim that the defendant attempted to buy stock or borrow money for that purpose to fulfill his obligations to his purchasers. His wife bought her stock with money which she had borrowed, and repaid it. It does not appear that either she or her husband ever contemplated the delivery of any part of it to any of the defendant's purchasers. In answer to the query of his counsel, Would the court permit the witness Walsh to testify to any conversations between himself and the defendant during the winter of 1910, and the years 1911 and 1912, as to any sale of stock made by him or his intention "in that respect?" the court answered in the negative. If the error alleged exists, it is within that narrow compass. The proposition submitted to the court was so indefinite and so wanting in particularity that error may not be predicated upon it.

The many other assignments of error have been considered, but a review of them is deemed unnecessary. The judgment of the District Court is affirmed.

Ex parte EQUITABLE TRUST CO. OF NEW YORK. EQUITABLE TRUST CO. OF NEW YORK v. WESTERN PAC. RY. CO. et al. (CENTRAL TRUST CO. OF NEW YORK, Intervener). In re EQUITABLE TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Ninth Circuit. March 29, 1916.)

Nos. 2755–2757.

1. RAILROADS ⟸192—MORTGAGES—FORECLOSURE—TIME FOR SALE.

The parties to a suit to foreclose a railroad mortgage were all agreeable to a decree of foreclosure, and it was shown by affidavit that the holders of a large majority of the bonds had deposited them pursuant to a plan of reorganization, under which the reorganization committee had procured an undertaking of certain bankers to secure an underwriting syndicate agreement respecting the underwriting of a new bond issue; that the undertaking had been performed; that under the plan and agreement it must be operative before March 15, 1916, and would expire July 1, 1916; that to make the plan effective the properties must be sold and such steps taken as would allow the benefits of the agreement to be taken before the last-mentioned date; and that, if the plans should fail by reason of delay, the parties to the reorganization agreement would be liable in large sums for underwriting and expenses, and money for necessary extensions of the railroad could be had only on less favorable terms. *Held*, that the parties were entitled to have the case proceed with convenient expedition, unless some matter arose calling for inquiry and delay.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⟸192.]

2. RAILROADS ⟸154—MORTGAGES—GUARANTIES—LIABILITY.

The P. Ry. Co. executed a mortgage to a trustee to secure a bond issue, and contemporaneously therewith entered into a contract with the D. and W. R. Cos. and the trustee, whereby the D. and W. Cos. (later consolidated as the D. Co.) agreed to purchase notes of the P. Co. to the amount by which the gross earnings of the P. Co. should be insufficient to pay its operating expenses, interest on bonds, etc., and to pay to the trustee such amount as, with the amounts appropriated by the P. Co. for the payment of interest and for sinking fund purposes, would pay such interest and meet the required sinking fund payment, such payments to the trustee to be credited on the purchase price of the notes. These payments on account of interest were to constitute a trust fund for the payment of interest, and it was provided that failure of the P. Co. to perform the agreement should not excuse the other companies from performance. It was covenanted that the agreement should run with the railways of the several companies and bind parties acquiring such railways. The mortgage assigned all property of the P. Co. to the trustee, including its rights under the contract, and provided for sale upon default, either by public auction or in judicial proceedings, of all of the mortgaged property, except the rights of the trustee and of the holders of the bonds to require the D. and W. Cos. to make the stipulated payments and to recover damages from them in default of such payments, and provided that such rights should survive to the trustee for the benefit of bondholders. *Held*, that the agreement of the D. Co. to make the specified payments to the trustee and its agreement to loan money to the P. Co. on its notes were separable covenants, and, while the P. Co. could not call on the D. Co. to make payments until it had applied its own earnings, the secured mortgage bondholders could demand that the D. Co. pay, no matter what the P. Co. did.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 472, 473; Dec. Dig. ⟸154.]

3. RAILROADS ⊂=167—MORTGAGES—PROPERTY COVERED.
Where the contract gave the P. Co. certain traffic rights over the roads of the D. and W. Cos., such traffic rights were covered by the mortgage.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 519–533; Dec. Dig. ⊂=167.]

4. RAILROADS ⊂=179—MORTGAGES—GUARANTY—PARTIES ENTITLED TO ENFORCE.
The rights vested in the trustee with respect to the enforcement of the suretyship of the D. Co. were reserved to the trustee, and it was the party in interest and authorized to bring suit to enforce the rights accruing to it as beneficiary.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 601–604; Dec. Dig. ⊂=179.]

5. RAILROADS ⊂=190—MORTGAGES—FORECLOSURE—DETERMINATION OF QUESTIONS AFFECTING OTHER PARTIES.
Whether or not the collateral agreement created an equitable lien or charge in the nature of a lien on the property of the D. Co. could not be adjudicated in a suit to foreclose the mortgage, without affording the D. Co. full opportunity to be heard.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 623; Dec. Dig. ⊂=190.]

6. RAILROADS ⊂=154—MORTGAGES—GUARANTIES—RIGHTS OF BONDHOLDERS.
The trustee was not a mere custodian of the payments required to be made by the D. Co. for the P. Co., nor were such moneys, when paid over to it, assets of the P. Co. in the same sense that its own earnings were; but the trustee was the covenantee of a trust fund for the benefit of the bondholders and was required to apply such moneys for their benefit.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 472, 473; Dec. Dig. ⊂=154.]

7. RAILROADS ⊂=167—MORTGAGES—PROPERTY COVERED.
While the P. Co. by the mortgage pledged all its assignable rights under the contract, the rights of the trustee under the contract were distinct from those of the P. Co., and were not included within the mortgage, and could not be sold under foreclosure, but remained in and survived to the trustee for the benefit of the bondholders.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 519–533; Dec. Dig. ⊂=167.]

8. RAILROADS ⊂=209—MORTGAGES—RECEIVERS—PROPERTY IN CUSTODY OF RECEIVER.
Where, in a suit to foreclose the mortgage, the court was not asked to give relief against the D. Co., nor to appoint receivers, except to protect and preserve the property subject to the mortgage lien, which did not include the right of the trustee to enforce rights against the D. Co., the receivers had a right to the custody of only such property as was the subject-matter of litigation described in the amended complaint.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 692–695; Dec. Dig. ⊂=209.]

9. COURTS ⊂=475(10)—JURISDICTION—SCOPE OF PRIOR PROCEEDING—MORTGAGE FORECLOSURE—ENJOINING OTHER SUITS.
Where the court in the foreclosure suit was not asked to give relief against the D. Co., nor to appoint receivers, except to protect and preserve the property subject to the mortgage lien, and the D. Co. was not within the jurisdiction of that court, and such court had no possession of any property except that covered by the mortgage, it could not prevent the trustee from bringing an action in personam against the P. Co. and the

D. Co. in another jurisdiction, to obtain a construction of the collateral agreement and its enforcement against the D. Co.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1250–1257, 1259; Dec. Dig. ⊂⊃475(10).]

10. RAILROADS ⊂⊃179—MORTGAGES—GUARANTIES—ENFORCEMENT.
If the P. Co. had a right to proceed upon the liability of the D. Co., notwithstanding its own default, and if the receivers appointed in the foreclosure suit might enforce such right, the remedy for its enforcement was by a suit in the nature of specific performance, or by other plenary action to compel payment by the D. Co., and not in the suit to foreclose.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 601–604; Dec. Dig. ⊂⊃179.]

11. RAILROADS ⊂⊃186—MORTGAGES—FORECLOSURE—PARTIES.
Assuming that the contract created an equitable lien upon the property of the D. Co., this did not defeat the right of the trustee to foreclose without making the D. Co. a party; the D. Co. having no property within the jurisdiction of the court against which the court could enforce a charge.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 615, 616; Dec. Dig. ⊂⊃186.]

12. EQUITY ⊂⊃427(1)—CONFORMITY TO ISSUES.
While a court of equity may and should scrutinize matters brought before it and fairly within and directly related to the issues presented, its jurisdiction is always limited to the subject-matter in the case before it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001–1004; Dec. Dig. ⊂⊃427(1).]

13. COURTS ⊂⊃343—FEDERAL COURTS—PARTIES—ADJUDICATION AS BETWEEN PARTIES BEFORE THE COURT.
It is the usual rule in the federal courts that, if a case may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with if they are citizens of another state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. ⊂⊃343.]

14. COURTS ⊂⊃343—FEDERAL COURTS—PARTIES—NECESSARY PARTIES.
If parties not before the court have rights so closely related to the issues between the parties in court that a final decision cannot be made between them without affecting the rights of those not before the court, the court may not dispense with such persons.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. ⊂⊃343.]

15. COURTS ⊂⊃343—FEDERAL COURTS—PARTIES—BRINGING IN NEW PARTIES.
Contemporaneously with the execution of a mortgage by the P. Ry. Co., a collateral agreement was entered into under which the D. Co. agreed to loan the P. Co. on its notes the amount by which its earnings should be insufficient to pay operating expenses, interest on bonds, etc., and to pay the trustee such amount as, with payments by the P. Co., should be sufficient to pay interest and for sinking fund purposes. The mortgage covered the P. Co.'s rights under the collateral agreement, and authorized a sale upon default of all mortgage property except the rights of the trustee and the bondholders to require the D. Co. to make the stipulated payments, and provided that such rights should survive to the trustee for the benefit of bondholders. *Held* that, the D. Co. not being a necessary or proper party to a suit to foreclose the mortgage, equity rule 37, providing that any person may be made a party if his presence is necessary or proper

to a complete determination, did not authorize the court to order that the D. Co. be made a party and interplead.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. ⟸343.]

16. APPEAL AND ERROR ⟸327(9)—PARTIES—NECESSARY PARTIES.
Where the court, in enjoining the trustee from suing the mortgagor and the D. Co. in another jurisdiction to enforce the collateral agreement, acted upon his own motion, and not upon any motion for an injunction by receivers appointed in the foreclosure suit, the receivers were not necessary parties to an appeal from the order granting the injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1796; Dec. Dig. ⟸327(9).]

17. RAILROADS ⟸186—MORTGAGES—FORECLOSURE—INTERVENING PARTIES.
An intervening petition of minority bondholders, alleging that the collateral agreement created an equitable lien on the property of the D. Co., that the trustee was not insisting upon such lien or using proper efforts to protect the rights of bondholders, but was acting against their interest, and that, if a foreclosure sale was had before the liability of the D. Co. was determined, it might be claimed that its obligation was extinguished, and asking that the D. Co. and others be made parties, and that no sale be had until the interests of the bondholders were properly protected, had no legal relevancy to the pending proceedings, as it was inconceivable that the trustee would incur the liability which would result if it should be recreant in the performance of its obligations, and it could not be held that its election to enforce any rights that the bondholders had under the collateral agreement after the foreclosure indicated infidelity to its trust, especially as it could not be seen how a bondholder not assenting to a plan of reorganization could be deprived by the foreclosure proceeding of his full right to insist on the enforcement of the collateral agreement.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 615, 616; Dec. Dig. ⟸186.]

18. RAILROADS ⟸192—MORTGAGES—FORECLOSURE—FIXING MINIMUM PRICE.
In a suit to foreclose a railroad mortgage, the court in its discretion has full power to make an order concerning an upset price upon the sale, if such procedure is deemed advisable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⟸192.]

19. PROHIBITION ⟸10(2)—RESTRAINING ACTS IN EXCESS OF JURISDICTION.
Where an order in a foreclosure suit requiring certain parties to become parties and interplead was in excess of the court's jurisdiction, the writ of prohibition was properly invoked.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 44–56; Dec. Dig. ⟸10(2).]

20. MANDAMUS ⟸3(1)—NECESSITY—PRESUMPTIONS.
In connection with an appeal from an order in a foreclosure suit, restraining the trustee under the mortgage from prosecuting a suit in another jurisdiction for the enforcement of a collateral agreement, the trustee applied for a writ of prohibition to prevent the court from compelling parties to such collateral agreement to interplead in the foreclosure suit, and for a writ of mandamus directing the District Court to grant its motion for a foreclosure decree. The court on appeal determined that the District Court could not restrain the trustee from prosecuting such other suit, and that it had no jurisdiction to require such parties to interplead. *Held*, that the presumption was that the District Court, on being advised of these views of the appellate court, would pro-

ceed to give the parties full measure of relief, and hence the writ of mandamus prayed for would be denied.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig § 8; Dec. Dig. ⇐3(1).]

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suit by the Equitable Trust Company of New York, as trustee, against the Western Pacific Railway Company and others. From an order (231 Fed. 478) enjoining complainant from prosecuting a different suit, complainant appeals, and also files original applications for writs of prohibition and mandamus, directed to Hon. William C. Van Fleet, Judge of the District Court for the Northern District of California, and to such District Court. Order reversed, writ of prohibition granted, and writ of mandamus denied.

Murray, Prentice & Howland and W. E. S. Griswold, all of New York City, and Jared How, of San Francisco, Cal., for appellant.

F. W. M. Cutcheon, of New York City, and John F. Bowie, of San Francisco, Cal., amici curiæ.

Garret W. McEnerney and John S. Partridge, both of San Francisco, Cal., for appellee Western Pac. Ry. Co.

Pillsbury, Madison & Sutro, of San Francisco, Cal. (Frank D. Madison, of San Francisco, Cal., of counsel), for appellee intervener.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The Equitable Trust Company of New York, as trustee, instituted foreclosure proceedings in the District Court in the Northern District of California to foreclose the first mortgage of the Western Pacific Railway Company, bearing date September 1, 1903, but acknowledged and delivered June 23, 1905. The trust company, as trustee, plaintiff in the court below, and appellant here, also asked that a receiver be appointed pendente lite. Jurisdiction was based upon diversity of citizenship.

The complaint sets forth that the entire amount of bonds secured by the mortgage sought to be foreclosed, $50,000,000, had been duly issued and were then outstanding, and the only default alleged was in the payment of one semiannual installment of interest which matured March 1, 1915, amounting to $1,250,000. The prayer, so far as it related to the appointment of a receiver, was substantially that a receiver be appointed to take possession of and to operate the properties of the Western Pacific Railway Company which are subject to the lien of the first mortgage, and to collect and receive the earnings, revenues, rents, issues, profits, and other income thereof, and to apply the net income thereof to the benefit of holders of bonds secured by such first mortgage as provided by the terms thereof, and with such other power and authority and with limitations of power and authority as to the court should seem proper.

The complaint was filed on the 2d of March, 1915. On that day

the Western Pacific Company, then the only defendant, by answer admitted all the allegations of the complaint, and on the following day the District Court appointed two receivers, who were duly qualified and are still acting. The court made them receivers of all the property of the Western Pacific Railway Company, and directed them to protect title, take possession, to continue operation, to prosecute all such suits as may be necessary in their judgment for the protection of the property and trust vested in them, and to appear and conduct the prosecution or defense of any suit then pending in any court against the Western Pacific Railway Company, or any company operated in the interests of said railway company, where, in the judgment of the receivers, it was necessary for the proper protection of the property placed in their charge for the interests and rights of creditors. March 30, 1915, the Equitable Trust Company, through the trustee, filed its amended bill against the Western Pacific Company, and averred substantially the things contained in the original bill.

On October 25, 1915, Central Trust Company of New York, which had become a party to the suit by intervention, filed its answer and cross-bill. Thereafter a stipulation was made by Central Trust Company consenting to a decree of foreclosure and sale, so that it is not very important to state the contents of the cross-bill, other than that it alleged that Central Trust Company is the trustee under the second mortgage of the Western Pacific Railway Company, this second mortgage covering all the properties of the Western Pacific Company, but is subject and subordinate to the first mortgage; that under the second mortgage there are outstanding bonds, aggregating in par value $25,000,000, which bear interest at 5 per cent. per annum; and that under the terms of the second mortgage, and because of the order appointing receivers of the property of the Western Pacific Railway Company, the Central Trust Company became entitled to foreclose and collect the entire amount secured by its mortgage.

The Equitable Trust Company, as trustee, on November 1, 1915, answered the cross-bill of Central Trust Company, admitting the material averments of the cross-bill; and on November 22, 1915, the Western Pacific Company filed its answer to the cross-bill, admitting all the allegations thereof.

On January 13, 1916, the Equitable Trust Company filed its supplemental and second amended bill. The substance of the averments of this supplemental bill is that since the amended bill had been filed the defendant railway company had defaulted in the payment of a second installment of interest, $1,250,000, due September 1, 1915, that the trustee under the mortgage had declared the principal of the $50,000,000 outstanding bonds to be due, and that that principal and interest were due and in default. It was alleged, too, that the Boca & Loyalton Railroad, Mercantile Trust Company of San Francisco, as trustee under its first mortgage, and Chester L. Hovey, as receiver of the property of the Boca & Loyalton Company, claimed an interest in some 3¾ miles of track of the Western Pacific Railway, and that such interest was subsequent to and inferior to the first mortgage of the Western Pacific.

The Western Pacific Company, the Boca & Loyalton Company, and the Central Trust Company filed their respective answers, admitting the allegations of the supplemental and second amended complaint. The Mercantile Trust Company of San Francisco, as trustee, and Hovey, as receiver, filed their answers, and asserted a priority over the lien of the first mortgage of the Western Pacific Company of the interest of the Boca & Loyalton Company in the 3¾ miles of track referred to. On March 6, 1916, the Equitable Trust Company filed and submitted to the court certain stipulations:

(a) Stipulation between the Equitable Trust Company, as trustee, and the Western Pacific Company and Central Trust Company, waiving the right to take testimony, admitting the truth of the facts set forth in the amended bill and in the supplemental bill, and as recited in a form for foreclosure decree and sale attached to the stipulation, and consenting to the entry of such decree forthwith, or at the time of any such early hearing as the court should assign.

(b) Stipulation between the Equitable Trust Company, as trustee, and Boca & Loyalton Railroad Company, Mercantile Trust Company of San Francisco, as trustee, and Chester L. Hovey, as receiver, that a decree of foreclosure and sale might be entered forthwith, provided that it should contain a provision that such sale should be made subject to all then existing rights of such defendants to a trackage right over the 3¾ miles of track heretofore alluded to.

(c) Stipulations by the Southern Pacific Company and Utah Fuel Company, claimants against the Western Pacific Company, who had presented their claims as preferred claims, and whose claims had not been paid, consenting to the entry of a decree of sale in accordance with the prayer of the amended bill and the supplemental and amended bill, and consenting to the setting of the cause for hearing.

Counsel for the Equitable Trust Company, as trustee, moved the court for a decree of foreclosure and sale in the form submitted, or that, if such motion be denied, the cause be set for hearing, and for the entry of such decree at such early day as the court should assign. No party to the cause objected, but the receivers protested. The court allowed them to offer evidence, and over the objection of plaintiff's counsel continued the hearing until March 16, 1916.

With these motions counsel for the trustee submitted two affidavits—one made by the solicitor for the trustee, setting up the consent of all parties that a decree of foreclosure and sale should be entered forthwith, and that all creditors whose claims had been presented and allowed had been paid in full, and another made by counsel for the reorganization committee of holders of first mortgage bonds of the Western Pacific Company, setting up that on May 1, 1915, a bondholders' protective agreement had been framed; that on December 15, 1915, the holders of more than $37,000,000 of such bonds had deposited them under the agreement, and on that date a plan and agreement for reorganization had been framed under which the holders of more than $43,000,000 of bonds had deposited them; that in order to procure the underwriting required by such plan and agreement for the sale of $20,000,000 principal amount of bonds to be issued there-

under the committee had procured an undertaking of certain bankers to secure an underwriting syndicate agreement; that the undertaking had been performed, and that by the terms of the plan and agreement it must be declared operative before March 15, 1916; that by the terms of the underwriting agreement that agreement expires July 1, 1916; that in order to carry out the plan and agreement it is necessary that the properties covered by the Western Pacific Company's first mortgage should be sold and steps necessary for the enjoyment of the underwriting agreement should be taken before July 1, 1916; that if delay in the entry of a decree of foreclosure and sale should be had the bondholders who were parties to it must become liable for various large sums for underwriting, commissions, and expenses; that the plan provides for the making of large extensions of the railroad out of the fund provided to be raised by the bond issue, and that if the plan should fail the money can be again had only upon less favorable terms, if at all; and that it is unnecessary that the receivership should be continued. To this affidavit were attached copies of the protective agreement, the plan and agreement for reorganization, and the underwriting syndicate agreement.

Certain other matters may here be stated:

On May 18, 1915, the receivers petitioned the court for six months' time within which to investigate and report to the court concerning matters and things in connection with certain contracts, including what is designated as "Contract B," and that pending examination of such contracts they might be effective without prejudice. The court ordered that a hearing upon the petition be had upon June 14, 1915.

Contract B was made on June 23, 1905, the same day upon which the first mortgage of the Western Pacific Company was executed. The parties to it were the Denver & Rio Grande Railroad Company (called the Denver Company) and the Rio Grande Western Company (called the Western Company), as parties of the first part, Western Pacific Railway Company (called the Pacific Company) as party of the second part, and Bowling Green Trust Company, as trustee under the first mortgage of the Western Pacific Railway Company (called the trustee), as party of the third part. The Equitable Trust Company of New York is successor to Bowling Green Trust Company as trustee under the first mortgage of the Western Pacific Railway Company, and the Denver & Rio Grande Railroad Company and the Rio Grande Western Railway Company are now consolidated into the Denver & Rio Grande Railroad Company.

Contract B recites: That the Denver Company operates a railway line from Denver, Colo., westerly to Grand Junction, Colo., at which point it connects with a railway operated by the Western Company from Grand Junction, Colo., westerly via Salt Lake City, Utah, to Ogden, Utah, connecting at Salt Lake City with the railway of the Pacific Company; that the Pacific Company has partially constructed, and is constructing the remainder of, a railway from San Francisco easterly to Salt Lake City, at which point the portion already constructed connects with the railway of the Western Company; that the Denver Company owns substantially all the stock of the

Western Company, and the Denver Company and the Western Company together own a majority of the authorized stock of the Pacific Company; that there is no line of railway which furnishes an outlet for either the Denver Company or the Western Company to the Pacific Coast that is not controlled by a competitor; that the Pacific Company has authorized an issue of $50,000,000 bonds for the purpose of completing and equipping its railway, interest upon which at 5 per cent. per annum is to be payable semiannually on the 1st days of March and of September, and to secure the payment thereof has authorized its first mortgage to the trustee upon its railway property, owned or to be acquired, and upon its said line of railway, and by said mortgage has covenanted to create a sinking fund to consist of $50,000 to be paid to the trustee during the year beginning September 1, 1910, and each year thereafter until the bonds shall be wholly paid; that the Pacific Company intends to pledge its interest under the agreement and to make the benefits to be derived therefrom a part of the security provided by the mortgage, to the end that it may be enabled to sell its bonds at a higher price than it could if the agreement were not so subordinated and pledged; that the railways owned and operated by the respective railway companies, parties to the contract, shall be operated as a joint through line for all purposes; that the Denver and Western shall turn over to the Pacific Company certain traffic; that whenever the Pacific Company shall not have sufficient freight equipment to perform its part in the operation of these three railways as a joint transportation system, the Denver Company and the Western Company shall furnish such additional cars as shall be required; that the Denver Company and the Western Company jointly and severally shall purchase semiannually demand promissory notes of the Pacific Company, to the amount by which the gross earnings and income of the Pacific Company during the preceding fiscal half year shall be insufficient to meet the sum of operating expenses, taxes which may become liens, interest falling due upon the Pacific Company's $50,000,000 first mortgage gold bonds during the then current half year, the Pacific Company's annual contribution to the sinking fund provided for in its first mortgage, any other charges or expenses that the Pacific Company shall necessarily pay to continue operation of its property and to protect unimpaired the lien and priority of its first mortgage, and interest upon all indebtedness of the Pacific Company other than its first mortgage bonds.

Without reciting the many provisions in detail, among other covenants material to the present controversy, we give the substance of these:

The payments made to the trustee as provided in a later paragraph shall be credited as payments of the purchase price of promissory notes of the Pacific Company, to be purchased by the Denver and Western Company.

The Denver and Western Companies covenanted that they would semiannually pay unto the trustee out of the purchase price of the notes such amount as, together with the amount actually appropriated by the Pacific Company out of its earnings and other income and by

it paid over to its fiscal agent in New York or San Francisco for the purpose of paying the interest to fall due upon the Pacific Company's first mortgage bonds, would be sufficient to pay all such semiannual installments of interest, and an amount sufficient, together with the amount appropriated by the Pacific Company out of its earnings and other income and by it paid over to the trustee for the purpose of meeting the sinking fund payment, to meet the sinking fund payments for the current half year.

The parties of the first part were to pay to the trustee under the first mortgage of the Pacific Company amounts required to be paid by them pursuant to the provisions of certain sections of the contract to supply, with the amounts paid by the Pacific Company, sufficient to pay the semiannual interest on the first mortgage bonds of the Pacific Company as such interest might fall due, and such additional amount as, with the amount already paid to the trustee by the Pacific Company for that purpose, would make up the full amount of payment for the sinking fund in accordance with the first mortgage requirements; and it was covenanted that all amounts payable to the trustee under the agreement to cover interest should constitute a trust fund for the payment of interest due, or thereafter to become due, upon the Pacific Company's first mortgage bonds, and should be by the trustee made available for the payment of interest upon said bonds as they should mature and payment be demanded. It was agreed that neither the Pacific Company nor any one claiming under them, save such persons as may be entitled to receive the interest on the first mortgage bonds, should be entitled to or possess any interest in, lien upon, or claim upon said fund or any part thereof.

The Denver and the Western Companies waived any right to demand the delivery of the promissory notes to be purchased before or coincidently with the payment by them, with the purchase price of any such notes as provided for, and agreed that they will promptly pay the purchase price of all notes that they are obliged to take, although the Pacific Company may not have taken steps necessary to deliver such promissory notes; but neither the Denver nor the Western Company, by reason of making such payments prior to the receipt of the notes, should be prejudiced in the right to receive or enforce the delivery by the Pacific Company of such notes.

The Pacific Company covenanted that it would construct its railway as contemplated and arrange with respect to traffic as provided, and make trackage agreements and operating rules, all as provided for; that it would make the promissory notes provided for, to be sold to the Denver Company; that the Pacific Company shall apply all its gross earnings and income to the payment of its operating expenses, its taxes, and to protect unimpaired the lien of its first mortgage, the interest on its bonds, its annual contribution to the sinking fund provided by its first mortgage, and any other charge or expense which it may be necessary for it to pay in order to assure the continued and efficient operation of its property and to protect the priority of its first mortgage.

The Pacific Company further covenanted that it would pay at cer-

tain times to its fiscal agents the installments of interest upon its mortgage bonds, and cause its fiscal agents to pay all moneys over to the trustee, and pay to the trustee moneys to be paid under the sinking fund payment, as required by the first mortgage. The trustee under contract B agreed that it would hold all moneys received by it pursuant to the provisions of contract B in trust for and would apply the same to the purposes prescribed, and for the uses named in the contract, and that it would from time to time, upon request of any holder or holders of bonds, secured by the first mortgage of the Pacific Company, acting alone or with the Pacific Company, take steps to enforce by a suit or suits in equity or at law, or by other proper proceedings, to be prosecuted or taken in its own name, or in the name of the Pacific Company, or in the name of both, all the terms and provisions of article II of the agreement that require any payments to be made to the trustee by the parties of the first part, or either of them, and that upon request of the holder or holders of 20 per cent. in amount of the first mortgage bonds outstanding would likewise enforce any and all other provisions of the agreement as provided in article VI of the contract.

Article VI of contract B was a mutual agreement by and between the parties to the instrument, each severally agreeing with each and all of the others. Included in such covenants were these:

The trustee shall give notification in the amount of moneys held by it for the purpose of paying interest under the terms of the first mortgage bonds at prescribed times, and the amount applicable as provided in the contract shall be equal to the difference between the amount so required, less the amount so held by the trustee, as shall on the date of the notice actually have been paid by the Pacific Company to its fiscal agent for the purpose of making such payment of interest, and the trustee shall at a certain time notify the parties of the amount held by it to be paid to the sinking fund payment as required by the terms of the mortgage, and the amount of moneys to be paid by the Pacific Company, applicable to the making of the sinking fund payment as required in the agreement, shall be the difference between the amount so required and the amount so held by the trustee. It was provided that failure on the part of the Pacific Company to perform the covenants of the agreements shall not excuse the Denver and Western Companies from fulfilling their obligations; but if they should fail the Pacific Company may resort to suit for specific performance or action for damages as may be appropriate, but nothing shall be taken to authorize any action which may impair in any manner the lien or security of the first mortgage of the Pacific Company or preventing or interfering with the exercise of any of the remedies thereby granted to the trustee, and time is of the essence in all the covenants to be performed by the Pacific Company with relation to payments.

It is expressly covenanted that the agreement should be in force and binding upon all parties until all of the $50,000,000 first mortgage bonds shall be fully paid, principal and interest, as provided in the first mortgage of the Pacific Company, and that the agreement—

"shall run with the railways of the said several railway companies, parties hereto, into whosoever hands the same may come; and this agreement and the provisions thereof shall be so construed that any person or persons, corporation or corporations, which may at any time acquire in any manner any of the said several railways of the parties hereto shall be held and be deemed to have expressly agreed by virtue of the act or acts, deed or deeds, or other instrument or transaction, * * * to observe and perform all of the terms required by this agreement to be performed or to be observed by the party hereto from whom, immediately or indirectly, the said person or persons, corporation or corporations, may have acquired the said railways or railway, and the said person or persons, corporation or corporations, * * * shall be held to be bound by an express contract with the parties hereto and by and upon an express trust to perform and observe as aforesaid all the terms hereof, including all acts and things that may be necessary to preserve in full force the several obligations and agreements herein established or contained for the full term hereof."

The obligations and provisions of the contract are also expressly deemed to be a part of the consideration of any contract or contracts by which any person may acquire or undertake to acquire the said several railways or any of them. Each of the railway companies covenants with all the other parties that, if at any time during the continuance of the agreement it shall in any way transfer its property or rights and franchises to any of the premises affected by the mortgage, any instrument shall contain a covenant that it is made subject to all the provisions of contract B, and that the grantee or transferee, and any person claiming under such grantee or transferee, shall, by the acceptance of such instrument and the acceptance of such grant or conveyance, become bound to perform and observe all of the terms required by the contract to be performed and observed by the party making such grant or conveyance, including all acts and things which may be necessary to preserve in full force the several obligations and agreements established and contained in the contract.

Among the mutual covenants is a provision that in the event of default by the Pacific Company under its first mortgage the trustee shall forthwith become vested with the right, upon written request of the holders of two-thirds in amount of outstanding bonds secured by the mortgage, to terminate the agreement; "but such termination of this agreement shall not be deemed to and shall not release, nor shall anything else done hereunder release, the rights of the trustee or of the holders of the first mortgage bonds of the Pacific Company to the benefits of the agreements of the railway companies, parties of the first part, to make the payments" provided for in paragraphs 4 and 5 of article II.

The concluding clauses of the contract are that "the pledge to the trustee of all the rights, benefits, and advantages to which the Pacific Company may be entitled hereunder contained in said first mortgage of the Pacific Company is hereby assented to, ratified, and confirmed," and it was expressly agreed that the interest of each and all the parties to contract B should be subject and subordinate in any and every respect to the first mortgage of the Pacific Company.

The mortgage made by the Western Pacific Company transferred and assigned to the trustee as security all the property of the West-

ern Pacific Company then owned or thereafter to be acquired by the Western Pacific Company. Among the properties specially included in the mortgage were the rights which the Western Pacific Railway Company then owned or should acquire in contract B, which was described. Upon default, the mortgage provided for sale by the trustee by public auction or sale under judicial proceedings of all and singular the mortgaged property held by the trustee. This exception appears:

"Except only the right of the trustee and of the holders of the bonds secured hereby under said agreement between the Denver & Rio Grande Railroad Company, the Rio Grande Western Railway Company, Western Pacific Company, and Bowling Green Trust Company to require said two first-named companies and each of them to make any payment or payments of money to the trustee, and to recover damages from said companies or either of them in default of any such payment or payments, which said rights and all rights secured by said agreement necessary for the enjoyment and enforcement of such rights shall remain in and survive to the trustee for the benefit of the holders of the bonds secured hereby, after and despite any and every sale made by virtue of this indenture, whether under the power of sale hereby granted and conferred or pursuant to judicial proceedings."

Among the provisions of the mortgage with respect to delivery upon completion of any sale to the trustee of all agreements held by the trustee and sold to the purchaser under proper assignments, we find this language:

"Provided, however, that so long as the Denver & Rio Grande Railroad Company and the Rio Grande Western Railway Company, or either of them, shall, by the terms of their said agreement with the railway company and the trustee, be under obligation to make any payment or payments to the trustee either for the purpose of providing funds wherewith to make payments of interest upon the bonds secured hereby or wherewith to make any payment into the sinking fund hereby provided for, the trustee shall not deliver said last mentioned agreement to any such purchaser or purchasers, although such purchaser or purchasers may have succeeded to any or all the interests and rights of the railway company thereunder."

And, further, that:

"After any sale or sales, whether under the power of sale hereby granted or pursuant to judicial proceedings, any and all moneys that may be received by the trustee under the provisions of said agreement between the Denver & Rio Grande Railroad Company, the Rio Grande Western Railway Company, Western Pacific Railway Company, and Bowling Green Trust Company, intended to provide the trustee with moneys wherewith to pay interest upon the bonds secured hereby, shall forthwith be applied by the trustee to the payment pro rata of the interest upon such of the bonds secured hereby as shall then remain unpaid in whole or in part, whether or not the same shall have been reduced to judgment; and any and all moneys that may be received by the trustee after any such sale or sales, under the provisions of said agreement intended to provide the trustee with moneys wherewith to make payments into the sinking fund hereby established, shall forthwith be applied by the trustee to the payment pro rata of the amounts remaining due for principal and interest upon the bonds secured hereby and then unpaid in whole or in part."

On March 26, 1915, the Equitable Trust Company of New York, as trustee, began suit in the United States District Court for the Southern District of New York against the Western Pacific Railway Company by filing an ancillary bill to the original bill filed here in California in the District Court. The District Court in New York appointed the same receivers of the properties of the Western Pacific

in that jurisdiction as the District Court had appointed here in California.

On the 27th of May, the Equitable Trust Company, as trustee, also filed in the District Court of New York what it denominated its ancillary dependent action in equity against the Denver & Rio Grande Railroad Company, Western Pacific Railway Company, and certain other fictitiously named defendants. This bill sets forth the agreement of the Denver Company as contained in contract B, the default of the Western Pacific and the Denver Company with respect to interest payment upon the first mortgage bonds of the Pacific Company, due March 1, 1915, and the default of both companies in payments under the sinking fund requirements under the first mortgage; that it was agreed that the obligations under contract B should run with the respective railroads; that suits in foreclosure of the Western Pacific Company's first mortgage have been commenced in California, and that jurisdiction has been had by ancillary suits in Utah and New York; that the principal of the first mortgage bonds would soon be declared to be due; that a sale of the mortgaged properties would be had at an early day; that in all probability such sale would realize an amount less than the amount of bonds secured by the mortgage, principal and interest; that the Western Pacific Company was insolvent; and that recourse must therefore be had to the Denver Company for the payment of the debt. Apparently the theory of the bill was that the amount of the liability under contract B of the Denver Company to the trustee was perhaps only the amount of the difference between the earnings of the Western Pacific and the amount required for interest and sinking fund. At all events, plaintiff in its bill asked for the true meaning of the contract in respect to the sinking fund payments.

An account of earnings of the Western Pacific Company from the time of the creation of the first mortgage until the time of such accounting is asked for, and adjudication is prayed that the amount required to be paid or to be secured to be paid by the Denver Company in fulfillment of its obligations under the contract be had. The prayer asked for a construction and effect of contract B with respect to the provision that the agreement "shall run with the railways of the several companies named therein," and that the provision be enforced as against the new Denver Company, in accordance with the meaning as decreed by the court. The further prayer was as follows:

"That in respect to the amount found, upon the accounting and adjudication hereinbefore prayed for, to be due from the old Denver Company either under the said contract B or under the said guaranties, the court decree and direct the payment thereof by the new Denver Company by a short day to be named by the court; that upon the failure of the new Denver Company to make such payment accordingly, the amount thereof be by the decree of this honorable court charged upon the property of the new Denver Company, and that all and singular the property and effects of the new Denver Company be sequestered in aid of the said decree and in order to the enforcement and satisfaction thereof; that, in the same event, a receiver or receivers be appointed by the court to take possession of the railways and other property and franchises of the defendant the new Denver Company, and the earnings, income, and proceeds thereof, with power to operate the said property, and with all such powers and authority as may be required to preserve the same until the sale thereof, as the same may be decreed and ordered by this honorable

court, and to secure the earnings of such railroad property and franchises to the use of your orator and of the holders of said first mortgage 5 per cent. thirty-year gold bonds of the Western Pacific Company."

On June 4, 1915, the receivers petitioned the District Court in California for instructions in respect to contract B. On June 9, 1915, hearing upon this petition was had, and on June 10th the court of its own motion directed that the Equitable Trust Company, as trustee, show cause why the dependent suit in New York should not be dismissed or its prosecution stayed by the trustee until the further order of the court. And the court restrained the trust company, trustee, from taking any further step of any nature in the New York suit until the return day of the order made here in California. On June 28, 1915, argument was had before the District Court in California, the receivers appearing by their counsel and the trust company appearing by its solicitor. On February 21, 1916, the court enjoined the Equitable Trust Company from further proceeding with its dependent suit in New York, and from bringing any further action or proceeding involving contract B, and from taking any steps which might impair the obligation of any of the provisions of contract B without first obtaining leave of the court in California, and ordered that the Denver & Rio Grande Railroad Company and the Missouri Pacific Railroad Company be made parties to the suit, and be compelled respectively to interplead, and to set up any rights which they or either of them might have in the suit.

The Equitable Trust Company has appealed to this court from the injunctive part of the order of the District Court just referred to, and it also applies for a writ of prohibition to prevent the District Court from compelling the Denver & Rio Grande Railroad Company and the Missouri Pacific Railroad Company to interplead in the foreclosure suit.

Writ of mandamus is also asked directing the District Court to grant the motion of the plaintiff made when the stipulations heretofore referred to were filed to enter foreclosure decree. To this petition answer is filed.

There are also before us petitions to intervene in opposition to the issuance of the writs of mandate and prohibition as asked for. They set up that the Savings Bank & Trust Company of San Francisco owns 125 and represents the holders of 575 additional first mortgage bonds of the Western Pacific; that on March 13, 1916, it filed petition in the United States District Court of California for leave to intervene in the suit there pending between the Equitable Trust Company, trustee, and the Western Pacific, in which the order of injunction heretofore referred to was made; that the District Court ordered the petition to be heard on March 20th, a date subsequent to the hearings before this court.

The petitioners' position is, substantially, as follows: As minority bondholders they are not satisfied with the plan of reorganization. They say contract B creates an equitable lien on the Denver Railway as of the date of that contract, June 23, 1905, and that such lien is ahead of certain outstanding refunding bonds (over $33,000,000 in

amount), issued by the Denver & Rio Grande Railroad Company on August 1, 1908, and ahead of $10,000,000 of certain outstanding adjustment bonds issued by the Denver & Rio Grande Company in May, 1912. It is argued that, if contract B has created an equitable lien as of its date, the earnings of the Denver Railroad will be enough to pay the interest upon the Western Pacific Railway bonds until the principal is fully paid in as provided in contract B, but not quite enough to pay the interest on all the refunding bonds and all the adjustment bonds; but, if no equitable lien exists, then the earnings of the Denver are insufficient to pay its refunding and adjustment bonds and the Western Pacific bonds. Petitioners insist that contract B is an equitable lien and that a decision that it is must vitally affect the value of their Western Pacific bonds. They aver that the Equitable Trust Company, as trustee, is not insisting that there is such an equitable lien, and that the trustee is not using all proper efforts to protect the rights of the bondholders of the Western Pacific; that the Denver Company should intervene in the foreclosure suit; that the trustee herein and the Western Pacific whose stock is owned by the Denver and the Central Trust Company, trustee, for the second mortgage bondholders, the bonds being owned by the Denver Company, and the Boca & Loyalton, whose stock is owned by the Denver Company, all consenting to decree, are really the Denver Company.

The complaint in intervention enters upon some history of the bond issue of the Denver Company, and of the sales of the first and refunding bonds of that company through the medium of certain bankers in New York, and alleges that the Denver Company made a trust deed to secure its first and refunding bonds, and that such deed of trust referred to contract B, thus giving the parties notice; that in 1912, the Denver Company made another deed of trust and another mortgage to secure its adjustment bonds, amounting to $10,000,000; that the adjustment and refunding bonds issued by the Denver Company were negotiated through certain bankers named; that the same bankers who negotiated these bonds initiated the reorganization scheme of the Western Pacific and the Denver & Rio Grande; that the nonpayment by the Denver Company to the Western Pacific of the interest due by the Western Pacific in March, 1915, and the consequent default, and the filing of the foreclosure suit with the application for the appointment of a receiver immediately followed; that the bondholders' protective committee is the same as the reorganization committee; and that in the plan to create a holding committee the members of the reorganization committee will be on the board of directors of the operating corporation of the plan.

It is alleged that the bankers interested in the reorganization scheme caused the institution of the present suit, and the institution of the suit in the United States District Court in New York; that in the New York suit the Bankers' Trust Company, trustee under the mortgage securing the first and refunding bonds of the Denver Company, and the New York Trust Company, trustee under the mortgage securing the adjustment bonds of the Denver Company, were not made parties; that in the New York suit the Equitable Trust Company, trustee, did

not ask the court to declare that the obligation of the Denver Company under contract B would be a lien prior to the rights of the holders of the Denver Company's first and refunding bonds or its adjustment bonds; and that if the New York suit is allowed to proceed the rights of the interveners and other holders of the first mortgage bonds of the Western Pacific will be imperiled and lost, and the result will be that the bonds of the interveners would be subordinated to certain first and refunding bonds and adjustment bonds of the Denver Company, all of which were issued through the medium of certain named bankers, who, it is alleged, caused the bringing of the suit. Interveners also allege that the Equitable Trust Company by its course in the foreclosure proceeding involved in this appeal, and its course in proceeding in the New York suit have been against the interests of the first mortgage bondholders of the Western Pacific, and that the Denver Company is endeavoring to obtain a decree reversing the order of the District Court herein appealed from, to the end that it may proceed in New York with its litigation, which will be injurious to the interests of the bondholders; that the plan for reorganization is intended to operate to the advantage of the Denver Company, by enabling the reorganization committee to purchase at the foreclosure sale of the properties of the Western Pacific all the properties of that company covered by the first mortgage at a price which the committee deems proper; and that the claims of depositing bondholders against the Denver Company will be turned over to the reorganization, and that nonassenting bondholders will receive only their distributive share of the proceeds of the sale of the property, the intention being apparently to deprive the nondepositing bondholders of their claims against the Denver Company on account of contract B; that neither the Denver Company, nor the Bankers' Trust Company, nor the New York Trust Company has consented to the decree of foreclosure against the Western Pacific, and if the properties of the Western Pacific are sold and the proceeds applied upon a judgment, and the judgment docketed against the railway company, if deficient, that the Denver Company, the Bankers' Trust Company, and the New York Trust Company may claim that the obligation of the Denver Company under contract B has been extinguished.

The prayer of the interveners is that the true meaning of contract B in respect to the obligations of the Denver Company to the Western Pacific and to the trustee and to all holders of first mortgage bonds be declared; that the court order the Bankers' Trust Company, and the New York Trust Company, and the trustees under the bond and mortgage of the Denver Company, to be brought in as parties, and the rights of interveners and of holders of first mortgage bonds of the Western Pacific, and of the trustee under contract B, and of the Western Pacific and the Denver under contract B, be determined, and that a lien be adjudged upon the railroad and property of the Denver Company as of June 23, 1905, and be held superior to any mortgage or lien of the Denver Company and the Bankers' Trust Company, as trustee, in refunding bonds of the Denver Company; and that it be declared a lien ahead of the adjustment bonds of the Denver Company,

and that no sale of the Western Pacific property be granted until the Denver Company and the Bankers' Trust Company and the New York Trust Company shall become parties to the suit, and shall enter into an agreement protecting the interests and claims of the interveners and first mortgage bondholders of the Western Pacific. Further prayer is that, before ordering any sale of the properties of the Western Pacific, the court take evidence with respect to the value of the Western Pacific and fix an upset price below which the commissioner making the sale will not be permitted to receive a bid for said properties, and that the upset price be high enough to protect properly the interests of interveners and of first mortgage bondholders not parties to the plan of reorganization.

[1] From the statement just made it appears that on March 1, 1916, as between the parties to the suit in foreclosure, there was but one disputed issue before the court. That controverted issue involved the right of the Boca & Loyalton Railroad Company in the three and a fraction miles of the Western Pacific Railway Company, sole defendant, to survive foreclosure of the first mortgage of the Western Pacific. But inasmuch as this matter was settled or adjusted between the parties to the suit before the decree was asked, it is unnecessary to dwell upon it at greater length. The parties to the suit were all agreeable to a decree in foreclosure, and upon the showing made by affidavit and pleadings before the court we think were entitled to have the case proceed with convenient expedition, unless some matter arose which called for inquiry and delay. We say this because the affidavits presented to the court disclosed that the relief which the trustee asked for in behalf of the mortgage bondholders could only be wholly effectual by prompt judicial enforcement of the rights of the trustee. As already shown, among the circumstances put before the court were that holders of more than $37,000,000 of first mortgage bonds had deposited their bonds pursuant to a plan of reorganization under which an underwriting for the sale of $20,000,000 principal amount of bonds were to be issued by the purchaser at the sale; that the undertaking had been performed, and that under the plan and agreement it must be operative before March 15, 1916, and would expire July 1, 1916; that to make the plan effective the properties of the Western Pacific must be sold, and such steps must be taken as would allow the benefits of such agreement to be taken before July 1, 1916, and that if the plan should fail by reason of delay in foreclosure decree and sale the bondholders who are parties to the agreement will be liable in large sums for underwriting and expenses; that the plan contemplated heavy expenses for railroad extensions out of the funds to be raised, and that it will be unnecessary to carry on the receivership. In critical examination of contract B it must be borne in mind that it was made contemporaneously with the mortgage of the Western Pacific and is to be construed accordingly. It had as a main purpose inducement to first mortgage bondholders, for it scarcely needs suggestion that with its existing provisions the bonds of the Western Pacific would bring higher prices in the financial markets than would an issue of bonds without such assurances.

[2] There appear to be separable covenants in the whole contract: One, wherein the Denver Company agrees to pay to the trustee of the first mortgage bonds an amount which, when added to the money actually paid by the Pacific Company, is enough to pay the interest and also the sinking fund as may be due. Another, where the Denver Company covenants to lend to the Western Pacific such an amount as will, when added to the net earnings of the Western Pacific and without including interest on bonds, enable the Western Pacific to make its interest payment. As a way of effecting this, the Denver Company was to pay the amounts to the Western Pacific, the Western Pacific was to give its note to the Denver, and then the Western Pacific would make the payments. Such a mode of procedure would result in this: The Western Pacific could not call on the Denver to make payments until it had applied its earnings to pay, but the secured mortgage bondholders could demand that the Denver pay, no matter what the conduct of the Western Pacific may have been respecting application of its earnings.

[3, 4] Another important general subject in contract B is that of traffic. The Western Pacific was to secure advantage in traffic to the East via Colorado points. But we can pass the details of this feature of the contract, because they are not vital to the questions here under consideration. It is clear, however, that the mortgage covered all the traffic rights of the Western Pacific as they are defined in contract B. But the rights vested in the trustee with respect to the enforcement of the suretyship of the Denver were reserved to the trustee. With those several features of the contract which pertain directly to operation and traffic, the trustee has less direct obligation, although it could terminate the traffic agreement under certain conditions. They were the property of the Western Pacific, and were to be carried out primarily at least by the railroad; but with the money matters affecting payments upon bonds the trustee is to deal directly, and is the party in interest and authorized to bring suit to enforce the rights accruing to it as beneficiary.

Contract B is, in its obligations upon the Denver Company, so explicitly kept alive for the benefit of the bondholders that provisions safeguarding and making certain the money payments are reiterated and the agreement shall (unless abrogated as therein expressly provided) "endure until all the first mortgage bonds of the Pacific Company shall be paid, and shall run with the railways of the said railway companies, parties to it, into whosever hands they may come."

[5] It is not our intention to decide that the agreement made to run with the railways of the railroad companies created an equitable lien or charge in the nature of a lien which attached to the railway property of the Denver Company. The question whether or not it did create such a charge cannot and should not be adjudicated without affording to the Denver Company full opportunity to be heard. But we can safely say that it contains an obligation effective when the principal debt of the Western Pacific was not paid, and when default in payment of interest due by the Western Pacific occurred, and

when the Denver Company neglected or failed to live up to the obligations imposed upon it.

[6] The covenant of the Denver Company and of the Western Company to pay the trustee such amounts as will, with the amounts actually paid over for those respective purposes by the Pacific Company, be sufficient to meet the interest on the bonds secured and the sinking fund requirements, runs not solely to the Pacific Company; nor was its principal purpose to aid the Pacific Company to pay its obligations; nor is the trustee a mere custodian for the Pacific Company; nor are the moneys, when paid over to the trustee, assets of the Pacific Company in the same sense that its own earnings are. Far more reasonable a construction is it that under the covenants the trustee is the covenantee of a trust fund for the benefit of the bondholders secured under the terms of the first mortgage, and that the trustee, when it shall receive moneys turned over to it under the covenants, would apply them for the benefit of the bondholders.

Whether the covenants are strictly of suretyship, as distinguished from guaranty, are questions not appropriate for decision now. It is enough to say that, whether one or the other in the strictest sense, the trustee has a right to sue the Denver Company for a breach of its covenants for the payment of interest and monies due, and may properly exercise such right in its own name for the benefit of the first mortgage bondholders. The mortgage itself, specially referring to contract B in clear words, says that in case of default in payment of interest there is the right in the trustee to "sell at public auction all and singular the * * * obligations, contracts, agreements, and interests of every description" held by the trustee, or subject to the indenture, excepting only the right of the trustee and of the holders of the bonds secured by the mortgage under contract B, requiring the Denver Company to pay moneys to the trustee and to recover damages from the Denver Company upon default of such payments. This right and all rights secured by contract B necessary for the enjoyment and enforcement of such rights shall remain in and survive to the trustee for the benefit of the bondholders despite sale. When this undertaking by the Denver Company to pay the debt of the Western Pacific if it has not been paid by that company was unperformed, the trustee became a real party in interest, having full right to proceed by suit to protect the mortgage bondholders.

[7] It is undoubtedly correct that when the Pacific Company made its first mortgage it pledged all the assignable rights it had under contract B. The rights of the trustee under contract B are distinct from the rights of the Pacific Company. Those of the Pacific Company are included within the mortgage or pledge and can be sold under foreclosure. Those of the trustee to enforce under B are not included, and therefore cannot be sold. They remain in and survive to the trustee for the benefit of the first mortgage bondholders.

[8] The District Court in California was not asked to give relief against the Denver Company; nor was it asked to appoint receivers, except to protect and preserve, pending the litigation, the property subject to the mortgage lien, which did not include the right of the

trustee to enforce rights, herein involved, against the Denver Company, for it may be reiterated that was not to be sold under foreclosure, but was to survive to the trustee for the benefit of the bondholders. It comes, then, to this: The receivers had a right to the custody of only the property the subject-matter of litigation described in the amended complaint, and none other.

[9] We also believe that the trustee had a right to proceed with its dependent action in New York. Guardian Trust Co. v. Kansas City So., 146 Fed. 337, 76 C. C. A. 615. The Denver Company not being within this jurisdiction, and the District Court in California having no possession of any property except that of the Western Pacific in California covered by the mortgage, could not prevent the trustee from bringing action in personam against the Western Pacific in a jurisdiction where that corporation might be found. Should judgment be obtained, doubtless satisfaction from the property in the hands of receivers could not be had without the aid of the court having authority over the receivers. But that is outside of this dispute.

[10, 11] The Pacific Company may have a right to proceed upon the liability of the Denver Company; but that need not be considered, because if it has, notwithstanding its own default, and if the receivers may enforce such right, remedy lies not in the present action, but in suit in the nature of specific performance or by other plenary action to compel the Denver to pay to the trustee, that being the corporation designated to receive the money. We may assume there was an equitable lien given by contract B upon the property of the Denver Company, and still it could not avail to defeat the right of the trustee to foreclose without making the Denver a party to the foreclosure suit. The Denver Company has no property within this jurisdiction, and in the event of decree the court would be without authority to enforce a charge against its property.

[12] We would not in any sense lessen the power of a court of equity to protect itself against being made an instrument of injustice. It may appropriately, and should, scrutinize matters brought before it and which are fairly within and directly related to the issues presented. But its jurisdiction is always limited to the subject-matter in the case before it. In Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464, Justice Brewer approved part of the opinion of Chief Justice Beasley in Munday v. Vail, 34 N. J. Law, 418, who said:

"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this, there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that, because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves, for all purposes, under the control of the court, and it is only over these particular interests which they choose to

draw in question that a power of judicial decisions arises. If, in the ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstances that the point decided was not within the substance of the pending litigation."

The record shows that neither plaintiff nor defendant invoked the jurisdiction of the court as against the Denver Company, and that no question was before the court for adjudication except the right of the trustee to foreclose the mortgage of the Western Pacific.

[13, 14] Under the usual rule of the federal courts, if a case may be finally decided between the parties litigant without bringing others before the court, who would, generally speaking, be necessary parties, such parties may be dispensed with, if they are citizens of another state. This in no real sense conflicts with the principle that, if those not before the court have rights so closely related to the issues between the parties in court that a final decision cannot be made between them without affecting the rights of those not before the court, then the court may not dispense with such persons. California v. So. Pac., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683. The citation from Beach on Equity Practice made by counsel in opposition to the plaintiff's appeal is very pertinent:

"Necessary parties are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties, if practicable, in obedience to the general rule which requires all persons to be made parties who are interested in the controversy, in order that there may be an end of litigation; but the rule in the federal courts is that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court leaving the rights of the absent parties untouched, to be determined in any competent forum. * * * Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

[15] It is argued that equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) gave to the court power to order that the Denver be made a party. It provides that:

"* * * Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause."

Having shown that the Denver was not a necessary or proper party to the cause before the court, the rule is inapplicable. Vaughan v. Black et al., 63 Mich. 215, 29 N. W. 523; Winsor v. Ludington, 77 Mich. 215, 43 N. W. 867.

[16] The receivers are not necessary parties to the appeal from the injunction issued. The record fails to show that the court acted upon any motion for injunction made by them. On the contrary, the learned District Judge remarked that the receivers stand indifferent as to how the litigation shall go. The order appealed from was made by the court, acting of its own motion, under the belief that it had power

to control and direct the trustee in respect to its actions in New York and elsewhere.

[17, 18] We may well doubt whether the petition in intervention has legal relevancy to the proceedings pending before us. But, passing that point, and regarding the theory of the application to intervene as resting upon the contention that contract B creates an equitable lien upon the properties of the Denver Company superior to adjustment and refunding mortgages issued by the Denver Company, there is nothing authorizing the court to infer that the trustee does not intend to do its duty and assert such a claim against the Denver Company after the foreclosure of the mortgage on the properties of the Western Pacific. Shaw v. Railroad Company, 100 U. S. 605, 25 L. Ed. 757. It is hardly conceivable that the trustee of so important a trust as is conferred upon the Equitable Trust Company will incur the liability which will come to it if it should be recreant in the performance of its obligations to enforce every right conferred by contract B for the protection of the first mortgage bondholders. We cannot here hold that an election by the trustee to enforce any rights that the mortgage bondholders may have under contract B against the Denver Company after foreclosure indicates infidelity to its trust. Possible controversies which may arise if it should be decided that contract B creates an equitable lien cannot be disposed of in this litigation. So plain do we think it that a failure to assert the claim of the trustee against the Denver Company on contract B and to reduce any such claim to judgment prior to foreclosure and decree is not fraudulent that we need not say anything more upon the point. And as we cannot see that a nonassenting bondholder in the plan of reorganization can be deprived of his full right to insist that an action be brought to enforce contract B, we fail to see how he can be injured by permitting the foreclosure proceeding to proceed. We are satisfied, however, that the District Court in its discretion has full power to make an order concerning an upset price upon the sale, if such procedure should be deemed desirable by the court; of course, hearing may well be accorded to these petitioners and such others as may appear to have any interest in the proceeding for the purpose of aiding the court in ascertaining and determining what the upset price should be.

Summarizing the principal points we conclude:

The receivers not being necessary parties to this appeal, the motion to dismiss the appeal must be denied.

The trustee, Equitable Trust Company, had a right to proceed to foreclosure as it prayed against the Western Pacific.

The Denver Company was not a necessary or proper party to such foreclosure proceedings, and the Denver Company not being within the jurisdiction of the court, and the court having no custody of its property, no order could be made compelling it to interplead in the foreclosure suit.

The trustee had a right to begin action against the Denver Company in New York to enforce any rights accruing under contract B to the bondholders, and the District Court in California had no power to interfere with the trustee in proceeding with such action.

[19] That part of the order which would compel the Denver Company and the Missouri Pacific Company to become parties to interplead having been in excess of jurisdiction, writ of prohibition is properly invoked. U. S. v. Mayer, 235 U. S. 67, 35 Sup. Ct. 16, 59 L. Ed. 129; McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762; In re Rice, 155 U. S. 396, 15 Sup. Ct. 149, 39 L. Ed. 198.

[20] We shall deny the petition for a writ of mandamus, because every presumption is that the District Court, being advised of the views of this court, will proceed to give the parties full measure of relief.

The order appealed from is reversed.

Petitioner's application for writ of prohibition is granted.

The application for writ of mandamus is denied.

GUARANTY TRUST CO. OF NEW YORK v. INTERNATIONAL STEAM PUMP CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1916.)

No. 218.

1. CORPORATIONS ⟸560(1)—RECEIVERS—MANAGEMENT OF PROPERTY—DUTY TO ASK FOR INSTRUCTIONS.

Where, after the appointment of receivers for a corporation in a creditors' suit, installments of interest became due on a mortgage, a failure to pay which entitled the trustee to declare the entire mortgage debt due and to foreclose, proper practice required the receivers to apply to the court for instructions with respect to the payment of such interest.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253, 2257, 2262; Dec. Dig. ⟸560(1).]

2. CORPORATIONS ⟸552—RECEIVERS—LEGALITY AND PROPRIETY OF APPOINTMENT—CONSENT OF DIRECTORS OF CORPORATION.

The consent of the directors of a corporation to the appointment of receivers in a creditors' suit *held*, on the evidence, to have been made in good faith, from a desire to keep the corporation a going concern at a time when the general financial situation was extremely uncertain, and not through any fraud or collusion with bondholders or one class of stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2201; Dec. Dig. ⟸552.]

3. CORPORATIONS ⟸479—MORTGAGES—RIGHT OF TRUSTEE TO FORECLOSE—RECEIVERSHIP FOR CORPORATION MORTGAGOR.

Where there was default in the payment of interest and sinking fund due on a mortgage by a corporation which was in the hands of receivers, the trustee properly exercised its power to declare the mortgage debt due and bring a foreclosure suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. ⟸479.]

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

Suit in equity by the Guaranty Trust Company of New York, trustee, against the International Steam Pump Company. Decree for complainant, from which Gilbert Collins, as foreign receiver, appeals. Affirmed.

The following is the opinion of Mayer, District Judge, confirming the report of the master:

It is unnecessary to add much to the literature of this proceeding, for the report of the special master, in whose conclusions I concur, is at once concise and comprehensive, and the hearing before him was conducted along the lines of thorough inquiry which I had hoped for, when brushing aside, for that purpose, all questions of laches and mere technique, I desired that the fullest opportunity should be opened to the objectors to prove the serious allegations of collusion and fraud, as well as the charge that the company was solvent on September 1, 1914, and thereafter, and able to pay the interest on the mortgage and the sinking fund installment which came due on that day.

While Receiver Collins is technically the party to this controversy who interposes an amended answer, the real attacking parties are certain stockholders and a committee of preferred stockholders who, among other things, insist that because of the unfairness of a proposed plan of reorganization the court should not make and enter a decree of foreclosure herein.

An earnest address is made by these stockholders, in effect, to the discretion of the court to prevent what they assert will be an unjust and unfair rearrangement of bond and stock holding interests under the new plan which is intended to be effective in due course if a sale under the decree of foreclosure takes place. I have said "in effect to the discretion of the court" advisedly, because courts are not empowered to make contracts for parties in interest, nor can courts adjudge or decree the terms upon which a mortgagee may allow to junior lienors, or others, participation in his mortgaged property when failure to pay the debt due him brings that property under the hammer.

It is rare that any reorganization is satisfactory to all concerned; for, in the nature of things, when there is not on hand enough to satisfy every obligation in full, some, and perhaps all, must suffer more or less; but, in the absence of fraud in the inception or a fraudulent scheme to which court proceedings are necessary incidents, the field in which the battle for respective adjustments must be fought out is beyond the court room, for the court can only ask whether, without the aid of fraud or unlawful means, the debt is really and justly due.

It is clear, therefore, that the court cannot directly or indirectly rewrite this reorganization agreement and I should not state something so obvious, were it not for the fact that the argument, so urgently pressed, comes down to that. The charges of fraud and collusion are not only not sustained, but are affirmatively disproved, as the record abundantly shows.

To have a real understanding of a situation, we must put ourselves back to the time when the event occurred. I well remember when the application for the appointment of receivers was made. The European War had gravely disturbed financial conditions, and as a consequence credit was tightened to the straining point. There was a large measure of forbearance and calm good sense, but financial institutions, of necessity, were reluctant to lend money in those earlier days of that trying period, for no man was wise enough to see far ahead; and, on August 26, 1914, and September 1, 1914, that any banking institution would lend money to the overcapitalized and overloaded International Steam Pump Company, doing a hesitant business, was a proposition so unlikely as not to suggest serious discussion. General business conditions, perhaps, were slightly better on December 2, 1914, the date when the trustee declared the principal due, but the condition of the company was no better for the practical purpose of relieving the default.

[1] I have no doubt that had the receivers applied to me for instructions, I would not have seen the way clear for the default to be relieved in view of the situation of the company and the then conditions of its business and of business at large. I regret that the receivers did not ask the court for instructions. Such a course might have averted the present controversy, and receivers are herewith informed that in all future cases they must apply for instructions; but there is no reason to believe that this omission was purposeful, for, in view of the petition for leave to issue receivers' certificates (Exhibit R) on or about September 18, 1914, they might naturally conclude that it would be an act of supererogation to ask what they should do in respect of the interest and the sinking fund installments in default when they had been authorized to raise a large fund because "without adequate capital

with which to carry on the business of defendant company so as to preserve and protect its property and assets."

In pointing out the course to be pursued by receivers hereafter, I am not to be understood as criticizing counsel for the receivers (upon whose advice, in such a matter, receivers are entitled to rely); for his labors have been marked by unceasing effort and a high sense and practice of devotion. The suggestion now made that the default may be cured at this time is highly impracticable, even if it were possible as a matter of law. The corporation has been declared dissolved and its charter forfeited by a decree of a court of competent jurisdiction. I know of no means to bring it to life. It cannot be that the Court of Chancery of New Jersey would vacate its own decree on a state of facts which cannot be changed, and in any event I cannot speculate on the ultimate result of further litigation along that line.

Other suggestions as to the sale of the plant and the borrowing by the receivers of money with which to pay the interest and sinking fund installments, are likewise impracticable. This court must keep faith with its own certificate holders and has always done so, and, after all, business is not an abstraction, but a real thing, and even if only $1,300,000, and not $10,200,000, were required, there is only one way, in justice to this property, to produce it and that is to produce it. To theorize about it may be interesting but is not convincing.

To conclude: The trustee was fully within its rights, there is no suggestion that its conduct was in any way open to question, and there was no fraud or fraudulent collusion to which the bondholders were parties. There are several reasons, as the master has pointed out, why the plaintiff must prevail; but, in confirming his conclusions, I think it desirable to add that the record satisfies me that the directors acted in good faith when they concluded that a receivership was inevitable and that this course was determined upon, not to injure the company, nor to gain advantage for any particular class of security holders, but to save the business and plant as a going proposition.

I think I understand the point of view of the complaining preferred stockholders and their criticisms of the reorganization agreement, and it is but natural that they should endeavor to obtain what they may consider would be a just participation in the proposed reorganization; but, on examination of this extensive record, there is no escape from the conclusion that both the receivership and the foreclosure were justified on the facts as they existed on and from August 26th and up to December 2d.

Finally, I am of opinion that the court had jurisdiction in the suit in which the receivers were appointed, and unquestionably had jurisdiction in the foreclosure suit. I have examined the cases cited, and I find no case which authorizes the court to withhold its foreclosure decree where fraud, in some form, is not shown.

The case of Bogert v. Southern Pacific Company (D. C.) 226 Fed. 500, called to my attention since the argument, deals with a situation which, in my opinion, is entirely different from the case at bar, both on the facts and in respect of the principles involved. For the reasons outlined, the special master's report will be confirmed, and the decree will pass.

As the amended answer was interposed in good faith and the trial before the master will, in my opinion, be a benefit in the long run, because all the facts have thus become of record and the doubt which always exists in the absence of a full inquiry has been removed, costs (by which is meant disbursements) will not be imposed. If, however, an appeal is taken, then the objectors acting through Receiver Collins will be taking their chances as litigants on facts which they now know, and, in the event of an affirmance, costs of this trial will be taxed against them in this court.

Settle decree on two days' notice.

The following is the opinion of Special Master Gilbert in the court below:

This cause was originally referred to me by order of this court dated August 19, 1915, to hear and determine the issues of law and fact arising in said cause and to report: (1) The amount due on the first lien 5 per cent. 20-year sinking fund gold bonds of the International Steam Pump Company for

principal and interest; (2) the nature, extent, and character of the property mortgaged and pledged by the first mortgage and deed of trust and the mortgage supplemental thereto of the International Steam Pump Company; and (3) the nature, extent, and character of the property of said International Steam Pump Company not subject to said first mortgage and deed of trust and the mortgage supplemental thereto. Subsequently, and by order dated October 19, 1915, Gilbert Collins, receiver of the International Steam Pump Company appointed by the Chancery Court of New Jersey in an action to dissolve the corporation, was permitted to amend his answer in this cause and to file an amended answer in the form submitted upon the application, except that there was stricken from the said proposed answer any and all allegations with respect to the "Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647) and any defense based upon the terms of said Act." The original pleadings required only the taking of proof of the formal allegations of the bill, and this proof had been taken and completed prior to the amendment of the answer by Receiver Collins.

The amended answer filed by Receiver Collins, however, presented two new issues, substantially as follows: (1) A defense that the default in the payment of interest and in the payment of the sinking fund installment required by the mortgage in suit, which interest and sinking fund installment became due September 1, 1914, was the result of collusion and fraud between the directors of the International Steam Pump Company and some of its stockholders and its bondholders and others; and (2) that the International Steam Pump Company was, on September 1, 1914, and thereafter, solvent and able to pay the interest on the mortgage and the sinking fund installment which came due on that day, by reason of which the defendant should be relieved of the default. Pursuant to the terms of the order of October 19, 1915, the taking of testimony before me on the special issues, presented by the amended answer of Receiver Collins began on October 19, 1915, and ended on November 1, 1915. On the hearing before me, I was attended by Messrs. Stetson, Jennings & Russell, solicitors for Guaranty Trust Company of New York, complainant (Mr. Wardwell and Mr. Sunderland, of counsel); by Messrs. Cravath & Henderson, solicitors for the complainants Conley and others in the action in this court in which receivers were appointed, and representing the bondholders' committee, of which Charles H. Sabin is chairman (Messrs. Paul D. Cravath and Douglas M. Moffat, of counsel); by Messrs. Alexander & Green, solicitors for the defendant International Steam Pump Company, and representing the stockholders' committee, of which Lewis L. Clarke is chairman (Mr. William W. Green, of counsel); by Leventritt, Cook & Nathan, solicitors for the receivers appointed by this court (Mr. Edgar M. Leventritt, of counsel); by Mr. Merritt Lane, counsel for Gilbert Collins, the New Jersey receiver; also by Messrs. W. Bourke Cockran and McDougall Hawkes, associated with Mr. Merritt Lane.

As to the defense based upon the charge of collusion and fraud:

The International Steam Pump Company for some years prior to the year 1914 owned all of the stock of various corporations which are hereafter termed "companies wholly owned by the International Steam Pump Company." It also controlled by ownership of stock the corporations known as Henry R. Worthington, Blake & Knowles Steam Pump Works, and Holly Manufacturing Company. These companies are hereafter referred to as "companies controlled by the International Steam Pump Company." All of the companies, either wholly owned by the International Steam Pump Company or controlled by the International Steam Pump Company, were operated as separate and distinct companies under the control of the International Steam Pump Company.

It is quite clear, from the minutes of the various meetings of the directors of the International Steam Pump Company and from various reports and correspondence in evidence, that as early as the spring of the year 1913 the directors of the International Steam Pump Company had found the company to be handicapped by lack of sufficient working capital. At that time the combined companies owed the various banks and others on bills payable approximately $1,500,000. The directors also found that the operation of the company and of the companies controlled by it was cumbersome and expensive, because of the necessity of keeping up separate organizations for

subsidiary companies; and as early as the spring of the year 1913 the directors began to consider plans for additional permanent working capital and for a so-called unification of the various plants owned or controlled by the International Steam Pump Company.

There is no doubt in my mind, after hearing the testimony of the various witnesses and after reading the various exhibits submitted to me, that these efforts then begun by the directors were begun and conducted in good faith, having in mind solely the interests of the company, without regard to any special advantage in favor of bondholders or of the holders of common stock, or any disadvantage to the holders of preferred stock of the International Steam Pump Company. In the month of May, 1913, the directors found it necessary to borrow the sum of $300,000, and in order to borrow this money they induced Messrs. William Salomon & Company, J. B. Haggin, and M. Guggenheim Sons to guarantee the payment of the loan. In July, 1913, the directors arranged for a loan of $1,800,000 from various banks and trust companies, pursuant to the terms of the so-called collateral trust agreement in evidence, whereby the International Steam Pump Company and various of the companies wholly owned by it and the companies controlled by it pledged certain obligations and accounts receivable with the trustee for these various banks to secure this loan of $1,800,000, which according to the terms of the agreement became due on March 1, 1914. On March 2, 1914, this loan of $1,800,000 under the collateral trust agreement was reduced to the sum of $1,150,000, and a new loan was made by the various banks and trust companies, coming due according to its terms on October 2, 1914. This loan of $1,150,000 was likewise secured by bills and accounts receivable of the International Steam Pump Company and its subsidiary companies.

During the spring of the year 1914 the efforts of the directors to work out a plan for the permanent financing of the company continued. Many difficulties were presented in the consideration of these various plans for permanent financing, and apparently it was impossible for any one of the various plans which had been presented to be adopted. There were several reasons for this. One was the difficulty of obtaining unanimous consent of the bondholders to the creation of a lien prior to their mortgage. Another was the inability of the Benjamin Guggenheim estate, which owned more than half of the common stock, to contribute its share of the cash required. A discussion of these various plans to permanently finance the company and for unification of its various plants continued during the spring and early summer of the year 1914. In June or July, 1914, various of the directors of the International Steam Pump Company took up with various banks and trust companies a suggestion to pay off the loan of $1,150,000 as of July 31, 1914, and the placing of a new loan to run for at least six months. It was intended in this way to effect an extension of the existing loan which otherwise would become due on October 2, 1914. The banks were disinclined to make that arrangement at that time, and the directors concluded that the payment of this loan would be forced by the various banks on October 2, 1914, when it became due. The European War began on or about July 31, 1914, at or about which time the Stock Exchange in the city of New York closed. Business conditions generally were in a most chaotic state for some time after July 31, 1914. As it subsequently developed, banks did not generally call loans or force their payment when they became due in or about the month of October, 1914; but it is impossible to state that the directors of the International Steam Pump Company in July and August, 1914, were not in fact apprehensive of the calling of this loan when it should become due.

Various meetings of the directors and others interested in the company were held in the months of July and August, 1914, as a result of which the directors of the company concluded that it was necessary for the protection of all parties interested in the company to place the company in the hands of receivers to be appointed by this court. In order to give this court jurisdiction, William Salomon & Co. arranged for the purchase of a claim from Rogers-Brown of Buffalo, New York, which was assigned and transferred to Alexander J. Lindsay, who became one of the complainants in the suit for the appointment of receivers. Mr. McCulloh, representing J. B. Haggin, procured the complainant Conley, in whose name stood certain of the stock belonging to the Haggin family, and William Salomon & Co. also procured Mr. J. Horace

Harding as a bondholder to act as one of the complainants. It was understood by the directors that an action for the appointment of receivers would be brought by Messrs. Conley, Lindsay, and Harding, and that upon the commencement of the action the International Steam Pump Company should admit the allegations of the bill and consent to the appointment of receivers. It is quite clear, too, that the various attorneys acting in the matter appreciated that the appointment of receivers would be followed by the foreclosure of the mortgage securing the bonds, and that by reason of such foreclosure the control of the property would be in the hands of the bondholders.

The bonds secured by the mortgage sought to be foreclosed in this cause were owned by 1,631 different persons. On the 26th of August, 1914, the date of the appointment of the receivers by this court, the board of directors of the International Steam Pump Company consisted of 11 members. Of these directors, Messrs. Henry, Gannett, and Lane are referred to in the record as representing bondholders. Neither of these gentlemen are shown to have owned any bonds of the International Steam Pump Company. Mr. Henry was a member of the firm of William Salomon & Co., who had sold the bonds of the International Steam Pump Company in 1909; Mr. Gannett was a member of the firm of Parkinson & Burr, of Boston, which firm was interested with William Salomon & Co. in the sale of the bonds; and Mr. Lane was president of the Standard Trust Company of New York, which was the trustee of the mortgage in suit, and upon the merger of that company with the Guaranty Trust Company of New York became and still is a vice president of that company. The other members of the board had either been connected with some of the subsidiary concerns upon their being taken over by the International Steam Pump Company, or originally became members of the board at the invitation of the Guggenheim stock, with the exception of Mr. Moller, who was himself a stockholder, and who represented the Haggin interests, and Mr. Parlin, who was also a holder of a very substantial block of preferred stock. But one of the 1,631 owners of bonds is shown to be a member of the board of directors of International Steam Pump Company. So far as the record shows, Messrs. Henry, Gannett, and Lane were members of the board of directors without the knowledge of the 1,630 holders of bonds, and without any authority to represent them.

Whatever view may be taken of the action of the directors in consenting to the appointment of receivers on August 26, 1914, in contemplation of the default in the payment of interest and of the sinking fund installment, this action of the board of directors, so far as this record shows, was entirely without the knowledge, approval, consent, or co-operation of these 1,630 bondholders. If there was any bad faith on the part of the directors (and I do not find from the evidence that there was any), the bondholders were not parties to, nor had they any knowledge of, such bad faith; and there is nothing in the record which will justify a finding that the action taken by the directors was the result of any collusion or fraudulent device or scheme to which the bondholders were a party.

As to the ability of the International Steam Pump Company to pay the interest and sinking fund installment which came due on September 1, 1914:

In the presentation of the case to me, counsel discussed the condition of the company as of August 26, 1914, immediately prior to the appointment of the receivers, rather than its condition on September 1, 1914; and it will greatly simplify the situation if I discuss the situation as of August 26, 1914. The situation was substantially the same on August 26, 1914, as it would have been on September 1, 1914, had receivers not been appointed. The situation was substantially changed by the appointment of the receivers, because immediately upon the appointment of the receivers the various banks applied balances to the credit of International Steam Pump Company against its indebtedness to these banks; and we cannot very well discuss the ability of the International Steam Pump Company to pay interest and sinking fund installment on September 1st, because on that date the company was under injunction and its assets and property were in the possession of the receivers appointed by this court.

The amount required to pay this interest and sinking fund installment com-

ing due on September 1, 1914, was $483,697.50, and the contention of Receiver Collins is that it was possible for International Steam Pump Company, had it not gone into the hands of receivers, to have made these payments when they became due. On August 26, 1914, the cash situation of the International Steam Pump Company and its subsidiary companies was as follows:

International Steam Pump Company:		
Moneys on hand in general account	$290,514 32	
Moneys on hand in special account	1,131 93	
On deposit with Bankers' Trust Company under collateral trust agreement	24,902 50	
Total cash resources of International Steam Pump Company, including moneys with Bankers' Trust Company covered by collateral trust agreement		$316,548 75
Companies wholly owned by International Steam Pump Company:		
Moneys on hand in general account	$ 28,515 14	
On deposit with Bankers' Trust Company under collateral trust agreement	32,868 89	
Total cash resources of companies wholly owned by International Steam Pump Company, including moneys with Bankers' Trust Company covered by collateral trust agreement		61,384 03
Henry R. Worthington:		
Moneys on hand in general account	$225,481 39	
On deposit with Bankers' Trust Company under collateral trust agreement	130,092 89	
Total cash resources of Henry R. Worthington, including moneys with Bankers' Trust Company covered by collateral trust agreement		355,574 28
Blake & Knowles Steam Pump Works:		
Moneys on hand in general account	$ 7,570 42	
On deposit with Bankers' Trust Company under collateral trust agreement	16,018 41	
Total cash resources of Blake & Knowles Steam Pump Works, including moneys with Bankers' Trust Company covered by collateral trust agreement		23,588 83
Holly Manufacturing Company:		
Moneys in special account (fire loss, pledged under Holly mortgage)		67,268 27
Making a total of cash resources of all the companies, as above stated, of		$824,364 16

It will be seen at once that the International Company as a separate organization did not have enough cash on hand to meet the payments coming due on September 1, 1914. It is also apparent that, if the International Company could possess itself of all of the cash of all the subsidiary companies, the payments could be met; and counsel for Receiver Collins insists that it was possible for International Steam Pump Company to have possessed itself of the cash of the various companies and thus meet the interest and sinking fund installment payments coming due September 1st. The theory on which counsel for Receiver Collins proceeds is that these various subsidiary companies were indebted to the International Steam Pump Company in large sums, and that the International Company could have called upon the subsidiary companies to liquidate these obligations, and, furthermore, that the International Company could have required the directors of Henry R. Worthington to declare a dividend, and thus transfer cash belonging to Henry R. Worthington to the International Company. Counsel for Receiver Collins also contends that there were accounts receivable in a large amount, which could

have been pledged or otherwise used to raise money, and that there were certain bonds which could have been used in reducing the amount of actual cash required and for the purpose of raising additional cash. It is necessary, therefore, to review generally the condition of the various companies, as of August 26, 1914.

We will first take up the suggestion that the companies might have been called on to pay indebtedness to the International Steam Pump Company and thus bring cash into that company. On August 26, 1914, Henry R. Worthington was indebted to International Steam Pump Company in the sum of $412,221.05. This sum represented the difference between a note of Henry R. Worthington to International Steam Pump Company in the sum of $537,500 and an indebtedness of International Steam Pump Company to Henry R. Worthington for the difference between $412,221.05 and $537,500. But this note of $537,500 of Henry R. Worthington to the International Steam Pump Company was pledged with the Bankers' Trust Company as trustee under the collateral trust agreement, so that this indebtedness of Henry R. Worthington to International Steam Pump Company was not available to the International Company.

On the same day Blake & Knowles Steam Pump Works was indebted to International Steam Pump Company in the sum of $972,965.53. Of this indebtedness $885,048.19 existed on June 30, 1909. Under the terms of the mortgage in suit there was pledged with Guaranty Trust Company as trustee, "five per cent. notes or other obligations when issued of said the Blake & Knowles Steam Pump Works, maturing in not more than twenty years from date, evidencing the entire indebtedness as of June 30, 1909, of said the Blake & Knowles Steam Pump Works to the Company." The 5 per cent. notes referred to in the mortgage were never issued, and the indebtedness of June 30, 1909, aggregating $885,048.19, remained an open account. Counsel for the complainant insists that, although it remained an open account, it was nevertheless pledged to the Guaranty Trust Company under the terms of the mortgage. Counsel for Receiver Collins contends, however, that this indebtedness was not affected by the mortgage, because the notes referred to had not in fact been issued. I am of opinion, however, that equity will deem this claim of $885,048.19 to be subject to the mortgage, leaving only $87,917.34 of open account which the International Steam Pump Company could have enforced against Blake & Knowles Steam Pump Works on August 26, 1914, and have used for the purpose of raising money.

This brings me to the accounts receivable. The situation with reference to accounts receivable owned by International Steam Pump Company and subsidiary companies on August 26, 1914, was as follows:

International Steam Pump Company and companies wholly owned by it:		
Accounts receivable assigned to Bankers' Trust Company under collateral trust agreement.....	$ 621,773 43	
Unassigned accounts receivable.....		$1,046,940 97
Henry R. Worthington:		
Accounts receivable assigned to Bankers' Trust Company under collateral trust agreement.....	319,974 02	
Unassigned accounts receivable.....		447,857 02
Blake & Knowles Steam Pump Works:		
Accounts receivable assigned to Bankers' Trust Company under collateral trust agreement.....	117,940 88	
Unassigned accounts receivable.....		112,255 66
Holly Manufacturing Company:		
Unassigned accounts receivable.....		270,583 82
Total assigned accounts covered by the collateral trust agreement.....	$1,059,688 33	
Total unassigned accounts.....		$1,877,557 47

For the purpose of the discussion we must at once exclude the accounts assigned to the Bankers' Trust Company and covered by the collateral trust

agreement. This leaves us with a very large amount of free unassigned accounts receivable in the possession of the International Steam Pump Company and its subsidiary concerns; and it is argued by counsel for Receiver Collins that these accounts receivable could have been used in raising money with which to meet the interest and sinking fund installment coming due on September 1st, 1914. No evidence, however, was introduced before me upon which I can find that it was possible to realize money on these unassigned accounts receivable. The proof is that most, if not all, of these unassigned accounts receivable had been tendered to the banks for the purpose of releasing cash on hand, which under the terms of the collateral trust agreement could be released upon the substitution of other accounts receivable of sufficient value; and I am unable to say that there were other means by which these accounts receivable could have been converted into cash.

Counsel for Receiver Collins further urges that the International Steam Pump Company bought and owned, presumably for sinking fund, bonds of the par value of $138,900, and that these bonds could have been sold to the sinking fund, which would have reduced the amount of cash actually necessary to pay the interest and sinking fund installment. But the answer to this suggestion is that at that time the market value of the bonds had largely depreciated and that it may not have been good business judgment to have used these bonds at that time for that purpose.

Counsel for Receiver Collins also urges that the International Steam Pump Company was entitled to draw down some $240,000 of bonds for improvements, and that these bonds might have been sold and the money used toward paying the interest and sinking fund installment. But that was impracticable for the reason that it would have been necessary to list these bonds on the Stock Exchange, which would involve publicity regarding the company's financial extremities which the board of directors desired to avoid, and further the market price of the bonds had fallen to less than 50. I am unable to say that it was bad faith or bad judgment on the part of the directors in failing to draw down these bonds, assuming that the company was entitled to do so.

Counsel for Receiver Collins complains of the action of the International Company depositing with the Guaranty Trust Company as trustee the 20-year gold note of Henry R. Worthington for $178,000, and questions whether the mortgage covered this note. However that may be, the directors of the International Company understood that it did and the Guaranty Trust Company on August 26, 1914, actually held this note. It was therefore not available as free assets at that time.

Counsel for Receiver Collins also urges that it was within the power of the directors of the International Steam Pump Company to have caused the directors of Henry R. Worthington to declare a dividend on stock, which would have brought money into the treasury of the International Steam Pump Company. With reference to this suggestion and all other suggestions of pressing subsidiary companies for payment of indebtedness, it must be borne in mind that much of the valuable assets of the International Company consisted of stock holdings in subsidiary companies, and that the pressing of claims against subsidiary companies at that time might have seriously affected the financial condition of those companies, and in turn have seriously affected the value of the stock held by the International Company in the subsidiary companies.

All of the suggestions presented to me by counsel for Receiver Collins might have been properly presented in this court upon an application to direct the receivers appointed by this court to do such acts and things as might have realized sufficient cash to meet the interest and sinking fund installment coming due September 1, 1914, or for presentation by the receivers in an application to this court for instructions. The receivers did not apply to the court for instructions, nor did any party in interest apply to this court to direct the receivers in this regard. I must assume that the action of the directors in failing to do those things which counsel for Receiver Collins now claims might or could have been done was in good faith, because there is no evidence to the contrary; and I must likewise assume, because there is no evidence to the contrary, that the receivers acted in good faith in failing to do

those things which Receiver Collins through his counsel now claims might or could have been done. The fact remains that the interest and sinking fund installment which came due on September 1, 1914, was not paid, and that the default continued for three months, and that by reason thereof the bondholders are entitled to foreclose the mortgage and deed of trust in suit.

As to the suggestion that the default may now be relieved against and the parties restored to the position in which they were on August 26, 1914:

On November 1, 1915, there was due on account of the bonds secured by the mortgage and deed of trust in suit and for sinking fund installments, $1,381,039.57. There is not now in the hands of the receivers sufficient moneys to pay this amount, and they could not pay it unless it is possible for them to realize moneys on accounts receivable or in some other form which this court might approve; but a very serious question is presented as to whether the parties can be restored to their original position. Counsel for Receiver Collins contends in the first place that the action in which the receivers were originally appointed by this court must be dismissed because of want of jurisdiction in the cause. This claim of want of jurisdiction is based upon two grounds: (1) That there was not such diverse citizenship as gave the court jurisdiction; and (2) that the action of the directors in consenting to the receivership was ultra vires. I am not able to agree with either of these contentions. I believe there was diverse citizenship, and I believe that the directors had the power to consent to the receivership. Counsel for Receiver Collins bases his claim of want of power in the directors to consent to the receivership upon section 63, page 1638, of the Compiled Statutes of New Jersey, which provides that within 10 days after a corporation shall become insolvent a meeting of stockholders shall be called and the affairs of the company laid before them. I see nothing in this statute which makes it impossible for the directors to consent to the appointment of receivers within the period of ten days. In fact Vice Chancellor Stevenson, in discussing the statute, says: "This duty imposed by this section is not often performed, and for this reason: It is generally more satisfactory when a corporation gets into the condition that this corporation is in to have a receiver appointed as quickly as possible."

But in attempting to restore the parties to their original positions, we are met with a still further difficulty. An action was brought in the Court of Chancery of New Jersey by one Ethel Elms to dissolve the corporation. In that action a decree of insolvency was entered on the 30th of November, 1914, by Chancellor E. R. Walker, advised by Vice Chancellor Eugene Stevenson. Receiver Gilbert Collins was appointed by order advised by Vice Chancellor Stevenson and signed by Chancellor E. R. Walker on January 8, 1915, and an order or decree dissolving the corporation was entered on the 28th day of April, 1915, advised by Vice Chancellor Eugene Stevenson and signed by Chancellor E. R. Walker. This last order or decree provides: "And the court doth by the power in it vested in pursuance of the statute therein made and provided, order, adjudge and decree that the said defendant corporation, the International Steam Pump Company, be and it hereby is dissolved and its charter declared forfeited and void."

I am therefore of opinion, and so advise, that the complainant in this cause is entitled to a decree of foreclosure and sale as prayed for by it.

Merritt Lane, of Jersey City, N. J. (W. Bourke Cockran, of New York City, of counsel), for appellant.

Stetson, Jennings & Russell, of New York City (Paul D. Cravath, William W. Green, Allen Wardwell, and Douglas M. Moffat, all of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. [2, 3] We are satisfied that the directors of the International Steam Pump Company were honestly desirous to keep the corporation a going concern and that they consented to the receiv-

ership under the creditors' bill filed August 26, 1914, only because their efforts to do so had been unavailing. The situation of the company had been most precarious for some time past, and the financial situation of the country threatened to be unfavorable to debtors and to borrowers in the future. There is not a vestige of evidence that the Steam Pump Company or its directors colluded with the bondholders or with the common stockholders to destroy the interest of the preferred stockholders. The trustee of the mortgage acted exactly as it should have done in filing its bill September 2, 1914, and its supplemental bill of foreclosure December 8, 1914, for the protection of the bondholders. There is no reason for disturbing the decree of foreclosure or for interfering with the sale under it. The special master and the District Judge were of opinion that the charges of fraud made in the answer of the New Jersey receiver were wholly unsustained and we agree with them.

The decree is affirmed, with costs.

COAL & COKE RY. CO. v. DEAL.

(Circuit Court of Appeals. Fourth Circuit. February 2, 1916.)

No. 1394.

1. COMMERCE ⇐27—"INTERSTATE COMMERCE"—FEDERAL EMPLOYERS' LIABILITY ACT—TELEGRAPH LINEMEN.

One who is injured while attempting to erect a telegraph pole to support wires over which messages are to be sent in directing the operation of trains of a company engaged in interstate commerce is engaged in interstate commerce, within the meaning of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⇐27.

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

2. COMMERCE ⇐27—EMPLOYMENT IN "INTERSTATE COMMERCE"—FEDERAL EMPLOYERS' LIABILITY ACT.

One engaged in employment necessary to the maintenance of any instrumentality essential to the successful operation of a road by a carrier engaged in interstate commerce is employed in interstate commerce under the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⇐27.]

3. MASTER AND SERVANT ⇐107(8)—INJURIES TO SERVANT—DUTY OF MASTER—SAFE PLACE TO WORK—FEDERAL EMPLOYERS' LIABILITY ACT.

The federal Employers' Liability Act, though abolishing the fellow-servant doctrine, did not change the rule as to the master's nonassignable duty to exercise reasonable care in providing the servants with reasonably safe tools and appliances with which to perform the work required of him by the master.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⇐ 107(8).]

4. APPEAL AND ERROR ⇐1002—REVIEW—VERDICT—CONFLICTING EVIDENCE.

Where the evidence was conflicting as to whether the use of a "deadman" was necessary for the safety of telegraph linemen erecting poles,

and whether the injured employé requested its use, but was assured by the foreman that it was not necessary, the determination of those issues by the jury in favor of plaintiff is final.

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

5. MASTER AND SERVANT ⊂⊃220(8)—INJURIES TO SERVANT—ASSUMPTION OF RISK—ASSURANCE OF SAFETY.

Where a telegraph lineman requested the foreman to furnish a "deadman" for use in erecting poles, and the foreman assured him that its use was not necessary, the lineman did not assume the risk occasioned by the failure to furnish the "deadman."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 646; Dec. Dig. ⊂⊃220(8).]

6. MASTER AND SERVANT ⊂⊃213(1)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

Where a servant is required to work in a dangerous and unsafe place the master is liable for any injuries sustained on account of the dangerous condition, since by his contract the servant agrees to obey the master's orders, and a refusal to do so would involve his dismissal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 559; Dec. Dig. ⊂⊃213(1).]

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

Action by David F. Deal against the Coal & Coke Railway Company to recover damages for personal injuries under the federal Employers' Liability Act. Judgment for the plaintiff (215 Fed. 285), and defendant brings error. Affirmed.

George E. Price and Buckner Clay, both of Charleston, W. Va., for plaintiff in error.

Harold W. Houston, of Charleston, W. Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff instituted an action in the District Court of the United States for the Northern District of West Virginia under the federal Employers' Liability Act against the defendant to recover damages for alleged personal injuries. The trial in the court below resulted in a verdict in favor of plaintiff in the sum of $6,500, and the case comes here on writ of error. The plaintiff in error will 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 defendant owns and operates a steam railroad located wholly within the state of West Virginia, running from the city of Charleston to the city of Elkins. It is conceded that at the time this cause of action arose defendant was engaged in the interstate transportation of freight and passengers within the meaning of the federal Employers' Liability Act. As a part of its equipment it owned and maintained along its track a telegraph and telephone line, over which it transmitted orders for the movement of its trains while engaged in interstate commerce. This line was out of repair at the time plaintiff was injured.

The defendant had in its employ a foreman by the name of Norval Sears whose duty it was to see that this line was kept in proper condition. Sears had been in the employ of the company for 4½ years, and was clothed with the power of hiring and discharging workmen who worked under him, or assigning them places to work, and of furnishing them with the requisite tools and appliances. The men who worked under Sears did so under his direct personal commands and orders. At the time plaintiff received his injuries, four men were working under Sears. These workmen were Hambrick, Silman, Lewis, and Deal, the plaintiff. The work in which they were engaged at that time was the taking down of defective telegraph and telephone poles and substituting new ones. The wires were merely transferred from the old to the new poles.

At the time Deal received his injuries, each of the four men working under Foreman Sears had assigned to them a given part of the work then being done. Foreman Sears stood at the butt of the poles as they were being raised and placed in position, giving orders to the men and guiding the poles into their proper places. Hambrick, Lewis, and Deal were assigned the work of raising the poles, using for that purpose long wooden poles with iron spikes in one end. Deal, owing to his superior strength, had been assigned to the position of working directly beneath the poles as they were being raised, while Hambrick and Lewis each worked on opposite sides of the poles, steadying and lifting them as they were being raised. The position of Deal was the most dangerous, as he was assigned to work directly beneath the poles. If, for any reason, a pole should fall, it would likely strike Deal. Among the tools and appliances then being used in the erection of the poles was one known as a "deadman." This is a wooden pole about six feet long, in the lower end of which is a spike to keep it from slipping when placed in position on the ground, and in the upper end is a semicircular piece of iron, with a small spike fitted in the middle, which is placed against the pole being raised. This appliance is used for the purpose of supporting the pole as it is being raised, to prevent it from falling, and to hold it while the men get a new hold with their spike poles.

One of these "deadmen" was a part of the equipment which Foreman Sears had provided for the work in hand, and is an appliance or tool commonly used in such work. It had been used by the men regularly, under his direct orders, while they had been placing and raising poles about 25 feet long. Having received orders from the company to cut the poles to 20 feet Sears had directed the men to discontinue the use of the "deadman." This happened the day before Deal was injured. There is some conflict in the testimony as to whether the "deadman" was with the other tools and appliances being used, on a hand car about 50 or 60 feet from where the pole that injured Deal was being raised.

It was shown that this pole was to be erected in an unusually dangerous place. The hole in which it was to be placed was dug on the side of a hill, about 10 feet from the edge of a 40-foot perpendicular

embankment. Foreman Sears ordered Hambrick, Silman, and Deal to raise the pole, while Lewis was sent after a tamping bar. While Hambrick, Silman, and Deal were in the act of raising the pole, it fell and struck Deal on the side of the head, fracturing his skull and knocking him over the 40-foot embankment above mentioned, resulting in injuries so serious that he did not recover consciousness for 11 days. His injuries resulted in an impairment of his general health, partial destruction of the sight of one eye, dizziness when he stoops, and a material impairment of his earning capacity.

[1] We are met at the threshold of this case with the question: Was the plaintiff, at the time he was injured, employed in interstate commerce? It is a matter of common knowledge that in order to successfully operate a railroad it is essential that a carrier should have a well-equipped telegraph or telephone line constructed and maintained near to and parallel with its tracks, so as to enable its train dispatchers to transmit train orders and thereby keep the engineers and conductors properly advised as to the relative positions of the respective trains. Under these circumstances a telephone or telegraph line is just as essential to the practical operation of the road as the track or any other particular part of the road's equipment.

Owing to the recent enactment of the statute under which this suit was brought, there has been more or less uncertainty as to the scope of the same. The roadbed and track constitute an essential element in the operation of trains, and acting upon this theory the Supreme Court of the United States, in the case of Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 151, 33 Sup. Ct. 649, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, in discussing this phase of the question, said:

"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. * * * We are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

The Supreme Court having declared that one who is injured while carrying spikes to be used in repairing a bridge over which interstate commerce is transported is deemed to be engaged in interstate commerce within the meaning of the act, it necessarily follows that, as in this instance, where one is injured while attempting to erect a telegraph pole to be used for the purpose of supporting wires over which messages are to be sent in directing the operation of trains in order that a company engaged in interstate commerce may safely operate its trains, such person is engaged in interstate commerce within the meaning of the act.

[2] It is strenuously contended that this construction would violate the rule announced by the Supreme Court in declaring the first Em-

ployers' Liability Act unconstitutional, and lead to absurdities; in other words, that there would be no place where a line could be properly drawn. The answer to this contention is, we think, that whenever it appears that a party injured is engaged in employment that is necessary to the maintenance of any of the instrumentalities essential to the successful operation of a road by a carrier engaged in interstate commerce, such party is deemed to be engaged in interstate commerce, and in case of injury, while thus engaged, is entitled to any benefits accruing under the federal Employers' Liability Act.

However, it is insisted (a) that defendant was not guilty of negligence, and (b) that plaintiff assumed the risk incident to his employment at the time he was injured.

[3] It is urged by counsel for defendant that by the enactment of the federal Employers' Liability Act "new and somewhat different obligations are created." While the act abolished what is known as the "fellow-servant doctrine," there is nothing contained therein which changes the rule as respects the nonassignable duty of the master to exercise reasonable care in providing the servant with reasonably safe tools and appliances with which to perform the work required of him by the master. In the case of Seaboard A. L. Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, the Supreme Court of the United States in discussing this phase of the question, said:

"There is an implied obligation of the master, under his contract with those whom he employs, to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and he is liable for damages occasioned by a neglect or omission to fullfill this obligation, whether it arises from his own want of care or that of his agents to whom he intrusts the duty."

Section 12 of Roberts' Injuries to Interstate Employés contains the following:

"Except that it abolishes the common-law rule of nonliability for injuries to employés within its terms due to negligence of fellow servants, the first section of the federal Employers' Liability Act which defines when a carrier is liable, adopts the common-law rule of negligence as to the two branches of liability mentioned. Under the act the company is not a guarantor of the safety of the places of work or of the machinery and appliances of the company. The extent of its duty to its employés is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen."

Thus it will be seen that in cases like the one at bar the master is required to use due care in furnishing and maintaining proper instrumentalities for the performance of the duty which he requires of the employé.

[4] That a "deadman" is a tool or appliance in general use in the performance of this character of work is not denied, and that it is essential, as a general rule, for the protection of the employés in lifting poles is equally well established. The plaintiff, among other things testified as follows:

"Well, with a deadman, now recollect that whenever you set that under a pole it can't fall straight down on top of the deadman and hit a man. It can't

go straight. It either has to fall sideways one way or the other, or else if the end at the hole slips loose the far end may drop down and the butt go up, but it can't go over on a man because the deadman keeps it off him. If the deadman had been there it would have fallen off of me, I would not have been caught under it; it would have fallen off of me, but we didn't have any deadman, and it fell direct straight down, and I had no chance to jump then at all. If I had had any chance to get out, I would have done it."

Witness Hambrick also testified as follows:

"Q. But for what particular purpose is the deadman made and used? A. Well, it is to support the pole, or to keep the pole, the way I understand, from falling, from falling straight down. But of course a pole will fall, if you set your deadman underneath the pole, it will fall if you don't steady it, but it will have to fall sideways. It will fall that way, or fall this way, if you don't have something to steady it, keep it from falling over sideways; but it won't fall straight down if you have your deadman underneath the pole, or if the pole gets up so far, and they don't take the hole, and overbalances, of course, if you let your pike slip out of it, it may topple over sideways, but if it don't, and the deadman is used under it the pole will simply overbalance over the top of the deadman, and the top of the pole will come down and leave the butt sticking up in the air."

Foreman Sears, a witness for the defendant, also testified as follows:

"Q. Well, isn't the object of the deadman one of the main objects of using it to prevent a pole from falling if the pike poles turn or if they happen to slip? A. Why, sure it will keep it from falling back straight down. It won't keep it from falling sideways, though."

While it is true that the foreman testified that the poles being placed on this occasion were of such a size as not to require the use of a "deadman," plaintiff testified that they were necessary in handling poles of this character, and the question was submitted to the jury and answered in the affirmative, which disposes of this point. Therefore it is essential to determine as to whether a "deadman" was furnished on this occasion, and if not who was to blame. The plaintiff in testifying as to this point, among other things, said:

"Q. Now, Mr. Deal, do you say that you told Mr. Sears that you ought to have the deadman there? A. Yes. Q. You told him there and then? A. Yes; I told him that looked like it might be a dangerous place, and we ought to have the deadman there for safety. But he says, 'You three men can raise that pole without any deadman.' He says, 'Throw the pole in the hole.' Q. Yes; and then you undertook to do it? A. We had to do it or go down the line. Q. Had to do it, or go down the line, you say? A. Yes; one of the two. I wasn't in shape to be fired, myself. * * * Q. Well, now, was your deadman on that hand car? A. No, sir; we had left it back behind some place. Didn't bring it with us. Q. Where had you left it? A. I don't know how far it was back, but we had left it back behind. Q. Well, how long had it been since you used it? A. I think we had used it the day before, if I ain't badly mistaken. I might be mistaken in that, but I know it wasn't long before."

Also, witness Hambrick testified as follows:

"Q. Did you understand or hear any conversation or statement by Mr. Deal to Mr. Sears? A. Well, I heard something said, but I couldn't exactly state to the words. Q. What was it, as near as you can tell? A. Well, it was concerning the deadman; but what he said I don't recollect just at this time."

Also Sears, the foreman, testified on behalf of the defendant as follows:

"Q. Mr. Sears, something has been said—Mr. Deal has testified something about his having stated that you ought to use a deadman; that it was dangerous not to use it in raising that pole. Did you hear any such remark? A. No, sir. Q. Was any such remark made to you? A. No, sir; not to me. Q. Was there a deadman available? A. Yes; we had our tools. On the evening before, I always kept my tools right with me wherever I was working, and we had the deadman with our tools."

Silman, a witness in behalf of defendant, testified that he was present and attempted to start the pole down into the hole; that he never heard the "deadman" mentioned that morning; that he did not hear the defendant say that it was dangerous; that he and the plaintiff were not together all the time that morning; that witness never asked to have the "deadman" brought there as he did not deem it necessary to use it. It is true that the testimony as to this point was conflicting, but the matter was submitted to the jury and found in favor of the plaintiff.

[5] It is well settled that where an employé requests an overseer or superintendent to furnish additional tools or appliances in order to insure his safety, and the overseer or superintendent refuses to comply with such request but assures the employé that there is no danger in the service which he is required to perform, the employé, under such circumstances, will not be deemed to have assumed the risk incident to his employment.

[6] By virtue of his contract the servant agrees to obey the orders of the master, and a refusal to do so would involve his dismissal. In referring to this point Fraser on Master and Servant, page 71, says:

"Where a servant deliberately violates his master's orders, or refuses to obey them when given, he is clearly guilty of the grossest breach of contract. His duty is to obey the master in all things for which he became bound expressly, or in which obedience is implied from the nature of the service undertaken."

It is for this reason that the courts have held that where a servant is required to work in a dangerous and unsafe place that the master is responsible for any injury that he may sustain on account of such unsafe and dangerous condition. The following cases bear directly upon this point:

The Supreme Court of Missouri in the case of Burkard v. A. Leschen & Sons Rope Co., 217 Mo. 466, 117 S. W. 35, said:

"Where a servant is apprehensive that the place in which he is required to work is dangerous and unsafe, but relies * * * upon the assurance of the foreman in charge of the work and in charge of the servant that it is safe, and the servant is injured without any negligence upon his own part, the master is liable."

Also, in the case of McKee v. Tourtellotte, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542, the Supreme Judicial Court of Massachusetts said:

"The mere fact that a man knows the unsafe condition of a thing does not necessarily, as a matter of law, constitute him negligent if he does that thing."

The Supreme Judicial Court of Massachusetts in the case of Lord v. Wakefield, 185 Mass. 214, 70 N. E. 123, also said:

"The plaintiff was not an experienced lineman, and he was set to work to do a particular thing in a particular place, under the supervision of a superior who knew the fact that he was not an experienced lineman. While the conversation shows that the plaintiff was apprehensive of danger if the pole was not guyed, yet we are of opinion that it was a case where the jury could find that he might well yield his judgment to that of his superior, and obey the command."

Also, the case of Postal Telegraph-Cable Company v. Frank Grantham, 187 Fed. 52, 109 C. C. A. 370, is very much in point as to some of the questions involved in this case.

The jury found as a matter of fact that the plaintiff requested the foreman, Sears, to furnish a "deadman," and that instead of doing so the foreman assured him that the use of a "deadman" was not necessary to protect him from injury. Therefore, under these circumstances, according to the rule announced, the plaintiff did not assume the risk occasioned by the failure of the company to furnish a "deadman" for his protection at the time he was injured.

A careful consideration of the assignment of errors which relate to the refusal of the court below to grant certain prayers for instructions offered by the defendant impels us to the conclusion that the same are without merit.

For the reasons stated, we are of opinion that the judgment of the lower court should be affirmed.

NEW ÆTNA PORTLAND CEMENT CO. v. HATT.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1916.)

No. 2696.

1. MASTER AND SERVANT ⊜125(9)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE MACHINERY—KNOWLEDGE OF VICE PRINCIPAL.

The superintendent in charge of a manufacturing plant owned and operated by a foreign corporation represents the corporation as to employés, and his knowledge of defects in machinery or appliances is attributable to his principal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 251; Dec. Dig. ⊜125(9).]

2. MASTER AND SERVANT ⊜201(3)—ACTION FOR INJURY TO SERVANT—DEFENSES.

Where defects in machinery, of which the master was charged with notice by reason of the knowledge of its superintendent, rendered unsafe the place where an employé was required to work, it is not a defense to an action for his death from such cause that the danger might have been obviated by certain action by fellow employés outside of their regular duties, when there was no rule or direction of the superintendent requiring such action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 518–523; Dec. Dig. ⊜201(3).]

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3. MASTER AND SERVANT ⊂=201(3)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONCURRING NEGLIGENCE OF FELLOW SERVANTS.

A master is not relieved from liability for injury to an employé resulting from defective machinery by the fact that there was concurring negligence on the part of fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 518–523; Dec. Dig. ⊂=201(3).]

4. MASTER AND SERVANT ⊂=288(5)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé, killed by an explosion of coal dust at the place where he was working, which had accumulated because of the leaking condition of an elevator device, *held* not shown to have had such knowledge of the danger and of the surrounding conditions as to charge him, as matter of law, with having assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1077; Dec. Dig. ⊂=288(5).]

5. COURTS ⊂=348—FEDERAL COURTS—PRACTICE IN—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In the federal courts, in an action for the injury or death of an employé, the burden of proving contributory negligence rests on the defendant, regardless of any contrary rule in the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 922; Dec. Dig. ⊂=348.]

6. MASTER AND SERVANT ⊂=265(14)—ACTION FOR DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE—PRESUMPTION.

Where an employé was killed by an explosion in the room where he was required to work, in the absence of any evidence to the contrary there is a presumption that he was in the performance of his duties and exercising due care for his own safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 893, 908; Dec. Dig. ⊂=265(14).]

7. TRIAL ⊂=108½—EXAMINATION ON VOIR DIRE—DISCRETION OF COURT.

In an action against a manufacturing corporation to recover for the death of an employé, it was not error for the court in the exercise of its discretion to permit plaintiff's counsel, in the examination of jurors on their voir dire, to ask each separately whether he had ever been in the insurance business, and whether he had ever been agent for a particular insurance company named.

[Ed. Note.—For other cases, see Trial, Dec. Dig. ⊂=108½.]

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action at law by Edmurson Hatt, administrator of the estate of William Lynn Hatt, deceased, against the New Ætna Portland Cement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Luman W. Goodenough and Irvin Long, both of Detroit, Mich., for plaintiff in error.

Claude H. Stevens, of Detroit, Mich., and Benj. F. Reed, of Lapeer, Mich., for defendant in error.

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

WARRINGTON, Circuit Judge. The administrator recovered judgment against the cement company for alleged negligence resulting

in the death of his intestate. At the date of the death the company was maintaining a cement factory in Genesee county, Mich., and operating the factory both day and night. The portions of the factory which are important here were the coal room and kiln room. The deceased was in the employ of the company and worked at night in the coal room as an oiler. It is enough to say of the process of manufacture that a mixture of marl and clay, called "slush," was pumped into rotating kilns, maintained in the kiln room, and fused into pellets of various sizes through the application of heat generated by burning coal dust. The coal dust was obtained by passing bituminous slack coal through grinders and dryers in the coal room; 92 per cent. of the product would pass through a 100-mesh sieve—as the company's chemist stated, it was "as fine as flour." After the coal was so pulverized and dried, it was carried by gravity through a slightly inclined tube into the lower portion of an elevator which was maintained near the southeast corner of the coal room and within about 4 feet of a brick wall separating that room from the kiln room. The elevator stood in an open concrete pit, some 4½ feet in depth below the level of the floor and extending into the coal room a distance of 3 to 4 feet from the west and south sides of the lower portion of the elevator, called the "boot." The elevating device extended from the floor of the pit to a cupola at the roof of the building, and was incased in sheet steel or iron. The elevator was originally designed for carrying all the coal dust from the boot to a point in the cupola, where provision was made for discharging the dust into a screw conveyer and transferring it thence to the kilns of the kiln room.

The casing surrounding the boot of the elevator had fallen into such disrepair as to admit of the escape of coal dust into the pit. It was not an uncommon occurrence to allow the coal dust there to accumulate to a depth of several feet. When these accumulations were suffered to remain in the pit for a time not definitely shown—the company's chemist being of opinion that they would not "get afire, if cleaned out every 12 hours"—the dust would develop heat to the degree of spontaneous combustion. This was a source of danger to employés, since, as the witnesses in substance say, any appreciable quantity of coal dust falling directly upon the burning portion of the dust, and so as to mix with air at the place of contact, would result in an "explosion," as some of the witnesses term it, but rather, as we understand, in a dangerous flash of fire. Indeed, while no witness was produced who saw the deceased at the moment he received his injuries, the facts and circumstances shown justify the conclusion, and it is virtually conceded, that he was so badly burned by one of these so-called explosions as to cause his death some hours later.

The day foreman sought to avoid the explosions. One method was to "wet the dust down" by the application of water from a hose conveniently located; but in practice this would cause the fire to smoulder; it would not extinguish the fire. Another plan of the foreman was to remove the accumulations to a place outside of the factory; this, however, was done only in daytime and at irregular intervals, some extending over several days; there was no rule charging

the duty of removal upon any particular employés, and the day foreman himself usually made such removals as occurred. It is true that one of the witnesses said the coal dust so accumulating could be returned to the elevator and carried thence to its normal destination, but admittedly this was impracticable after spontaneous combustion had set in and water had been applied. Further, the day foreman called the attention of Mr. Bumps, who was superintendent of the entire plant, to the defective condition of the portion of the elevator in question, stating, "I talked with Mr. Bumps about it, and he told me he ought to fix it up," and also stating that the superintendent "would not give a man time to repair it, or fix it up, because he wanted the machinery kept going."

At the close of all the evidence the company moved that a verdict be directed in its favor, relying in substance upon the grounds: (a) Negligence of fellow-servants; (b) assumption of risk; (c) contributory negligence; (d) decedent was not at the time of receiving his injury engaged "in the course of his business or employment." The motion was denied. The company then presented requests for special instructions to the jury, which were in substantial accord with the grounds relied on in the motion to direct. The contention made here is to the same effect.

[1] The theory of the defense overlooks, in the first place, the company's responsibility for the continuing state of disrepair of the elevator casing. The company is a corporation organized and existing under the laws of the state of Maine, and, so far as appears here, Superintendent Bumps was its principal and controlling representative in Michigan; concededly he was the vice principal. Clearly, the company was chargeable through him with knowledge of the unsafe conditions prevailing at the elevator pit. Leonard Martin Const. Co. v. Highbarger, 175 Fed. 340, 342, 343, 99 C. C. A. 128, and citations (C. C. A. 6th Cir.). It is sought to excuse the company as respects the holes in the casing by reason of chemical conditions causing it to rust out quickly; but this could not absolve the company from a reasonable discharge of its continuing duty to maintain a safe place to work (Kreigh v. Westinghouse & Co., 214 U. S. 249, 256, 29 Sup. Ct. 619, 53 L. Ed. 984); and here weeks, if not months, were allowed to elapse without attempting to repair or replace the defective parts of the casing.

[2, 3] It is in effect urged that the dangers arising from this apparent neglect of the company should have been avoided by the employés through proper care of the pit; that this was a mere detail of the work which could rightfully be imposed upon them. If such a theory as this be accepted, it is enough to say that there was a total absence of system or rule created or imposed by the superintendent or any authorized official touching the treatment of coal dust escaping into the pit. It results that the company itself was guilty of negligence as to the continuing disrepair of the casing and the consequent and recurring dangers due to accumulations of coal dust in the elevator pit; and it is, therefore, not important whether the decedent's fellow servants were guilty of concurring negligence or not. Kreigh v.

Westinghouse & Co., supra, at page 257 of 214 U. S., 29 Sup. Ct. 619, 53 L. Ed. 984; Texas & Pacific Ry. v. Howell, 224 U. S. 577, 582, 32 Sup. Ct. 601, 56 L. Ed. 892; Standard Oil Co. v. Brown, 218 U. S. 78, 85, 30 Sup. Ct. 669, 54 L. Ed. 939; Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 702, 1 Sup. Ct. 493, 27 L. Ed. 266; Bryson v. Gallo, 180 Fed. 71, 76, 103 C. C. A. 424 (C. C. A. 6th Cir.); Meers & Dayton v. Childers (decided by this court January 10, 1916) 228 Fed. 640, — C. C. A. —.

[4] As to assumption of risk, it cannot be said as matter of law, that the decedent comprehended the conditions which would bring about an explosion. True, he had worked in the same room and in the same capacity for a time during the working season of the previous year and for something like two months during the season in question. This, it must be conceded, was calculated to admonish him of the fact that explosions might occur; but it is not shown that he was ever advised or warned of the conditions that would produce an explosion, and in view of the nature of the conditions, as well as the circumstances shown, the question of decedent's appreciation of the risk was a question of fact. Casey-Hedges Co. v. Oliphant (decided January 4, 1916) 228 Fed. 636, — C. C. A. —; Adams v. Grand Rapids Refrigerator Co., 160 Mich. 590, 596, 125 N. W. 724, 27 L. R. A. (N. S.) 953, 136 Am. St. Rep. 454, 19 Ann. Cas. 1152; American Car & Foundry Co. v. Matzok, 228 Fed. 179, — C. C. A. — (C. C. A. 3d Cir.); and see Boston & M. R. v. Baxter, 228 Fed. 257, 262, — C. C. A. — (C. C. A. 1st Cir.). Shortly before the injury, it became necessary to repair the coal dust conveyer in the cupola, and the night foreman seems to have given directions to two men to make the repair; a ladder extended from the floor to a platform maintained about the cupola at a point some six feet below the top of the elevator; while the work was in progress upon the conveyer, the deceased received his injuries. It is shown that there were openings between the planks which formed the floor of the platform, and that considerable quantities of coal dust had gathered upon these planks. It does not appear, however, that the deceased had any duty calling him to the platform or that he was in fact upon it at the time the men were working there. The machinery in the cupola was oiled only in the daytime; it is open to fair inference that the decedent had no occasion at any time to go upon the platform; and, apart from the question of his knowledge of the conditions necessary to produce an explosion, it does not appear that he knew of the accumulations of coal dust on the platform. We think it is fairly deducible from all the proved facts and circumstances that the repairers, while moving about the platform, caused a considerable quantity of coal dust to fall from the planks and upon the coal dust in the elevator pit. Such conditions as these, when there was any fire in the pit, were the very ones that would produce an explosion, and it was open to the jury to find that the decedent was ignorant alike of this fact and also of the further fact that coal dust had gathered on the planks of the platform.

[5] As regards contributory negligence, it is to be remembered that under the well-settled rule prevailing in the federal courts, regardless

of any contrary rule existing in the state courts, the burden of proving negligence on the part of the deceased was upon the company. Tex. & Pac. Ry. v. Volk, 151 U. S. 73, 77, 78, 14 Sup. Ct. 239, 38 L. Ed. 78; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 557, 11 Sup. Ct. 653, 35 L. Ed. 270; Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291, 298, 23 L. Ed. 898; Erie R. Co. v. Weinstein, 166 Fed. 271, 274, 92 C. C. A. 189 (C. C. A. 6th Cir.); Horn v. Baltimore & O. R. Co., 54 Fed. 301, 304, 4 C. C. A. 346 (C. C. A. 6th Cir.); Missouri, K. & T. Ry. Co. v. Wilhoit, 160 Fed. 440, 443, 87 C. C. A. 401 (C. C. A. 8th Cir.); O'Hara v. Central R. Co. of New Jersey, 183 Fed. 739, 740, 106 C. C. A. 177 (C. C. A. 2d Cir.); Town of Watertown v. Greaves, 112 Fed. 183, 189, 50 C. C. A. 172, 56 L. R. A. 865 (C. C. A. 1st Cir.); Ellsworth v. Hunt, 168 Fed. 506, 510, 93 C. C. A. 662 (C. C. A. 7th Cir.). It cannot safely be said that the evidence even preponderates in favor of, much less that as matter of law it establishes, the defense of contributory negligence. It is urged that the deceased might have avoided the explosion by applying water to the coal dust in the pit. If it be assumed (it is not satisfactorily proved) that he had been instructed by the day foreman to "wet this coal (dust) down," the evidence fails to show that he did not; but, as we have seen, it is shown that such treatment would not put out the fire, and it is not claimed that the deceased was under any duty to remove the contents of the pit. It is scarcely necessary to add that while coal dust escaped from the coal grinders and settled in the coal room and about the machinery, yet this did not occur in such quantity at any single place as to result in spontaneous combustion. One of the uses for which the hydrant and hose were placed in the coal room, as stated, was to keep the floor wet; the day foreman had instructed the decedent to use the hose for that purpose; there is, however, no evidence tending to show that this duty was neglected, or that coal dust from these sources had anything to do with the explosion.

[6] As respects the claim that the decedent was not at the time of receiving his injuries engaged in the course of his employment, it is difficult to follow the argument. At one stage it is urged that the deceased had no duty calling him to the platform of the elevator; at another it is insisted that he might have received an order from the night foreman to go to the platform and render assistance to the repairers; but while the evidence sustains the former theory, it is wholly lacking as to the latter. It is shown that the duty of the deceased required him to be about the pit at times when oiling in the coal room. It is, therefore, plain enough that the deceased might well have received his injuries while in the discharge of his ordinary duties. It is worthy of remark that neither the night foreman nor the men working on the platform were called as witnesses. It is to be inferred from what was said in argument, that the night foreman and one of the repairers lost their lives in this explosion, and that the other repairer was absent from the district during the trial below. Humphrey, a cement burner, saw the reflection of the fire in the coal room, and in "about a minute" later saw Hatt (the decedent), with his clothing on fire, running toward him from the coal room, when he discovered that

Hatt's body was badly burned. Since Hatt met his death from this cause within a few hours, we think the jury might have believed that at the time of receiving his injuries he was engaged in the performance of his duty. Stephenson v. Brick & Tile Co., 151 Iowa, 373, 130 N. W. 586, concerned an employé who had been fatally injured while in charge of a hoisting machine, and who, it seems, had survived his injuries some appreciable length of time. There were no eyewitnesses of the accident, and under a claim of contributory negligence error was assigned to a special instruction which permitted the jury "to consider the instincts of men which naturally lead them to avoid danger." In passing upon this instruction it was said (151 Iowa, 379, 130 N. W. 589):

"As there were no eyewitnesses of the accident, the instruction is correct unless the physical facts, taken in connection with the other testimony, show without question that the deceased could not have received his injuries except he were in a position where he had no right to be or in such a position that he must be held guilty of contributory negligence in assuming that position."

And again (151 Iowa, 380, 130 N. W. 589):

"We must assume, then, giving heed to the instinct of self-preservation common to mankind in general, that deceased was exercising due care for his own safety in performing the work he was then doing, and it was not error to give the instruction."

Further, in the absence of evidence to the contrary, we see no difference in principle between the instant case, in the respect now under consideration, and the evidential effect that is accorded to the finding of a deceased employé's body at a place where his duty had called him. As was said in Maguire v. Fitchburgh Railroad, 146 Mass. 383, 15 N. E. 904, when applying the rule alluded to:

"The jury might well have believed that he was on the track in the performance of his duty and in the exercise of all the care to be expected of a prudent man."

A presumption of performance of duty arises in a variety of circumstances, where there is an absence, as here, of direct testimony on the point in dispute. Worthington v. Elmer, 207 Fed. 306, 309, 125 C. C. A. 50, and citations (C. C. A. 6th Cir.).

It follows from the foregoing considerations of the different grounds urged in support of a directed verdict, that the motion was rightly denied. So far as the requests for special instructions to the jury are concerned, they were embraced in the general charge, except as to features that in our judgment were unsound. The charge of the court was as favorable to the company as its defense justified.

[7] Other errors are assigned, and they have been carefully considered; we are convinced that they were not prejudicial. There is one, however, which we think ought to be specially noticed. It relates to the impaneling of the jury. Counsel for the administrator were permitted to ask the talesmen, separately, upon their voir dire, whether any of them had ever been in the insurance business or had ever been an agent for the Baltimore Fidelity & Casualty Company of Baltimore, Md. One of the talesmen, in answer to the first question, said that he had not, and another one said that he had been in the insur-

ance business, though no answer appears to have been made to the second question. Counsel for the company objected to the questions and requested the court to warn counsel for plaintiff against asking such questions. The court was disposed to allow "a very broad range"; exceptions were reserved, and error is assigned here. The relevancy and the propriety of such questions as these have been the subjects of frequent decision, where they have been presented (a) in the impaneling of a jury, or (b) in the examination of witnesses. A manifest distinction arises concerning the pertinency of the questions when testing the qualifications of proposed jurors and when determining the admissibility of evidence under distinct issues during the trial. The weight of authority favors the allowance of such questions and the answers, where the questions appear to be presented in good faith and for the purpose only of ascertaining the fitness of persons summoned as jurors. Girard v. Grosvenordale Co., 82 Conn. 271, 279, 73 Atl. 747; Blair v. McCormack Construction Co., 123 App. Div. 30, 33, 107 N. Y. Supp. 750, affirmed without opinion, and, in view of the decision below, apparently upon the present question, 195 N. Y. 521, 88 N. E. 1115; Spoonick v. Backus-Brooks Co., 89 Minn. 354, 358, 359, 94 N. W. 1079; Heydman v. Red Wing Brick Co., 112 Minn. 158, 162, 163, 127 N. W. 561; Foley v. Cudahy Packing Co., 119 Iowa, 246, 251, 93 N. W. 284; Iroquois Furnace Co. v. McCrea, 191 Ill. 340, 344, 61 N. E. 79; Swift v. Platte, 68 Kan. 10–14, 72 Pac. 271, 74 Pac. 635; Hoyt v. Independent Asphalt Paving Co., 52 Wash. 672, 677, 101 Pa. 367; Dow Wire Works Co. v. Morgan (Ky.) 96 S. W. 530, 533; M. O'Connor & Co. v. Gillaspy, 170 Ind. 428, 431, and citations at 432, 83 N. E. 738; Goff v. Kokomo Brass Works, 43 Ind. App. 642, 644, 647, 88 N. E. 312; Faber v. C. Reiss Coal Co., 124 Wis. 554, 561, 562, 102 N. W. 1049; V. C. G. M. Co. v. Firstbrook, 36 Colo. 498, 502, 86 Pac. 313, 10 Ann. Cas. 1108; Cripple Creek M. Co. v. Brabant, 37 Colo. 423, 426, 87 Pac. 794; Saller v. Shoe Co., 130 Mo. App. 712, 718, 720, 109 S. W. 794; Rinklin v. Acker, 125 App. Div. 244, 109 N. Y. Supp. 125. As to the scope of inquiry generally allowed to be made of jurors under supervision of a trial court, though not involving questions such as the present, see Connors v. United States, 158 U. S. 408, 413, 15 Sup. Ct. 951, 39 L. Ed. 1033; also Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 245, 246, 18 N. W. 797.

On the other hand, there is a distinct class of decisions forbidding such questions, as well as the answers, while the cause is in course of trial; the theory of these decisions is that, since there are no issues to which the questions and answers can have any relevancy, the real object of the questions is to suggest to the jury that the defendant is protected against loss by an indemnitor not a party to the cause; and the practice occasionally resorted to of so interrogating witnesses is censured, and, except where the designed effect appears to have been completely removed by action of the trial judge, is in effect penalized by reversal of the case in the reviewing court. Kerr v. Brass Mfg. Co., 155 Mich. 191, 194, 195, 118 N. W. 925; Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494; Hordern v. Salvation Army, 124 App. Div. 674, 676, 109 N. Y. Supp. 131; Frahm v. Siegel-Cooper Co.,

131 App. Div. 747, 749, 750, 116 N. Y. Supp. 90; Manufacturing Co. v. Woodall, 115 Tenn. 605, 609, 90 S. W. 623; Emery Dry Goods Co. v. De Hart, 130 Ill. App. 244, 247, 251; and see Tremblay v. Harnden, 162 Mass. 383, 385, 38 N. E. 972; Dow v. Weare, 68 N. H. 345, 346, 44 Atl. 489.

The instant case of course concerns the relevancy of such inquiries and answers only as they occur in examinations made with reference to impaneling a jury. Where it appears to the satisfaction of the trial judge that the object sought through such inquiries and answers as these is in reality solely to test the qualifications of the proposed jurors, the defendant failing, as here, to show that such indemnity does not exist, we think appropriate questions and answers should be allowed under supervision of the court. We do not see why this might not ordinarily be done effectively by a general question put to the prospective jurors collectively; but we are not disposed to hold that questions may not be allowed and answered individually, where in the sound discretion of the judge such course is deemed necessary. The fact is too well understood to require more than a mere statement that in cases where the right of trial by jury exists litigants are entitled to have their cause tried before an impartial jury; and perhaps the most effective means of securing this end is through an intelligent and legitimate exercise of the right of challenge, both peremptory and for cause.

The record here is open to fair inference that a considerate exercise of the right of challenge was the sole object of the course pursued; and consequently that there was neither abuse of privilege nor of discretion in impaneling the jury. It is not a sufficient answer to say that the jurors were nevertheless advised of the possible existence of indemnity; this is simply to suggest the marked distinction between the two classes of decisions before cited. The reason for the one class is to protect a right; the reason for the other is to guard against a wrong. In other words, any question tending to reveal possible interest or bias of a person offered as a juror is admissible because of its relevancy to the matter of his fitness for such service; the circumstance that the question has the additional effect of suggesting the existence of a fact irrelevant to the merits of the case (indemnity in this instance) is not an uncommon occurrence; this, however, is to be remedied through precautionary instructions of the court. But such a question and the testimony sought to be elicited, as well as their entire effect, become inadmissible, when offered in the course of trial, because of total irrelevancy. The present plaintiff in error relies on decisions pertinent to the latter situation; they are not applicable to the instant case. It should be added that no request was made here, either upon the impaneling of the jury or at the close of the evidence, for an instruction as to the purpose of the inquiries and answers in dispute and the duty of the jurors to disregard them when considering the merits of the cause; and so nothing of this character is before us.

The judgment is affirmed, with costs.

WESTERN MARYLAND RY. CO. v. EASTERN CEMENT GUN CO.

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

No. 1399.

CONTRACTS ⊜353(8)—ACTION FOR BREACH—INSTRUCTIONS.

Plaintiff contracted to do certain work for defendant railroad company in the construction of a roundhouse, to be completed within 55 working days; the contract plainly providing that defendant's chief engineer should be its sole representative with respect to the work, with power to declare the contract forfeited in case of default, and his decision to be conclusive in any dispute arising. Plaintiff was slow in commencing, and after a very small part had been done discontinued the work in December until spring, with the consent as claimed, of defendant's engineer in charge, but without the consent of or notice to the chief engineer. When plaintiff was again ready to commence, 87 days after the contract was made, the roundhouse had been otherwise completed and was in use, and permission was refused. *Held*, in an action to recover damages, that an instruction was erroneous which permitted plaintiff to recover if the jury should find that defendant's engineer failed to notify it promptly after it quit work that it was in default, and that if it had been so notified it could have completed the work within the 55 days, since, the terms of the contract being explicit, no such notice was required, and defendant could not be estopped by failure to notify the plaintiff of a fact which it was presumed to know.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1837-1840; Dec. Dig. ⊜353(8).]

Woods, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action at Law by the Eastern Cement Gun Company against the Western Maryland Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

George R. Gaither, of Baltimore, Md., for plaintiff in error.

Francis J. Carey and James Piper, both of Baltimore, Md. (Carey, Piper & Hall, of Baltimore, Md., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

DAYTON, District Judge. This controversy springs from a contract dated October 25, 1912, whereby the Cement Company contracted to perform certain cement or "gunite" work by use of a patented device known as the "Cement Gun" upon the stalls of the railway's roundhouse then in course of construction at Hagerstown, Md.

It is clearly shown and admitted that the contract was a "rush" one. The cement company undertook to start the work within 2 days and complete it within 55 working days, or the equivalent thereof in working time, "from the day that at least three stalls of steel or the equivalent thereof should be in place." Further, to insure the prompt completion of the work, the contract provided that the Cement Company should "place at least four cement guns, with the necessary machinery

and labor to operate the same, on the work at once, and to maintain this outfit, or more, if necessary, to complete the work within the time limit of 55 working days." Pratt, the railway's chief engineer, was by the terms of this contract constituted the sole executive representative of the railway company, his decision was to be final and conclusive in any dispute arising, and he was empowered under broadest terms, if in his opinion the work was not efficiently prosecuted, either to take charge of it and with the Cement Company's tools and machinery complete it, charging over to the Cement Company the cost of doing so, or to declare the contract, for any failure or omission, forfeited, in which latter event the Railway Company was to be exonerated from any and all liability for work done. He was also empowered, if deemed expedient or necessary, to stop the work, or any portion of it, or diminish the force engaged upon it without claim for damage by reason of so doing.

A careful analysis of the evidence adduced on trial clearly demonstrates that the Cement Company was wholly unprepared to meet the requirements of such a contract as this. Instead of being able to start within two days and "to place at least four cement guns with the necessary machinery and labor to operate same on the work at once," it is admitted that it took it from October 25th to November 18th, 24 days, to collect together its apparatus and get it upon the ground, and it was not until December 3d, 15 days thereafter, that it had all its scaffolding erected, had placed chicken wire over roof members, and had in its machinery and some sand, although three stalls of steel were in place on November 18th. The work dragged along until December 18th, when Pierce, the Cement Company's manager in charge, "in the interest of his company," shut it down, until spring should bring better weather conditions. He instructed his foreman to remove and pack all equipment and to lay off all men, and proceeded to look out for work elsewhere. At this time the Cement Company had material in the nature of wire, lumber, and piping, and one carload of sand on the ground. Up to then all the cement it had used had been borrowed from the Railway Company, and it had only cemented a portion of one beam covering a surface of a few square yards. This shut-down until spring, the Cement Company claims, was effected by Pierce after he had discussed the matter with McCausland, the railway's engineer in charge, who expressed his thought that "it would be best for all concerned to do so." McCausland denies this, but in our view of the case it becomes immaterial whether he did or not. The contract was too plain in its terms for any one to be misled. As we have said, Pratt, chief engineer, was the sole representative of the company with whom any modifications of it could be made or any such shut-down could be agreed upon. The court below very properly so ruled, and instructed the jury that McCausland had no authority to allow the stoppage of the work. Jordan, general manager, and Warner, president, of the Cement Company, however, as disclosed by the correspondence introduced in evidence, assumed the contrary, and on December 20th, two days after, Jordan wrote Pratt asking an advancement upon the contract price as a matter of favor, not of

right. On January 17th following he wrote a letter to McCausland, asking his assistance in securing this advance, and on the same day one to Pratt inclosing a photograph of cement gun work at the West Philadelphia station of the Pennsylvania Railroad as illustrating the character and possibilities of "gunite" work, and suggesting:

"If this weather continues to hold, it is very possible that we will go down to Hagerstown again and possibly start some sort of operation, provided it meets the approval of Mr. McCausland."

He further states he—

"expects to go to Hagerstown some time in the near future for the purpose of taking over a new general superintendent of construction work, who is a thorough civil engineer with 10 or 12 years' practical experience."

On January 20th, he both telegraphed and wrote McCausland that he "would like very much to proceed with work, stall at a time," that the weather was favorable, his operating men were idle, and a "cracker jack new superintendent" was available. In his letter he believes the weather conditions will continue favorable enough to enable him to make considerable showing on the work, and "if it would not interfere with the movements of locomotives in the roundhouse" he feels sure he could "finish several stalls before the real spring work opens and we put a number of guns to work." It is to be borne in mind that during this period of 87 days since the contract (to be executed in 55 days) had been signed, this roundhouse had been so far completed as to be fit for use and was being used; that its use was claimed to be worth $18,000 a month to the railway company; that it was full of locomotives, and that such locomotives could not be housed in it while the cement work was being done, for the reason that its dust would get into the locomotive bearings and greatly injure them; that the sum total contract price for this cement work was only $12,700, and that cementing the steel stalls by this "gunite" process was largely an experiment, not at all necessary, other than as a preservative of the steel work, which could otherwise be secured by acid paint. Jordan's proposition to go down "and start some sort of operation" very naturally was turned down at this time and under these conditions. This led to a personal interview and further correspondence between Jordan and McCausland, and then Warner, president of the Cement Company, took it up with the only man, Pratt, authorized to settle the matter. In his first letter of February 10th he expresses his surprise that his company is to be "eliminated" from coating the roundhouse with an entirely inadequate allowance for preliminary expenses made in the fall and winter preceding "*before we were ordered to shut down.*" In his letter of March 20th he expresses it as a "mutual *agreement to discontinue.*" Pratt may have regarded these expressions as somewhat disingenuous, in view of the fact that he had never been in any way consulted by any one about the shut-down and knew nothing of it until after its complete accomplishment by the Cement Company's manager in charge. The upshot of the matter was that on April 13th he informed Warner that the work was not stopped on instructions from the Railway Company, but by his manager, Pierce, who was

handling matters in a very unsatisfactory manner, and therefore the company did not consider itself liable for any claim on account of the work. Thereupon this suit was instituted.

As a matter of law, if upon the trial the defendant had asked for a peremptory instruction directing a verdict for itself, we are clearly of the opinion that it should have been given, because this evidence was wholly insufficient to warrant a verdict for the plaintiff. But no such instruction was asked. The plaintiff however did ask, and the court gave the jury, an instruction to the effect that if they found from the evidence that the plaintiff Cement Company "believed in good faith that it had the consent of the defendant to suspend work," and "that the chief engineer of defendant knew that the plaintiff so believed," and "did not notify the plaintiff promptly that it was in default under the contract and that it would treat the contract as forfeited," and if they should further find "that the work required to be done by the plaintiff could have been completed by it within 55 working days from the time when three stalls of steel, or the equivalent thereof, were in place on the work, had the plaintiff been so notified," they should find for the plaintiff. This instruction is designated in the record as "plaintiff's fourth prayer." The court further refused defendant two instructions, designated as defendant's first and second "prayers," which under the evidence were unobjectionable and should have been given.

This fourth instruction given for plaintiff was erroneous for at least these reasons: First, because it was not warranted by the evidence. It cannot be seriously contended that the stoppage of work on December 18th by the Cement Company was not a violation and abandonment of the contract, if it was done of its own will and without authority and consent of the Railway Company. It cannot be contended that the Cement Company could, under the terms of the contract, obtain this authority and consent from any one other than Pratt; that the statement of McCausland, if made, "that it would be best for all concerned to stop," could and did give no such authority or consent on the part of Pratt; or that Pratt at the time of the stoppage knew or had any reason to know of any such expression of opinion by his subengineer. It is not contended for an instant that his subordinate's judgment or opinion in this regard was submitted to Pratt for his approval. How, then, could the plaintiff in a legal sense "believe in good faith that it had the consent of the defendant to suspend work"? If it had no such consent, and no ground to believe in good faith it had, how could Pratt know that it so believed? Suppose he might have conjectured that the plaintiff was blindly misinterpreting the terms of the contract, what reasonable ground had he for so doing? Was it reasonable for him to assume or conjecture that plaintiff's officers were not competent to interpret the plain terms of the contract expressed in simple English language? If it was not reasonable for him to do so, how could the jury be permitted to conjecture that he did so conjecture and from such conjecture arrive at knowledge that it was so? In Midland Valley R. Co. v. Fulgham, 104 C. C. A. 151, 181 Fed. 91, it is very pertinently said:

"Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action * * * is indispensable to the maintenance of a verdict sustaining it."

But, second, the instruction is further erroneous in that it assumes in effect that if one executes a plain, unambiguous contract to do work, abandons it upon the advice of one not a party to it, or in any way empowered to authorize such abandonment, he nevertheless can recover damages from the party whom he has injured by such act of his unless the other promptly notifies him that he is in default. In other words, the injured party to a broken contract is estopped from denying recovery of damages from him by the party breaking the contract unless he promptly notifies the latter of his wrongdoing.

We can find no justification for this proposition under the law of estoppel. That law holds an innocent person, under various circumstances and conditions, protected from injury when he has been misled to his injury by another who was inert and silent when, morally and in good conscience, he should have been active and outspoken, or who was active and outspoken where he should have been inert and silent. This law is for the benefit of the innocent party deceived and misled. It cannot be invoked under any conditions by a wrongdoer to secure gain by way of damages, profits, or otherwise from the person he has wronged.

It follows that the judgment must be reversed and the case remanded, with directions to the court below to set aside the verdict and award a new trial.

Reversed.

WOODS, Circuit Judge (dissenting). In this case there was a conflict of evidence. The majority of the court are of opinion that the conflict is immaterial, and that in no view of the facts was there any issue for the jury. To this conclusion I am unable to assent. The Eastern Cement Gun Company made a contract on October 25, 1912, with the Western Maryland Railway Company to cover with gunite, a cement preparation, certain exposed steel work on its new roundhouse under construction at Hagerstown, Md. The work was to be begun within 2 days and completed within 55 working days. The contract provided:

"For the failure to prosecute the work with an adequate force for noncompliance with his instructions in regard to the manner of executing the work, or for any other omission or neglect of the requirements of this agreement and specifications on the party of the first part, the said chief engineer may, at his discretion, declare this contract, or any portion or section embraced therein, forfeited, which declaration and forfeiture shall exonerate the said Railway Company from any and all obligations and liabilities arising under the contract the same as if this agreement had never been made; and the reserve percentage of 10 per cent. upon any work done by the party of the first part may be retained forever by the Railway Company. It is mutually agreed and understood that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties of the agreement relative to or touching the same."

The agreement also contained these provisions:

"If it shall be necessary or expedient to stop the work, or any portion of it, or that the forces employed thereon should be diminished, the party of the second part shall have the right and power to stop said work, diminish said force, and the party of the first part shall have no claim for damage by reason thereof. But the time herein specified for the completion of the work shall be extended for a period equal to that during which the work is suspended."

This action is for damages for repudiation of the contract and preventing the plaintiff, the Cement Company, from completing the work. The Cement Company began work, but found it was operating to its disadvantage because of the difficulty of keeping out of the way of contractors for other portions of the work, and the cold weather which prevented the placing of cement by the plaintiff's process. Under these conditions, according to the evidence on behalf of plaintiff, McCausland, the assistant engineer of the railway company, in immediate charge of the work at the roundhouse, agreed with the plaintiff on December 18, 1912, that it would be better to stop temporarily and resume work in the spring. Pierce, the manager in charge of the cement work, testified that at the time plaintiff was ready, able, and willing to complete the work and could have done so within the time required by the contract. Jordan, who became manager of the work in the latter part of the year 1912, testified that the company was ready, able, and willing to do the work in the spring; and Warner, the president, testified that in March he gave notice to Pratt, the chief engineer of the Railway Company, of his readiness to proceed. McCausland denied that he agreed for the work to be stopped and resumed in the spring, and he and Pratt testified that its progress was very unsatisfactory. It was not disputed, however, that McCausland notified Pratt that the Cement Company had stopped work with the intention to resume in the spring, and that Pratt made no objection nor protest. He explained his failure to object or protest at the time by saying that he supposed the Cement Company had already stopped and thereby broken the contract. He did not declare the contract forfeited until March, 1913. There was testimony from both sides to the effect that it would have been almost impossible for the Railway Company to use the roundhouse for its engines, had they allowed the Cement Company to continue its work in the spring. On December 20, 1912, the general manager of the Cement Company wrote to Pratt, setting forth the situation, indicating the company's intention to complete the work later, and asking for financial assistance. Afterwards other letters of the same purport were written by officers of the Cement Company to Pratt, as well as McCausland. The correspondence with McCausland admitted of the inference that he did not regard the contract relations of plaintiff and defendant ended by the suspension of the work. Pratt made no response to letters sent him on the subject of later completion of the work or allowance of compensation for the labor and expenses incurred, until February 19, 1913, when he wrote:

"Absence from the office and pressure of other matters has prevented my being able to make earlier acknowledgment of your of the 10th inst. I hope

to be able to communicate with you at an early date, setting a time for a conference on the matter referred to in your letter."

On April 14, 1913, he wrote as follows:

"Referring to your communications of March 20th and April 7th, I have to advise that in accordance with my statement to you when you called at the office some little time ago, the work at Hagerstown was not stopped on instructions from the Railway Company, but by your manager, Mr. Pearson, who, I understand from a statement of your representative, was handling matters in a very unsatisfactory manner. The Railway Company does not consider that you have any claim in connection with the Hagerstown work, but we are willing to discuss with you your actual expenditures at that point."

This statement is sufficient, without further narrative, to make clear the issues made by the testimony. The District Judge instructed the jury on behalf of the defendant that McCausland, the assistant engineer, could not bind the Railway Company by consent to the suspension of work with the understanding that it was to be resumed in the spring. He refused instructions tendered by the defendant, which under the evidence would have required a verdict for the defendant, and gave at the request of the plaintiff the following instruction as the issue on which the verdict should depend:

"The plaintiff prays the court to instruct the jury that if they find from the evidence that the plaintiff believed in good faith that it had the consent of the defendant to suspend the work on the Hagerstown roundhouse until the following spring, and that the chief engineer of the defendant knew that the plaintiff so believed, and shall further find that the defendant did not notify the plaintiff promptly that it was in default under the contract and that it would treat the contract as forfeited, and if the jury further find that the work required to be done by the plaintiff could have been completed by it within 55 working days from the time when three stalls of steel or the equivalent thereof were in place on the work, had the plaintiff been so promptly notified, then their verdict shall be for the plaintiff."

Under these instructions the jury found a verdict for the plaintiff. Whether action or nonaction or mere silence will operate as estoppel depends upon the facts of each case, under the application of some general principles by which they are to be tested. Here reliance is placed upon the silence of the chief engineer of the Railway Company when he was informed of the purpose of the Cement Company to suspend work temporarily and resume and complete the work in the spring. For the silence of the chief engineer to be available as estoppel, the Cement Company was under the burden of showing: (1) Such relationship between the parties as imposed the duty upon the chief engineer to speak to prevent loss; (2) the misleading of the plaintiff to its damage by the silence of the chief engineer; (3) the expectation chargeable to the chief engineer that the plaintiff would probably be misled by his silence; (4) facts indicating that a different course of conduct would have been taken and the loss averted but for the silence of the chief engineer. Wiser v. Lawler, 189 U. S. 260, 23 Sup. Ct. 624, 47 L. Ed. 802; Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 64, 8 Am. Dec. 538; Bank v. Lee, 13 Pet. 107, 10 L. Ed. 81; Carmine v. Bowen, 104 Md. 204, 64 Atl. 934, 9 Ann. Cas. 1135; Eareckson v. Rogers, 112 Md. 160, 75 Atl. 513; Carroll v. Manganese Co., 111 Md. 252, 73 Atl. 665.

The Supreme Court of Maryland thus states the principle in Carmine v. Bowen, supra:

"Where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice."

In Bigelow on Estoppel, 564, it is said:

"A representation in the nature of a negative of one's rights may, as we have seen, arise from pure silence; and from pure, but misleading, silence with knowledge, or passive conduct joined with a duty to speak, an estoppel will arise."

From this statement of the evidence and the law it seems clear that these issues of fact were involved in the decision of the cause: (1) Did the assistant engineer in charge of the work consent that the work should be suspended and resumed and finished in the spring? (2) Did the chief engineer know, or should he have known from the telephone message sent him by McCausland, his assistant, from the letters to him, or from the circumstances, that the plaintiff believed McCausland to be his representative, and that as such he had authority to consent to the postponement of the completion of the work, and that he had done so? (3) Was the plaintiff misled by the silence of the chief engineer, and was it for that reason that it failed to complete the work within the time limit provided by the written contract? (4) If it was so misled, and the chief engineer did not intend to acquiesce in the postponement of the work until the spring, did justice and good conscience impose upon him the duty of notifying the plaintiff of his refusal to acquiesce in time for it to complete the work within the time limit?

As to this last question it seems important to observe that on the issue of estoppel from conduct, in a law case, it is generally for the jury to decide, not only what the facts are, but also the issue whether under the facts as found the party against whom the estoppel is set up has so misled the other party by his acts or omissions as to his legal rights, or as to his intention to assert them, that it would be unjust to allow him to avail himself of them. Maxwell v. Bay C. & B. Co., 41 Mich. 453, 2 N. W. 639; Snow v. Hutchins, 160 Mass. 111, 35 N. E. 315; Munroe v. Stanley, 220 Mass. 438, 107 N. E. 1012; Harlow v. Jaseph, 183 Mich. 500, 149 N. W. 1047; Tune v. Beeland, 131 Ga. 528, 62 S. E. 976; Columbia & C. R. R. Co. v. Laurens Cotton Mills, 82 S. C. 24, 61 S. E. 1089, 62 S. E. 1119.

There are some authorities which hold, on the contrary, that the question whether the inference of estoppel is to be drawn from ascertained facts is always a question of law for the court. Amarillo Bank v. Sanborn (Tex. Civ. App.) 169 S. W. 1075; Pittsburg C. Co. v. West Side R. R. Co., 227 Pa. 90, 75 Atl. 1029; Holt v. New England T. & T. Co., 110 Me. 10, 85 Atl. 159. We cannot doubt, however, that where reasonable men might draw different inferences from the facts proved or admitted it is for the jury to draw the inference whether

acts, omissions, declarations, or silence of one party are of such character as to influence the other party to do to his detriment what he would not otherwise have done, and whether the person charged with the acts, omissions, declarations, or silence ought in good conscience to bear the consequences. It is not easy to see why the inference of estoppel in a doubtful law case should be accepted or rejected by the court, and not the jury, any more than the like inference on the closely related questions of fraud and mistake.

On this reasoning I think the District Judge was right in rejecting the defendant's request to charge, but I think he should have added the words, or their equivalent, which we have italicized, so that the instruction would read as follows:

> If the jury find from the evidence that the plaintiff believed in good faith that it had the consent of the defendant to suspend the work on the Hagerstown roundhouse until the following spring, and that the chief engineer of the defendant knew that the plaintiff so believed, and shall further find that the defendant did not notify the plaintiff promptly that it was in default under the contract and that it would treat the contract as forfeited, and if the jury further find that the work required to be done by the plaintiff could *and would* have been completed by it within 55 working days from the time when three stalls of steel, or the equivalent thereof, were in place on the work, had the plaintiff been promptly notified, *and if they find, further, that the Railway Company, or its chief engineer, ought in justice and good conscience to have informed the plaintiff that the work would not be accepted at a later date*, then their verdict shall be for the plaintiff.

I therefore concur in reversing the judgment, though I am unable to agree to the reasoning or conclusion of the majority.

LEHIGH VALLEY R. CO. v. KILMER.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 202.

1. RAILROADS ⇐312(3)—ACCIDENTS AT CROSSINGS—NEGLIGENCE—SIGNALS.
   Even if there is no statute requiring signals at highway crossings, so as to make the engineer's failure to sound them negligence per se, such failure is negligence, if ordinary care in the operation of trains requires that they be given.

   [Ed. Note.—For other cases, see Railroads, Cent. Dig. § 990; Dec. Dig. ⇐312(3).]

2. RAILROADS ⇐351(9)—ACCIDENTS AT CROSSING—INSTRUCTIONS—SIGNALS—SPEED.
   In an action for injuries to an automobile chauffeur at a railroad crossing, a charge that it was the legal duty of the defendant to give some adequate warning of the approach of the train to the crossing, and to run its train at such speed, and to have it under such control, and to give such warning as to avoid doing unnecessary damage to those using, or about to use, the crossing, was correct.

   [Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1201½; Dec. Dig. ⇐351(9).]

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3. RAILROADS ⊂⊃330(3)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE.
The failure of an engineer to sound the whistle or bell on approaching a highway crossing does not relieve the chauffeur from the necessity of taking ordinary precaution for the safety of himself and his party.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1073; Dec. Dig. ⊂⊃330(3).]

4. RAILROADS ⊂⊃335(5)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE —PROXIMATE CAUSE.
The failure of one about to cross a railroad track to use due care bars recovery, if such negligence proximately contributed to the injury, but not otherwise.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1028; Dec. Dig. ⊂⊃335(5).]

5. RAILROADS ⊂⊃324(1)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE —"DUE CARE."
"Due care," required of one about to cross a railroad track, means ordinary care, and implies the use of such watchfulness and precautions to avoid coming into danger as a person of ordinary prudence would use under the same circumstances, in view of the danger to be avoided, but does not require the use of extraordinary care, or the exercise of the best judgment or the wisest precaution.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020, 1022, 1023; Dec. Dig. ⊂⊃324(1).
For other definitions, see Words and Phrases, First and Second Series, Due Care.]

6. RAILROADS ⊂⊃334—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE —ACT IN PERIL.
A chauffeur, who is suddenly put in peril by the negligent approach of a railroad train to a highway crossing, is excusable if he made an unwise decision as to what he should do.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1027; Dec. Dig. ⊂⊃334.]

7. RAILROADS ⊂⊃350(30)—ACCIDENTS AT CROSSING—EVIDENCE—CONTRIBUTORY NEGLIGENCE.
In an action for injuries to a chauffeur, whose automobile was struck by a train at a crossing, evidence *held* not to show, as matter of law, that plaintiff was contributorily negligent.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1189; Dec. Dig. ⊂⊃350(30).]

8. RAILROADS ⊂⊃347(11)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—LOOKOUT BY OTHERS.
In determining whether an employed chauffeur was negligent in approaching a railroad crossing, the fact that his employer was beside him, and was looking out for an approaching train, can be considered.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1134–1137; Dec. Dig. ⊂⊃347(11).]

9. RAILROADS ⊂⊃350(19)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE—PLACE AND TIME TO LOOK.
A chauffeur, approaching a highway crossing, who stopped and looked for an approaching train, is not negligent, as matter of law, because he did not stop and look at the precise place and time where and when looking would have been of most advantage.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1173; Dec. Dig. ⊂⊃350(19).]

Ward, Circuit Judge, dissenting.

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

Action for personal injuries by Carl Kilmer against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cobb, Cobb, McAllister & Feinberg, of Ithaca (Riley H. Heath, of Ithaca, of counsel), for plaintiff in error.

Hiscock, Doheny, Williams & Cowie, of Syracuse, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This is an action to recover for injuries sustained by the plaintiff below in attempting to cross in an automobile the tracks of the defendant company at what is known as the Swarthout crossing, near Valois, N. Y. The automobile was struck by a locomotive drawing a passenger train. The plaintiff was acting at the time as chauffeur for an automobiling party including three other persons: Edgar A. Emens, who is professor of Greek in Syracuse University, his wife, and his sister. The two latter persons received injuries from which they died. Professor Emens and the plaintiff were injured.

At the time of the accident the party was riding in an Oldsmobile, on August 28, 1910. The plaintiff had driven the automobile for about four months, and before that had driven cars for about two years. The party had been to Fayette, and gone from there, by way of Geneva, to Penn Yan. They left the latter place at 2 o'clock in the afternoon on their way back to Fayette, and the accident occurred about 5 o'clock that afternoon. The rear curtain of the automobile was down and the side curtains were off.

The plaintiff had the kneecap of his left knee torn off, and the ligaments were torn loose from the knee and ankle of his leg; the left ankle was strained and wrenched, and the flesh and skin were torn off to the bone on his left shin; the bones of the left lower leg were splintered and bruised; and for a considerable period he was deprived of the use of his ankle and knee. At the trial, almost three years after the accident, he testified that he was unable "to do hardly anything, only sit around; I cannot use it any in doing hard work; I can't lift anything, only to stand on my right foot alone." He said he was unable to run, and that he could walk slowly without limping, but that he limped badly if he walked above a moderate gait. Three times since the accident the kneecap had slipped out of place, had slid out bad enough to let the knee water off the joint. "On each of those three occasions, when the cap has been dislocated enough to flow the water, it has swollen until it filled my trouser leg very nearly. I wear bandages on it yet." He also testified that his knee pained him all the while. The surgeon and physician who treated him testified that when he first saw his knee it was twice the normal size; that he thought his condition at the time of the trial was a permanent one, and that any strain like heavy lifting or pushing was liable to throw the kneecap out, and that running or fast walking was liable to have

the same effect; that the condition of his knee would grow worse as he got older; that he thought it would be necessary for him to wear bandages in order to obtain any use of it during the rest of his life. The jury found a verdict in his favor for $5,000.

[1] It is not necessary for us to consider at any length the negligence of defendant. The plaintiff proved that the engine gave no signal by bell or whistle until it gave the danger signal, two short blasts and two long ones, given just before or just as the engine struck the automobile. There were eight competent and disinterested witnesses, farmers and residents of the neighborhood, who testified positively that no bell rang and no whistle blew until the danger signal sounded. In addition a number of witnesses stated that they heard no bell or whistle. The evidence to the contrary given by the engineer and fireman and others evidently did not impress the jury.

In almost every state it is made by statute the duty of an engineer, in approaching a crossing, to sound his whistle, or ring his bell, or both. Where the statute imposes the duty, the failure to comply with it is negligence per se. Unless the duty is imposed by statute, the failure to give such signals is not as matter of law a neglect of duty. In such a case the failure to give the signals would be a question of fact for the jury to decide whether, under the circumstances, the omission amounted to a failure to exercise due care. In New York the General Railroad Act of 1850 made a railroad company liable for all damages sustained by the failure of an engineer to ring the bell or sound the whistle upon approaching a highway crossing. In 1886 the prior act was repealed. In a case which came before the Court of Appeals in 1892 the court, referring to this matter in Vandewater v. New York & New England Railroad Co., 135 N. Y. 583, 588, 32 N. E. 636, 637 (18 L. R. A. 771), said:

"Of course, the companies still owe a duty to the public at such crossings, as elsewhere. The duty is to run their trains with care and caution, and when they cross such roads it may well be that the failure to give due warning by whistle or bell, or in some other way, would be held, under all the circumstances, to be a failure to manage and run their train with proper care and caution, for which they would be liable to a party injured, if otherwise entitled to recover. Even when compelled by statute to make such signals, it is not necessarily a defense in all cases to prove that they were made. The making of the signals is the least the company can do, and in a given case it might not be enough." Harty v. Railroad, 42 N. Y. 468; Thompson v. Central Hudson R. R. Co., 110 N. Y. 636, 17 N. E. 690.

[2, 3] In the case at bar the trial judge instructed the jury as follows:

"In determining whether the defendant railway company was negligent or not, you must remember that it was the legal duty of the defendant to give some adequate or suitable warning of the approach of the train in question to the Swarthout crossing, where the accident occurred, and that at a suitable distance therefrom to give warning. As to the speed of the train, it was the duty of the defendant to run the same at such a rate of speed, and to have this train under such control, and to give such warnings in approaching the highway crossing, as to avoid doing unnecessary damage to those lawfully and properly using the same or about to use the same."

We find no error in the instruction in this particular, and the verdict has established the fact that the defendant was negligent. The

failure of the engineer to sound the whistle or ring the bell did not relieve the plaintiff from the necessity of taking ordinary precautions for his and his party's safety. The negligence of the defendant's employés would not excuse his negligence. Schofield v. Chicago, Milwaukee & St. Paul Ry. Co., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224 (1885).

[4, 5] The failure of one about to cross a railroad track to use due care deprives him of his right to recover damages, if such negligence proximately contributed to the injury, but not otherwise. Shearman & Redfield on Negligence (6th Ed.) vol. 2, § 472. Due care in these cases means ordinary care. It implies the use of such watchfulness and precautions to avoid coming into danger as a person of ordinary prudence would use under the same circumstances in view of the danger to be avoided. But no greater care than that is required. Totten v. Phipps, 52 N. Y. 354; Davis v. Concord, etc., R. R. Co., 68 N. H. 247, 44 Atl. 388. A person is not bound to use extraordinary care or to exercise the best judgment or to use the wisest precaution. Lent v. N. Y. Central, etc., R. Co., 120 N. Y. 467, 24 N. E. 653.

[6] This brings us to inquire whether the plaintiff exercised the care which the law required him to exercise. What the plaintiff did after he got upon the track is not a matter of controlling importance. In such a case as that in which the plaintiff then found himself suddenly put in peril, he is excusable if he made an unwise decision as to what he should do. The rule on this phase of the matter is correctly laid down in Shearman & Redfield (6th Ed.) vol. 1, § 85a, where it is said:

"If one is placed by the negligence of another in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance. Even if, in bewilderment, he runs directly into the very danger which he fears, he is not at fault. The confusion of mind caused by such negligence is part of the injury inflicted by the negligent person, and he must bear its consequences."

[7] What the plaintiff did or did not do before he got upon the track is of greatest importance; and this brings us to inquire whether he exercised the care which the law required him to exercise before he attempted to cross the defendant's tracks. Did he approach the crossing with prudence and care and with senses alert to the possibility of approaching danger? Tolman v. S. B. & N. Y. R. Co., 98 N. Y. 202, 50 Am. Rep. 649.

The plaintiff knew for a distance of half a mile south of the crossing that he was approaching it. When he was about 825 feet from it he shut off the power and let his automobile coast to a point in the vicinity of the Swarthout hitching block, where he brought his car, as he testified, to a full stop. This was at a point 146 feet from the first rail of the west-bound track. He then looked both ways along the tracks, and, seeing no sign of a train, started towards the crossing and continued to look as well as he could, both ways, until he got on the crossing and saw the engine approaching him from about 200 feet

away. He heard no sound of the engine before he saw it. At that time his seat in the automobile was right over the first track. He then opened up the throttle of his machine just as wide as he dared to in an effort to get across ahead of the train, because, he said, he knew he couldn't stop to clear it. The locomotive hit the rear end of the automobile and threw it from the track, smashing it pretty well to pieces.

The plaintiff testified that before he approached the crossing and when he stopped his car to look and listen as above stated, there was a pear orchard between him and the railroad track, and that as he looked to the south he could see the line of the rails for a little ways and the pear orchard, and that he looked as far as he could and "took a good look"; that before he got to the tracks he looked toward them several times. He was asked, "Will you swear you looked during the last 50 feet before you got to this railroad crossing and before you saw the train when you were on the crossing?" To which he answered, "Yes; I did." And he added, "I am positive I did." He was asked, "How far did you look?" He replied, "I looked the best I was able to in the car—looked back south as far as I could see."

Professor Emens who sat beside him in the automobile testified that the automobile had been running at a speed of 12 or 14 miles an hour, but when they reached the Swarthout block they slowed down to 5 or 6 miles an hour; that he was looking and listening; that just before ascending the grade to the tracks he looked up and down the tracks and said to the plaintiff, "It looks as if everything were all right," and they proceeded up the grade, and as the rear wheels of their car passed the first rail he saw the train coming on the other track at a distance of perhaps 300 feet; that that was the first sight he had caught of it; that before that time the train had not whistled; that he had looked the best he could, and was looking all the time; that he remembered that the automobile slowed down as it approached the crossing, but whether it stopped or not he could not be sure; that the top of the automobile interfered somewhat with his view, the highway being somewhat lower than the railroad tracks, but that he looked the best he could; that he had a clear view down the track, but his view in the other direction was obstructed and confusing because of the pear orchard and the cattle guards. He was asked:

"Now, Professor, how many times do you recollect looking? A. I recollect looking twice before the final look, and then before that I remember looking, and perhaps I might say looking continuously. Q. First one way and then the other. And you had your mind on the question that there was a crossing there? A. Absolutely. Q. And on the possibility of a train approaching? A. I did. Q. And did you see or hear that train before you saw it at the time you have described, about 300 feet away, after your car was up at the tracks? A. I did not."

[8] As the plaintiff was employed by the Professor, the fact that he was riding by the side of the plaintiff and was looking out for the train is a circumstance to be considered in judging the plaintiff's conduct on the subject of the latter's negligence. Mr. Emens testified that his view was obstructed and confusing, owing to the pear orchard and

cattle guards between the highway and the track. The plaintiff also refers in his testimony to the pear orchard. Coleman testified:

"Well, there was places that you could see; but you would have to get, well, very near opposite Swarthout's barn before you could see through, on account of buildings this side of the crossing there—Mr. Predmore's; then, if you happen to know just where to look, you could see clear to the curve."

Another witness, Smith, testified:

"I can't say positively whether there is any place where you can see down the track while you are west of the pear orchard. My recollection is that you couldn't; I think the photographs show that you couldn't."

He also testified:

"I have been familiar with this crossing ever since the railroad was built. As you come from the south going north on that road there is an orchard and trees on the south side of that east and west road, and it hides your view till you get very near Mr. Swarthout's; and then, there is one place right in front of Mr. Swarthout's block where I always look; there you can see clean to the curve; and that is about, as they said here yesterday, about 125 feet; I should judge it was about 125 feet from the crossing. That is the location of Mr. Swarthout's stepping stone, or Swarthout's block. There is one place right there you can see very distinctly clean to the curve. As you approach along the road before you come to Mr. Swarthout's block you cannot see very distinctly. This was so at the time of the accident."

The defendant, however, claims that if plaintiff had stopped and looked as he said he did, he would have had an unobstructed view of the tracks; and that, if by chance he stopped his car at a place where he could not see 50 feet down the track, it was his duty to continue to take observations and to refrain from going on the track until he reached a point where he could see and determine that it was safe for him to proceed.

One of the plaintiff's witnesses was asked:

"Q. Now did you make a mark at a place 120 feet southwest of the crossing on the highway and look from there southerly toward the curve in the railroad tracks? A. That is from the first rail or from—from the east-bound track from the west. Q. Where was that point? A. That 120 feet? Q. Yes. A. From the west rail of the west-bound track, the center of the beaten highway. Q. From the first rail of the west-bound track? A. Yes, sir. Q. And where were you when you made that observation? A. Why, I was 120 feet— Q. Were you in your buggy I mean? A. Why, I was, and also when I was standing at different times. Q. Now how far south down the railroad track could you see from that point? A. I could see way up around the curve a little; three-quarters of a mile anyway. Q. You could see partly around the curve? A. Yes, sir. Q. And from that point up to the rails of the railroad track, the crossing there, did you from that point to point make observations from your buggy—while sitting in your buggy and while standing in the road, as to the view you had southerly down the railroad track? A. Yes, sir. Q. What did you find? A. Didn't find anything. Q. Find anything to obstruct your view? A. Nothing. Q. And those observations were made by you when the conditions were the same as at the accident? A. I should think they would be the same. Q. And from a point where you were either standing or driving on the traveled portion of the highway going north? A. Yes, sir. Q. At any point on the 120 feet was there any obstruction to an oncoming train from the south? A. I don't think there is. Q. And did you actually see trains coming at different occasions? A. I have. I have actually seen trains down as far as that curve; that is the engine, the first coach, from these various points 120 feet from the west rail of the west-bound track."

The question upon which this case must turn is whether upon the evidence the court was justified in leaving the question of contributory negligence to the jury, or whether the court should have decided that the evidence disclosed contributory negligence as a matter of law. If the plaintiff had an unobstructed view of the track, and might have seen the train if he had looked, and nevertheless went upon the track just as the train got to the crossing, he was guilty of contributory negligence as a matter of law, and is not entitled to recover.

[9] The record convinces us that between the Swarthout block, where the plaintiff stopped to look and listen, and the crossing where the collision occurred there were places where the plaintiff might have obtained an unobstructed view of the track for a considerable distance. But it does not necessarily follow as a rule of law that he is remediless because he did not look at the precise place and time when and where looking would have been of the most advantage. Rodrian v. N. Y., N. H. & H. R. R. Co., 125 N. Y. 526, 26 N. E. 741 (1891). The court below left the question of contributory negligence to the jury. The court in its charge said:

"This court is of the opinion that a person driving an automobile, a stranger to the locality, who approaches a railroad crossing and stops, or substantially stops, at a point 145 or 150 feet from the actual crossing, being less than 50 feet in a direct line from such tracks, and looks and listens, exercising due and reasonable and ordinary care in so doing, hears no train and no signal, and no signal is given, and who then proceeds at reasonable speed, continuing to look and listen and who neither sees or hears the approaching train which is coming nearly head on behind him on a downgrade, gliding or floating at from 40 to 60 miles per hour, without sounding bell or whistle, is not necessarily guilty of contributory negligence in not again stopping or in failing to see or hear the approaching train."

In our opinion the court was justified in reaching the conclusion it did. The question under all the circumstances was a proper one for the jury. The plaintiff stopped, looked, and listened if he told the truth, and whether he told the truth was for the jury. The question whether he exercised as much care in looking and listening as he should have done was also for the jury. The question whether, having stopped and looked and listened 145 feet from the crossing without seeing or hearing anything, ordinary care and prudence required him to stop again before going upon the tracks, and whether he could have been in the exercise of due care in looking and listening, when he neither saw nor heard this train until he got upon the track, were under all the circumstances questions of fact for the jury.

Judgment affirmed.

WARD, Circuit Judge (dissenting). As the defendant did not dispute its liability in this court, and the amount of the verdict is not a subject of review, the only question in the case is whether the plaintiff was guilty of contributory negligence. He employed an engineer to take measurements on the ground, who testified that at a point 146 feet south of the track on which the train was approaching there is an unobstructed view to the curve, that is, about 3,498 feet from the crossing, and at a point 100 feet south an unobstructed view for 3,380 feet. Such obstructions as were spoken of, as, for instance, fences,

cattle guards, telegraph poles, interfered no more with the plaintiff's vision than would a balloon or a bird flying in the air. Giving the train 60 miles and the car 8 miles an hour, which are the highest speeds testified to, the train would move 88 feet and the car nearly 12 feet a second; in other words, at a point 146 feet south of the place of collision one could see the train approaching about 1,520 feet away, and one who started from that point, as the plaintiff says he did, would at 8 miles an hour arrive at it in 15 seconds, with the train in full view all the time. The plaintiff testified he stopped at the 146-foot point, looked, and did not see the train, and then started up and looked, and did not see it until the train was within 200 feet. This testimony cannot be believed. If he had looked, he must have seen it in time to avoid the collision, because he said he could stop his car in 6 feet.

I think the plaintiff was guilty of contributory negligence as matter of law and that a verdict should have been directed for the defendant. Dolfini v. Erie R. R. Co., 178 N. Y. 1, 70 N. E. 68; Northern Pacific Railroad Cos. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014.

LEHIGH VALLEY R. CO. v. EMENS.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 200.

RAILROADS ⊂=350(30)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE —PASSENGER IN AUTOMOBILE.

A woman riding in the back seat of an automobile, with her husband and an experienced chauffeur on the front seat, who stopped 146 feet from a railroad crossing to look, but failed to discover the approach of a train which sounded no signals, is not contributorily negligent as matter of law because she did not insist that her husband and the chauffeur do more than they did to discover the train, when the chauffeur had been held not contributorily negligent as matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1189; Dec. Dig. ⊂=350(30).]

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

Action by Edgar A. Emens, as executor of the last will and testament of Jessie S. Emens, against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cobb, Cobb, McAllister & Feinberg, of Ithaca (Riley H. Heath, of Ithaca, of counsel), for plaintiff in error.

Hiscock, Doheny, Williams & Cowie, of Syracuse, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This is an action brought by the plaintiff below as the executor of the last will and testament of Jessie S. Emens, deceased, to recover damages for causing her death. The action is

based upon the New York statute which authorizes a personal representative to maintain an action under the circumstances and for the purposes therein specified. The deceased was one of an automobile party of four. Her husband and the chauffeur sat in the front seat, and the deceased and her sister-in-law sat in the rear seat. The automobile was driven in front of one of defendant's passenger trains on August 28, 1910, at Swarthout crossing, east of Valois, N. Y.

The question upon which this case must be decided is whether the deceased was guilty of contributory negligence as matter of law. The court submitted the question as one of fact to the jury. The counsel insists that the undisputed testimony shows that there was a clear view within the distance of 146 feet from the crossing and that the plaintiff's testatrix did absolutely nothing to stop the chauffeur from driving in front of the train. The testimony shows she said nothing until the automobile was on the track and the train was seen 200 feet away. She then just spoke his name. What she did before that, if anything, does not appear. The chauffeur testified that he had not noticed "what the ladies were doing in the back seat as we approached this crossing. I only know that they were there." The back curtain of the automobile was down. What the testatrix did in the way of looking or listening, if anything, is not disclosed.

The circumstances connected with this collision are somewhat fully set forth in our opinion in Lehigh Valley Railroad Co. v. Kilmer, 231 Fed. 628, — C. C. A. —, recently decided in this court, and need not now be restated here. In that action the chauffeur of this automobile party sued to recover for the injuries inflicted upon him in this collision. We held in that case that the question whether the plaintiff was guilty of contributory negligence under the circumstances disclosed by the record was a question for the jury. We think that our decision in that case rules this, and that it was for the jury to say whether the plaintiff's testatrix was guilty of contributory negligence.

This court cannot say that a woman riding in the back seat of an automobile, with her husband and an experienced chauffeur sitting on the front seat, and who stopped and looked and listened at a point 146 feet from the crossing, and who failed to discover an approaching train, which sounded no whistle and rang no bell, was guilty of contributory negligence as a matter of law because she did not insist on the husband or chauffeur doing more than they actually did, when what the chauffeur did has been held not to be, as matter of law, contributory negligence.

Various assignments of error have been brought to our attention respecting the admission of evidence and the charge of the trial judge. We do not find it necessary to consider them in detail. If any errors were committed, they were not sufficiently serious to justify the court in sending the case back for another trial.

Judgment affirmed.

LEHIGH VALLEY R. CO. v. EMENS.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 201.

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

Action by Edgar A. Emens, as executor of the last will and testament of Martha E. Emens, deceased, against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cobb, Cobb, McAllister & Feinberg, of Ithaca (Riley H. Heath, of Ithaca, of counsel), for plaintiff in error.

Hiscock, Doheny, Williams & Cowie, of Syracuse, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This is a collision case, and the action is brought to recover for the death of the plaintiff's testatrix, occasioned by defendant's negligence. At the time the collision occurred the deceased was riding in an automobile. She was sitting on the back seat at the time of the accident in the company of her sister-in-law. The circumstances attending the collision appear in the cases of Lehigh Valley Railroad Co. v. Kilmer, 231 Fed. 628, — C. C. A. —, and Lehigh Valley Railroad Co. v. Emens, 231 Fed. 636, — C. C. A. —, recently decided in this court, and the principles therein announced govern this case.

Judgment affirmed.

HISTORICAL PUB. CO. v. JONES BROS. PUB. CO et al.*

JONES BROS. PUB. CO. et al. v. HISTORICAL PUB. CO.

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

Nos. 2071, 2076.

1. APPEAL AND ERROR ⟸71(3)—RIGHT OF REVIEW—INTERLOCUTORY DECREE.
Under Judicial Code (Act March 3, 1911, c. 231) § 129, 36 Stat. 1134 (Comp. St. 1913, § 1121), authorizing an appeal from an interlocutory decree granting or refusing an injunction, complainant, in a suit to restrain the infringement of two copyrights, can appeal from a dismissal of his bill as to one copyright.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 393–398; Dec. Dig. ⟸71(3).]

2. COPYRIGHTS ⟸86—INFRINGEMENT—INJUNCTION—OWNERSHIP OF COPYRIGHT.
In a suit to restrain the infringement of a copyright and for damages, where the bill alleged and the answer admitted that the complainant was the owner of the copyright at the time of filing his bill, and there was evidence that defendant was then threatening an infringement, complainant is entitled to an injunction, though there was no evidence that he had owned the copyright at the time of the previous infringement, so that he could not recover damages for such infringement, since restraining the future commission of injurious acts is one of the objects of an injunction.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 79, 80; Dec. Dig. ⟸86.]

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

* For opinion on reargument, see 231 Fed. 784. — C. C. A. —.

3. PLEADING ⊂⊃36(3)—ADMISSION BY PLEADINGS—CONCLUSIVENESS.
Where the answer expressly admitted complainant's title to the copyright, defendant cannot attack such title at the hearing.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 82; Dec. Dig. ⊂⊃36(3).]

4. COPYRIGHTS ⊂⊃48—INFRINGEMENT—LICENSES—EVIDENCE.
Oral evidence of a written license, which was not produced and not satisfactorily accounted for, to use copyrighted matter, can be disregarded in a suit for infringement, where the complainant, who was the alleged licensor, was not the owner of the copyright at the date the license was claimed to have been given, and its right to give such license was not explained.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 46; Dec. Dig. ⊂⊃48.]

5. COPYRIGHTS ⊂⊃86—INFRINGEMENT—INJUNCTION—SCOPE.
Where only one part of a single-volume publication and two volumes of a six-volume publication were shown to infringe complainant's copyright, and those parts can be separated from the rest, an injunction against infringement should be limited to the infringing parts.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 79, 80; Dec. Dig. ⊂⊃86.]

6. COPYRIGHTS ⊂⊃76—INFRINGEMENT—PARTIES—AGREEMENT TO BUY.
An agreement whereby the owner of the copyright agreed to sell and the other party agreed to buy the copyright, the sale to be executed nearly two years thereafter upon the buyer making a certain payment, vests an equitable title to the copyright in the buyer, which gives it sufficient interest in a bill by the seller and the buyer to restrain the infringement.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 68; Dec. Dig. ⊂⊃76.]

7. APPEAL AND ERROR ⊂⊃187(2)—QUESTIONS REVIEWABLE—MISJOINDER.
Where no question of misjoinder was raised by the pleading, it cannot be raised on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1185; Dec. Dig. ⊂⊃187(2); Parties, Cent. Dig. § 167.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit by the Jones Brothers Publishing Company and another against the Historical Publishing Company for an injunction to restrain the infringement of two copyrights. Injunction granted as to one copyright, and denied as to the other, and both parties appeal. Reversed and remanded on complainant's appeal, with directions to issue an injunction, and modified and affirmed on defendant's appeal.

The following is the opinion of Thompson, District Judge, in the court below on final hearing:

The bill charges infringement by the defendant of copyrights for two books, one entitled "History of the United States, Prepared Especially for Schools on a New and Comprehensive Plan, Embracing the Features of Lyman's Historical Chart, by John Clark Ridpath, A. M.," and the other entitled "Columbus and Columbia." The latter is alleged to contain matter contained in the former, together with new and original matter of which James G. Blaine, James W. Buel, John Clark Ridpath, and Benjamin Butterworth were the authors.

It is found from the evidence and averments in the bill admitted in the answer that the first-named book, hereafter, for convenience, designated "Ridpath's School History," was entered for copyright in the office of the Librarian

of Congress on December 5, 1874, in the name of John T. Jones, as proprietor by assignment from the author. John T. Jones, on December 1, 1884, sold and assigned the copyright to Van Antwerp, Bragg & Co., who afterwards, on November 20, 1890, sold and assigned it to the American Book Company. John Clark Ridpath, author of Ridpath's School History, died on July 31, 1900, leaving a widow, Roxana B. Ridpath, who in the year 1902, and within 6 months before the expiration of the original term of copyright, duly obtained the copyright for a further term of 14 years. The rights of Roxana Ridpath, together with whatever rights were in the American Book Company, were acquired by assignment by the Jones Bros. Publishing Company, one of the plaintiffs, upon a date, not set forth in the bill nor proved in the case, prior to August 15, 1913, the date of the filing of the bill. At that time the plaintiff Jones Bros. Publishing Company, had the sole right and liberty of printing, reprinting, publishing, completing, copying, and vending Ridpath's School History.

In 1892 the second book, "Columbus and Columbia" was published and copyright was duly obtained on March 7, 1892, by H. S. Smith. In 1896 H. S. Smith, then conducting a publishing business under the name of Historical Publishing Company, failed in business and assigned the copyright to Alexander Balfour, by whom it was assigned to Charles R. Graham, Thomas Simpson, and John D. Avil, and by them assigned to the defendant, the Historical Publishing Company. On February 3, 1912, the Historical Publishing Company in consideration of $1,600 sold and assigned to the Review of Reviews Company by a written instrument:

"(1) All of the right title, and interest of said Historical Publishing Company and all its publishing rights and copyright or any interest in any of the foregoing in or to or in connection with the following described books, to wit:

"Columbus and Columbia: Copyrighted 1892, by H. S. Smith and published by the Historical Publishing Company.

"People's History of the United States: Copyrighted April 15, 1895, by H. S. Smith (20,752–A–2).

"Ridpath's History of the United States: One-volume edition, published by Historical Publishing Company in 1902 and 1906, copyrighted by E. J. Stanley.

"Same: One-volume edition, published by Historical Publishing Company and copyrighted by C. R. Graham, 1902.

"(2) The electrotype plates from which the last edition of said Ridpath's History of the United States, above referred to, to wit, the edition copyrighted by ———, was published by said Historical Publishing Company."

On October 25, 1912, an agreement of sale was entered into between the Review of Reviews Company and the Jones Bros. Publishing Company, coplaintiffs, whereby the Review of Reviews Company agreed to sell and the Jones Bros. Publishing Company agreed to purchase, inter alia, the copyright in the book "Columbus and Columbia," the sale to be executed September 1, 1914, upon payment by the vendee of $2,500. In the agreement of sale was included the electrotype plates from which the last edition of Ridpath's History of the United States was published by the Historical Publishing Company, which plates had been sold to the Review of Reviews Company by the instrument of writing of February 3, 1912. In consideration of the agreement of sale, the Review of Reviews Company agreed that it would not publish the work nor make use of it prior to September 1, 1914, but would permit Jones Bros. Publishing Company to bring suit in the name of the Review of Reviews Company to prevent any publication of the work. The agreement of sale between the coplaintiffs was extended by the parties to the agreement for a period of 30 days after September 1, 1914, and thereafter for a period covering the month of January, 1915, and was therefore existing at the time of the hearing. On February 8, 1912, the Review of Reviews Company wrote the following letter to the Historical Publishing Company:

"February 8, 1912.

"Historical Publishing Company, Philadelphia, Pa.—Gentlemen: Since the publication rights and the copyright of Ridpath's History of the United States, originally copyrighted by H. S. Smith in 1892, as 'Columbus and Columbia,' have now passed to the Review of Reviews, it is necessary to have an agree-

ment between us in regard to the use of part of this History in your American Reference Library.

"We therefore consent to the continuation of your use of so much of this historical matter as is now incorporated in the American Reference Library without consideration to the Review of Reviews. It must be understood, however, that no part of the text of this work may be used by you for any other purpose, and that this license is not exclusive in any way, and is for the benefit of your company and its corporate successor or successors in the publication of the American Reference Library, and is not assignable.

"It is furthermore understood that, in the event of your selling the plates and publication rights of the American Reference Library, they will be sold with a special provision that this historical matter may not be used for any other purpose whatsoever.

"Yours truly, The Review of Reviews Company,
"FWS-M F. W. Stone."

The copyrighted books consist of Ridpath's School History, copyrighted in 1874, renewed in 1902, Exhibit A, at the time of the filing of the bill owned by the Jones Bros. Publishing Company, and Columbus and Columbia, copyrighted in 1892, Exhibit B, of which the legal title to the copyright at the time of the filing of the bill was in the Review of Reviews Company, and the equitable title, under the agreement of sale of October 25, 1912, was in the plaintiff, the Jones Bros. Publishing Company. The books which it is claimed infringe consist of Exhibit F, Ridpath's History of the United States, first published by the defendant, the Historical Publishing Company, in 1902, Exhibit C, History of the United States, in six volumes, copyrighted 1906 by E. J. Stanley, and containing on the title page the imprint "Philadelphia Encyclopedia Publishing Company," and Stanley Exhibit No. 1, American Reference Library, in six volumes.

A careful comparison of the copyrighted books and the books alleged to infringe was made by the plaintiffs' witness, Mr. Todhunder, of 30 years' experience as editor and publisher of books and having familiarity with their make-up. From his comparison it is satisfactorily established that the book, "Ridpath's History of the United States," Exhibit F, is printed from the same plates as "Columbus and Columbia," Exhibit B; that Exhibit C, History of the United States, by Ridpath, in six volumes, is printed from the same plates as Stanley Exhibit No. 1, American Reference Library. All four of the abovementioned exhibits, B, F, C, and Stanley No. 1, contain the same text. The text of these exhibits is substantially a copy, with more or less paraphrasing of the text, of Exhibit A.

The defendant claims a license from the Review of Reviews Company to print, publish, and sell editions from the set of plates from which Exhibit F, Ridpath's History of the United States, copyrighted by E. J. Stanley in 1906, was printed, by virtue of a reservation to that effect in an option given by the Historical Publishing Company to the Review of Reviews Company, dated December 14, 1911, for the purchase of the copyrights and plates afterwards sold and assigned by the instrument in writing of February 3, 1912. The evidence shows that this option expired before the purchase was consummated and that its terms were not carried into the assignment made February 3, 1912. After the sale and assignment of February 3, 1912, therefore, the reservation contained in the option was no longer effective, as the option was but a preliminary agreement, which led up to and was merged in the final sale under the agreement of February 3, 1912. Without the knowledge of the Review of Reviews Company, the defendant had in its possession at the time of the sale another set of plates for the matter contained in Exhibit C, the six-volume edition of History of the United States by Ridpath. As has been seen, "Columbus and Columbia," the single-volume "Ridpath's History of the United States," the six-volume "History of the United States by Ridpath," and the six-volume edition of "American Reference Library" contain the same text, so that a publication of either of the three latter volumes would infringe the copyright in "Columbus and Columbia." Under the letter from the Review of Reviews Company to the defendant of February 8, 1912, however, the defendant acquired a license covering further publication of the American Reference Library, and whatever publications or sales were made by it under that

license did not infringe the copyright which had been assigned to the Review of Reviews Company. In the letter it is stated:

"It must be understood, however, that no part of the text of this work may be used by you for any other purpose, and that this license is not exclusive in any way, and is for the benefit of your company and its corporate successor or successors in the publication of the American Reference Library, and is not assignable.

"It is furthermore understood that, in the event of your selling the plates and publication rights of the American Reference Library, they will be sold with a special provision that this historical matter may not be used for any other purpose whatsoever."

The defendant, on or about June 25, 1912, published and printed the one-volume book entitled "Ridpath's History of the United States," which contains part of the matter contained in the copyrighted book "Columbus and Columbia," and sold a copy of that book as late as April 1, 1914. The defendant has also sold since February 3, 1912, copies or sheets of books containing matter contained in the copyrighted book "Columbus and Columbia." The names of the books, of which copies or sheets have been so sold, are American Encyclopedia of History, last sold October 23, 1912; Analytical Historical References, last sold October 23, 1912; and Ridpath's History of the United States, one-volume book, above referred to, last sold April 1, 1914. The defendant claims to have published, printed, and sold the alleged infringing works under license from the Review of Reviews Company contained in the option agreement of December 14, 1911, and to have had a parol agreement with the Review of Reviews Company, prior to February 8, 1912, under which, in pursuance of the reservation contained in the option, the Historical Publishing Company, among other things, retained the right to print and sell an edition of 10,000 copies of Ridpath's History of the United States in one volume, before making delivery of the plates therefor to the Review of Reviews Company. The effect of the reservation in the option of December 14, 1911, has been already stated. Inasmuch as the subsequent agreement of license from the Review of Reviews Company was made in writing contained in the letter of February 8, 1912, the evidence of the parol negotiations leading up to the granting of the license in writing is immaterial and irrelevant and the license must be construed from the written evidence alone. Consequently the acts of the defendant in printing, publishing, and selling sheets and books containing matter contained in Columbus and Columbia, Plaintiffs' Exhibit B, except where used in printing, publishing, and selling the American Reference Library, constitute infringements of the copyright in "Columbus and Columbia," in which the Review of Reviews Company has the legal title and the Jones Bros. Publishing Company has the equitable title. Infringement cannot be predicated upon any acts of the defendant in publishing the matter contained in the copyrighted book "Columbus and Columbia," prior to the assignment of February 3, 1912. Both plaintiffs are claiming under that assignment, and are estopped to deny the rights of the defendant in the publication prior thereto of any works included in the assignment. As there is no evidence to show the date of the commencement of the title of the Jones Bros. Publishing Company, plaintiff, in the copyright of Exhibit A, Ridpath's School History, the plaintiffs have not established infringement of that work.

It appears that on July 1, 1913, the Historical Publishing Company, through its vice president, made an offer in writing to one G. H. Wooling, of Indianapolis, Ind., to publish a new 5,000 edition of the Ridpath History in six volumes on a royalty basis and to arrange for a canvassing and sale of this edition. This is sufficient to sustain the allegations in the bill of the defendant's threats of infringement of "Columbus and Columbia," prior to the time of the filing of the bill. But there is nothing to show that at that time Jones Bros. Publishing Company had any interest in the copyright to Ridpath's School History, so that there is no evidence of infringement or threatened infringement of that work for which Jones Bros. Publishing Company was entitled to sue when the bill was filed.

Considerable evidence was received subject to the plaintiffs' objection intended to show that the Jones Bros. Publishing Company had not an exclusive copyright to the Ridpath's School History by reason of a certain agreement in

writing, not produced or satisfactorily accounted for, alleged to have been made about 1893. The conclusion reached that Jones Bros. Publishing Company has failed to establish their title to the copyright in Ridpath's School History prior to any alleged infringing acts of the defendant renders unnecessary a ruling upon the questions of relevancy, materiality, or competency of that evidence.

A decree may be entered in favor of the plaintiffs finding infringement, in accordance with this opinion, for an injunction restraining such infringement, for profits, for damages suffered by the respective plaintiffs, due to the infringement, to be assessed in the amount of $1 for every infringing copy made or sold by or found in the possession of the defendant, its agents, or employés, and for the delivery upon oath for destruction of infringing copies, with reference to a special master to ascertain and report the amount of profits and damages payable to the respective plaintiffs.

Archibald Cox and Robert W. Byerly, both of New York City, for plaintiffs.

Hector T. Fenton, John Weaver, and Frederick A. Blount, all of Philadelphia, Pa., for defendant.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The bill in this case puts the jurisdiction of the court below on two grounds: (1) Diversity of citizenship; and (2) the copyright statutes of the United States. The action was brought on August 15, 1913, by the Jones Publishing Company and the Review of Reviews Company, and charged the Historical Publishing Company and certain individuals with infringement and threatened infringement of two copyrighted books. The title of the first may be summarized as "Ridpath's School History of the United States"; the title of the second is "Columbus and Columbia." The offending publications are charged to infringe the two copyrights conjointly, but in any event no question of misjoinder either of parties or of subject-matter has been raised. The somewhat complicated facts are detailed in Judge Thompson's opinion, and we need not add much to his statement, although we are obliged to disagree in part with his conclusions. After a hearing on pleadings and proofs, he dismissed the bill altogether as to the individual defendants, and (as far as the School History is concerned) dismissed it also as to the corporation defendant, the Historical Publishing Company, "for lack of proof of title in said plaintiffs at any date prior to the filing of the bill." As far as "Columbus and Columbia" is concerned, he sustained the bill, enjoined the Historical Publishing Company from printing, publishing, selling, etc., certain infringing books, and ordered an account for damages and profits. Both parties have appealed, and the first subject for consideration is the defendant's motion to dismiss the plaintiffs' appeal.

[1] The motion rests upon the authority of Ex parte National Enameling Co., 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707, and need not be discussed at length, as we have had occasion recently to examine and decide the same question in Ward Baking Co. v. Weber Bros., 230 Fed. 142, —— C. C. A. ——. The opinion in that case will be reported in due season, but we may restate briefly what was there decided, namely: That section 129 of the Judicial Code allows a plaintiff

to appeal, if an injunction be refused or dissolved by an interlocutory order or decree (thus remedying the situation presented in Ex parte National Enameling Co.); and that the partial dismissal of such a bill as the one before us is the clear equivalent of a refusal. The motion to dismiss is therefore overruled.

[2] 1. We think the plaintiffs' appeal must be sustained. It is true that no evidence was offered to prove that the Jones Company's title to the copyright of the School History antedated the bill, and of course, therefore, no previous conduct of the defendant would be an infringement in fact. But we think the court below overlooked the precise situation presented by the pleadings and proofs. In paragraph VI the bill distinctly avers that the plaintiffs had title at the date of filing, and the answer expressly admits this averment. If, therefore, the evidence shows that the defendant was then threatening to infringe the copyright, the plaintiffs were entitled to protection, although no actual infringement had as yet taken place. One of the objects of an injunction is to restrain the future commission of injurious acts, for a suit at law is the appropriate remedy for acts that have already been done. If authority be needed for so elementary a proposition, it may be found in Woodworth v. Stone, Fed. Cas. No. 18,021, Page, etc., Co. v. Land (C. C.) 49 Fed. 936, Canton Steel Co. v. Kanneberg (C. C.) 51 Fed. 601, and National Meter Co. v. Thomson Meter Co. (C. C.) 106 Fed. 531.

[3, 4] On this point of threatened infringement the District Court has no occasion to consider the evidence, and we have therefore examined it, and are satisfied that at the time of filing the bill the plaintiffs had reasonable ground to anticipate that the defendant was about to interfere with their right. In view of the express admission in the answer, the attempt that is made to attack the plaintiffs' title cannot be considered. We have also considered the alternative defense that, even if the plaintiffs' title in August, 1913, be assumed, they did not have an exclusive copyright in the School History. This defense is based upon a written agreement—alleged to have been made in 1892 or 1893, but not produced and not satisfactorily accounted for—under which the defendant claims a license to do the acts that we have referred to as a threatened infringement. The District Judge did not make a definite finding on this subject, but evidently he was not impressed by the evidence, and we share the opinion he intimates. There are several sufficient objections to this defense, but we content ourselves with pointing out that in 1892 the American Book Company was the owner of the copyright, and that the right of the plaintiffs and the defendant to make any agreement concerning it was not explained. We feel justified in disregarding the oral evidence on this subject, and in holding that an injunction should have been awarded, but restricted in scope as hereinafter stated.

[5] 2. With reference to "Columbus and Columbia" we see no occasion to add anything to what the District Court has so well said. But we think the scope of the injunction is somewhat too wide. The infringing matter is contained in a red volume entitled "Ridpath's History of the United States," and in a six-volume publication entitled "His-

tory of the United States and Dictionary of Events—Ridpath." But, as it also appears that only part 3 of the red volume, and volumes II and III of the other publication, are made up of the infringing material, and as part 3 and volumes II and III can apparently be separated from the other material, we think the injunction should be confined to the parts that infringe. We see no reason why the defendant should not be permitted to rearrange these publications if it should see fit to do so, omitting the offending matter, and to sell the noninfringing pages for what they really are, namely, the work of other hands than Ridpath's. This modification will no doubt be made on application to the court below.

[6, 7] We agree with the court below in holding that the agreement of October 25, 1912, vested the equitable title to "Columbus and Columbia" in the Jones Company, and therefore gave that company a sufficient interest in the pending bill. But, even if such a title did not pass, the Review of Reviews Company would then continue to be the owner of the whole title, and of course would be authorized to sue. And in this connection we may repeat that no question of misjoinder was raised by the pleadings, and therefore cannot be raised now.

At present we have nothing to do with the disposition that may be made of the plates that have been seized.

The result of both appeals, therefore, is to reverse the decree on No. 2076, and to direct the issuing of an injunction as to the first copyright, and on No. 2071 to affirm the decree as modified in accordance with this opinion.

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

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

No. 56.

1. COPYRIGHTS ⊜85—INJUNCTION—DENIAL OF RELIEF—FAILURE TO DO EQUITY.

R. agreed to sell and assign to defendant all musical compositions written during the period of five years. In violation of his legal and moral obligation under this agreement, he assigned a musical composition to other parties, who had it copyrighted. *Held*, that his assignees, who stood in his shoes, were not entitled to an injunction restraining defendants from infringing the copyright, as R. committed iniquity, and did not come into court with clean hands, and his misconduct was, for the purposes of the suit, the misconduct of those standing in his shoes.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. ⊜85.]

2. EQUITY ⊜54—DENIAL OF RELIEF—UNCONSCIONABLE RELIEF.

A court of equity is a court of conscience, and within the scope of its powers is governed by its own rules, and withholds aid whenever it is asked to do that which it deems to be against conscience.

[Ed. Note.—For other cases, see Equity, Dec. Dig. ⊜54.]

3. COPYRIGHTS ⊜85—INJUNCTION—DENIAL OF RELIEF—FAILURE TO DO EQUITY.

That an injunction is asked to protect a copyright does not take the case out of the general principle that an injunction will not be granted to

one who has not done equity and does not come into court with clean hands.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. ⊂=85.]

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

On rehearing. Former order vacated, and order of the District Court affirmed.

For former opinion, see 229 Fed. 42, — C. C. A. —.

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

Cohen & Richter, of New York City, for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This cause was argued in this court on October 22, 1915, and a decision was rendered in which we directed the District Court for the Southern District of New York to issue an injunction pendente lite to restrain the defendants from infringing plaintiff's copyright in a musical composition entitled "Oh, Those Days." We decided the case as we did because the record contained a judgment entered in the Supreme Court of the state of New York in a suit between the same parties or their privies, and that judgment had dismissed the complaint on the ground that the contract entered into between Romberg and the plaintiffs in that suit was unequitable and lacked mutuality of obligations and remedy. As there can be no contract where there is no mutuality of obligation we considered that judgment as res adjudicata of this controversy. That suit had been brought by the defendants in this suit against Sigmund Romberg, the Shubert Theatrical Company and Jacob J. Shubert, and the plaintiffs in this suit derived their rights through an assignment by Romberg to the Winter-Garden Company of New York which in turn assigned to them.

In December, 1915, an application for a reargument was made. That application was based on the claim that the New York judgment was not in fact as it had been disclosed in the record. We filed a per curiam opinion on January 5, 1916, in which we said:

"Application has been made for a reargument, and with such application there has been filed a copy of the printed case on appeal to the Appellate Division in said cause in the state court. This printed case on appeal apparently indicates that the state Supreme Court amended its judgment, subsequent to original entry, so that its disposition of the issues before it is different from what it was in the original judgment.

"The mere filing of this paper book in no way changes the situation here; the only record before us is the record certified to this court by the United States District Court. We will, however, withhold mandate from issue during this session, so that the counsel, who has moved for reargument, may make application, on notice, on one of our regular motion days, for such relief as he may be advised, to show, if he can, that the state court did not hold the contract sought to be enforced invalid at law, and so operate to deprive his client of the opportunity to obtain a decision on the merits of this cause in the federal courts." 229 Fed. 50, — C. C. A. —.

Subsequently there was presented to this court the record of the case in the New York court, and the parties on both sides stipulated in

open court that the judgment roll in the action in the state court was correctly set forth in the printed appeal book entitled "Case on Appeal." It appears now that in the action in the Supreme Court of New York judgment was rendered on December 23, 1914, in which it was "ordered, adjudged and decreed that the complaint herein be and the same hereby is dismissed upon the merits." It appears, also, that on January 19, 1915, the justice who tried the case resettled the judgment making it read as before but striking therefrom the words "upon the merits." It appears, further, that under the New York Code of Civil Procedure a final judgment dismissing the complaint, either before or after trial, does not prevent a new action for the same cause of action unless it expressly declares, or it appears from the judgment roll, that it is rendered upon the merits. Section 1209, New York Code of Civil Procedure. We, therefore, consider that this court is at liberty, as our mandate has not yet been sent down, to take up this appeal for further consideration.

[1, 2] The contract which Romberg made need not be set out in full. The main portion of it was stated in our former opinion. In it Romberg agreed with the present defendants that he would "sell, assign, transfer and set over and vest" in them the right to print, publish and sell all compositions which he might write during a period of five years from the date of the agreement. Romberg expressly agreed in the contract that he transferred to Stern & Co., defendants herein, the sole and exclusive publishing right [copyright] of all the compositions "which he is going to write during the next five years." The contract also stated that "in compensation for this transfer of the copyright Stern & Co. will have to pay to Mr. Romberg a share of profits on each copy of each composition, as follows." Then followed a detailed statement as to the royalties to be paid, which it is not important to set forth herein. For reasons stated in our former opinion, and which we do not now find it necessary to enlarge upon, this agreement constituted a valid and binding contract supported by a valuable consideration. The contract was a valid executory agreement to sell, and the breach of the agreement could be redressed in an action at law for damages. We are not now concerned with whether it could or could not be enforced specifically in a court of equity. It is enough for us at this time to know that the contract is a valid contract and that it imposed a legal and moral obligation upon Romberg which he has seen fit since to repudiate and renounce.

The plaintiffs in this suit who have succeeded to his rights by successive assignments can claim in this court no greater rights than Romberg the assignor could himself assert. If Romberg, having entered into this valid agreement to sell and assign to these defendants the musical production herein involved, and having repudiated his agreement and taken out a copyright in his own name, had then come into a court of equity to obtain an injunction as against these defendants, restraining them from publishing the song, could he have succeeded? If he could not, the plaintiffs in this suit are not entitled to an injunction for they stand in his shoes. As assignees their rights are subject to the equities of these defendants as against Romberg the assignor.

The answer to the question does not depend upon whether the original contract Romberg made with the defendants can or cannot be specifically performed. The plaintiffs are in a court of equity which is a court of conscience, which within the scope of its powers is governed by its own rules. It stays its hand and withholds its aid whenever it is asked to do that which it deems to be against conscience. If it is asked to decree specific performance of a valid written contract for the sale of real estate, it refuses to do so and leaves the parties to their rights at law, if it concludes that the party invoking its aid has wrongfully conducted himself in respect to the contract or if the circumstances show that its enforcement would be harsh and unfair. Thus in Mortlock v. Buller, 10 Vesey, Jr., 292, Lord Eldon, in 1804, said:

"It is much too late to discuss now whether this court ought to order a contract that it would not specifically perform, to be delivered up and to decree the performance of a contract which it would not order to be delivered up; for the distinction is always laid down that there are many cases in which the party has obtained a right to sue upon the contract at law, and under such circumstances that his conscience cannot be affected here, so as to deprive him of that remedy; and yet on the other hand the court, declaring he ought to be at liberty to proceed at law, will not actively interpose to aid him and specifically perform the contract."

And so it has been held that equity will not decree the specific performance of a contract where to do so would necessitate a breach of a prior contract with a third person. Fry on Specific Performance (5th Ed. with Canadian Notes) § 407. And in similar fashion equity will withhold an injunction when it would be against conscience to grant it. This is based upon the principle that he that hath committed iniquity shall not have equity. As the Supreme Court said in Creath's Administrator v. Sims, 5 How. 192, 204, 12 L. Ed. 111 (1847):

"Whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith. * * * This prayer, too, is preferred to a court of conscience, to a court which touches nothing that is impure. The condign and appropriate answer to such a prayer from such a tribunal is this: That, however unworthy may have been the conduct of your opponent, you are confessedly in pari delicto; you cannot be admitted here to plead your own demerits; precisely, therefore, in the position in which you have placed yourself, in that position we must leave you."

And see Pope Mfg. Co. v. Gormully, 144 U. S. 224, 236, 12 Sup. Ct. 632, 36 L. Ed. 414 (1891); Haffner v. Dobrinski, 215 U. S. 446, 450, 30 Sup. Ct. 172, 54 L. Ed. 277 (1910); Barnes v. Starr, 64 Conn. 136, 155, 28 Atl. 980 (1894); McCusker v. Spier, 72 Conn. 628, 633, 45 Atl. 1011 (1900); Rudnick v. Murphy, 213 Mass. 470, 471, 100 N. E. 643, Ann. Cas. 1914A, 538 (1913).

In our opinion the plaintiffs do not come into this court with clean hands. Their misconduct relates to the matter now in litigation. Their right is the right of Romberg and the latter's misconduct is for the purposes of this suit theirs. Having agreed by a binding contract to assign this song to these defendants, he has not done as he agreed, but has repudiated the legal and moral obligation which the agreement imposed upon him. In doing so he has committed iniquity as respects

this copyrighted song and the relation of these defendants thereto. And with his hands thus unclean he has no standing in a court of equity in asking an injunction to restrain these defendants from exercising a right which he bound himself to give exclusively to them. As the plaintiffs stand in his shoes we must decline to grant them what we could not grant to Romberg.

[3] There is nothing in the fact that the injunction is asked to protect a copyright which takes the case out of the general principle to which we have referred. In Kerr on Injunction (5th Ed.) 413, the rule is laid down respecting the right to an injunction in copyright cases as follows:

"The interference of the court by injunction being founded on pure equitable principles, a man who comes to the court must be able to show that his own conduct in the transaction has been consistent with equity. A book accordingly which is itself piratical cannot be protected from invasion, nor will the court protect by injunction a work which is of an immoral, indecent, seditious or libelous nature, or which is fraudulent."

The rule thus stated is well established, and the particular instances the author mentions are not intended to be exhaustive, but simply illustrative of the principle applicable in such cases.

In view of the changed judgment entered in the suit brought in the Supreme Court of New York, to which we have herein referred, this court vacates the order it originally made in this suit, and the order of the District Court is affirmed.

DOYLE v. FIRST NAT. BANK OF BALTIMORE.

(Circuit Court of Appeals, Fourth Circuit. February 18, 1916.)

No. 1390.

BANKRUPTCY ⇐⇒407(5)—DISCHARGE—STATEMENT TO OBTAIN CREDIT—"FALSE."

A member of a bankrupt firm, who did not prepare the false statement, and who knew nothing of its contents, and did not know of the falsity of the statement which he did sign, cannot be denied a discharge under Bankr. Act July 1, 1898, c. 541, § 14b, cl. 3, 30 Stat. 500, as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (Comp. St. 1913, § 9598), entitling him to a discharge, unless he had obtained money on a materially false statement in writing made by him, since "false" means that which is not true, coupled with a lying intent, and in jurisprudence imports more than the vernacular sense of erroneous or untrue (quoting Words and Phrases, False).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761; Dec. Dig. ⇐⇒407(5).]

Appeal from the District Court of the United States for the District of Maryland, at Baltimore, in Bankruptcy; John C. Rose, Judge.

Bankruptcy proceedings against Daniel H. Doyle, trustee, and as copartner of J. Herbert Waite. From a decree denying discharge in

bankruptcy on the objection of the First National Bank of Baltimore (In re Waite, 223 Fed. 853), the bankrupt appeals. Reversed.

Edward M. Hammond, of Baltimore, Md. (R. Bennett Darnall, of Baltimore, Md., on the brief), for appellant.

Frederick C. Colston, of Baltimore, Md. (Venable, Baetjer & Howard, of Baltimore, Md., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the District of Maryland, wherein the bankrupt was denied a discharge.

It appears that the firm of John Turnbull, Jr., & Co. had, at the date of the institution of this proceeding, been engaged in the furniture business in Baltimore for a number of years. The firm was originally composed of John Turnbull, Jr., Samuel R. Waite, Daniel H. Doyle, and J. Herbert Waite. Samuel R. Waite and J. Herbert Waite were the son-in-law and grandson, respectively, of Mr. Turnbull. John Turnbull, Jr., died in the year 1910. In his will he disposed of his interest in the firm of John Turnbull, Jr., & Co., as follows:

"Tenth. It is my present intention to continue the existing partnership with Samuel R. Waite, Daniel H. Doyle and J. Herbert Waite, under the firm name of John Turnbull, Jr., and Company until May 1st, 1915. In case such extension of the partnership is made, or in case I die before making said extension, and said Samuel R. Waite, Daniel H. Doyle and J. Herbert Waite should form a partnership for the purpose of carrying on the business of importers and dealers in carpets and furniture, as now carried on, I authorize and direct my executors to allow my capital in the business as the same may be ascertained at the time of my death to remain until May 1st, 1915. After my said capital has been ascertained I direct that there shall be charged to my capital account and credited to the capital account of my grandson, J. Herbert Waite, the sum of five thousand dollars as a legacy to him, and after charging said amount the balance of my capital thus ascertained is to bear interest at the rate of six per cent. per annum, and there is to be paid out of said interest to my executors the sum of five thousand dollars per annum in equal semi-annual installments accounting from the day of my death, and the balance of said interest is to be added to the principal and is to remain in the business until the expiration of said term of five years from the formation of said partnership. * * * After May 1st, 1915, I direct that my said capital and the surplus interest thereon shall be collected by my executors from said firm, and they shall then pay out the following legacies."

The sum of $105,000 was left in the firm of John Turnbull, Jr., & Co. by the executors in accordance with the directions contained in the will of John Turnbull, Jr. On the 1st of October, 1910, a new partnership agreement was drawn up between Messrs. Waite, Doyle, and Waite. It was then agreed that the capital of John Turnbull, Jr., should be credited to his estate on the books of the new firm as a liability of that firm. Under this agreement the business continued until the date of the filing of the petition in bankruptcy. In 1912 Samuel R. Waite died, and the business was thereafter conducted under the terms of the same partnership agreement as hereinbefore mentioned. Prior to his death the firm kept an account at the National City Bank and had there borrowed on their notes the sum of $22,500. Sam-

uel R. Waite had been a member of the board of directors of the National City Bank. The First National Bank of Baltimore took over the assets of the National City Bank, and with these assets the obligation of the firm of John Turnbull, Jr., & Co. This $22,500, made up of several notes originally given to the National City Bank, was gradually reduced, until at the filing of the bankruptcy proceedings the firm only owed $13,500.

It appears that upon the maturity of each note the company would pay a part of the same and renew the balance. The witness Waite testified as to the method of renewing these notes as follows:

"So that when the note came due for $5,000 they made out a new note for $4,000 in renewal of or for $4,500, and sent down a note for $4,500; in the case of the one due December 29th, they sent down on the 26th a note for $4,000, together with a check for $1,000, and handed them in at the discount clerk's window, and went away; * * * that there was no new money whatever; that they would send down a check for the total amount of the loan; and on referring to the firm's check book to give an illustration of the method used showed how, for instance, on November 25, 1914, a check was drawn in favor of the First National Bank for $4,000, which took up the note maturing that day, and then the bank was given a new note dated November 24th and maturing February 24th for $3,000."

Henry B. Wilcox, president of the First National Bank, in describing the method by which the $22,500 was reduced to $13,000, testified as follows:

"These notes are extension notes—for instance, there is one for $5,000 due February 24th, and witness presumed that they brought that down, and it was discounted and took up the note that was due that time; but, if it was not a full renewal, they came down on that date and with the proceeds took up a note that was due at that time."

Witness Wilcox also testified:

"That when the notes would become due Turnbull & Co. would pay something on account of them and then renew; that they would not wait until the note was due to renew it; that is, on the date of the maturity of the new note, the old note would be discounted a day or two in advance, and it will be noted that on January 7th that note was renewed by paying $500 and the bank discounted $7,000."

Thus it will be seen that no new money was obtained at the time the renewal notes were discounted, but, on the other hand, the $22,500, by reason of partial payments and renewals for the balance, was gradually reduced from time to time; and it further appears from the testimony that the bank refused to loan the firm any new money.

It was shown that the alleged false statement upon which it is contended that money was fraudulently obtained from the bank was prepared by E. C. Winter, the bookkeeper, and J. Herbert Waite, who at the time was managing the financial end of the business. It is also shown that, after the death of Samuel R. Waite, J. Herbert Waite managed the financial affairs of the firm. Mr. Waite testified that the duties of appellant were those of salesman, and that he had nothing whatever to do with the firm's financial arrangements. Appellant testified on cross-examination that he never signed any statements that were sent to the bank, except the one dated January 31, 1913, and

that he did not understand its contents; further that during the entire time he was connected with the firm he did not believe that he ever looked at any of the statements made by the firm to the banks. This testimony is uncontradicted.

On February 3, 1915, the petition was filed against this firm, and on April 12, 1915, the appellee, the First National Bank of Baltimore, which is objecting to the discharge of Mr. Doyle, filed exceptions to the allowance of the claim of Josephine T. Waite, executrix of the estate of John Turnbull, Jr., deceased, in which they claimed that the money left by him in the business is liable for the debts of the bankrupt firm and should not be considered as a loan by the estate to the bankrupts. On April 20, 1915, the bank filed its specifications objecting to the discharge of Doyle upon the ground that the firm of John Turnbull, Jr., & Co. obtained money on credit from them upon a materially false statement in writing made to them for the purpose of obtaining moneys on credit, the alleged false statement being dated January 31, 1914.

It is insisted that the statement that the firm of John Turnbull, Jr., & Co. is false, in that it did not show that they owed the estate of John Turnbull, Jr., the sum of $100,629.48. The appellant was denied his discharge in pursuance of the amendment of 1910 to the Bankruptcy Act of 1898, known as section 14, subsection b, clause 3, wherein it is provided that the court after a hearing shall permit the discharge unless the bankrupt has:

"3. Obtained money or property on credit upon a materially false statement in writing made by him to any person or representative for the purpose of obtaining credit from such person."

Thus it appears that, unless the bankrupt obtained money or property on credit upon a materially false statement in writing made by himself to any person or representative in order to obtain credit from such person, he is entitled to a discharge. It is well settled by the courts that the ground upon which he is denied his discharge is that the statement made is knowingly and intentionally false. The facts in this case, most of which are not in dispute, show very clearly, first, that appellant had no knowledge of the statement in question; and, second, the evidence shows most conclusively that they were not intentionally untrue. This view is sustained by Collier in his work on Bankruptcy (10th Ed.) p. 351, in the following language:

"The creditor alleging this objection must prove that the bankrupt (1) obtained money or property on credit, that he did so on (2) a statement of his financial condition relied on by the creditor that such statement was (3) in writing, that it was (4) materially false, and (5) that it was so made to the creditor or his representative (6) for the purpose of obtaining credit from such creditor. To these should be added the usual elements, that the obtaining of property must have been (7) by the bankrupt or by some one duly authorized by him."

This court in an opinion by Judge Keller, in the case of Frank v. Michigan Paper Company, 179 Fed. 776, 103 C. C. A. 268, 30 L. R. A. (N. S.) 623, said:

"Under the existing statute the question of what will bar a discharge has now been passed upon by at least three * * * Circuit Court of Appeals, and all of these decisions are in substantial harmony in holding that the bar to a discharge by reason of a false statement in writing is confined to such person or persons as actually made such statement with the intention to deceive."

In the case of Gilpin v. Merchants' Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023, Judge Gray in referring to this section said:

"* * * It seems to us clear that the plain language of this third clause of section 14b requires that the * * * statement made by the bankrupt, for the purpose of obtaining credit, etc., should be knowingly and intentionally untrue, in order to constitute a bar to the discharge of the bankrupt. In other words, 'false statement' connotes a guilty scienter on the part of the bankrupt."

Also, in the case of Peck v. Lowenbein, 178 Fed. 178, 101 C. C. A. 498, this court reached the same conclusion. In that case it appears that Lowenbein prepared and signed a statement which was false; but it was shown by the evidence that Owens, his partner, furnished the information from which he prepared the statement. However, it also appeared that Lowenbein knew nothing of the truth or falsity of the statement of facts upon which he prepared his statement. The court in disposing of the case, among other things, said:

"It is the evident purpose of the Bankruptcy Act to protect that unfortunate class of debtors who are unable to pay their debts by giving them a discharge, thus affording them an opportunity to engage in business again, while, on the other hand, it is manifestly intended to deny a discharge to those whose conduct has been such as to show that they obtained credit by false statements calculated and intended to deceive and thereby defraud their creditors. Construing the act with these ends in view, it would be manifestly unjust to deny a discharge to a debtor when it appears, as it does in this instance, that the statement which he made was not actuated by any fraudulent purpose. This finding of fact has been approved by the learned judge who heard the case below, and is within itself conclusive in so far as the question involved in this controversy is concerned."

In the case of Franklin v. Monning Co., 33 Am. Bankr. Rep. 257, 217 Fed. 929, 133 C. C. A. 601, in referring to this phase of the question, the court quotes the definition of the word "false" from Words and Phrases, which is as follows:

"'False means that which is not true, coupled with a lying intent.' 'False in jurisprudence naturally imports something more than the vernacular sense of "erroneous" or "untrue."'"

There are other grounds upon which appellant relies, but we do not deem it necessary, in view of what we have said, to discuss the same. It appearing that the statement of December 15, 1914, was not prepared by appellant and that he knew nothing of its contents, and it also appearing that he had no knowledge as to the character of the statement which he signed, we think, in view of the rule as announced in the cases above cited, that the court below erred in refusing to grant a discharge.

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

WALDO et al. v. WILSON.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1916.)

No. 1386.

1. TRIAL ⟸11(2)—EQUITY JURISDICTION —TRANSFER FROM LAW SIDE.
There is no statute authorizing the court, where a suit for equitable relief is brought on the law side of the court, to transfer it to the equity side, and equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), providing for a transfer from the equity to the law side, does not authorize a transfer from the law to the equity side.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 29; Dec. Dig. ⟸ 11(2).]

2. TRIAL ⟸11(1)—EQUITY JURISDICTION—TRANSFER FROM LAW SIDE.
Judicial Code, § 274a, as added by Act March 3, 1915, c. 90, 38 Stat. 956, providing that, where a suit at law has been brought in equity or a suit in equity has been brought at law, the court shall order any amendments necessary to conform the pleadings to the proper practice, and any party shall have the right to amend, relates only to the power of the court in a case where a suit has been improperly brought either on the equity or law side, and authorizes amendments to have the pleadings conform to the proper practice.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 28; Dec. Dig. ⟸ 11(1).]

3. TRIAL ⟸11(1)—EQUITY IN JURISDICTION—TRANSFER FROM LAW SIDE—STATUTES.
Even if that section authorized a transfer of a suit in equity, improperly brought on the law side of the court, to the equity side, it could not relate back, so as to validate a transfer made before it was enacted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 28; Dec. Dig. ⟸ 11(1).]

4. ACTION ⟸64—"COMMENCEMENT" OF EQUITY SUIT.
A suit in equity is begun by filing the original bill, not by the issuance of summons.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 725–734; Dec. Dig. ⟸64.

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

5. COURTS ⟸335(1), 336—RULES OF PROCEDURE—STATE LAWS.
Rev. St. § 914 (Comp. St. 1913, § 1537), providing that the practice, pleadings, etc., in civil causes other than equity and admiralty causes, in the District Court, shall conform to those in like causes in the courts of record in the state, does not require the United States courts in the trial of equity and admiralty causes to conform to the procedure in like causes in state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 899, 902, 903, 906, 907; Dec. Dig. ⟸335(1), 336.]

6. COURTS ⟸492—CONCURRENT JURISDICTION—INSTITUTION OF SUIT.
Where an action was instituted by the issuance of summons in the federal court, which was thereafter determined to be a suit in equity and ordered transferred to the equity side, the issuance of the summons could not be considered the beginning of the suit in equity, so as to give the federal court jurisdiction as against a suit in the state court begun between the issuance of the summons and the filing of the complaint.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1345; Dec. Dig. ⟸492.]

7. COURTS ⊂=508(1)—JURISDICTION—INJUNCTION AGAINST STATE COURTS

The federal courts will restrain proceedings in a state court only to enforce a decree or judgment of a United States court, or against a party who, after jurisdiction over him and the cause was fully vested, resorted to proceedings in the state court necessarily in conflict with the jurisdiction of the United States court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1418; Dec. Dig. ⊂=508(1).]

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

Suit by W. L. Wilson against Frank Waldo and another. From an order of the District Court refusing to dissolve an injunction (221 Fed. 505), defendants appeal. Reversed, with instructions.

John S. Adams, of Asheville, N. C. (James H. Merrimon, of Asheville, N. C., on the brief), for appellants.

Julius C. Martin, of Asheville, N. C. (Martin, Rollins & Wright, of Asheville, N. C., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an appeal from an order of the District Court of the United States for the Western District of North Carolina refusing to dissolve an injunction which had been granted to stay proceedings in a state court. The statement of facts by the learned judge who heard the case in the court below is as follows:

"There is no controversy about the facts. On the 28th of August, 1913, Wilson the present plaintiff, caused a summons to issue from the District Court of the United States at Greensboro, returnable to December term, 1913, at Greensboro. This summons called upon the defendants, Frank Waldo and Leonard Waldo, to appear at the said term and answer the complaint then to be filed; and said summons was served on the 3d of September, 1913; on the 30th of August, two days after the issuing of the summons from the United States court as above stated, Frank Waldo and Leonard Waldo procured a summons to be issued from the superior court of Graham county, returnable to an ensuing term, in which said summons W. L. Wilson, the plaintiff here, was made defendant. This summons was served on Wilson September 3, 1913. It is admitted that the subject-matter of both suits was a tract of land in the county of Graham, and it is also admitted that Frank Waldo and Leonard Waldo are nonresidents of the state of North Carolina, and W. L. Wilson, a resident of said state; and it is further admitted that the matter in controversy exceeds three thousand ($3,000.00) dollars, exclusive of interest and costs. At the December term, 1913, of the United States District Court at Greensboro, upon motion of the attorneys for the plaintiff, Wilson, the case was transferred to Asheville (Graham county being in that division), and thereafter on motion of plaintiff the cause was transferred to the equity side of the docket, and the plaintiff filed a bill seeking to remove a cloud from the title of the land in Graham county, which it was alleged existed by reason of certain title or interest which the defendants claimed. The plaintiffs in the state court suit filed their complaint in ejectment, and the defendant, Wilson, answered, setting up the fact that a suit, involving the same subject-matter between the same parties, had been instituted and was pending in the United States District Court, before the institution of the state court suit; a motion to dismiss, on that ground, was refused by the state court. The plaintiffs in the suit in the state court are about to proceed to try the case there, and now comes the motion for restraint as above stated. The defendants here oppose

the motion for injunction on the ground that the issuing of a summons in the federal court is the commencement of an action at law, and that the commencement of a suit in equity is by the filing of a bill, and thereupon the issuing of a subpœna in equity, returnable at rule day and not to a regular term; that, therefore, the suit pending here was not begun until the bill was filed. The question presented, therefore, is whether or not the summons, which Wilson caused to issue on the 28th of August, 1913, which was followed by a bill in equity, was the institution of a suit, which gave this court original jurisdiction. It is admitted that the subject-matter involved and the parties to both actions are the same."

This being a suit where the jurisdiction of the state and federal courts is concurrent, the decision hinges upon the question as to which court first acquired jurisdiction. It appears that the complaint filed by the plaintiff in the court below is in the nature of a bill in equity, and as such contains a prayer for equitable relief, notwithstanding it was instituted on the law side of the docket. The court upon a demurrer held that inasmuch as the complaint was in the nature of a bill in equity that it was improperly brought on the law side of the court, and thereupon transferred the same to the equity side. This raises the question as to whether the court under the law as it existed at that time had the power to make such transfer.

[1] After an exhaustive examination we fail to find any statute which authorizes the court in a case where, as in this instance, a suit for equitable relief is brought on the law side of the court, to transfer the same to the equity side. Equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) provides that where a suit commenced in equity should have been brought as an action on the law side of the court that:

"It shall be therewith transferred to the law side of the docket and there proceeded with, with only such alterations in the pleadings as shall be essential."

If this had been a suit improperly instituted on the equity side of the court, then the court would have had the right to transfer it to the law side of the docket; but this rule cannot be construed so as to authorize the court to transfer a case from the law side of the court to the equity side.

[2] It is insisted that the court below acted in pursuance of section 274a of the new Judicial Code, as amended by Act March 3, 1915, c. 90, 38 Stat. 956, in transferring this case to the equity side of the court. The section in question is in the following language:

"That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

This section relates only to the power of the court in a case where a suit has been improperly brought, either on the equity or the law side of the court, and provides that the same be amended so as to have the pleadings conform to the proper practice.

[3] Even if this section authorized the transference of a cause from the law to the equity side of the court it would not apply to the case at bar, and could not be construed as relating back so as to defeat the jurisdiction of the state court if it had already been acquired, inasmuch as it was enacted subsequent to the date of the institution of this suit and its transfer to the equity docket.

However, it is contended that even though the court was without power to transfer the cause to the equity side of the court, that inasmuch as the complaint, which is in the nature of a bill in equity, under the order of the court having been filed on the equity side of the court, it should be treated as a bill properly filed in equity, and that for the purpose of determining which court first acquired jurisdiction it should relate to the date of the issuance of the summons.

[4] The method by which a suit in equity may be instituted is very simple. Section 99 of Bates on Federal Equity Procedure, volume 1, which refers to this question, is as follows:

"A suit in equity in the Circuit Courts of the United States is commenced by the filing of an original bill in the clerk's office, and the issuance thereon of a subpœna, and its service upon the defendant and return. An equity rule provides that 'the process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill'; and another equity rule provides that 'no process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office'; and by another equity rule it is provided that 'upon the return of the subpœna as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.' Under these rules which have the force of law, there is no suit 'pending in the court' until the subpœna has been actually served and executed upon the defendant and returned to the clerk's office; and this was substantially the English practice. It is said that 'this writ [the subpœna] must be issued and served upon all the parties defendant to a bill (except the Attorney General, who being an officer of the crown, always supposed to be present in court, is, as we have seen, merely attended with a copy of the bill), before a cause can be properly said to be commenced.'"

The Supreme Court of the United States in the case of Farmers' Loan, etc., Co. v. Lake St. Rd. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, said:

"The contention that the jurisdiction of the state court first attached because, although the suit therein was not commenced till after the commencement of the suit in the federal court, the summons issued by the state court was served before the service of the writ of subpœna issued by the federal court, is not well founded. A suit in equity is commenced by filing a bill of complaint. Story's Equity Pleading (4th Ed.) § 7. * * *"

The learned judge who heard the case in the court below, in discussing this phase of the question, among other things, said:

"Under the North Carolina practice act, there is but one form of action, which is by summons. This act followed upon the abolition of the distinction between courts of law and courts of equity; and when parties are brought into court by summons, the plaintiff can file his complaint alleging a legal cause of action or an equitable cause of action, or can combine both as he may elect. The fact that the distinction between the courts of law and of equity has been abolished in North Carolina, and a practice adopted in accordance therewith, and the further fact that the distinction between the two jurisdictions is still preserved in the federal courts confronts us frequent-

ly with some difficulty. It, at least, occasionally occurs that a case removed from the state court to the federal court involves both a legal and an equitable cause of action, and when it comes into the federal court, of course, the case must be divided; or if a cause is commenced in the state court, which is based upon an equitable cause and is removed to the federal court although such cause was commenced by a summons, yet when it reaches the federal court it is docketed upon the equity side. With these conditions existing it is easily to be seen how readily the profession in this state can be confused to some extent in commencing actions in the federal court. Now, the United States statute provides that the federal courts shall adopt as near as may be, the practice in use in the states, in which such courts are held. Whilst this would not, perhaps, supplant the equity practice which prevails in the federal court, yet I think it is reasonable to conclude that, although a case was instituted by summons instead of the filing of a bill and the issuing of a subpœna, when the parties and subject-matter are brought within the jurisdiction of the court, it is then within the power of the court to retain the cause upon the law or transfer it to the equity docket, as may be necessary in order to fully administer the rights of the parties with reference to the subject-matter of the action."

[5] The law which provides that the practice in the federal courts shall conform as near as may be to the practice in the state courts is to be found in section 914 of the Revised Statutes (Comp. St. 1913, § 1537), and is in the following language:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

There is nothing contained in this statute which requires the United States courts, in the trial of equity and admiralty causes, to conform to the practice, pleadings, forms and modes of procedure existing at the time in like causes in the state courts within which the District Court is held. Simkins, in his work entitled "A Federal Suit at Law," page 11, in referring to this section, says:

"It will be noticed that section 914 excludes from its operation suits in equity or admiralty. The blended system of pleadings in many of the states cannot be followed, wherein legal and equitable causes of action are permitted to be set up in the suit. The distinction between law and equity in the federal courts is one of substance, and not of form, and this must be kept in mind in framing the pleadings on the law side. McKemy v. Supreme Lodge, A. O. U. W., 104 C. C. A. 117, 180 Fed. 961; Lindsay v. First Nat. Bank, 156 U. S. 485, 15 Sup. Ct. 472, 39 L. Ed. 505; Courtney v. Pradt, 87 C. C. A. 463, 160 Fed. 562. * * *"

[6] In view of what we have said it follows that a mere transference of the cause from the law to the equity side of the court did not meet the requirements essential to the institution of a suit in equity so as to give the court the power to grant an injunction. Under the circumstances, the court should have dismissed the suit instituted on the law side of the court with leave to institute a suit on the equity side, and this could only have been done by filing a bill and issuing a subpœna as required by the equity rules.

In addition to what we have said, it also appears that, after the appellee had filed his complaint in the court below, he appeared in

the state court, where appellants had instituted suit against him, and there filed a demurrer and also an answer on the merits, setting up all that his complaint filed in the court below contained, and as a further defense to the action in that court he set up a claim of title by adverse possession, praying that he be adjudged the owner of the property involved in this controversy, thereby asking for affirmative relief. It is insisted by counsel for the appellants that this alone gave the state court jurisdiction. In view of what we have said already, we do not deem it necessary to express any opinion as to this phase of the question.

[7] The rule as to when the federal court will enjoin proceedings already instituted in a state court is clearly and concisely stated by Circuit Judge Pardee in the case of Oliver v. Parlin & O. Co., 105 Fed. 272, 45 C. C. A. 200:

"An examination of the cases which have attempted to follow French v. Hay [22 Wall. 238, 22 L. Ed. 854] and Dietzsch v. Hindekoper [103 U. S. 494, 26 L. Ed. 497] will show that in every well considered case, when an injunction restraining already instituted proceedings in a state court has been issued by a United States court, it was either based on a decree or judgment of the United States court which it was necessary and proper to enforce, or, if issued prior to judgment or decree, it was directed against a party who, after jurisdiction over him and the cause was fully vested, had resorted to proceedings in the state court necessarily conflicting with, if not ousting, the jurisdiction of the United States court."

We are of opinion that the state court first acquired jurisdiction of this controversy, and therefore the court below was without power to enjoin the parties from proceeding in the state court.

For the reasons stated, it follows that the court below erred in transferring the case to the equity side of the court, instead of dismissing the same; further, that the restraining order was improvidently granted by the court below. Therefore the decree of the lower court is reversed, with instructions to dissolve the restraining order.

Reversed.

GILCHRIST CO. v. ERIE SPECIALTY CO.

(Circuit Court of Appeals, Third Circuit. January 28, 1916. Rehearing Denied April 14, 1916.)

No. 1979.

JUDGMENT ⇐675(1)—PERSONS CONCLUDED—PERSONS PARTICIPATING IN PROSECUTION OR DEFENSE.

Where both parties to an infringement suit, involving the question of priority of invention between two patentees, although not parties of record, openly participated in a prior suit involving the same issue and contributed to the expense thereof, the decree in such suit is conclusive on both, and the question as between them is res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190, 1194; Dec. Dig. ⇐675(1).]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Gilchrist Company against the Erie Specialty Company. Decree for defendant, and complainant appeals. Affirmed.

See, also, 215 Fed. 741.

The following is the opinion of Orr, District Judge:

This case is before the court for disposition after trial. The plaintiff is the owner of the United States patent No. 833,620, issued October 16, 1906, to R. Nielsen for an ice cream spoon. Plaintiff charges the defendant with infringement at the city of Erie, in this district, and at other places. The defendant does not deny infringement, if the patent be found valid. It denies, however, the validity of the patent, and offers United States patent to Bolland, No. 714,440, dated November 25, 1902, for an ice cream disher, and United States patent to Albert P. Olmstead, No. 819,373, dated May 1, 1906, for an ice cream dipper, as disclosures in the prior art of everything contained in the patent in suit.

All of said patents embrace devices for the removal of ice cream from ice-cream freezers in such quantity at each removal as would make a small portion for an individual consumer. To prevent the ice cream from sticking in the spoon, or disher, or bowl, fingers are caused to revolve within the bowl closely to the interior surface thereof. The several dishers of the respective patents differ in the construction of the parts by which the fingers in the bowl are made to move.

Quite early in the history of this case, the defendant made a motion to limit the testimony to be taken by excluding therefrom evidence relating to priority of invention as between Olmstead and Nielsen, for the reason that such dispute had been adjudicated in previous litigation wherein the parties to the present suit were parties or privies. The court thereupon made an order imposing a limitation upon the evidence to be produced in the present case. 215 Fed. 741. The case in which the question of priority between Nielsen and Olmstead had been adjudicated is the case of Walker et al. v. Giles et al., 207 Fed. 825, in which Judge Ray determined that the Olmstead patent, No. 819,373, was entitled to priority over the Nielsen patent, No. 833,620. The decision of Judge Ray has since been affirmed by the Court of Appeals of the Second Circuit. 218 Fed. 637. With the decision in that case this court is heartily in accord. It is not necessary to even specify the variations between claim 1 of the Olmstead patent, which was the subject of that adjudication, and claims 4, 5, 7, and 8 of the patent in suit, which are the claims relied upon by the plaintiff. The variations are unimportant, and do not cause any difference in the operations of the subject-matter of the patents. Indeed, the construction of the Nielson patent might very readily have been adopted by any mechanic anywhere who had the Olmstead dipper before him. Indeed, the Bolland patent, to which reference has been made above, is suggestive of everything disclosed in the Olmstead and Nielsen patents, except the removability of the fingers located within the bowl and the gear wheel to which they are attached.

The court is satisfied that the Nielsen patent, No. 833,620, is invalid, in view of the Olmstead patent, No. 819,373. The bill should be dismissed at the costs of the plaintiff. Let a decree be drawn.

Fred Gerlach, of Chicago, Ill., for appellant.

J. C. Sturgeon and H. M. Sturgeon, both of Erie, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Gilchrist Company, owner of patent No. 833,620, granted October 16, 1906, to Nielsen, filed a bill against the Erie Specialty Company charging its infringement. On final hearing that court held the patent invalid and dismissed the bill. Thereupon this appeal was taken.

The patent concerns a small cone-shaped dipper or spoon used for ladling a fixed quantity of ice cream from a freezer, and means for scraping the cream from such dipper. The question here involved is whether Nielsen or one Olmstead first invented the device. This dipper is the subject of four different opinions—Judge Ray's, Walker v. Giles (D. C.) 207 Fed. 825, holding Olmstead was prior to Nielsen in conceiving it; Judge Lacombe's, Walker v. Giles, 218 Fed. 637, 134 C. C. A. 395, affirming such decree; Judge Orr's, in the present case (D. C.) 215 Fed. 741, limiting proofs therein on the ground that the parties to this suit were parties or privies in the case before Judge Ray in the Northern district of New York, and that as to them the question of Olmstead's priority over Nielsen was res adjudicata; and, finally, the opinion of Judge Orr on final hearing, set forth above, wherein he held the present bill should be dismissed. The various phases of this controversy are so fully set forth in the foregoing opinions, we refrain from restating them.

The briefs and proofs in this case and the opinions in the Second circuit have had our careful attention. In the case in the Northern district of New York, 207 Fed. 825, Walker and others, the owners of patent No. 819,373, granted to Olmstead, for an ice cream dipper, charged Catharine Nielsen and Henry S. Giles with infringing the first claim thereof. The bill alleged:

"That said Albert P. Olmstead was the *original and first inventor* or discoverer of any material and *substantial* part of the ice cream spoon disclosed by letters patent No. 819,373."

The defendants, Nielsen and Giles, being the grantees to whom the Nielsen patent (in suit in the present case) was issued, justified their alleged infringement under said patent and by stipulation in the trials thereof it was agreed:

"That the Gilchrist Company, a corporation of Newark, N. J., is the owner of United States letters patent No. 833,620, granted to Rasmus Nielsen, for ice cream spoon, dated October 16, 1906, and that the defendants herein are licensed to manufacture and sell under said patent, and that said the Gilchrist Company is participating in the defense in this action and sharing in the expense of such defense."

It will thus be seen that both Nielsen's and Olmstead's patents had issued, were owned by the parties to the case, and the relative priority of the two inventors was put in issue in the cause. The specifications of the two patents show that for all functional purposes the two devices are substantially the same. Such differences as exist are in mere minor, mechanical details. Taking as the generic device the patent of Nielsen—which in date was earlier than Olmstead's—we see that Olmstead followed its main features, save that, where Nielsen placed *on his handle and beneath* the teeth which intermeshed with the teeth of the revolving stem the flange which kept the stem from dropping out of the cup, Olmstead placed *on his stem and over* the teeth which intermeshed with the teeth of his handle the flange which kept the stem from dropping out of the cup. The difference was a mere shifting of parts, with a retention of functional identity. The other difference was a change in location of the stop screw. Nielsen's device had

a threaded stop which, when screwed to its thread limit, kept the handle and stem in operative relation. When Nielsen desired to clean his device, the stop was unscrewed. This let the handle swing back and the teeth at its end pass out of engagement with the stem teeth. This permitted the device to come apart. Olmstead's device also used a threaded stop, which, when screwed to its thread limit, also kept his handle and stem in engagement. It had, however, the further function of serving as a handle pivot. When Olmstead desired to clean his device, this screw was loosened until its reduced, unthreaded end, by means of a slot in the handle, permitted the latter to slide back, so that the teeth at the end of the handle passed out of engagement with the stem teeth and thus permitted the several parts of the assembled device to come apart.

While these minor mechanical differences existed, it will be apparent that the two devices were substantially the same, and if priority of invention was adjudged to one inventor's device, such priority put an end to all claim on the part of the other. If Nielsen's was the original device, then Olmstead's was but a mere transposition and mechanical rearrangement of parts, made possible by the shape of Olmstead's handle, which, as we have said, itself served as a stop. In Judge Ray's case, the suit was brought on the Olmstead patent, and defended on the alleged priority of the Nielsen patent. In the present case, the suit is on the Nielsen patent, and is defended on the alleged adjudged priority of the Olmstead patent. The subject-matter and the issue in the two cases are the same.

The issue of priority in the New York case having been adjudged in favor of Olmstead, it remains to consider whether that decision is binding on the parties to the present suit. The present plaintiff is the Gilchrist Company, a corporation of the State of New Jersey. The present bill avers that company became the owner of the Nielsen patent, and of all rights of action thereunder, on February 21, 1910. The record in the New York case shows that case was begun in May, 1910, and that on April 20, 1911, the Gilchrist Company, having meanwhile become the owner of the patent and "of all rights of action thereunder accrued," entered into a stipulation whereby it agreed that it—

"may be regarded as proved in this case: That the Gilchrist Company, a corporation of Newark, N. J., is the owner of United States letters patent No. 833,620, granted to Rasmus Nielsen, for ice cream spoon, dated October 16, 1906, and that the defendants herein are licensed to manufacture and sell under said patent, and that said the Gilchrist Company is participating in the defense of this action and sharing in the expense of such defense."

It is clear, therefore, that with its purchase of the patent and of the rights of action thereunder the Gilchrist Company was the real defendant when the decree was entered. The defendant in the present suit is the Erie Specialty Company, and that company duly joined in the foregoing stipulation in the New York case, agreeing:

"That the Erie Specialty Company, a corporation organized and existing under and by virtue of the laws of the state of Pennyslvania, of Erie, Pa., and Edwin Walker, of Erie, Pa., are participating in and paying the expenses of conducting this suit."

The subject-matter of the Pennsylvania suit having been contested in the New York suit, both parties to the present suit having contributed to carrying on the prior suit and having openly participated therein, the final decree in that case became, as between the said parties, res adjudicata. It is to the interest of the republic that litigation should end, and the court below was right in holding that the parties to the New York suit could not relitigate the question of patent priority in the Pennsylvania case. "The doctrine is well settled," said Judge Lurton in Penfield v. Potts, 126 Fed. 475, 61 C. C. A. 371, "that one who for his own interest joins in the defense of a suit to which he is not a party of record is as much concluded by the judgment as if he had been a party thereto, provided his conduct in that respect was open and avowed, or otherwise well known to the opposite party."

The judgment below is affirmed.

PENNSYLVANIA R. CO. v. GROVES.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 156.

1. MASTER AND SERVANT ⊜265(14)—INJURIES TO SERVANT—BURDEN OF PROOF —CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries to a servant, brought in the federal court, contributory negligence is a defense, which the master must prove by a fair preponderance of the testimony.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 893, 908; Dec. Dig. ⊜265(14).]

2. MASTER AND SERVANT ⊜289(29)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

It is not contributory negligence as matter of law for a railroad yard conductor, who was thoroughly familiar with the yard, to stop for a minute and a half on a track conversing with the yardmaster, who was his superior officer, and whose duty it was to regulate the movement of trains in the yard, with his back to an engine which he had a right to suppose would take another track, especially where the signal was set against such engine, so as to require the engineer to proceed with caution, having his engine under such control that he could stop it immediately if danger threatened.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1121; Dec. Dig. ⊜289(29).]

Rogers, Circuit Judge, dissenting.

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

Action for personal injuries by Charles N. Groves against the Pennsylvania Railroad Company. Judgment for the plaintiff upon a verdict in his favor for $6,000, and defendant brings error. Affirmed.

On writ of error to review a judgment for $6,045.16 entered upon the verdict of a jury in favor of the plaintiff for $6,000 for injuries sustained by him on April 19, 1914. The action was tried by Judge

Edwin S. Thomas sitting for the Western district of New York at Buffalo. Judgment was entered April 23, 1915.

Frank Rumsey, of Buffalo (H. J. Adams, of Buffalo, of counsel), for plaintiff in error.

Sullivan, Bagley & Wechter, of Buffalo (Joseph A. Wechter, of Buffalo, of counsel), for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The parties will be alluded to hereafter as they appeared in the court below, as plaintiff and defendant. The accident occurred on one of the tracks of the New York Central Railroad Company about 1,000 feet east of the passenger station of that company in the city of Buffalo. In addition to the four main tracks there is a cross-over track upon which the defendant's train, whose locomotive struck the plaintiff, was running just previous to the accident. The defendant's engine and cars were permitted to use these tracks pursuant to an agreement between the two companies. The plaintiff was the yard conductor employed by the New York Central and had been employed in the immediate vicinity of the accident for more than 20 years. He was thoroughly familiar with the yard in question and the time when regular trains were expected to arrive and depart. He knew also when milk trains and local trains were expected to cross or occupy these tracks. In short, the plaintiff was thoroughly familiar with the entire situation.

The Pennsylvania engine which struck the plaintiff had been in the station with a passenger train. The train was then run up on track 3 to a point a little to the east of Louisiana street, where it came to a stop with the engine headed west. Just previous to this time the plaintiff had been attending to his duties as yard conductor and was proceeding easterly when he met the New York Central's assistant yardmaster and the two men engaged in conversation near the tower 52. At this time the Pennsylvania train and a Susquehanna train were both expecting to proceed to the milk platform on the south side of the tracks. The yardmaster had control of the trains and decided which should cross over first, the movement being controlled by the man in the tower.

After meeting at the tower, the plaintiff and the yardmaster stepped over onto the main track No. 1. The two stood there engaged in conversation for about a minute and a half when the plaintiff was struck by the defendant's engine which had taken the cross-over and had turned in on main track No. 1.

[1, 2] The principal defense urged in this court is the alleged contributory negligence of the plaintiff. This is a defense in the federal courts and must be proved as are other defenses by a fair preponderance of testimony. P. & R. Coal & Iron Co. v. Keslusky, 209 Fed. 197, 127 C. C. A. 555. We think that it cannot be said that standing for a minute and a half on track No. 1 was negligence as matter of law. When Moore and the plaintiff stepped on that track there was nothing to indicate that it was or was likely to be a dangerous place. The plaintiff had a right to suppose that the Pennsylvania engine would

take the "Ohio street lead," which was the natural and customary thing to do.

Then, too, the "pot signal" was set against any movement to the west and the plaintiff had a right to rely upon the obligation of any one approaching the place where he stood to proceed with caution, having his engine so under control that he could stop it immediately if danger threatened. There is also a strong presumption to be drawn from the conduct of the plaintiff and Moore. Probably no two men in existence were more thoroughly acquainted with the situation and better qualified to speak than they. For years their daily vocation had been the management and direction of trains at this point. And yet they stepped upon track No. 1 in perfect confidence that no danger could befall them by so doing. Would Moore, who was the superior officer of the two, have chosen this particular point for consultation with the plaintiff unless he was assured that no danger could threaten? In risking his own life at this point he practically said to the plaintiff, "No danger can threaten us here."

We are therefore led to the conclusion that the question of contributory negligence was one for the jury and that their verdict that the plaintiff was not negligent cannot be set aside as unsupported by the evidence.

The judgment is affirmed with costs.

WARD, Circuit Judge (concurring). I think that, even if the plaintiff be held guilty of negligence, his negligence will not prevent him from recovering, because the crew of the engine, which was moving slowly in a railroad yard, could have prevented the accident by the exercise of ordinary care in stopping or blowing the whistle or ringing the bell. Inland Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270.

ROGERS, Circuit Judge (dissenting). I am unable to concur. The plaintiff below was in my opinion clearly guilty of contributory negligence. He was injured in the yards of the New York Central Railroad at Buffalo where he had been employed 21 years. This yard was a very busy place. The towerman who had control of the movements of the trains in the yard estimated the number of trains moving over the cross-over in that yard as 1,600 in the course of eight hours. The plaintiff was asked: "You have got to be on the alert every moment of the time for any engine?" To which he answered: "All the time, and be on the alert for other people besides—there is a lot there for you to look after. It is a very dangerous place there if a man is working there." He was asked: "Engines are coming and going hither and yonder so that it seems like perfect pandemonium unless you are used to it, that is true?" And he answered, "Yes." Asked: "And the only safe way for a man to get along there is to watch out continuously if he is on a track?" He answered: "When you are working, watch out, and watch out for other people, too."

Notwithstanding all this the plaintiff, experienced man that he was, deliberately stood on the main track for a minute and a half at least

talking with an assistant yardmaster and knowing that a train which stood waiting to go west might come over the very track on which he stood if the towerman should so determine it, and yet he stood there with his back to the east and was struck. In my opinion he was as matter of law negligent and his negligence contributed to his injury. Both the engineman and fireman testified that their view of the track in front of the engine was cut off for some distance by the boiler of the engine. The engineman said his vision was cut off for about 65 or 70 feet by the boiler. The engineman and fireman each testified that the bell was ringing all the time. The speed of the train was only 6 or 8 miles per hour. If those in the engine had seen the plaintiff on the track 65 or 70 feet away and then lost view of him because of the obstruction of their vision, it does not follow that they had no right to assume that the plaintiff would get off the track and not remain standing directly in front of the approaching engine.

The fireman testified that just as they were turning from track 3 into the cross-over he saw two men 200 feet or better ahead of the engine, and that when he last saw them they were 100 feet or more ahead of the engine, and that they passed from his view in front of the engine so that the boiler cut off his view; they were moving at right angles to the engine, or, in other words, were moving across the track in front of it; that at the time he last saw them they had commenced to turn into track 1, and that he did not see them again. The engineman testified that as he proceeded down the cross-over he was looking straight ahead of the engine along the track, and of course he did not know whether the engine was to proceed straight ahead into the Ohio street branch or turn in on track 1 until he struck the switch points and the engine commenced to turn; that he did not see the plaintiff any time until after the accident. The engineman was operating his engine in a very busy place, and was obliged to look for signals regulating the movement of his train.

The contributory negligence of the plaintiff prevents a recovery unless his injury resulted from the willful, wanton, or reckless conduct of the defendant. To constitute a willful injury the act must have been intentional, or the act or omission which produced it must have been committed under such circumstances as evinced reckless disregard of the safety of others, as by failure after discovering the danger to exercise ordinary care to prevent impending injury. 29 Cyc. 509.

The distinction is this: That if one who is in the exercise of ordinary care is injured by one who is not in the exercise of ordinary care the latter is liable; but if one who is not in the exercise of ordinary care is injured by one who acts willfully or wantonly the latter is liable, notwithstanding the contributory negligence of the injured party. In one case a mere lack of ordinary care makes the wrongdoer liable. In the other case no liability exists unless the conduct complained of was committed in wanton and reckless disregard of consequences. It is such conduct, if it results in the death of the injured person, as would make the wrongdoer guilty of manslaughter. See Banks v. Braman, 188 Mass. 367, 369, 74 N. E. 594. It was this, I think, that the Supreme Court had in mind in Inland & Seaboard Coast-

ing Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270 (1891), when it held that the contributory negligence of a plaintiff would not prevent him from recovery, if the defendant might by the exercise of reasonable care and prudence have avoided the consequences of the plaintiff's negligence.

The difference between the two kinds of liability, ordinary negligence, creating liability in the absence of contributory negligence, and willful, wanton, and reckless conduct, creating liability notwithstanding the plaintiff's contributory negligence, was not called to the attention of the jury in the charge as originally given. Indeed, the court charged the jury, "If the plaintiff was negligent, and you find from the evidence that this negligence contributed to the accident, he cannot recover, no matter how negligent the defendant was." The court afterwards on the request of counsel, however, charged that plaintiff's contributory negligence would not exonerate the defendant, if it were shown that defendant could by the exercise of reasonable care and prudence have avoided the consequences of its conduct.

If the court had instructed the jury that the plaintiff was as a matter of law guilty of contributory negligence, and that the question for it was to determine whether the defendant's conduct was willful, wanton, or reckless, and if they so found that they should bring in a verdict for the plaintiff and determine the amount of the damages, no error of law would have been committed. But, having submitted to the jury the question of contributory negligence, this court cannot know that the jury reached its verdict because it found that the plaintiff was not guilty of contributory negligence, and therefore the defendant was liable because of its failure to exercise ordinary care, or whether it found that the plaintiff was guilty of contributory negligence, but that defendant was guilty of willful, wanton, and reckless conduct.

I therefore am of the opinion that the judgment should be reversed.

FREDERICK v. CITIZENS' NAT. BANK.

In re STEVENSON et al.

(Circuit Court of Appeals, Third Circuit. April 4, 1916.)

No. 2067.

1. BANKRUPTCY ⇐309—PARTNERSHIP—PROVABLE CLAIMS.

Notes for borrowed money may be proved against the estate of a partnership in bankruptcy, although signed by individual members of the firm, where the money was in fact borrowed and used for the benefit of the firm, and it was the understanding of both borrower and lender that the notes were firm obligations.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555–564; Dec. Dig. ⇐309.]

2. BANKRUPTCY ⇐330—PROOF OF CLAIMS—SPLITTING INDEBTEDNESS.

Where a creditor holds more than one note against a bankrupt, they should be proved as a single claim, and if proved separately the claims will be treated as one.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 517, 519, 521; Dec. Dig. ⇐330.]

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3. BANKRUPTCY ⊂=467—APPELLATE PROCEDURE—GENERAL ORDER ALLOWING CLAIMS.

Although a court of bankruptcy allowed a number of claims by a single general order, for the purposes of an appeal such order must be treated as several.

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

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In the matter of William Stevenson and John J. Stevenson individually, and the firm of Stevenson, Titus & Co., bankrupts. From an order allowing claims, Elliott Frederick, trustee in bankruptcy, appeals. On motion to dismiss. Motion overruled, and order affirmed.

The following is the opinion of Orr, District Judge:

This matter comes before the court upon a petition to review an order of the referee sustaining objections to eleven claims filed against the partnership, and disallowing participation of said claims in the dstribution of the partnershp assets of the bankrupts.

The claims are all based upon obligations commonly called judgment notes. Each is an absolute promise to pay a sum therein named, within a period therein limited, to the order of the payee. Each contains in addition thereto a warrant of attorney authorizing the confession of judgment, and each is under the seal or seals of the maker or makers. All of the notes, except the note held by H. F. Hoffarth, hereinafter mentioned, are signed by all the individuals composing the partnership, and to several of the notes there is in addition the signature of a surety, and the signature of an individual who was at the date of the notes a member of the copartnership, but who, subsequent to the making thereof, died. The Hoffarth note was signed by one of the partners, John J. Stevenson only. None of the notes have any reference, either on the face or by indorsement, to the partnership, Stevenson, Titus & Co.

The proofs filed by the holders of said notes, with the exception of three hereinafter noted, expressly state in somewhat various forms that the consideration of the debt is for money borrowed for partnership purposes.

The claim filed by Maude Stevenson contains the averment that Stevenson, Titus & Co. was indebted to the deponent and that the note was given for borrowed money.

In the claims filed on behalf of George R. Rinehart and A. G. Titus, there is the averment that William Stevenson and John J. Stevenson, individually and trading as Stevenson, Titus & Co., are indebted to the deponent upon a judgment note given for borrowed money.

To each of said claims the trustee filed an objection, "as a claim entitled to share in the distribution of the assets of Stevenson, Titus & Co., a copartnership, until the partnership creditors have been paid in full, for the reason that the said claim is based upon a note which has been signed by * * * and does not purport to be a partnership undertaking."

The question in respect to each of the notes before the referee was: Was the indebtedness represented by such note an indebtedness of the partnership, or was it an indebtedness of the individuals or individual who signed it? The referee had before him as evidence upon this question the proofs of claim filed before him in the course of the bankruptcy proceedings, and the testimony taken at the examination of the bankrupts, which testimony, it was agreed by the attorneys for the parties interested, should be taken as the testimony to be considered in relation to the objections by the trustee.

Because the referee appears to have overlooked the fact that the averments in formal proofs by creditors in bankruptcy are entitled to some probative

force, it is well to consider what weight should have been given to them in the determination of the questions.

In Whitney v. Dresser, 200 U. S. 532, 535, 26 Sup. Ct. 316, 317 (50 L. Ed. 584), it is expressly ruled that bankruptcy proceedings are more summary than ordinary suits, and a sworn proof of claim against a bankrupt is prima facie evidence of its allegations, in case it is objected to. In the opinion the Supreme Court says:

"The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue. The words are: 'Objections to claims shall be heard and determined as soon,' etc. Section 57f. It is the objection, not the claim, which is pointed out for hearing and determination. This indicates that the claim is regarded as having a certain standing already established by the oath. Some force also may be allowed to the word 'proof' as used in the act. Convenience undoubtedly is on the side of this view. Bankruptcy proceedings are more summary than ordinary suits. Judges of practical experience have pointed out the expense, embarrassments, and delay which would be caused if a formal objection necessarily should put a creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it. We believe that the understanding of the profession, the words of the act, and convenient and just administration all are on the side of treating a sworn proof of claim as some evidence when it is denied."

With respect to the testimony, it may be said that search thereof to find anything in direct conflict with the material averments in the proofs of claim is vain. The referee rightfully says in his opinion with respect to the testimony relating to all the notes: "This testimony shows that the money that was obtained on the notes was used (a) as a fund with which to purchase Hill's interest in the firm of Hill & Stevenson; or (b) to pay directly for improvements to the store or for stock for the store; or (c) as a fund from which the partnership paid debts." In explanation of the reference to the purchase of Hill's interest in the firm of Hill & Stevenson, it appears that, prior to the formation of the partnership now in bankruptcy, a partnership by the name of Hill & Stevenson carried on the business, and that upon the withdrawal of Hill a partnership was formed between Wm. Stevenson, John J. Stevenson, and Myers N. Titus, under the name of Stevenson, Titus & Co., each partner owning a one-third interest in the new firm, and that some of the money obtained on the notes was used by the new partnership to pay Mr. Hill, the retiring partner, for his interest.

The referee states that there is no proof that the parties to any of the notes knew at the time of the execution of the notes, and the payment of the money thereon, that the matter was a partnership undertaking, and that there is no proof of any later assumption of any of the debts by the partnership. We do not see that it is very material as to what the knowledge of the creditor may have been at the time of the creation of the liability. It is clear that every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way, and the firm is responsible for whatever is done by any of the partners when acting for the firm within the limits of the authority conferred by the nature of the business which it carries on. Lindley on Partnership, 124 (star paging).

Again, there is a principle of law that a person dealing with the agent can, when he discovers the undisclosed principal, hold him liable instead of the agent, and that, if a contract be entered into by one partner in his own name only, still, if in fact he was acting as the agent of the firm, his copartners will be in the position of undisclosed principals, and they may therefore be liable to be sued on the contract, although no allusion is made to them in it. Lindley on Partnership, 177, 178 (star paging).

It is true the conclusions expressed by Lord Lindley related to contracts not under seal; but the same rule applies even where a seal is used upon

the instrument, if the instrument itself does not require a seal. Gibson v. Warden, 14 Wall. 244, 247, 20 L. Ed. 797.

It is apparent that a seal is not necessary to give validity to any one of the notes in this case, because credits appear upon those against whom the statute of limitations would otherwise run.

The evidence discloses that it was a practice of the partnership to borrow money and give notes therefor by the signatures of the member as individuals. Indeed, the very number of notes presented in this case, not only by individual lenders, but by the bank, shows the practice.

The practice adopted by the firm, the fact that all the members of the firm were accustomed to sign notes, and the fact that all the money was used for partnership purposes, and not for the purposes of the individuals, seems to be conclusive upon the question of the authority of the individuals to act on behalf of the copartnership. Having acted thus upon the authority of the copartnership, and the partnership having received the benefits of their action, it should not be held that the partnership assets, which alone were so measurably increased, are not answerable to those whose money was so used.

In Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669, there was a claim upon a note of which the following is a copy:

"$2,500.00. January 1st, 1902.

"For value rec'd (money) we, or either of us, promise to pay John L. Hinton, two thousand and five hundred dollars, with interest, after date, said amount to be paid by the 1st of March, 1902. Witness our hands and seals.

"R. H. Raper. [Seal.]
"Thomas C. Jones. [Seal.]
"Florence E. Jones. [Seal.]
"W. S. Cartwright. [Seal.]
"John F. Engle. [Seal.]

"Witness: W. T. Davis."

The debt expressed in that note was the subject of proof against the estate of the partnership. Objection was raised that it was the note of the individuals. The Court of Appeals of the Fourth Circuit reversed the court below, and in its opinion uses this language:

"The referee, however, in his report, which was confirmed by the court in bankruptcy, holds as a matter of law that, because the bond is signed by the members of the firm individually, under their separate signatures and seals, it is an individual debt and cannot be proven against the partnership assets of Jones, Raper & Co., until all the partnership debts have been paid in full. In this conclusion we think there is error, and that, although the paper bears the signatures and seals of the individuals composing the firm, yet, from the uncontradicted evidence, it appears affirmatively and fully that the debt was contracted by the firm, for its benefit, and that the whole proceeds of the note were used in the due course of the partnership business. The undisputed evidence in the case establishes the fact beyond controversy that the bond to Hinton was for a firm debt, and we so hold, and that, as such debt, it is provable against the estate of the partnership in bankruptcy."

That case was approved by the Court of Appeals of the Ninth Circuit in Mock v. Stoddard, 177 Fed. 611, 101 C. C. A. 237.

A word seems proper with respect to those notes which are signed by all the partners, including a deceased partner. No settlement was ever made with the representatives of the deceased partner. In fact, those interested in the estate of the deceased partner testified that they expected nothing out of the firm, and that the deceased partner had no estate, except a small sum by way of life insurance which went to the widow. It further appears that the partnership, after the death of Myers N. Titus, paid the interest upon the notes. It does not seem that under the testimony in this case the death of that partner should prevent the allowance of the claims, because the law is that the dissolution of a partnership does not dissolve its obligations.

From the foregoing it appears that the referee was in error in sustaining the objections filed by the trustee to the eleven claims referred to in his

opinion, and that the said claims should be allowed to participate in the distribution of the partnership assets.

Alexander J. Barron and McKee, Mitchell & Alter, all of Pittsburgh, Pa., for appellant.

F. W. Downey and Joseph Patton, both of Waynesburg, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In 1904 William Stevenson, John J. Stevenson, and Myers N. Titus formed a trading partnership under the name of Stevenson, Titus & Co. In 1907 Titus died and his interest in the firm was taken over by the remaining partners, who assumed the firm liabilities then existing and continued business under the same name. In September, 1914, the firm and the two individual partners were adjudged bankrupt, and thereafter a number of claims were presented to the trustee. Among them were eleven judgment notes owned by George N. Rinehart, A. G. Titus, Robert Minor, Maud Stevenson, P. J. Hoffart, and the Citizens' National Bank of Waynesburg, respectively. These notes are signed either by Myers Titus and the two Stevensons, or by the two Stevensons without Titus, or by J. J. Stevenson alone, and two of them are also signed by sureties. All the proofs of claim asserted the notes to be obligations of the firm, and on this subject some further testimony was taken. The notes were for borrowed money, all of which was applied to firm purposes with the knowledge and consent of the partners. No doubt there are merchandise creditors also, but we have no information concerning the time when their debts were contracted.

[1] The referee rejected all the claims on the ground that the face of the notes showed them to be individual obligations merely, and that this presumption had not been satisfactorily overthrown. Believing the evidence to be sufficient, however, the District Judge came to a different conclusion, and allowed the claims. In this court there is little dispute about the legal rules that should govern the controversy; the principal question is whether, on all the evidence, the presumption arising from the form of the notes has been overcome, and, as we agree with the District Judge in his view of the facts, we shall add nothing to his opinion as above set out, except to say that we think the evidence as a whole justifies the inferences (1) that the payees of the notes understood that the loans were made to the firm and for its benefit; and (2) that the notes were given with the intention of binding the firm, and in the belief that such a result was being accomplished.

[2] The bank rests its motion to quash on the fact that it owns two of the notes, one for more than $500, and one for less, and asks us to dismiss the appeal so far as the smaller claim is concerned on the ground that under section 25 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1913, § 9609]) we have no jurisdiction to entertain it. The record shows that the notes were separately proved before the referee, in accordance with a practice that is said to prevail in the county of Greene, where the bankruptcy proceeding was

carried on. No reason appears for thus dividing such a claim in the hands of a single creditor, and we think the practice is objectionable. Clearly the debt due the bank was the aggregate of both notes, and the claim should have been so proved. The motion to quash is therefore refused.

[3] On the argument before us another objectionable matter was disclosed, to which we deire to call attention. The referee's order of rejection was general in its terms; but, as this was equivalent to a specific disallowance of each claim, it was properly so treated when the six claimants separately asked the District Court to review the order. And, although the order of the District Judge allowing the claims was also general in its scope, this again was equivalent to specific action upon each, and we find no difficulty in so treating it. But the action of the trustee in taking a single appeal from the comprehensive order of allowance violates a settled rule of appellate procedure, and would justify us in dismissing the appeal of our own motion. In the interest of regularity of practice, no other course would be open to us if we had felt obliged to disapprove the order in part, and to approve it in part. The six claims are wholly independent of each other; they are supported by different evidence, are owned by distinct parties, and present distinct subjects of litigation. As it happens, however, we have come to a similar decision on each claim, and we have therefore concluded to overlook the present error, but with the warning that our action now is not to be taken as a precedent.

The order allowing each of the claims in question is affirmed.

LUCAS v. McNEILL.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1916.)

No. 159.

1. COURTS ⟸365—RULES OF DECISION—STATE DECISIONS—CONSTRUCTION OF WILL.

   In construing a will affecting title to real estate in Kansas, the federal court is controlled by the construction placed on similar provisions by the Supreme Court of that state.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 807; Dec. Dig. ⟸365.]

2. WILLS ⟸440—CONSTRUCTION—INTENT OF TESTATOR—TECHNICAL RULES.

   In construing a will, the testator's intention, gathered from the entire will, controls as against technical rules, the application of which would defeat such intention.

   [Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. ⟸ 440.]

3. WILLS ⟸616(8)—CONSTRUCTION—ESTATES CREATED—POWER OF DISPOSITION.

   Under the laws of Kansas as construed by its Supreme Court, a will which gives the first taker the absolute right to dispose of the property enables him to deprive the remaindermen of their interest.

   [Ed. Note.—For other cases, see Wills, Cent. Dig. § 1426; Dec. Dig. ⟸616(8).]

4. WILLS ⟸616(8)—CONSTRUCTION—ESTATES CREATED—POWER OF DISPOSITION.

A will which devised testator's real and personal property to his wife and her assigns, to hold during her life on condition that she remain a widow, and directed that on her decease the remaining real and personal property should be equally divided among the children, gave the wife an absolute power of disposition, so that the remainder did not vest in the children; and one of them, who became a bankrupt during the lifetime and widowhood of his mother, had no interest in the real estate which could pass to his trustee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1426; Dec. Dig. ⟸ 616(8).]

5. WILLS ⟸616(1)—CONSTRUCTION—INTENT OF TESTATOR—POWER OF DISPOSAL.

Since there is nothing in the will to indicate that the testator intended to differentiate the real and personal property, the courts cannot limit the power of disposal to the personalty.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418, 1428–1430; Dec. Dig. ⟸616(1).]

Petition to Revise Order of the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

In the matter of William H. Lucas, bankrupt. Petition by the bankrupt against Maurice McNeill, trustee, to revise an order of the District Judge affirming the conclusion of the referee that the bankrupt was the owner of a vested remainder in certain real estate devised by his father's will. Order vacated, with directions.

This is a petition to revise an order in bankruptcy. The facts, as they appear from the record, are that the petitioner was adjudicated a bankrupt; that the trustee, who had been duly elected and qualified, filed a petition with the referee in bankruptcy, to whom the cause had been referred, in which he claimed that the bankrupt owned an interest in certain real estate, which had not been included in the schedules, filed by him in the bankruptcy proceeding. After notice to the bankrupt a hearing was had, and the referee found that, under the will of the father of the bankrupt, he had a vested remainder in certain realty. The part of the will which the referee found devised to the bankrupt a vested remainder in the real estate is as follows: "I devise and bequeath unto my wife Elizabeth M. Lucas all my property both real and personal to have and to hold the same with all the appurtenances thereunto belonging, to have and to hold the same unto the said Elizabeth M. Lucas and her assigns, and to have and to hold the same during her life conditionally she remain a widow for her sole use and benefit upon her decease. I direct that all of my property remaining both real and personal be equally divided with my children hereinafter named (naming his five children, among them the bankrupt) and I further give and bequeath one dollar to each of the children (naming them)."

The referee also found that Elizabeth M. Lucas, widow of the deceased father of the bankrupt, "at once entered into possession of all of the property of the testator; she exercised ownership and control over it ever since * * * and has transferred and conveyed a part of the real estate and a part of the personal property to other persons"; that she has not remarried and is still living. Upon these facts he reached the conclusion that "the bankrupt is the owner of a vested remainder in the real estate mentioned in said supplemental report, by virtue of the will of his late father, Benjamin F. Lucas."

Upon a petition for review the learned District Judge affirmed the findings and conclusions of the referee, and this petition to revise was instituted by the bankrupt to reverse the order of the court.

Edward E. Sapp, of Galena, Kan., and A. M. Keene and W. W. Padgett, both of Ft. Scott, Kan., for petitioner.

C. A. McNeill, of Columbus, Kan., and J. W. Iden and E. L. Burton, both of Parsons, Kan., for respondent.

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

TRIEBER, District Judge (after stating the facts as above). The only question involved is whether the bankrupt has a vested remainder under the will of his father in the lands of which his father died seised. On behalf of the petitioner it is claimed that as the devise is to the mother, who is still living and unmarried, "and assigns," and devises to his children only the property "remaining," she has an absolute fee, and the children only a contingent remainder, dependent upon the widow remarrying or dying seised of the property devised to her, and unless that happens he has no interest in the lands which could pass to his trustee in bankruptcy.

[1, 2] The authorities construing such provisions in a will are not harmonious; but, as this will affects the title to real estate in the state of Kansas, the construction placed upon similar provisions in wills, by the Supreme Court of that state must control. A well-established rule of that court is that in construing a will the testator's intention, gathered by the consideration of the entire will, controls. Technical rules, it is held, ought never to be resorted to, where the application defeats the manifest intention of the testator. Williams v. McKinney, 34 Kan. 514, 518, 9 Pac. 265; Ernst v. Foster, 58 Kan. 438, 443, 49 Pac. 527; Holt v. Wilson, 82 Kan. 271, 108 Pac. 87; Bullock v. Wiltberger, 92 Kan. 904, 142 Pac. 950.

Counsel for the petitioner claim that the will gives the mother absolute power to sell, as the devise is to her "and assigns," and devises to his children only the property remaining at her death or upon her remarriage undisposed of by her, therefore she owns the land in fee simple, or at least she has absolute power to sell it during her lifetime and as long as she remains unmarried, and as she is living the petitioner has no interest in the lands, except a contingent or expectant remainder, which may never become vested. The devise set out in the statement of facts is copied literally, and shows that the punctuation is not accurate, but the intention of the testator is clearly shown.

[3] Under the laws of Kansas, as construed by the Supreme Court of that state, it is claimed a provision in a will which gives the first taker under it an absolute right to dispose of the property enables him to deprive the remaindermen of their interest. In our opinion this contention is sustained by the uniform decisions of the Supreme Court of Kansas. In Ernst v. Foster, supra, a devise of property to E., "to have and to use and dispose of during her natural life, and after her death to be divided equally among my three youngest heirs," was held to confer a life estate with power of disposition on E., and leave but a contingent remainder to the heirs.

In McNutt v. McCombs, 61 Kan. 25, 58 Pac. 965, the will provided that, after the wife died, what remained of the estate should go to his

children, and it was held that the will granted the widow a power of disposition, and her conveyance passed a title in fee.

In Greenwalt v. Keller, 75 Kan. 578, 90 Pac. 233, the will read:

"I wish my wife * * * to have all my property of every kind that I may own at my death, to have for her own use and benefit while she may live. And at her death all property that may be left by her [is to pass to certain devisees named]."

In construing this clause of the will the court said:

"By the use of the last clause of the last sentence the power of disposal in fee is added to that which would otherwise constitute a life estate only. The only property which he intended his heirs to receive was whatever might be left by the mother at her death. This clearly indicates that he intended her to use and permanently dispose of a part of the estate so that it would not be in existence at the time of her death for the benefit of the heirs. We think this amounts to a life estate with power to convey in fee."

In Bullock v. Wiltberger, supra, the provisions in the will were: The second paragraph of the will devised a life estate to the widow. The next paragraphs read:

"Third. After the death of my said wife, it is my will that all of my property, both personal and real, * * * shall be divided equally among my four children.

"Fourth. If any of my said children shall die before my wife, * * * then it is my will, that the share which would go to my deceased child or children if living, shall be divided among his or her children in equal parts; and if any of said children shall die without issue, prior to the death of my said wife, then it is my will that his or her share, shall be divided equally among my children then living, or if any of them be dead, then, his or her share, equally among their children."

In construing this will the court held that the manifest intention of the testator was that his estate should be kept intact until the death of his wife, and was then to be divided among his children and the heirs of such as might be deceased; that each of the four had contingent remainders, the contingency being that they survive the testator's wife, and failing in this, as to any one or more of them, the remainder vest in his or their representatives by purchase. To the same effect is Holt v. Wilson, supra.

For a remainder to be vested, it is necessary that throughout its existence it stands ready to take effect in possession, whenever and however the preceding estate determines. It is contingent when it is limited on an event which may happen before or after, or at the time or after the determination of the particular estate. Ætna Life Ins. Co. v. Hoppin, 214 Fed. 928, 131 C. C. A. 224, and authorities there cited.

[4, 5] In the case at bar, petitioner's estate was only such as may remain undisposed of at the remarriage or death of the widow, and as she has never remarried and is still living the most that can be claimed is that the petitioner's estate is one of expectancy. Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 673, 16 Sup. Ct. 705, 40 L. Ed. 838. The words "and her assigns" in the first clause, and the word "remaining" in the second clause, indicate clearly that the testator intended to give the widow the power of disposal. As there is nothing in the will to indicate that the testator intended to differentiate the

personal and real estate of which he died seised, the will bequeathing and devising both to the widow, the courts are powerless to impose such a restriction on the real estate, and limit the power of disposal to the personalty.

The District Court erred in holding that the petitioner had a vested interest in the realty, and its order against the petitioner is vacated and set aside, with directions to enter an order or decree in accordance with the views expressed in this opinion.

In re STOUGHTON WAGON CO. et al.

In re BOOTH et al.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1916.)

No. 2723.

1. SALES ⇐55—CONSTRUCTION—LAW GOVERNING.

Where the bankrupts resided and did business in Michigan, and the goods claimed by a petitioner were received and held by the bankrupts, the construction and effect of the contract under which they were held must be determined by the laws of that state as construed by its Supreme Court.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 2, 153; Dec. Dig. ⇐55.]

2. BANKRUPTCY ⇐184(2)—TITLE OF TRUSTEE—CONDITIONAL SALE.

A contract for the delivery of goods, which retained title thereto in the seller until paid, and which plainly contemplated a resale by the buyer, and provided that the goods were to be paid for, whether resold or not, and that all accounts and notes for goods purchased, whether given in payment for goods, or as collateral security, should be immediately due in case the buyer sold out, thus implying a right to sell otherwise than at retail, is a contract of absolute sale retaining a lien for the purchase price, which must be recorded as required by the laws of Michigan to be valid against the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⇐184(2).]

3. SALES ⇐454—CONDITIONAL SALE—RESERVATION OF TITLE—INCONSISTENT PROVISIONS.

In a contract for the delivery of goods intended for resale, a reservation of title in the seller cannot be sustained unless, taking the entire contract and the circumstances together, the reservation of title is clearly dominant over the right of resale and other inconsistent features of the contract, and the resale can be considered as made by the buyer as agent or consignee of the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. ⇐454.]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Michigan, in Bankruptcy; Arthur J. Tuttle, Judge.

Proceeding in bankruptcy against Fred C. Booth and another. Petition by the Stoughton Wagon Company for reclamation of certain property in the possession of the trustee in bankruptcy was denied by

the referee, and his order affirmed by the District Judge, and the petitioner petitions to revise. Judgment of the District Court affirmed.

E. L. Beach, of Saginaw, Mich., for petitioner.

W. S. Wixson and Timothy C. Quinn, both of Caro, Mich., for respondents.

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

KNAPPEN, Circuit Judge. Petition for reclamation of certain lumber wagons and wagon seats sold by petitioner to the bankrupts, and which passed into the possession of their trustee in bankruptcy while the purchase price was wholly unpaid.

The petitioner's right to reclaim depends upon whether, as claimed by petitioner, the sale was a conditional one, with title reserved in the vendor until payment of the purchase price, or whether it was an absolute sale with attempt to reserve a lien for the purchase price, required by the Michigan statute to be filed, and so invalid as against the trustee in bankruptcy under the June, 1910, amendment of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838), because not so filed. The referee denied the petition to reclaim, and his order was affirmed by the District Judge and the petition dismissed.

[1] The bankrupts resided and did business in Michigan, and the goods in question were received and held there. The construction and effect of the contract must thus be determined by the law of Michigan, as evidenced by the decisions of the Supreme Court of that state.

[2, 3] The contract of sale, by implication at least, plainly contemplates a resale of the goods by the vendee. But while it expressly provides that the title to the goods sold, and the proceeds of any sale of the same, shall remain in the name of the seller "until the same are settled for in cash," it contains other terms on their face inconsistent with reservation of title by the vendor. In the case of Mishawaka Woolen Mills Co. v. Westveer, 191 Fed. 465, 112 C. C. A. 109 (in an opinion by Judge Warrington), and in John Deere Plow Co. v. Mowry, 222 Fed. 1, 137 C. C. A. 539 (in an opinion by Judge Denison), the leading applicable decisions of the Supreme Court of Michigan were fully considered, and the conclusion reached therefrom that where goods are intended for resale the reservation of title cannot be maintained as a conditional sale unless, taking the entire contract and circumstances together, the reservation of title is clearly dominant over the right of resale and other inconsistent features of the contract, and that, as expressed in the Mowry Case, such reservation of title can be sustained "only on the theory that the resale is made by the vendee as the agent or consignee of the vendor, by an agency or consignment which underlies the executory sale and which is a continuing one until it is terminated either by the resale or the vendee's personal performance of the conditions, which then, for the first time, vest title in him."

If the Westveer and Mowry Cases are to be followed, the contract in question must be held one of absolute sale, with attempt to retain a lien as security for the purchase price. Among the features which give this dominant character are the provision that the goods were to be paid for by the bankrupts whether sold by them or not, title being retained by the seller only until the goods "are settled for with cash," instead of until sold, and the provision making all accounts and notes for goods purchased, whether "given in payment for goods or accounts or as collateral security thereto," immediately due and payable in case the "purchaser under this contract sells out," thus plainly implying a right in the vendee to sell otherwise than at retail in the usual course of business or as agent or consignee of the vendor. In the Mowry Case we expressed the opinion that there is no settled rule in Michigan applicable to the precise facts disclosed by the record in that case, and that "it is only to such settled rule that we should yield our own judgment."

Appellant invokes the decision of the Supreme Court of Michigan in Mishawaka Woolen Mills Co. v. Stanton, 154 N. W. 48, announced since our decision in the Mowry Case, as settling a rule of decision contrary to our holdings in the Westveer and Mowry Cases. An examination of the opinion in the Stanton Case discloses nothing at variance with our opinions in the two cases just referred to, both of which are cited in the opinion in the Stanton Case, and without apparent criticism. Indeed, the contract in the Stanton Case is an extreme instance of carrying out the notion that the consignee is receiving, and is to sell the goods, as agent and representative of the consignor. Among the significant conditions of the Stanton contract (which was made since the Westveer decision) are these: The contract throughout uses the word "orderer" instead of "purchaser"; sale otherwise than "in ordinary course of business at retail sale" is expressly forbidden except with the consent of the first party; title in the first party is not retained (as in the Westveer Case) until the goods are "fully paid for in cash," but until they are actually "sold by said second party"; there is the further condition that upon sale of the goods so ordered "the proceeds received therefor * * * shall be and remain the property of said first party until the goods are fully paid for in cash," instead of being held merely as collateral security, as in some of the cases. We see no reason for departing from our views as expressed in the Westveer and Mowry Cases.

The decisions of the United States Supreme Court cited by appellant do not, in our opinion, sustain the character of the transaction in question as a conditional sale. Each of the decisions so cited are, in our judgment, readily distinguishable from the instant case. Thus Bryant v. Swofford, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997, is based upon a construction of the Arkansas law. In Ludvigh v. American Woolen Co., 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345, the net proceeds of sales were to be accounted for to the consignor, and the consignee was obligated to sell the goods and to collect and pay over the proceeds to the consignor. In the instant case there is no obligation to resell. Holt v. Henley, 232 U. S. 637, 34 Sup. Ct.

459, 58 L. Ed. 767, seems not to have involved a purchase of goods for resale.

The recent Michigan statute (P. A. Mich. 1915, Act No. 64) requires, except as between vendor and vendee, that conditional contracts of sale by which title is reserved in the vendor, with right to resell in the vendee, be filed in the same manner as chattel mortgages. In view of this statute, the questions before us are likely to be of comparatively little future interest, and a less elaborate discussion of the instant case than we might otherwise think necessary seems thus to be justified.

It results from the views we have expressed that the petition for reclamation was properly denied. The judgment of the District Court is accordingly affirmed, with costs.

The method of review has not been considered, because not raised; the practical result to the parties would be the same, should the petition to revise be dismissed.

WALTER A. WOOD MOWING & REAPING MACH. CO. v. CROLL.

In re J. B. FRUCHEY & SONS' ESTATE.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1916.)

No. 2761.

1. SALES ⇐55—CONSTRUCTION—LAW GOVERNING.

Where the bankrupt resided and did business in Michigan, and the goods claimed by petitioner were received and held there, the construction and effect of the contract under which they were held must be determined by the laws of that state as construed by its Supreme Court.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 2, 153; Dec. Dig. ⇐55.]

2. BANKRUPTCY ⇐184(2)—TITLE OF TRUSTEE—CONDITIONAL SALE.

Where the contract under which goods were delivered to the bankrupts contemplated a resale by them, provided that the goods and proceeds of sale thereof were to be held by the bankrupts as collateral security and in trust for the seller until the indebtedness to the seller was paid, required the goods to be settled for at fixed times whether already sold or not, and provided that all past-due accounts should draw interest and that the goods and their proceeds should be surrendered to the seller on demand, but were not to become its property, except as they were credited and considered as payments on account, the contract was one of absolute sale, reserving a lien for the purchase price, which must be recorded as required by the laws of Michigan to be valid against the trustee in bankruptcy, and not a conditional sale contract reserving title in the seller.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⇐184(2).]

3. SALES ⇐454—CONDITIONAL SALE—RESERVATION OF TITLE—INCONSISTENT PROVISIONS.

In a contract for the delivery of goods intended for resale, a reservation of title in the seller cannot be sustained unless, taking the entire contract and the circumstances together, the reservation of title is clearly dominant over the right of resale and other inconsistent features of the contract, and the resale can be considered as made by the buyer as agent or consignee of the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. ⇐454.]

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4. BANKRUPTCY ⟸467—APPEAL—FINDINGS—REVIEW.

Where the testimony was taken before the referee, his finding of the facts, affirmed by the District Judge, will not be rejected on appeal on anything less than a demonstration of a plain mistake.

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

5. BANKRUPTCY ⟸303(3)—TITLE OF TRUSTEE—WAREHOUSE RECEIPT.

On a petition for reclamation of property held by a trustee in bankruptcy, evidence *held* to show that a warehouse receipt given by the bankrupts to petitioner, who had sold the goods under contract of absolute sale, was taken as additional security for the purchase price, not as a transfer of the goods.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⟸303(3).]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Bankruptcy proceeding against J. B. Fruchey & Sons, in which Henry Croll, Jr., was trustee. Petitions by Walter A. Wood Mowing & Reaping Machine Company for reclamation of certain machinery and implements were denied by the referee, and his order affirmed by the District Court, and petitioner appeals. Affirmed.

Kinnane & Lane, of Bay City, Mich., for appellant.

Campbell & Foster, of Gladwin, Mich., for appellee.

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

KNAPPEN, Circuit Judge. This case involves two separate petitions for reclamation of certain agricultural machinery and implements sold by petitioner to the bankrupts, and which passed into the possession of their trustee in bankruptcy before the purchase price was paid. The property involved in the first petition was sold under written contract of October 20, 1911; that involved in the second petition under contract of December 21, 1912. As to the latter property the asserted right to reclaim depends *solely* upon whether, as claimed by petitioner, the original sale to the bankrupts was a conditional one, with title reserved in the seller until payment of the purchase price, or whether, as claimed by the trustee, it was an absolute sale, with attempt to reserve a lien by instrument required by the Michigan statute to be filed, and so invalid as against the trustee in bankruptcy for failure to so file.

Petitioner's claim under the first petition rests not only upon an alleged original retention of title under the sales contract of 1911, but also upon a so-called warehouse receipt given by bankrupts to petitioner on December 21, 1912, in connection with a settlement for goods sold to bankrupts under the 1911 contract. The referee denied both petitions to reclaim, and his order was affirmed by the District Court.

[1, 2] Considering first the rights based upon the respective sales contracts: The bankrupts resided and did business in Michigan, and the goods in question were received and held there. The construction and effect of these contracts (which were in writing and in identi-

cal terms) must thus be determined by the law of Michigan, as evidenced by the decisions of the Supreme Court of that state. The contracts of sale plainly contemplated a resale of the goods by the vendees. But while the vendees thereby agree (paragraph 7) to hold the "goods on hand and the proceeds of all sales of all goods received" under the contracts "as collateral security in trust and for the benefit of and subject to the order of" the vendor until all obligations thereunder due the vendor from the vendees are fully paid in cash, and to surrender to the vendor on demand, at any time, all goods received by the vendees under the contracts, as well as their proceeds, to the extent necessary to pay in full for the goods so sold, they contain other features on their face inconsistent with reservation of title by the vendor.

[3] As pointed out in our decision in Re Stoughton Wagon Company, 231 Fed. 676, —— C. C. A. ——, this day decided, the leading applicable decisions of the Supreme Court of Michigan were considered by this court in the recent cases of Mishawaka Woolen Mills Co. v. Westveer, 191 Fed. 465, 112 C. C. A. 109, and John Deere Plow Co. v. Mowry, 222 Fed. 1, 137 C. C. A. 539, and the conclusion reached therefrom that where goods are intended for resale the reservation of title cannot be sustained as a conditional sale unless, taking the entire contract and circumstances together, the reservation of title is clearly dominant over the right of resale and other inconsistent features of the contract, and that, as expressed in the Mowry Case, such reservation of title can be sustained "only on the theory that the resale is made by the vendee as the agent or consignee of the vendor, by an agency or consignment which underlies the executory sale and which is a continuing one until it is terminated either by the resale or the vendee's personal performance of the conditions, which then, for the first time, vest title in him."

The dominant character of the two contracts of sale here in question must, as was the one involved in the Stoughton Wagon Company Case, be held to be that of absolute sale, with attempt to retain title for the purchase price, provided we are to adhere to our decisions in the Westveer and Mowry Cases. This dominant character of absolute sale is shown not only by the absence of express provision (which was in fact found in the Stoughton contract) that the title to the goods sold and their proceeds shall remain in the seller until settlement is made, and by the provision that such goods and proceeds are to be held by the vendees as *collateral security* (although in trust for the vendor's benefit and subject to its order) until the vendee's indebtedness to the vendor is paid; but by the further requirement that all goods be settled for at fixed times, whether already sold by the vendees or not, the fact that all past due accounts are made to draw interest, that the goods and their proceeds, which by paragraph 7 are to be surrendered to the vendor on demand, are not by such surrender to become its property except as they are to be credited to the vendees and "considered as payment on account" (the notes and accounts so turned over to be indorsed and guaranteed by the vendees), and that countermand by the vendees is forbidden except upon payment "of 20 per cent. of the net amount thereof as agreed liquidated damages."

Here, as in the Stoughton Case, the recent decision of the Supreme Court of Michigan in Mishawaka Woolen Mills Co. v. Stanton, 154 N. W. 48, announced since our decision in the Mowry Case, is urged as settling a rule of decision contrary to our holdings in the Westveer and Mowry Cases. For the reasons stated in our opinion in the Stoughton Case, we are unable to accept this contention, and accordingly adhere to our views expressed in the Westveer and Mowry Cases.

It follows that the second petition for reclamation was properly denied, as was the first petition so far as it rests upon an asserted reservation of title in petitioner under the sales contract of October 20, 1911.

As to the warehouse receipt: November 6, 1912, the bankrupts gave petitioner their unsecured note for $702, due October 1, 1913, which covered binders and mowers then on hand and for which the bankrupts were entitled to be carried another season. This note drew interest after maturity. Settlement for the remaining indebtedness was not then had, apparently because bankrupts were not prepared to pay. December 21, 1912, petitioner took bankrupts' note for $873.75, due six months from date, in payment for all indebtedness, exclusive of the binders and mowers referred to, which were represented by the earlier note for $702, and thus for all other goods, whether sold or unsold. This note for $873.75 drew interest from date, and was secured by "a bunch of farmers' notes" amounting to $773.32 owned by the bankrupts (containing no title clause and turned over to petitioner without reference to whether or not they were taken for goods received by bankrupts under the Wood contracts) and by a mortgage on real estate worth from $250 to $300. On the same day bankrupts gave petitioner a so-called warehouse receipt, whose pertinent provisions (omitting the property described) are printed in the margin.[1]

This receipt included not only the binders and mowers represented by the $702 note of November 7th, but also $260 worth of goods whose purchase price was included in the note for $873.75 given on the same December 21st. The receipt was never filed or recorded anywhere, and the goods covered by it remained continuously in the bankrupts' possession, having been removed to another building only because of the sale of the building in which they had been contained. It was expressly agreed when the receipt was given that in case, and to the extent, of shipments on petitioner's order, credit was to be given bankrupts on their paper. No shipments were ever made or directed, although bankruptcy did not occur until July, 1913.

1 "This will certify that J. B. Fruchey, implement dealers of Beaverton, in the county of Gladwin and state of Michigan, have received of the Walter A. Wood Mowing & Reaping Machine Company ..... as its property the following described goods: ..... I agree to store without expense to said company the above property, safely and securely housed in building located at .....

"I further agree to deliver, without expense to said company, all the above property f. o. b. cars Beaverton, Michigan, promptly upon request of said company or its authorized agents for shipment to such company to such point as may be directed.

"It is understood and agreed that the title to the above described property is now, and shall remain, vested in said company, and that such property shall, under no circumstances, be removed from the location described, or otherwise disposed of, without the express written consent of said company."

[4] The entire testimony on the hearing of the petitions for reclamation was taken in the presence of the referee, who held, as did the District Judge, that the so-called warehouse receipt was merely taken as additional security for the payment of goods sold by petitioner to the bankrupts. This conclusion upon the facts should not be rejected upon anything less than a demonstration of plain mistake. Deupree v. Watson (C. C. A. 6) 216 Fed. 483, 485, 132 C. C. A. 543, and cases cited.

[5] If the conclusion upon the facts was right, the judgment was correct as matter of course. The nature of the receipt involves a question of intent, and the question of intent is one of fact. Careful consideration of the evidence presented constrains us to agree with the conclusions of the referee and the District Judge, notwithstanding the latter was apparently mistaken in the understanding that the warehouse receipt included other goods than those sold under the 1911 contract. Among the significant facts leading to the correctness of the conclusion below are that the receipt was not given at the time the $702 note was taken, but a month and one-half later, and in connection with a settlement under conditions that seemed to require unusual security (indeed, one of the bankrupts testified that the receipt was given at the suggestion of petitioner's representative after the $873.75 note had been given and the collateral notes turned over), that the receipt included property whose payment was provided for in the earlier note, and that the goods to be shipped thereunder were merely to be credited upon the bankrupts' account or paper. We are unable to resist the inference that the whole transaction of December 21st had for its object the securing of existing indebtedness, and that this intent prompted and permeated the so-called warehouse receipt as well as the other transactions of that date. True, petitioner's representative, in reply to a question which one of the notes the "warehouse receipt was given to assume (assure?)" said that it "was taken to cover the goods, *particularly the note due this fall* [2] October, 1913," which would be the $702 note of November 7th; and in reply to the question whether it was taken as additional security to that particular note said, "No, I could not say that, because the goods were already ours, according to the contract, and was simply taken as further acknowledgment of our title to the goods." It is also true that petitioner's representative asserted that the receipt was taken in the forenoon and the $873.75 note not until afternoon. But the conflict as to the order in which the documents were made presents merely a question of fact, and the testimony taken together is not enough to overcome the inference resulting from other testimony in the case, having in mind our conclusion that the original contract was intended as one of absolute sale.

It follows from these views that the judgment of the District Court should be affirmed with costs.

[2] Italics ours.

MAXWELL v. HOLMESVILLE MILL & POWER CO.

In re IOWA-NEBRASKA PUBLIC SERVICE CO.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1916.)

No. 4489.

1. PAYMENT ⟸18—NOTES OF THIRD PARTY.
The acceptance by an electric power company from its consumer of negotiable notes of a third party, which were not paid when due, for the amount due from the consumer, did not, in the absence of an agreement to that effect, operate as a payment, so as to preclude the power company from exercising its option to terminate the contract for arrears in payment.
[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 78–85; Dec. Dig. ⟸18.]

2. ELECTRICITY ⟸11—ELECTRIC POWER COMPANY—CONTRACT—TERMINATION.
Where a contract to furnish current at certain rates gave the power company the option to terminate the contract if the payments thereunder should become three months in arrears, it was not necessary that the power company turn off the current before it gave notice of exercising its option to terminate the contract.
[Ed. Note.—For other cases, see Electricity, Dec. Dig. ⟸11.]

3. ELECTRICITY ⟸11—POWER COMPANY—CONTRACT—TERMINATION—SERVICE OF NOTICE.
A notice of the termination of a contract to furnish electric current, which was directed to the company which originally contracted for the current, but was served on the president and general manager of the company which succeeded to the rights of the contracting company, who was also the president and general manager of the contracting company, was sufficient notice to the succeeding company.
[Ed. Note.—For other cases, see Electricity, Dec. Dig. ⟸11.]

Carland, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

In the matter of the Iowa-Nebraska Public Service Company, bankrupt. From an order allowing the claim of the Holmesville Mill & Power Company for the balance of an account for electric current, Henry E. Maxwell, as receiver in bankruptcy, appeals. Affirmed.

Edgar M. Morsman, Jr., of Omaha, Neb., for appellant.

Hazlett & Jack, of Beatrice, Neb., for appellee.

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

SANBORN, Circuit Judge. This is an appeal from an order allowing the claim of $69.72, the balance of an account for 69,725 kilowatt hours of electric current furnished by the Holmesville Mill & Power Company to Henry E. Maxwell, receiver in bankruptcy of the estate of the Iowa-Nebraska Public Service Company, during the month of October, 1913. The parties agreed that the current was furnished and that the reasonable value of this current was 1.1 cents per hour. Maxwell claims that the current was furnished and re

ceived under a written contract which fixed its price at 1 cent per kilowatt hour, and it is conceded that he has paid that amount. The Power Company insists that the contract under which Maxwell claims had been forfeited and was not in force when the current was furnished, so that it was entitled to recover the reasonable value of the current, which is conceded to have been $69.72 more than the price fixed in the contract.

The real question, therefore, is whether or not the contract was in force in October, 1913. It was made in July, 1910, between the Power Company and the Electric Service Company, a corporation, and it provided that it should continue in force until November 1, 1915, that it should be binding upon the parties to it, their successors and assigns, that the Electric Company should remain liable for the payment of the amounts therein agreed to be paid, notwithstanding any sale or assignment thereof by it, and that in case the Electric Company should become three months in arrears in the payments of the amounts due thereunder the contract might be terminated at the option of the Power Company. On February 19, 1913, the Power Company served a notice upon the Electric Service Company and upon the Iowa-Nebraska Public Service Company to the effect that it canceled the contract because its charges for electric current furnished in June and July, 1911, and in December, 1912, and January, 1913, were unpaid.

[1] As delinquency in payment for the current for 3 months was indispensable to the right of the Power Company to terminate the contract, if there was no delinquency on its part in the payment for the current furnished in June and July, 1911, the attempted termination of the contract was ineffectual. Hence the receiver insists that there was no delinquency in payment for the current furnished during these 2 months. The facts determinative of this claim are that the Power Company on August 17, 1911, accepted for the current furnished by the Electric Service Company in June and July, 1911, the promissory note of the Bullock Public Service Company, a corporation, for $1,231.97, that the articles of incorporation of the Bullock Public Service Company were amended so as to change its name to the Iowa-Nebraska Public Service Company, that on October 20, 1911, that company first became the owner of the physical properties of the Electric Company and of its contract with the Power Company, that this note was taken up by another note for $1,479.10 on March 7, 1912, that on December 14, 1912, the note for $1,479.10 became due and was taken up by the execution and delivery to the Power Company of two promissory notes made by the Iowa-Nebraska Public Service Company dated December 14, 1912, one for $579.10 and the other for $900, each payable 60 days after their date. The Electric Company was not a party to any of these notes. The Power Company accepted them, discounted them at its bank from time to time, and used the proceeds of the discounts. On February 19, 1913, when the notice of termination of the contract was served the two last notes were due and unpaid, and the bills for the electric current furnished in December, 1912, and January, 1913, also remained unpaid.

It is specified as error that the court below held that the acceptance by the Power Company for the current furnished in June and July,

1911, of the promissory note of the Bullock Public Service Company and the promissory notes of the Iowa-Nebraska Public Service Company did not constitute a payment of the indebtedness of the Electric Service Company for that current. Counsel insist upon argument that the acceptance of a negotiable note of a third party on account of a debtor's liability raises the presumption of a payment of that liability, and they call attention to the fact that there is no evidence in this case whether these promissory notes were accepted in payment of the indebtedness of the Electric Service Company or merely as evidence of security for the indebtedness. But an examination of the decisions has satisfied that the weight of authority is that the taking by a creditor of the negotiable note of a third party for an antecedent debt does not extinguish the debt unless there is an express or an implied agreement that the negotiable note is received as payment. Peter v. Beverly, 35 U. S. 532, 567, 9 L. Ed. 522; Randolph on Commercial Paper, § 1534; Bankers' Trust Co. v. T. A. Gillespie Co., 181 Fed. 448, 456, 457, 104 C. C. A. 196. As the notes had not been paid when the notice was given, and as the bills for the current for the months of December, 1912, and January, 1913, had not been paid, the Service Companies were in arrears more than 3 months, and the Power Company had the option to terminate the contract when it gave its notice.

[2, 3] The next contention of counsel for the appellant is that the contract was not terminated by the notice, because demand for payment and a reasonable time thereafter had not been given, but the evidence satisfies that this contention cannot be sustained upon the record; second, that the termination of the contract could not be affected because the current was not shut off by the Power Company and a refusal to furnish it made before the notice was given, but no reason is perceived to sustain this contention; third, that the notice is directed to the Electric Service Company, not to the Iowa-Nebraska Public Service Company, which at the time and for a year prior thereto had been operating the electric light plant at Beatrice, and had succeeded to the rights of the Electric Service Company, but the notice was served upon the president and general manager of the latter company, who was the same man as the president and general manager of the former company, and it was, in our opinion, sufficient to give the Iowa-Nebraska Public Service Company full notice of its effect; and, fourth, that it was not a bona fide notice, and was never intended to operate as such, because Mr. Bullock, the president and general manager of the Service Company, testified that, when Mr. Steinmeyer served it upon him, he told him that if he was successful in some contest he had with some stockholders of his companies he need pay no attention to the notice, but Mr. Steinmeyer denied this statement, and the court below was not convinced that such a statement was ever made. The notice was sufficient and effective.

Finally it is said that the forfeiture and cancellation of the contract has been waived time and again. The testimony upon this subject is voluminous. It details the actions of the various parties while the electric current has been furnished to the Electric Service Company, to the Iowa-Nebraska Public Service Company, to certain creditors of the Iowa-Nebraska Public Service Company under the contract be-

tween them and the Power Company, and to the receiver in bankruptcy of the Iowa-Nebraska Public Service Company. Suffice it to say that all the testimony upon this subject and all the briefs concerning it have been carefully read and considered, but they have failed to convince that the court below was in error in its conclusion that no waiver had ever been made.

Let the order of the court below, allowing the claim of the Power Company for the sum of $69.72 as an unsecured claim, be affirmed.

CARLAND, Circuit Judge (dissenting). I am unable to concur in the opinion of the court, and will briefly state the reasons for my dissent. The case presents a single question. Was the contract of July, 1910, in force in October, 1913? It was, if not legally forfeited by the action of the board of directors of appellee in passing a resolution to cancel the contract February 18, 1913, and serving notice thereof on the Electric Service Company, February 19, 1913. The reason for the forfeiture as stated in the resolution was that the bills for electric current for the months of June and July, 1911, December, 1912, and January, 1913, had not been paid. The contract was one for the furnishing of electric current at 1 cent per kilowatt hour. It did not specify the time of payment, except as may be inferred from the following language:

"In case party of the first part shall become three months in arrears in the payment of the amounts due hereunder, then this agreement may be terminated at the option of the second party."

It might be inferred from this language that the payments were to be made monthly; but, however this may be, they never were so made.

The case must also be considered with reference to the principle of law that equity never under any circumstances lends its aid to enforce a forfeiture or penalty or anything in the nature of either. Marshall v. Vicksburg, 82 U. S. 146, 21 L. Ed. 121; Livingston v. Tompkins, 4 Johns. Ch. (N. Y.) 415, 8 Am. Dec. 598; 2d Story's Equity, § 1319; Bank v. Dearing, 91 U. S. 35, 23 L. Ed. 196; Jones v. Guaranty Co., 101 U. S. 628, 25 L. Ed. 1030. With this rule of law in view, I am of the opinion that the words "three months in arrears" ought to be construed as meaning 3 "continuous" months. Waiving this contention, however, I am further of the opinion that the appellee waived its right to forfeit the contract for the bills of June and July, 1911. Currents for these months had been furnished 1½ years when the notice of February 19, 1913, was served. A note was given for these bills in August, 1911. In March, 1912, this note was taken up by a new note executed by the Iowa-Nebraska Public Service Company. On December 14, 1912, the note of March 12, 1912, was renewed by two notes maturing February 12, 1913. Conceding that the notes were not payment of the bills, the appellee could not without demand forfeit the contract for the nonpayment of the same. It would seem to be clearly inequitable so to do, especially as the appellee was not the owner of one of the notes at the date of the forfeiture.

In view of the manner that payments were made, a demand was necessary as to the bills of December, 1912, and January, 1913, in order to place the Power Company in default. Tingue v. Patch, 93 Minn. 437, 101 N. W. 792; K. C. E. Co. v. U. P. R. R. Co. (C. C.) 17 Fed. 200; Carpenter v. Wilson, 100 Md. 13, 59 Atl. 186; Cole v. Johnson, 120 Iowa, 667, 94 N. W. 1113.

I think the judgment below should be reversed, and judgment entered for the receiver.

KEYES v. DAVIE.

In re CHEHALIS RIVER LUMBER & SHINGLE CO.

(Circuit Court of Appeals, Ninth Circuit. March 27, 1916.)

No. 2717.

1. BANKRUPTCY ⊂=348—CLAIMS—PRIORITY—"PERSON PERFORMING LABOR."

The general manager of a corporation, who with his wife owned all but one share of the corporate stock, and who was appointed by a board of directors, consisting of himself, his wife, and his attorney, is not one "performing labor" for the corporation, who is entitled by Rem. & Bal. Code Wash. §§ 1149, 1150, 1153, to a priority for the balance of his salary due at the time the corporation filed a voluntary petition in bankruptcy.

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

For other definitions, see Words and Phrases, Second Series, Person Who Performs Labor.]

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

Nor was he a "servant" of the corporation, so as to be entitled to priority under Bankr. Act July 1, 1898, c. 541, § 64b, cl. 4, 30 Stat. 563 (Comp. St. 1913, § 9648), allowing a priority for the wages due to workmen, clerks, salesmen or servants, earned within three months before the bankruptcy.

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

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

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Voluntary proceeding in bankruptcy by the Chehalis River Lumber & Shingle Company, bankrupt, in which W. W. Keyes was trustee. The claim of W. C. Davie to a prior lien was sustained by the referee, whose order was affirmed by the District Court, and the trustee appeals. Reversed.

Raymond J. McMillan, and Ernest K. Murray, both of Tacoma, Wash., for appellant.

Van M. Dowd, of Tacoma, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The bankrupt, a corporation, was engaged in the manufacture and sale of lumber and shingles. It employed

approximately 220 men. W. C. Davie, appellee here, was the corporation's general manager, employed at a salary of $300 per month. The corporation was adjudged a voluntary bankrupt on September 24, 1914. At that time there was due to Davie, as the balance of his salary earned within the six months next prior thereto, the sum of $587.55. For this amount he filed a claim in this proceeding, asserting a lien and priority therefor under and by virtue of the laws of the state of Washington. To this claim, in so far as it asserted a lien and priority, the trustee objected, for the reason that the claim did not state facts sufficient to entitle the claimant thereto. The referee overruled the objections. The District Court affirmed the referee's order. Thereupon this appeal was perfected.

[1] The question is whether appellee is entitled to a lien and priority under and by virtue of the statutes of the state of Washington. We think it very clear that he was not. Section 1149, Rem. & Bal. Annot. Codes and Statutes of Washington (Laws 1897, c. 43, § 1), reads as follows:

"Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, * * * shall have a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corporation, which is used in the operation of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien."

Section 1150 of the same Code provides that no person shall be entitled to the lien given by section 1149 unless within 90 days after he has ceased to perform labor he shall file with the proper county auditor a notice of claim containing certain specified statements, and serve a copy of the notice within 30 days after filing. Section 1153 of the Code referred to is as follows:

"Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall require such receiver or assignee to pay all claims for which a lien could be filed under this chapter, before the payment of any other debts or claims, other than operating expenses."

The appellee, Davie, was manager and president of the bankrupt corporation; he and his wife owned all but one share of the stock; he managed the whole property, hired and discharged all employés, looked after all orders, attended to all financial arrangements, and to the procuring and manufacturing of all timber. He expressed his own relationship to the corporation in this way: "I did everything. * * * I was the whole thing." His salary was fixed by the board of directors, which consisted of appellee himself, Mrs. Davie, his wife, and his attorney. We may well take appellee at his word that he was "the whole thing," for the evidence showed that he was carrying on a business which for every purpose was his own, and which he himself elected to wind up by voluntary bankruptcy in the federal court. He used the form of corporate organization for reasons doubtless sufficient as to general creditors, but which are not of enough strength

to afford him priority over those who were employed by him to do labor for his corporation. Courts of bankruptcy will look through such a situation as the facts present, and will avoid the injustice of deciding that the owner and self-chosen directing manager of a corporation can through his practically exclusive control fix his own compensation as manager, and thereafter, when he has put his corporation into voluntary bankruptcy, claim a priority for moneys due to himself, as one who has performed labor, over those subordinates whom he has employed to do work.

[2] The general principle underlying statutes giving priorities to certain persons was discussed in Blessing v. Blanchard, 223 Fed. 35, 138 C. C. A. 399, where we held that the word "servant," as used in section 64b of the Bankruptcy Act, means a restricted class of subordinate helpers who work for wages, but who are not salesmen, workmen, or clerks, and that it did not include the manager of a business, notwithstanding that he may also have rendered services as a salesman. Judge Gilbert said:

"Priority of payment was intended for the benefit only of those who are dependent upon their wages, and who, having lost their employment by the bankruptcy, would be in need of such protection." In re Stryker, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; Penn. & Del. R. R. Co. v. Leuffer, 84 Pa. 168, 24 Am. Rep. 189; In re Directors of American Lace & Fancy Paper Co., 30 App. Div. 321, 51 N. Y. Supp. 818; In re Carolina Cooperage Co. (D. C.) 96 Fed. 950; In re Greenberger (D. C.) 203 Fed. 583; In re Albert O. Brown (D. C.) 171 Fed. 281; In re Crown Point Brush Co. (D. C.) 200 Fed. 882; In re Continental Paint Co. (D. C.) 220 Fed. 189.

In Re Lawler (D. C.) 110 Fed. 135, Judge Hanford was of the opinion that the statute of Washington (already quoted) gives a lien of priority to a traveling salesman who worked upon a salary and who went from place to place exerting himself to find a market for the lumber manufactured by his employer. He expressed the general view that:

"All participants in carrying on the operation of the several different kinds of companies mentioned (in the statute) are entitled to liens."

But the facts before the court did not require so broad a construction; the case is not persuasive.

Cors & Wegener v. Ballard Iron Works, 41 Wash. 390, 83 Pac. 900, is cited by respondent. In that case the Supreme Court of the state, affirming findings of fact made by the lower court, sustained the priority of liens filed under the state law, quoted above, by certain claimants who were stockholders and officers in the corporation and who appear to have claimed wages as employés. The Supreme Court in its opinion discusses the evidence, but does not refer to the language of the statute, nor to its scope, further than to say that under the facts as found by the referee and lower court the claimants were entitled to priorities. The opinion expressly says that:

"The only question here involved is one of fact, and, having determined that the findings made by the court are all supported by the evidence, we think the conclusion of law and final order made necessarily follow."

It goes without saying that, if the Supreme Court of the state had construed the statute as generally applicable to one situated as was

the appellee in the case before us, we should follow that construction; but we think the case is not authoritative upon the point here involved.

Our opinion being that the claim of the appellee was not entitled to priority under the statutes of the state of Washington, we need not consider whether the state statute has been supplanted by Bankr. Act, § 64b, cl. 5, dealing with priority of liens, for plainly appellee cannot contend that he is included in those whose priorities are preserved by clause 4 of the federal statute.

The order of the District Court is reversed.

ROSENTHAL v. BRONX NAT. BANK et al.

(Circuit Court of Appeals, Second Circuit. March 21, 1916.)

No. 225.

BANKRUPTCY ⊂=166(4)—PREFERENCE—BELIEF OF CREDITOR.

Where a bank took a chattel mortgage covering the machinery and all movable property from an insolvent firm to secure a loan, the greater part of which was applied to unsecured notes of the firm held by the bank, but not yet due, and notes the security for which was insufficient, after the chief credit man of the bank had refused several applications for loans by the firm within a short time, knew that its account at the bank was depleted, and that many of its checks, some issued to employés for as little as $1, had been dishonored, and that the firm had evaded the bank's request for a statement, and had rendered no statement to a mercantile agency showing their assets and liabilities within the past year, the bank had reasonable cause to believe that the firm was insolvent, and that a preference would result from the giving of the chattel mortgages, so that it was voidable by the trustee, under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1913, § 9644).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 256; Dec. Dig. ⊂=166(4).]

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

Suit by Marcus Rosenthal, as trustee in bankruptcy, against the Bronx National Bank and others, to set aside a chattel mortgage and recover the value of the property sold by defendant Bank thereunder. Decree for complainant (222 Fed. 83), and defendant Bank appeals. Affirmed.

Defendant Bronx National Bank appeals from final decree in favor of defendant, setting aside a chattel mortgage and awarding plaintiff the sum of $3,442, being the net value of the property covered by the mortgage.

Williams, Folsom & Strouse, of New York City (C. D. Folsom, of New York City, of counsel), for appellant.

E. L. Bondy, of New York City, for appellees.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. On January 13, 1914, the bankrupts, trading as Oriental Lace Company, owed the Bronx National Bank about

$3,700. On that day they executed and delivered to the bank a chattel mortgage for $4,200, and, with the proceeds, paid the amount which they owed the bank. The trustee assails this transaction as coming within section 60b of the Bankruptcy Law, on the ground that the bankrupts were then insolvent, and that the bank knew or had reasonable cause to believe they were insolvent, and that the transfer by way of chattel mortgage would effect a preference in favor of the bank.

The adjudication in bankruptcy was against the bankrupts both as individuals and as copartners. The partnership had been banking with defendant on and off since about January, 1912. In January, 1913, relations ceased, but were resumed in May, 1913. In addition to the use of an ordinary checking account, the partnership from time to time borrowed money, usually on the security of outstanding accounts receivable. In November, 1913, at a time when the condition of the bankrupts must have seemed satisfactory, the bankrupts borrowed $2,000 from the bank, without security, for which they gave two notes, of $1,000 each, dated November 26, 1913, and payable respectively January 26, 1914, and February 26, 1914. Throughout their relations with the bank, the bankrupts from time to time had overdrawn their account, but apparently made these overdrafts good.

In December, 1913, however, there followed in rapid succession, events sufficient to warn any bank official of ordinary intelligence that the bankrupts were in a precarious financial condition. Altman, one of the bankrupts, applied to Quinn, vice president and credit man of the bank, for a loan of $5,000, and discussed, in that connection, giving a chattel mortgage. Quinn refused to make the loan because, as Altman testified, "he did not care to go any further with loans, since we owed him so much money." Kolbe, the cashier of the bank, in December, 1913, and January, 1914, was constantly insisting that Altman's firm should make good a considerable number of dishonored checks, or, as Kolbe put it:

"There is a bunch of checks come in here; and you haven't a cent of money in the bank there, and the checks are varying from $1 up. I am going to turn down every one of them if you don't make good."

These small checks had been given to laborers or wage-earners in the employ of the bankrupts. About the middle of December, 1913, Quinn asked Altman for a new financial statement. This, for obvious reasons, was never furnished by Altman, and the request was evaded. Quinn testified that in December he called upon Dun & Co. for a financial report of the Oriental Lace Company; but this report, while dated December 18, 1913, could not have enlightened Quinn, and, on the contrary, should have aroused inquiry, because it did not contain any data as to assets and liabilities later than December 3, 1912—about a year previous.

Altman, evidently in desperate straits, was persistent, and again offered a chattel mortgage to secure a loan. Quinn now changed his attitude, undoubtedly in a desire to secure the bank against a failing debtor. He concluded to make a loan of $4,200, secured by a chattel mortgage covering machinery, plant, and tangible assets, except merchandise. With the proceeds of the loan, the Oriental Lace Company

paid the bank the $2,000 owed on notes, not yet due, took up about $1,573 balance due the bank and secured by assigned accounts which had become stale and evidently worthless, and the remaining amount of about $627 went to the bankrupts and was used by them in paying debts and making good dishonored checks. The mortgage was executed January 12, 1914, and filed January 13, 1914. The inevitable result of filing a chattel mortgage covering all the bankrupts' available mortgageable property followed on January 16, 1914, when a petition in bankruptcy was filed against the bankrupts individually and as copartners.

From the foregoing facts, which are somewhat more fully set forth in the opinion of the District Judge, it is apparent that Quinn was placed on his guard, and that he must have believed or, in any event, had reasonable cause to believe, that the bankrupts were insolvent. The lending of a little extra cash is an expedient well known to those familiar with transactions of this kind. Its purpose is to give an appearance of good faith and of present new consideration to a transaction which has for its object the securing of an existing or past-due indebtedness. In this case the chattel mortgage amply secured the loan of $4,200, and would have fully protected the bank if it had withstood the assault of the trustee. It is not often that so clear and convincing a case of preferential transfer is made out as the trustee has here proved.

It is insisted, however, that, in any event, the value of the mortgaged chattels as found by the District Court was excessive. With this we do not agree. There was evidence upon which the trial court could have placed the value at a higher figure. His conclusion on that subject, with the credit he allowed the bank, including the expense of moving the chattels, was conservative, and was fully supported by the evidence.

Other questions raised need not be discussed, and are sufficiently considered in the opinion of the District Judge.

The decree is affirmed, with costs.

EAMES v. H. B. CLAFLIN CO.

In re MANTINDALE et al.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 146.

1. RECEIVERS ⟸198(1)—COMPENSATION—AMOUNT—DISCRETION OF COURT.
Receivers are entitled to a fair and reasonable compensation for the services rendered, to be fixed by the court appointing them after considering the nature of the matters administered, the amount involved, the complications attending it, the amount of the bond, the time, labor, and skill needed and expended, the degree of success under all the circumstances, the fidelity to details, and the promptness in accounting, and to be determined on the compensation for similar services in the performance of official duties, rather than in private business transactions, and

in consideration of the value of the services rendered, not generally, but with reference to that trust.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 392-395; Dec. Dig. ⊂⊃198(1).]

2. APPEAL AND ERROR ⊂⊃955—RECEIVERS ⊂⊃198(2)—DISCRETION OF COURT—COMPENSATION OF RECEIVER.

The compensation allowed a receiver is within the discretionary power of the lower court, which ordinarily has better knowledge of the controlling circumstances than an appellate tribunal can have, and will not be reversed, where there are no facts which show that the court abused its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3822; Dec. Dig. ⊂⊃955; Receivers, Cent. Dig. § 396; Dec. Dig. ⊂⊃198(2).]

3. RECEIVERS ⊂⊃198(2)—COMPENSATION—AMOUNT.

An allowance by the District Court of $33,000 as compensation to each of two receivers of a large mercantile corporation, of which the assets exceeded $55,000,000 and the liabilities $47,000,000, exclusive of capital stock, where the receivership lasted eight months, during which assets exceeding $30,000,000 passed through the hands of the receivers, whose services were efficient and satisfactory in trying circumstances, is not so low as to show an abuse of discretion, though the creditors advised the court that they would not object to an allowance of $50,000 to each of the receivers.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 396; Dec. Dig. ⊂⊃198(2).]

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

Suit in equity by John C. Eames against the H. B. Claflin Company. In the matter of the application of receivers for allowances. From an order of the District Judge, fixing the compensation of the receivers theretofore appointed, the receivers appeal. Affirmed.

Rushmore, Bisbee & Stern, of New York City (Charles E. Rushmore and Henry Root Stern, both of New York City, of counsel), for appellants.

White & Case, of New York City (Joseph M. Hartfield, of New York City, of counsel), for noteholders' committee, B. W. Jones, bidder, and Mercantile Stores Corp.

Saul S. Myers, of New York City (Seldon Bacon, of New York City, of counsel), for respondents Belding and others.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. By an order dated June 24, 1914, Joseph B. Mantindale and Frederic A. Juilliard were appointed temporary receivers of the H. B. Claflin Company, of the city of New York, and they at once took possession of the properties of the company and continued in the possession of the same until in February, 1915, they were given authority to continue, manage, and operate the business of the company until the further order of the court.

The failure of the H. B. Claflin Company is thought to have been, as respects the assets and liabilities involved and the world-wide standing and reputation of the house, the largest mercantile failure which ever occurred in this country, or, so far as we know, in any country.

Their balance sheet, as of the date when the receivers were appointed, disclosed assets to the amount of $55,259,523.92 and liabilities to the amount of $47,225,423.58. The excess of the assets over liabilities, exclusive of capital stock, was stated to have been $8,034,100.34. The capital stock amounted to $9,000,000, so that the deficit, including capital stock liability, was $965,899.66.

The estate which passed through the hands of the receivers was very large. It appears that the purchases and sales made by the receivers in the eight months they were in possession amounted to some $15,000,000, and that the upset price fixed on the sale of the business as a whole amounted to over $14,000,000 more. The total amount of assets which passed through their hands is admitted to have been over $30,000,000. Ten days prior to the transfer of the assets by them their miscellaneous disbursements had amounted approximately to $1,585,000, and they had cash on deposit in the banks to the amount of $6,339,552.89.

The difficulties which the receivers would have to contend with in ordinary times were enhanced very considerably by the European War, which made the matter of collections in Europe an embarrassing task. There is no question but that the receivers discharged their duties in a very efficient and satisfactory manner. One of the receivers is the president of the Chemical National Bank, and the other is a member of a mercantile house engaged in the same character of business as that of the H. B. Claflin Company. Each of these men enjoys in the business community the highest reputation for integrity and business acumen. The esteem in which they are held is shown by the fact that the creditors practically recommended to the court, or perhaps it would be more accurate to say that they advised the court, that if it saw fit to fix the value of the services of each at the sum of $50,000 such action would be satisfactory to the creditors.

The District Judge, however, has seen fit to enter an order allowing to each the sum of $33,000. In his opinion that was a proper allowance for the services rendered. No doubt he gave a careful and conscientious consideration to the rights of all concerned. Nevertheless the allowance made did not prove to be satisfactory to the receivers, and the matter has been brought into this court on assignment of errors and an appeal. The appellants claim in this court that they should have been paid the sum of $50,000 each.

[1] The receivers are entitled to a reasonable compensation for the services they have performed. The court which appointed them has the right to determine what that reasonable compensation is. In doing so it must exercise its discretion. But while the matter is left to its discretion, it is not at liberty to fix the allowance at more than a fair and reasonable amount. The controlling considerations in such cases have been well stated in 34 Cyc. 472, as follows:

"The considerations that should be controlling with the court in fixing compensation are the nature of the matters administered, the amount involved, the complications attending it, the amount of bond required, the time spent, the labor and skill needed or expended, the degree of success attained under all the circumstances, the fidelity to details, the appreciation evidenced as to the responsibilities of the position, the character of such responsibilities,

the expedition with which the trust has been administered, in view of results reached, and the method, character, and promptness of the accounting, having regard, as a standard, to what is paid for somewhat similar services in the performance of official duties, not the standard in private business transactions. The amount of a receiver's compensation does not depend upon the special qualifications or standing of the person appointed, or the demands made upon his time by private business, nor yet upon the estimates that persons who are themselves in receipt of an ample income may put upon his services from the standpoint they occupy. The value of the services rendered should not be considered generally but only with reference to the trust administered."

[2] Appellate courts are not much inclined to interfere with the exercise of this discretionary power of courts of first instance. The lower court ordinarily has better knowledge of the controlling circumstances than an appellate tribunal can have. As the Supreme Court, speaking through Mr. Justice Bradley, said in Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157 (1882):

"The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have."

To the same effect is Stuart v. Boulware, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. Ed. 568 (1890), where Mr. Chief Justice Fuller quotes approvingly from Trustees v. Greenough, supra. And see In re Cash-Papworth Grow-Sir, 210 Fed. 24, 126 C. C. A. 604 (1913), where this court, speaking through Judge Lacombe, said:

"The discretion of the District Judge does not come here for review, except where such discretion has been plainly abused, and the record sufficiently indicates upon what state of facts it was that the discretion was exercised."

[3] Our observation has led us to think that courts, when they have erred in fixing the allowances of receivers, have done so by making them too great, rather than too small. In some parts of the country allowances have sometimes been so excessive as to justly provoke severe criticism. It is not often that it is said that a court has underestimated the value of a receiver's services. In all cases of this nature the allowances made should be with a jealous regard to the rights of all concerned. In the particular case the court below conscientiously endeavored to arrive at a just conclusion. There are no facts presented which show that the court has abused its discretion.

Order affirmed.

LONDON v. BIOGRAPH CO.

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

No. 104.

COPYRIGHTS ⇐55—INFRINGEMENT—COPYING CONSTITUTING INFRINGEMENT.

A copyright of a story *held* not infringed by a moving picture play, where the fundamental plot, common to both, was old, and the narrative and embellishments by which the author gave literary value to the story were not reproduced in the play.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 52; Dec. Dig. ⇐55.]

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

Suit in equity by Jack London against the Biograph Company. Decree for complainant, and defendant appeals. Reversed.

This cause comes here upon appeal from a decree in favor of complainant in a suit brought under the Copyright Act. The decree awarded a permanent injunction against the production of certain motion pictures and the manufacture or sale of films therefor; it also adjudged payment of damages by the defendant in the sum of $250, with a similar amount for complainant's attorney's fee.

Robert C. Beatty, of New York City, for appellant.
Hugh A. Bayne, of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The complainant in 1906 wrote a short story entitled "Just Meat," which he sold to the Magazine Company. It was published in the magazine and duly protected by copyright, secured by the company. Defendant prepared and exhibited in motion pictures a dramatic story, the scenes of which closely resembled those described in the story. The motion picture is entitled "Love of Gold."

The bill alleged that complainant was "the author of a certain original story entitled 'Just Meat'"; defendant traversed that allegation by an express denial. Under our decision in Bosselman v. Richardson, 174 Fed. 622, 98 C. C. A. 127, complainant should have produced testimony to support his averment. We are of the opinion, however, that defendant did not specifically call the point here raised to the attention of the trial court. Had he done so presumably, the complainant would have taken the stand, and we should have been informed to what extent, if at all, he was consciously indebted to earlier sources for the plot or incidents of the copyrighted story.

The plot of both the story and the picture play is this: Two thieves commit a burglary, capturing a large amount of money and jewelry. They return to their room and discuss, not harmoniously, the division of the plunder. Each of them succeeds, unknown to the other, in putting poison in something which the other is about to swallow. Each swallows the poison prepared by the other and both die. There are variances in the details between the story and the picture play. In the one a single burglar enters the room and murders the man therein, while the other keeps watch in the street; in the other both enter and chloroform the man in the room. In the one the story opens with one man on patrol and his partner inside; the other opens with both of them starting from their living room. In the one, burglar A goes out and buys some steak for breakfast and puts poison on part of it, while burglar B in the interim puts poison in one of the coffee cups. In the other, both remaining in the room and each ignorant of what the other is doing, A puts poison in a glass of whisky and B puts poison in a coffee cup. The fundamental idea, common to both story and picture play is the mutual poisoning of the criminals, who thus die by their own hands. Apparently that is the one strong dramatic touch, which

makes both salable. If, after the burglary, the thieves had merely escaped with their booty, or had after more or less discussion divided it between them, it is hardly likely that any one would pay good money to buy the story or to see the play. It is the swift and startling manner in which retributive justice is meted out for their crimes. Destiny, the Anangke of the old Greek drama, using their own passions, their own wills, and their own hands to effect the result, constitutes the strong point. The plot is highly dramatic and calculated to appeal powerfully to reader or spectator. But it is an old one; it appears in Chaucer's Pardoner's Tale. In the works of Chaucer edited by Rev. Walter W. Skeats and published in 1894 (vol. III, 438 to 445), earlier versions of the story are given and it is traced back to the East. Sometimes there is one robber, sometimes more; sometimes one is killed by violence and the other by poison; but in all the criminals themselves are the avengers. The same occurrence is a prominent feature in Kipling's story of the King's Ankus found in his Second Jungle Book. The plot is common property; no one by presenting it with modern incidents can appropriate it by copyrighting.

In the complainant's story there is more than this old plot; the narrative is made attractive by the introduction of physical and psychological elements. It indicates the different personal equations of the two men, their respective attitudes towards the crime committed. It has a strongly written description of the patrol kept by one burglar on watch—we are not taken into the house and do not see the crime committed; the conditions in the street, indoors and out, the passage of chance pedestrians, the dodging of a policeman on his beat, especially the abnormally developed instinct of human presence and the capacity of the foxlike thief for sensing whether it imports danger or is harmless. There is none of this in the picture play; indeed, it seems hardly possible that any amount of effort to "register" emotions could produce it on a film. Moreover, the story contains another dramatic element, not found in the play. As has been said, the man found with the jewels and money is strangled by the burglar who awakened him. From the newspaper of the next day they learn that the victim had robbed his partner and was waiting at the time and place with his plunder to take a steamer whose sailing had been delayed a few hours. Here, too, was swift and terrible retribution following crime. If the story stopped with the reading of the newspaper and the division of the burglar's booty, it would have literary merit; the same could not be said of the play, if the element of mutual poisoning were eliminated.

Of course in transferring the action of this story, centuries old, to modern times, the criminals will not be Orientals, but highwaymen or burglars; their home will not be in a cave or a hut in a wood, but in a rented room in a modern building; their surroundings will be squalid, not comprising a separate kitchen; they will perpetrate their crimes according to modern methods; if they are to be given poison, it will presumably be conveyed in meat or bread, coffee or whisky. Resemblance between the story and the play in such minor incidents are unimportant; not a single one of them is dramatic, exciting, or attractive as was the railroad scene in Under the Gaslight. The copy-

right cannot protect the fundamental plot, which was common property long before the story was written; it will protect the embellishments with which the author added elements of literary value to the old plot, but it will not operate to prohibit the presentation by some one else of the same old plot without the particular embellishments.

The decree is reversed, with costs.

In re H. BATTERMAN CO.

In re BEDFORD CO.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

Nos. 75, 76.

BANKRUPTCY ⟸223—REFEREE—COMPENSATION—COMPOSITION WITH CREDITORS.

Where a bankrupt's composition with its creditors was confirmed on the basis of a payment of 65 per cent. in cash, and thereafter certain creditors agreed to waive deposit of the cash required to pay their claims, and later waived payment of their claims in consideration of the payment of 15 per cent. and notes for 85 per cent. thereof executed by another corporation, it must be presumed that some consideration moved from the bankrupt to the other corporation, and from it to the creditors, which induced them to accept the notes, and the referee is entitled to his commission on the amount of those claims which would have been paid in cash if the creditors had not waived payment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888–894; Dec. Dig. ⟸223.]

Petitions to Revise Appeals from the District Court of the United States for the Eastern District of New York.

Separate involuntary proceedings in bankruptcy against the H. Batterman Company and against the Bedford Company were argued and decided together. The bankrupt's petition to revise the order of the District Court fixing the compensation of the referee. Order affirmed.

These two cases involve precisely the same questions and were by agreement of the parties to be argued and decided together. In the following opinion the Batterman Company only will be referred to.

White & Case, of New York City (J. M. Hartfield, of New York City, of counsel), for appellants.

O. A. Lewis, of Brooklyn (Alexander M. Birnbaum, of Brooklyn, on the brief), for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. June 26, 1914, involuntary proceedings in bankruptcy were begun against the H. Batterman Company, whose property was in the hands of receivers appointed in an equity suit in the United States District Court for the Eastern District of New York. February 4, 1915, the alleged bankrupt filed its schedule of assets and liabilities and offered a composition of 65 per cent. in cash to its creditors. February 26th and 27th, at meetings of the creditors, this offer was accepted by a majority in number and amount. March 3d a body

of the creditors known as the "note creditors," holding notes of the alleged bankrupt to the order of the H. B. Claflin Company and indorsed by it, waived in writing the deposit of cash which the court required under section 12b of the Bankruptcy Act. On the same day by another instrument they agreed to waive payment of their claims by the alleged bankrupt, upon confirmation of the composition. March 8th the referee reported to the court in favor of confirming the composition and annexed to his report a schedule showing the amount due to each creditor, the percentage he was entitled to receive under the composition and the referee's commissions calculated at one-half of one per cent. thereon as fixed by section 40a of the Bankruptcy Act. March 9th the agreements of the note creditors dated March 3d were filed.

April 20th the District Judge confirmed the composition and directed the alleged bankrupt to deposit enough cash with the clerk of the court to cover the costs of the proceedings and the claims of creditors who had not waived the deposit of 65 per cent. in cash. The note creditors were parties to the plan of reorganization of the H. B. Claflin Company, and under it exchanged their notes for 15 per cent. of the same in cash paid by the H. B. Claflin Corporation and the balance of 85 per cent. in notes of the Mercantile Stores Corporation. June 15th by an order resettled October 18th the fees of the referee were fixed at $3,651.91, being one-half of 1 per cent. on all of the claims proved or allowed.

The question to be determined is whether the referee is entitled to commissions on the claims of the note creditors who have released the alleged bankrupt. If there had been only a waiver of deposit, and the alleged bankrupt had failed to pay the 65 per cent. in cash, we think the referee could not for that reason be denied his commissions. The money, though not paid, was "to be paid," within the meaning of the act, and the creditors would take the risk of waiving the deposit with the court. Likewise he would not be prejudiced if the creditors had accepted, instead of cash, notes of the alleged bankrupt in settlement which were never paid, or if they had released the alleged bankrupt in consideration of receiving notes or property from some other person. Now, without knowing the precise considerations which moved the parties respectively in the reorganization of this very large and complicated corporate system, it is not to be supposed that the H. B. Claflin Corporation and the Mercantile Stores Corporation, the parties who took it over, gave cash or notes to the note creditors of the alleged bankrupt for their claims without some consideration moving to them from it, or that the creditors of the alleged bankrupt released it without some consideration moving to them from it or from some one on its behalf, whether for value or gratuitously makes no difference. In short, we think the 15 per cent. cash and the 85 per cent. in notes are to be regarded as equivalents of the 65 per cent. of the claims in cash which was to be paid under the composition agreement, and that the proceeding is to be treated throughout as if 65 per cent. of the claims in cash had been deposited with the court "to be paid" to the note creditors. Judge Chatfield properly allowed the referee his commissions thereon.

The order is affirmed.

MOTION PICTURE PATENTS CO. v. UNIVERSAL FILM MFG. CO. et al.

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

No. 248.

ABATEMENT AND REVIVAL ⇐12—SUIT FOR INFRINGEMENT—DISMISSAL OF APPEAL—PENDENCY OF ANOTHER SUIT.

The pendency of another suit between the parties in another jurisdiction, which may not determine their rights in the instant suit, is not ground for dismissal or stay of an appeal in an infringement suit.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95, 98; Dec. Dig. ⇐12.]

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

Suit in equity by the Motion Picture Patents Company against the Universal Film Manufacturing Company and others. From the decree, complainant appeals. On motion to dismiss or stay appeal. Denied.

Melville Church, of Washington, D. C., for appellant.

Edward Wetmore and O. W. Jeffery, both of New York City, for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. We think the motion should be denied. A stay now would simply postpone the hearing of this appeal. It would not, or at least it may not, determine the complainant's rights in this case, which is apparently a simple infringement suit based upon a patent owned by the complainant.

The defendants have set up the alleged license agreement, and if they claim under it they cannot attack it. The more orderly and safer way is to let the case proceed on its merits.

KEENE et al. v. NEW IDEA SPREADER CO.

(Circuit Court of Appeals, Sixth Circuit. March 17, 1916.)

No. 2690.

1. PATENTS ⇐69—PATENTABLE INVENTIONS—"DESCRIBED IN PRINTED PUBLICATION."

A device is "described in a printed publication," within the meaning of Rev. St. § 4886 (Comp. St. 1913, § 9430), and therefore not patentable as a new invention, where it is shown in the drawings of a prior patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 84; Dec. Dig. ⇐69.]

2. PATENTS ⇐16—INVENTION—QUESTION OF FACT.

The question whether a patented device is the result of invention, or only mechanical skill, is one of fact.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. ⇐16.]

3. PATENTS ⟸26(1)—INVENTION—COMBINATION OF OLD ELEMENTS.
The fact alone that the elements of a combination claim are old is not enough to invalidate it.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26(1).]

4. PATENTS ⟸26(2)—"INVENTION"—COMBINATION OF OLD ELEMENTS.
Where the elements of a combination claim were not merely old, but in point of equivalency had for years been devoted to the same uses in the same art and with substantially like results, the combination shows mechanical skill, rather than invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 29; Dec. Dig. ⟸26(2).
For other definitions, see Words and Phrases, First and Second Series, Invention.]

5. PATENTS ⟸34—INVENTION—PRIOR PATENTS AS EVIDENCE.
While a patented combination may not be anticipated by any single prior patent, such patents, showing elements of the combination, are a part of the prior art, properly to be considered on the question whether invention or only mechanical skill was required to make the combination.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. ⟸34.]

6. PATENTS ⟸328—INVENTION.
The Keene patent, No. 782,564, for an axle, used chiefly in the construction of manure spreaders, *held* void for lack of invention in view of the prior art.

7. PATENTS ⟸19—INVENTION—IMPROVEMENT IN DEGREE.
The mere carrying forward of an original conception, resulting in an improvement in degree simply, is not invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 19; Dec. Dig. ⟸19.]

8. PATENTS ⟸30(1)—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
Commercial success of a patented article cannot aid claims of the patent which are clearly lacking in invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 34; Dec. Dig. ⟸30(1).]

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 Louis A. Keene and Mott R. Pharis against the New Idea Spreader Company. Decree for defendant, and complainants appeal. Affirmed.

Luther L. Miller, of Chicago, Ill. (L. B. Smith, of Chicago, Ill., of counsel), for appellants.

F. S. Stitt and R. S. & A. B. Lacey, all of Washington, D. C., for appellee.

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

WARRINGTON, Circuit Judge. This is an appeal from a decree in a patent suit dismissing the bill for want of equity. The bill is in the usual form, alleging infringement by defendant of letters patent No. 782,564, issued February 14, 1905, to Louis A. Keene, and in which Mott R. Pharis had an equitable interest from the date of the

issue of the patent. The answer consists of specific denials, including one of alleged infringement, and also of further distinct defenses: (a) That the claims of the patent are for aggregations; and (b) that in view of the prior art and certain prior use the patent is void for want of invention. If the claims in issue are valid, we think the denial of infringement cannot, under the present record, be sustained. We are thus required to pass upon the validity of the claims in suit. It is declared in the first two paragraphs of the letters patent that the patentee had "invented certain new and useful improvements in axles," and that the object of the invention was to produce "an improved axle for vehicles wherein simplicity of construction is combined with great strength." The first four claims of the letters patent consist of combinations which embrace an axle member comprising two horizontal arms and a central arched portion, two chord members, and certain bolts and clips with threaded ends and adjustable nuts. These claims are, as respects the "two chord members," the narrowest in the patent; the defendant has not used these two chord members; and so infringement of the first four claims is not even alleged. The remaining claims, 5 to 9, inclusive, are the only ones in issue. These claims associate in a running gear certain additional elements, expressly named, with some of the elements of the first four claims. For instance, both claims 5 and 6 in express terms add a tongue and braces and connect such members each with the axle; claims 7, 8, and 9 respectively, add to the parts thus far mentioned a fifth wheel mounted on the arch of the axle and supporting a "forward bolster." Figure 1 of the drawings shows the running gear with all these parts *in place,* and with a running wheel at each end of the axle; the parts so named are also described in the specification. Further, the specification states that "by reason of the arched construction the axle is adapted to vehicles having small forward wheels," and the only use shown to have been made of the patented parts is in the front running gears of manure spreaders. Plainly then, the form of vehicle so referred to comprises a front running gear, which can readily be turned either way without interfering with the body of the vehicle.

A better understanding of the patented structure may be gained through description of the parts grouped in the several claims in dispute. Claims 5 and 6 combine, in a running gear, an arched axle, a tongue connected with the arched portion of the axle, "means" for preventing the arch from "spreading," and "means" (in claim 5) and rods (in claim 6) for rigidly connecting the end portions of the axle with the tongue.

It is frankly admitted that the arch of the axle is old and not original with Keene. The axle, consisting of a round steel bar, is so arched in its central portion as to comprise a horizontal top bar, diverging sides, and oppositely extending horizontal arms; the wheels being adjusted to the outer portions of such arms. It is not claimed that the axle wheels possess any patentable quality in themselves. The tongue called for would seem to be of the ordinary type, and, according to the specification, is "pivotally secured to the top bar" of the axle, through the use of clips embracing the bar and extending up-

wardly through suitable openings in a plate which is maintained above the bar and extended for some distance on top of the tongue; these clips are held in place by threaded ends to which nuts are adjusted on top of the plate. The tongue is further held in place by two rods disposed between points (in the chord below described and to which the rods are fastened) near the ends of the axle and common points forwardly on the sides of the tongue, where they are fastened. We must turn to the specification and drawings for the only definition given (at least in the letters patent) of the term "means," as it is used in these claims, for preventing the arched axle from spreading. The specification provides for two chord members (appearing in the drawings to be two similar pieces of straight timber) extending side by side upon the arms of the axle, across the arch, and having grooves in their meeting faces to receive the diverging sides of the arch; the chord members are secured together by bolts, and to the arms of the axle by clips surrounding the arms and extending upwardly through suitable openings in the chord members where the ends of the clips are adjusted to and held in place by nuts. It is to be observed that these claims do not call for the "two chord members," but use, instead, the broader clause "means for preventing the arch from spreading." They therefore reach a single chord or tie rod, such as defendant uses, and so are open to anticipation in this respect by a single chord or tie rod in the old art. The claims appear in the margin.[1]

Claim 7 introduces the fifth wheel before alluded to and is in terms associated in a running gear with an arched axle. The tongue, including the plate and the rods for connecting it with the axle, as also the chord members, are omitted. The fifth wheel comprises two plates, connected centrally by a kingbolt, and arranged to rotate one upon the other. The lower member is secured to the upper bar of the axle by depending arms which are bifurcated at their lower ends so as to receive the bar, and to hold it by the use of bolts passing through openings in the lower ends of the arms and beneath the bar. These arms and bolts afford the pivotal support and withdrawable means mentioned in the claim. The upper plate is provided with two bracket arms extending forwardly to support a portion of the vehicle body; and two posts rising from the upper member support the forward bolster of the vehicle. It is to be noted that the pivotal support before referred to is nowhere shown in the specification, and if such relation exists it has no apparent advantage and none is stated. Claim 7 is set out in the margin.[2]

[1] "5. In running gear, in combination, an arched axle; a tongue connected with the arched portion of said axle; means for preventing the sides of said arched portion from spreading; and means for rigidly connecting the end portions of said axle with said tongue.

"6. In running gear, in combination, an arched axle; a tongue; means for connecting the end of said tongue with the arched portion of said axle; means for preventing the sides of said arched portion from spreading; and rods rigidly connecting said tongue with the end portions of said axle member."

[2] "7. In running gear, in combination, a fifth wheel having two downwardly extending arms, bifurcated at their lower ends; an arched axle pivotally supported in the bifurcations of said arms; and withdrawable means for retaining said axle in said arms."

The parts in terms combined in claims 8 and 9 are substantially alike; but claim 8 calls simply for an axle while claim 9 calls for an arched axle; apart from this difference, both claims expressly provide for a fifth wheel and a tongue, with pivotal connection between each and the top bar of the axle, but they call only for "means" to connect the tongue with the ends of the axle. Claims 8 and 9 are shown in the margin.[3]

In testing the effect of the prior art upon the claims in suit, it will be helpful even again to recall the elements of the contested claims, without present reference to the merits of the combinations themselves. They are grouped in a running gear comprising: An arched and braced axle mounted on ordinary low wheels; a tongue connected directly with the top bar and indirectly through brace rods with the ends of the axle; and a fifth wheel, having withdrawable means, mounted on the top bar of the axle, with its upper and lower members connected by a kingbolt, the upper member bearing a forward bolster and having bracket arms extending forwardly to support a portion of the vehicle body. Although we have mentioned the forward bolster and bracket arms, they, as well as the end wheels of the axle, are each omitted from the claims. Keene in effect admitted his purpose of using an old form of arched axle, when he said, as already stated, that it is "adapted to vehicles having small forward wheels"; and his purpose of strengthening the arch is made equally plain by his specification, where it is stated that "the weight of the load placed upon this axle is carried upon the arch of the axle proper." The idea of bracing an arched axle, however, was old at the date of his application. It is also true that the tongue used and its connections with the axle were likewise old.

The patent to Lomont in 1889, No. 410,249, shows an arched and trussed front axle with wheels that would readily pass under the vehicle body when making short turns in either direction. The front axle is composed of an arched metallic bar; it is supported, moreover, by a metal bar chord and by metal bar braces supplementing the chord. The patent also shows a tongue, the rear end of which appears from the drawings, though not by the specification, to be connected with the trussed axle; but braces for the tongue are distinctly shown and described, which are disposed similarly to the rods of the present patent, and which connect the tongue with the end portions of the front axle. The patent to Morel and Lomont in 1890, No. 433,482, contains a trussed axle similar to Lomont's, and a tongue maintained as follows: its rear end is fastened to the upper bar of the axle by converging metal arms, and through the use of inclined bars the tongue

[3] "8. In running gear, in combination, a fifth wheel comprising an upper and a lower member rotatably secured together; an axle pivotally connected with the lower fifth-wheel member; a tongue connected at one end with said axle; and means for connecting the ends of said axle with said tongue."

"9. In running gear, in combination, a fifth wheel comprising an upper and a lower member rotatably secured together; an axle having an arched central portion, which central portion is pivotally connected with the lower member of said fifth wheel; a tongue connected at one end with said central portion; and means for connecting the ends of said axle with said tongue."

is also fastened to the end portions of the axle; in point of equivalency these features are the same as those of the patent in suit. It is true these patents relate to road scrapers, but they are large four-wheeled devices that would seem to require much strength and sustaining power in the front axles, as well as tongues rigidly maintained for drawing and turning the vehicles. The patent to Senderling in 1900, No. 653,489, discloses an arched axle and means for preventing the sides of the arch from spreading; also a tongue which is so adjusted as in effect to be connected both with the arched portion of the axle, and, through the use of brace rods, with the end portions of the axle. The arched axle proper would seem to be of metal, though this is not distinctly stated; a large wooden member is fitted to and placed upon the upper surface of the member just mentioned; the two members are fastened together by substantial clips disposed similarly to those of the patent in suit except that their threaded ends and nuts are maintained at the bottom instead of the top of the braced structure. The strength of this construction is questioned by counsel; but the unitary character of the structure would seem substantially to utilize the combined strength of its parts.

There are other patents showing parts similar to those we have described. For example, patents to Custer in 1870, No. 107,688; to Vanorman in 1871, No. 121,692; to Bell in 1883, No. 278,855; to Jewett and Nichols in 1887, No. 363,241, and to Bulger in 1889, No. 397,777, disclose each a trussed arched axle; and further patents, to Moulton in 1886, No. 347,820; to Moulton and Booth in 1887, No. 370,347; and to Reed in 1890, No. 438,896, severally disclose arched axles and tongues with devices designed to fasten the tongues to the centers and, through lateral tie rods, to the ends of the axles.

The remaining elements to be considered with reference to the prior art are the fifth wheel, its pivotal connection with the arched axle, and the "withdrawable means for retaining said axle in said arms." It will be remembered that the fifth wheel is first mentioned in claim 7, and that this claim is the only one that calls for the "withdrawable means" stated, while the pivotal connection alluded to appears in claims 7, 8 and 9; but when Keene made his application these elements were also old. It is well to remark here that a number of the patents before alluded to, indeed all disclosing four wheels, show devices of one kind or another for turning the front running gear of each freely upon its vertical axis; in truth, it is common knowledge that these devices are called fifth wheels regardless of their forms.

The patent to Gorsuch in 1885, No. 330,781, relates exclusively to fifth wheels, and seems plainly to have anticipated Keene's fifth wheel. The device of Gorsuch in part consists of a "base ring," the lower member of the fifth wheel, mounted on a straight axle and clipped thereto by two sets of integral arms, each set having a tie plate upon the lower ends, and each tie plate being held against the under face of the axle by nuts. The "cap ring" is the upper member of the fifth wheel, and is so constructed with reference to the base ring as to equalize all the bearings. It is to be noted that, apart from the fact that the upper and lower members of this fifth wheel are designed to

rotate one upon the other, the depending arms and tie plates that are maintained about the axle are to all intents and purposes the same as the bifurcated arms and attachments of the lower member of the fifth wheel in suit. Further, the "withdrawable means" in question had been disclosed by the device of Gorsuch more than 18 years before the date of Keene's application. The patent to Bache in 1892, No. 488,060, discloses a fifth wheel comprising two plates, in the form of arcs, designed to rotate one upon the other, the lower one having two depending clips for securing the device to the axle of the vehicle, and, as Bache says in his specification, "in the ordinary manner." These clips are provided with nuts at their lower ends, and so furnish another illustration of the "withdrawable means" claimed by Keene. The patent to Crall in 1889, No. 600,305, shows two circular and rotatably connected members of a fifth wheel; the lower member is provided integrally with lugs which are designed to straddle the axle and hold it in place, the lugs having clamp plates which are secured by nuts to the lower side of the axle; and, besides the other features of obvious resemblance, it is to be noted that this is an additional instance of the withdrawable means of Keene.

As to pivotal connections between arched axles and fifth wheels, our attention has been called to the patents of Kemp, one in 1897, No. 584,877, and the other in 1901, No. 666,426, which were for improvements in manure spreaders. The front running gear of each includes a fifth wheel connecting an arched axle with the frame or upper portion of the vehicle. We speak of the axles as *arched,* for the reason that they are so shown by the drawings; though in the specification of the first patent a "bent front axle" is called for, while in the second a "front axle" is mentioned. Indeed, the lack of detailed descriptions in the specifications as respects alike the fifth wheels and front axles is suggestive of the idea that fifth wheels and front arched axles were then regarded as familiar objects, especially when compared with other specifically described features of the patented devices. However, when the identifying letters appearing in the specifications are read in connection with the drawings, the parts are easily recognized and, moreover, a marked similarity is readily seen between the fifth wheels and the axles of those patents and the corresponding parts of the patent in suit. The particular feature of the Kemp patents to which attention is here called is that the arched front axle of each is pivotally connected with the fifth wheel. The axles are apparently round metal bars, and are maintained in circular openings of arms which extend downwardly from the fifth wheels; thus the pivotal quality of each of those connections is shown quite as certainly as it is in Keene's patent; and this is not to speak again of the fact that Keene fails to show any advantage to be derived from such a connection. And this pivotal connection was also shown in the patent to Watkins in 1887, No. 374,134, for improvements in manure spreaders. The front axle there is arched and appears to consist of a round metal bar. A fifth wheel, plainly shown between the axle and front bolster, has broad depending arms which embrace the central portion of the axle and are held together by a bolt passing through openings near the lower ends of the arms.

[1] Apart from the undisputed testimony of the defendant's expert, the drawings alone must here be relied on; it hardly can be doubted, however, that they show the arched axle to be pivotally connected with and supported by the depending arms of the fifth wheel. Further, the bolt mentioned would seem to afford withdrawable means equally with that feature of Keene's patent; and we think it is clear that through these drawings the device mentioned was "described" in a "printed publication" within the meaning of the Patent Act. Section 4886, as amended by Act March 3, 1897, c. 391, 29 Stat. 602; Loom Co. v. Higgins, 105 U. S. 580, 594, 26 L. Ed. 1177; Saunders v. Allen, 60 Fed. 610, 613, 9 C. C. A. 157 (C. C. A. 2d Cir.).

[2-4] Now, in view of the prior art, can it rightfully be said that patentable novelty, rather than mechanical skill, is disclosed by any of the combinations set out in the claims in suit? The question of invention or skill is necessarily one of fact. Loose Leaf Co. v. Leaf Binder Co., 230 Fed. 120, — C. C. A. —, decided by this court December 15, 1915; Herman v. Youngstown Car Mfg. Co., 191 Fed. 579, 112 C. C. A. 185 (C. C. A. 6th Cir.); Ferro-Concrete Const. Co. v. Concrete Steel Co., 206 Fed. 666, 668, 124 C. C. A. 466 (C. C. A. 6th Cir.). Although the range of inquiry into the state of fact presented here is large, it is to be remarked that the plaintiff's expert distinctly admitted that he had not considered the prior art. The fact alone that the elements of a combination-claim are old is, of course, not enough to invalidate it. Loom Co. v. Higgins, supra, 105 U. S. 591, 26 L. Ed. 1177; Loose Leaf Co. v. Leaf Binder Co., supra; Ferro-Concrete Case, supra, 206 Fed. 668, 124 C. C. A. 466. Here, however, the elements of the claims in issue were not merely old at the date of Keene's application, but in point of equivalency they had for years been devoted to the same uses in the same art and with substantially like results. It would seem to follow that skill, rather than inventive faculty, was involved in producing the combinations in question. See decisions of this court in Overweight Counterbalance El. Co. v. Henry Vogt Mach. Co., 102 Fed. 957, 961, 962, 43 C. C. A. 80; American Carriage Co. v. Wyeth, 139 Fed. 389, 391, 392, 71 C. C. A. 485; Star Hame Mfg. Co. v. United States Hame Co., 227 Fed. 876, 882, 883, — C. C. A. —, and citations. As Judge Severens said in the first of these decisions:

> "There is no invention in merely selecting and putting together the most desirable parts of different machines in the same art, where each operates in the same way in the new machine as it did in the old, and effects the same result. No principle of the patent law stands on plainer reasons than this."

[5] But it is said that defendant has failed to show any single patent or prior publication which contains all the elements of any of the contested claims, and that "the question of anticipation" cannot be determined upon a showing from the history of the art that one of the elements may be found here and another there and so on throughout the entire number. Clearly the facts of the present case do not admit of, much less require resort to such a course here; too many parts of the present structure are found, as we have seen, in a single

prior patent, not to speak of their repetition in each of *several* earlier patents. It is true, however, that the method suggested by counsel might not of itself justify condemning a patent; it is equally plain that the suggestion is not an answer to the question that must be met here; it overlooks the evidential tendency of the prior art in a given case either to establish or to negative the presence of invention. It scarcely need to be said that courts may and do look into the prior art for the purpose of ascertaining whether the elements of a claim are new or old and, if old, whether through the means of comparison so afforded the skill of the mechanic, or indeed the faculty of the inventor, was required to organize the elements of the claim and to adapt them so as to accomplish the result attained. It is not perceived, nor do counsel suggest, what better source of information, what means more calculated to lead the mind to a right conclusion, can be found than in the prior art. True, prior art becomes at times a source of confusion and even abuse. Still, to insist that claims disclose invention or discovery where their substantial equivalency in elements, in mode of operation and results, plainly appear in two or more earlier patents or publications, though not all in one patent or publication, is to ignore the very terms of the patent act. Above all, counsel's theory is opposed to the settled course of judicial decision. As was said, in holding a claim to be void for want of invention, in Dilg v. George Borgfeldt & Co., 189 Fed. 588, 590, 110 C. C. A. 568, 570 (C. C. A. 2d Cir.):

"* * * Although all the elements of the claim may not be found in any one patent, it is clear that they are all to be found in different patents. No single patent may anticipate, but they all have a bearing upon the question whether invention or mechanical skill was involved or required."

Again, in Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, at 222, 13 Sup. Ct. 850, at 853 (37 L. Ed. 707), when affirming a decree dismissing the bill in a patent suit, Mr. Justice Brown said:

"In view of the advance that had been made by prior inventors, it is difficult to see wherein Orum displayed anything more than the usual skill of a mechanic in the execution of his device. All that he claims as invention is found in one or more of the prior patents."

And further (149 U. S. 223, 13 Sup. Ct. 853, [37 L. Ed. 707]):

"In view of the fact that Mr. Orum had no actual knowledge of the Gory patent, he may rightfully claim the quality of invention in the conception of his own device, but as he is deemed in a legal point of view to have had this and all other prior patents before him, his title to invention rests upon modifications of these, too trivial to be the subject of serious consideration."

So in Florsheim v. Schilling, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574, where alleged infringements of two separate patents were involved, and error was assigned to a finding of the circuit court that "there was no novelty in complainants' invention, because one feature was found in one old patent, and another feature in another, and still another feature in a third patent, all of which constituted the subject-matter of the claims in complainants' patent," it was held (137 U. S. 72, 11 Sup. Ct. 23 [34 L. Ed. 574]):

"We concur with the Circuit Court that all the claims in these patents, except the last two claims in No. 238,101, are invalid by reason of their long prior use as inventions secured by patents which cover every feature described in those claims; and that the combination of these features in No. 238,100 is not a patentable invention."

And in Busell Trimmer Co. v. Stevens, 137 U. S. 423, 11 Sup. Ct. 150, 34 L. Ed. 719, when denying the contention that certain features in the Orcutt patent constituted "patentable novelties, especially the combination of them into one device," it was said (137 U. S. 433, 11 Sup. Ct. 153 [34 L. Ed. 719]):

"We repeat that in view of the previous state of the art we think otherwise. The evidence, taken as a whole, shows that all of those claimed elements are to be found in various prior patents—some in one patent, and some in another, but all performing like functions in well-known inventions having the same object as the Orcutt patent, and that there is no substantial difference between the Brown metal cutter and Orcutt's cutter, except in the configuration of their molded surfaces. That difference, to our minds, is not a patentable difference, even though the one cutter was used in the metal art, and the other in the leather art. A combination of old elements, such as are found in the patented device in suit, does not constitute a patentable invention."

See, also, decisions of this court before cited: Overweight Counterbalance El. Co. v. Henry Vogt Mach. Co., 102 Fed. at page 961, 43 C. C. A. 80; American Carriage Co. v. Wyeth, 139 Fed. at page 391, 71 C. C. A. 485.

[6, 7] We may add that when all the parts of the claims involved in the instant suit are considered, either separately or collectively, it cannot escape attention that there is substantial identity both in function and result between these parts and those of other structures, which, it is safe to say, had been well known for many years. We cannot doubt that it was well within the skill of the mechanic, when once told of defects existing in any of the old parts so intended to be used, to devise and make the changes appearing here. If it were conceded that Keene's arrangement is attended with better results than had been obtained before, still this would not sustain the contested claims, for "the mere carrying forward of an original conception, resulting in an improvement, in degree simply, is not invention" Consolidated Roller Mill Co. v. Walker, 138 U. S. 124, 132, 11 Sup. Ct. 292, 34 L. Ed. 920; Burt v. Evory, 133 U. S. 349, 359, 10 Sup. Ct. 394, 33 L. Ed. 647; Star Hame Mfg. Co. v. United States Hame Co., supra, 227 Fed. at page 883, — C. C. A. —, and citations; Dilg v. George Borgfeldt & Co., supra, 189 Fed. at page 591, 110 C. C. A. 568; Overweight Counterbalance El. Co. v. Henry Vogt Mach. Co., supra, 102 Fed. at page 961, 43 C. C. A. 80; American Carriage Co. v. Wyeth, supra, 139 Fed. at page 391, 71 C. C. A. 485.

[8] It is shown that large sales have been made of the manure spreaders upon which the patented structure in question has been used, and it is insisted that this fact, in connection with the presumption arising from the issue of the letters patent, ought to sustain the patent. True, in cases of doubtful validity, commercial success of the patented device is often helpful; but such a fact cannot aid patented claims which are, as here, clearly lacking in the necessary quality of

invention. Olin v. Timken, 155 U. S. 141, 155, 15 Sup. Ct. 49, 39 L. Ed. 100; Richards v. Chase Elevator Co., 159 U. S. 477, 487, 16 Sup. Ct. 53, 40 L. Ed. 225; Lane v. Welds, 99 Fed. 286, 292, 39 C. C. A. 528 (C. C. A. 6th Cir.); Autosales Gum & Chocolate Co. v. Caille Bros. Co., 224 Fed. 473, 476, 140 C. C. A. 159 (C. C. A. 6th Cir.).

The decree dismissing the bill is affirmed, with costs.

TOCH et al. v. ZIBELL DAMP RESISTING PAINT CO.

(Circuit Court of Appeals, Second Circuit. February 21, 1916.)

No. 25.

PATENTS ⇐328—VALIDITY—PRIOR USE—METHOD OF TREATING CEMENT.

The Toch patent, No. 813,841, for method of treating cement and cement construction, which consists in applying to the surface of a Portland cement construction a liquid acid resin which, uniting with the free lime in the pores of such construction, forms a resinate of lime, making a hard surface impervious to water, etc., *held* void for prior public use of the treatment by another more than two years before the filing of the application.

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

Suit in equity by Henry M. Toch and another against the Zibell Damp Resisting Paint Company. Decree for defendant, and complainants appeal. Affirmed.

This cause comes here on appeal from a decree entered in the United States District Court for the Southern District of New York dismissing the bill of complaint. The facts appear in the opinion.

Kenyon & Kenyon, of New York City (Robert N. Kenyon, William Houston Kenyon, and Walter C. Noyes, all of New York City, of counsel), for appellants.

Merwin & Swenarton, of New York City (Timothy D. Merwin and W. Hastings Swenarton, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The United States granted to complainants on February 27, 1906, letters patent No. 813,841 of which they are still the sole and exclusive owners. The patent was issued for improvements in methods of treating cement and cement construction. The invention consists of a method of treating with a suitable organic acid or acid body a Portland cement construction for the purpose of making its surface "dust proof, oil proof, water proof and wear proof." The invention relates to the surfacing after setting of a Portland cement construction, and is largely employed in surfacing cement floors which are subject to wear and abrasion. This abrasion of the surface raises continuously a fine dust containing free lime, which is injurious both to health and to machinery. Any attempt to paint a Portland cement surface met the difficulty of the early peeling off of the paint,

due to the chemical action of the free lime upon the constituents of the paint, and it was generally understood that a Portland cement construction could not be successfully painted. Moreover, Portland cement construction, although hard and rocklike, is to a certain extent porous and for that reason non-water proof and non-oil proof. The Toch invention was intended to overcome these difficulties.

The patentee, Maximilian Toch, is a chemist of distinction and is connected with Columbia University and the College of the City of New York. After three years of experimental investigation of Portland cements and of resins he claims to have discovered that the modicum of free lime present in the pores is the root of the dust and paint-scaling evil. He invoked the known chemical reaction of free lime in the presence of acid resins to produce resinate of lime as a means to an end, and conceived the idea of applying with a brush a liquid acid resin to the surface of a Portland cement construction. He thus secured, after allowing time for penetration and chemical reaction, a resinate of lime to be formed in situ in the pores of the Portland cement construction, to a depth of from one-eighth to three-eighths of an inch, which filled the pores and consolidated the structure. Thus the cement structure and the resinate of lime structure constituted a new composite substance said to be non-porous, insoluble in oil or water, and mechanically more solid and resistant than the Portland cement construction alone. The practical result it is said was a substantially new composite surface upon Portland cement construction which was liquid proof and wear proof, dustless and strong, and which would hold paint permanently. The problem of surfacing Portland cement construction against wear, as for floor purposes, and against weather, as for wall purposes, and for receiving and retaining paint, it is claimed was thus solved by him. The invention has gone into practical use to a large and increasing extent.

It is not claimed that Dr. Toch discovered the reaction that takes place between lime and the acid resins. That it is admitted was well-known. And he did not discover the characteristics or qualities of resinate of lime by itself. That also was well known. But it is claimed that he did discover that, in the surface pores of Portland cement construction after setting, there is just that modicum of free lime to react in those pores with such quantity of liquid acid resins as will deeply penetrate the pores when externally applied and form resinate of lime in situ. This it does in such a way as to substantially integrate with the solid portions of the Portland cement construction itself, the resinate of lime extending down in rootlike forms in the pores of the Portland cement construction and solidly filling those pores—rock in rock—the whole producing a new composite surface partly Portland cement, partly resinate of lime mechanically strengthened and proof against abrasion and wear, and dustless, and at the same time liquid proof. And it is claimed that no one had ever actually done that thing or described that thing before.

Dr. Maximilian Toch describes his process in his specifications as follows:

"I first apply to the cement floor, wall, or other construction a filler prepared from a highly acid resin, such as Manila or copal gum. For the

preparation of the filler the resin is heated, together with a suitable vegetable drying oil or mixture of oils—as, for instance, linseed and chinawood oils—under conditions which will substantially avoid the loss of volatile resin acids. This heating is preferably effected in vacuo, although the method technically known as 'underheating' may be used. The heating is continued until solution is effected, after which a suitable diluent, as benzol, acetone, turpentine, or naphtha, is added. One or more coats of this filler may be applied to the cement. For the preparation of the second coating mixture the resin is heated under such conditions as to expel a portion of the volatile resin acids and an increased proportion of vegetable drying oil is used. The solution is diluted as above and is preferably mixed with a suitable pigment, as oxid of iron or zinc or sulfid of zinc in proper proportion to give the desired shade. The mixture so prepared will dry in about five hours to a hard and durable coating, in which no surface disintegration will occur, even after a long period of use."

The complainants aver that the defendant, without any license from them and in violation of their rights and in infringement of their patent, has wrongfully used and caused to be used and still is using the invention described in their patent. They ask for an injunction, preliminary and permanent, as well as profits and damages.

The defendant in an amended answer asserts (1) that Toch, the inventor, was not the first and original inventor of the alleged invention or improvement covered by the patent in suit, but that it was anticipated in the prior art; (2) that the alleged invention was not and is not an invention or discovery which could lawfully be made the subject of a patent under the statutes of the United States, in view of the prior public use.

The District Judge held the patent invalid because of two British patents which he regarded as anticipations of it, and on that ground dismissed the bill.

It appears that in 1884 a British patent, No. 5,237 was issued to Walley & Gare. The specification of that patent states that the invention consists:

"In protecting from damp, moisture or decay, and in varnishing and enameling and in some cases hardening or toughening stone, brick, tile, earthenware, cements, lime, and gypsum, plasters, metals, wood, fibrous materials, paper, yarns, threads, cords, ropes, and woven, knitted, and braided fibrous fabrics, by applying to or combining therewith a certain composition hereinafter described which is or may be made use of in reference to the said substances or materials by applying to the same as a varnish either alone or combined with ordinary paint or pigment.

"It is or may also be made to act when required as an enamel either alone or in combination with other known or suitable substances, when several coats of it are applied to the surfaces of the said substances or materials after the pores or interstices in such have become filled or saturated with it, and the said composition is or may also be made to harden or toughen more or less the said substances or materials (except metals) when they are soaked in or combined therewith. It is or may be applied to or combined with stone, brick, tiles, cement, lime or mortar, plaster or gypsum, or plaster of Paris, either before or after being built or formed into walls, structure, or articles.

"When applied as a varnish or enamel to metals it protects against damp, moisture, or atmospheric effects, and prevents rust and decay. When applied as a varnish to walls inside or outside it will prevent damp or moisture from passing either into or out of the wall, plaster, or cement. It will varnish, enamel, waterproof, and penetrate and harden or toughen paper, fibrous materials, and articles or manufactures made from same. It will act as a substitute for paint alone, or combined with paint or pigment, and also as a

substitute for varnish and enamel. The composition above referred to consists of resin-gum-thus, and spirit of petroleum, benzoline, or bisulphide of carbon, and also boiled linseed oil and sometimes a little India rubber or caoutchouc."

The court below thought, as we have said, that the above patent amounted to an anticipation of the patent in suit. The Walley & Gare patent, however, is one of those characteristic English patents which this court has often had occasion to criticize, where a man who finds out that his device or preparation will accomplish something in certain relations draws on his imagination and suggests its use in numerous relations about which he knew nothing experimentally. In that patent we find the patentee enumerating 17 substances; for aught that is disclosed he may not have tried his composition on more than 2 or 3 of them. They are far from identical or even from being similar. There is a vast difference between metal and yarns, for example, and yet the patent is applicable. The patentee might as well have enumerated 27 or 57 substances. This court has always been loath to give a broad construction to such patents as that of Walley & Gare, and while "cements" is broad enough to include "Portland," it is not at all clear to us that in England in 1884 the patentees had Portland cement in mind. But in the view we take of the case at bar it is not necessary to dispose of it upon that point and we refrain from passing upon it.

The second patent considered is a British patent, No. 18,032, issued in 1901 to Heinrich Spatz of Berlin, Germany. In his specification Spatz says:

"It is well known as a great inconvenience of freshly whitewashed masonry that a very long time is necessary for the complete drying of the same, inasmuch as the carbonic acid contained in the atmosphere acts upon the lime and liberates water, forming at the same time carbonate of lime. The slowness of the drying process of such freshly coated walls of masonry is a great drawback in view of the final coating or the wall paper or the like having to be applied only after considerable time for drying has been allowed. Furthermore, it has been impossible to determine the completion of the drying process with any degree of exactness, which resulted in the inconvenience of coatings of paint, wall paper, and the like, if applied too early to the walls, becoming destroyed by moisture. Then the separation of moisture upon the surface of masonry induces the growth of fungi which are very detrimental to health. The object of the present invention is to prevent the formation of moisture, not only upon the freshly whitewashed walls, but upon wet masonry in general, so as to avoid the inconveniences arising therefrom. This is effected by producing an impervious coating upon the wet walls or the like it is desired to dry, this coating being impermeable to moisture and well-nigh invisible to the eye, and, being applied to the wet walls, makes it possible to coat the same immediately with the wall paper, paint, or the like."

He also states:

"Masonry which has been coated with any of these solutions, though it might be in a wet condition or freshly whitewashed, may be immediately covered with wall paper or any other coating, as the solvent rapidly evaporates, leaving the impervious lime salt behind. It is evident that my invention may be applied to wet and freshly whitewashed walls for basements, cellars, tunnels, and the like, and it is of great advantage also when used in combination with coatings in cement, mosaics, and others."

The court below thought the Spatz patent amounted to an anticipation of the patent in suit. The Spatz patent was accepted January 2,

1902. We believe that the Toch invention does not date back of March or April, 1902, when Maximilian Toch explained it to Baekeland. Maximilian Toch testified, it is true, that he conceived his invention in 1900 and disclosed the same to his brother in 1901. But upon the evidence it seems to us that Maximilian Toch was in 1900 and 1901 still experimenting and had not completed his invention. And if we are mistaken in this respect the evidence as to what Dr. Toch told his brother in 1900 and in 1901 is not sufficient to establish that actual disclosure of the invention which the law requires. As said by the Supreme Court in Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521 (1891):

"Such testimony, given for the purpose that this was, is necessarily subject to the gravest suspicion, however honest and well-intentioned the witness may be."

And see Taigman v. Forsberg, 223 Fed. 787, 139 C. C. A. 607 (1915); Greenwald Bros. v. La Vogue Petticoat Co., 226 Fed. 448, — C. C. A. — (1915).

This court does not question in the least the entire honesty and correct intentions of Dr. Toch. But the evidence is not sufficient under the rule governing such cases to establish the fact that Toch had completed his invention and disclosed it prior to the publication of the Spatz patent in England. The Spatz patent, in the concluding words of the specification, stated:

"It is evident that my invention may be applied to wet and freshly whitewashed walls for basements, cellars, tunnels, and the like, and it is of great advantage also when used in combination with coatings in cement, mosaics, and others."

This led the court below to find anticipation of the Toch patent for he concluded that the above phrase meant "coatings laid in cement, such as mosaics and similar coatings." In other words, the court below thought that under the Spatz description these mosaic coatings were to be themselves coated with the oleic acid solution. But we do not so understand the patent. Spatz never contemplated, in our opinion, the application of the oleic acid solution to the outside of the mosaic itself. He states that:

"Masonry which has been coated with any of these solutions, though it might be in a wet condition or freshly whitewashed, may be immediately covered with wall paper or any other coating."

Then he goes on to say that the invention is of great advantage also when used in combination with coatings in cements, mosaics, and others. The mosaics laid in cement are themselves the coatings that cover the already treated masonry. They are not themselves coated by anything. The Spatz patent was in our opinion correctly summed up by the expert, who testified that:

"It is evident * * * that the only object sought or accomplished by the process described in this patent is to prepare, by waterproofing, a surface of mortar (wet masonry) for receiving a coating of wall paper, paint, or mosaics. * * *"

Moreover, there could be no reason for applying the Spatz solution to a mosaic surface, for in mosaics the upper exposed surface con-

sists almost entirely of pieces of glass, earthenware, or stone. And the uncontradicted testimony of those skilled in the art shows that mosaic coatings were not laid in Portland cement (to which the Toch patent applied), but that they were always laid in Keene cement, or in similar gypseous cement which contained no free lime. The cement in which mosaics are laid is practically covered up by them, and appears on the surface only in fine lines or cracks between the edges of the inlaid pieces. Even if Portland cement had been used and the Spatz solution applied, there would be no reaction between the latter and the inlaid pieces which form practically the whole surface; and if there were any reaction along the fine lines of the cement appearing on the surface, it would take place on such a small part of the surface that it would be wholly insignificant and negligible and useless. It did not teach the practical art how to treat Portland cement construction. Toch's patent relates to Portland cement construction. We agree, however, with the court below that the Spatz patent shows an understanding of the theory of the patent in suit, in that it discloses a knowledge of the chemical reaction taking place between the acid gum and the lime of the cements and mortars. As said by Judge Hand in the court below:

"He says that the lime combines with the carbonic gas in the air and forms carbonate of lime, but that in so doing it liberates water. Hence he wishes to form a lime salt which, being already chemically combined, will have no affinity with any of the elements in the air. He chooses, as an acid to unite with the lime base, oleic acid first and curiously enough resinous acids second. The resulting resinate of lime is exactly what Toch showed in his preferred example."

We also agree that if the Spatz process were applied to Portland cement it would act as the solution of the patent in suit does and produce the same result.

This brings us to the second defense, that of prior public use. The rule on this subject of prior public use is elementary. It is stated in Walker on Patents, § 71, as follows:

"Novelty is negatived by prior knowledge and use in this country by even a single person of the thing patented. This rule applies even to cases where that knowledge and use were purposely kept secret; and it applies no matter how limited that use may have been."

The law is clearly established that a single prior public use for more than two years prior to the application for the patent makes the patent void. Egbert v. Lippmann, 104 U. S. 336, 26 L. Ed. 755 (1881); Hall v. Macneale, 107 U. S. 90, 2 Sup. Ct. 73, 27 L. Ed. 367 (1882).

The defendant claims that it, or Zibell, its president, made public use of the Toch invention more than two years before the Toch application was filed. The testimony shows that in 1903 defendant furnished a material called protectorine to a contractor to be applied to the Portland cement walls of a squash court at the summer home of a Mr. Blair in Peapack, N. J., and that it was so applied. It is claimed that the material so furnished was like the protectorine now used by the defendant and which is alleged to infringe. The president of the defendant company testified that he began to manufacture protectorine in 1903, and made it in the same way now

that he used when he began making it in 1903. According to his testimony protectorine has a tendency to force itself deeply into the cement, to clog up the pores, and to make it as hard as stone. Having applied the protectorine to the cement, he was in the habit of giving to it a coating of paint or hard oil floor varnish. He found it adhered better, and was not injured by the acids which the cement contained. The testimony of the experts shows that the protectorine which is alleged to infringe consists almost wholly of resin, resin oil, or like products, dissolved in volatile thinners, and an oil such as linseed oil mixed with a pigment. The expert testimony shows that the second coat given to the Blair squash court in 1903 contained linseed oil and resin admixed with a pigment. Prior to the use of defendant's protectorine it appears that the parties had experimented on the squash court walls with a great many kinds of paint, ordinary and extraordinary, and that defendant's was the first that would even stay on. The walls were subject to a great deal of dampness and the paint previously tried had sloughed off. "It sagged and would not stay." A specimen of the wall was subjected to chemical analysis, and it corresponded to an ideal Portland cement mixture, being about one part cement to one part sand. And the analysis of the paint chips taken from the wall conformed to the analysis of the protectorine and paint now used by defendant.

The complainants endeavor to break the force of this testimony. They call attention to the fact that before defendant's protectorine was applied the walls had been scraped to rid them of the coats of paint which had been previously given to the walls in the unsuccessful attempt to paint them to which we have directed attention. They lay emphasis, too, on the fact that the walls had also been washed with turpentine, and then with washing soda, and finally with water. They would have us understand that walls so treated would be entirely changed in their nature, that the several coats of paint that were originally applied would be attacked by the free lime, and that the free lime would combine with some of the constituents of the paint and form a lime soap, thereby causing the paint to flake off, and that the result of this would be that most, if not all, of the free lime in the wall would be destroyed. They further say that washing the wall with turpentine would tend to carry into the wall such constituents of the paint as the turpentine could dissolve; that when the wall was next sponged with washing soda, if any of the free lime were left in the Portland cement, this washing soda, which is carbonate of soda, would unite with the free lime and convert it into carbonate of lime; and that the wall that would result from this would not be an ordinary Portland cement wall, but would have its pores already largely filled up with paint, and would have no free lime in it with which the resin acid of the protectorine could combine.

We are not impressed with the testimony in support of the above theory, especially in view of the fact that the complainants' witnesses did not analyze the cement taken from the Blair squash court, while the defendant's expert made such an analysis. The defendant's expert testified that the analysis showed that in the cement of the Blair walls

the free lime had been slightly increased over the average, as there was more actual lime, both combined and uncombined, by about 4 per cent., than is found in the ideal Portland cement, to wit, 66.6 as against 62.2. Moreover, as free lime is slightly soluble in water, and fresh linseed oil repels water, and turpentine does not mix with water, but repels it, we do not see how any substantial neutralization of the free lime could have occurred in the cement surface.

The testimony of the defendants' witnesses as to what was done to the cement walls at the Blair squash court and of their experts as to what their chemical analysis shows as to the cement walls and the nature of the protectorine then used and that it corresponded with that now sold by defendants is convincing coming as it does from persons of high standing. One of defendant's experts was one of the founders of and an assistant director in the Institute of Industrial Research at Washington. He had been educated as a chemist at Brown University and at the University of Pennsylvania, and for five years prior to the trial had been director of the scientific section of the Paint Manufacturer's Association of the United States. Another witness called by the defense had been educated as a chemist at the University of Berlin, and had received the degree of Doctor of Philosophy there. In this country he had been employed as a chemist by the largest manufacturers of dye stuffs in America. The complainants' expert, after stating that he had visited the house of Mr. A. Douglas Nash on Long Island in March of the year of the trial, and found that defendant was treating a Portland cement floor therein with its protectorine and waterproof paint, and that he had taken samples to his laboratory and made an analysis of them, testified as follows:

"The process which I saw carried out upon the cellar floor of Mr. Nash's residence at Flushing, L. I., by the defendant company on March 1, 1911, is the precise method specified in claims 1 and 2 of the patent in suit. It is the method of claim 1, because it consisted in treating a Portland cement construction by applying to the surface of the cement an organic acid or acid body which was suitable because it had the properties of and produced the results effected by the materials mentioned in the description of the patent; and it is the method of claim 2 because the particular organic acid or acid body used was an acid resin and because it was applied in the form of a solution."

The testimony satisfies us that the protectorine sold by defendant to-day and the process it employs is that which was used by it in 1903. And as complainants' own expert testified that the process used by defendant is substantially that used by complainants under the patent in suit we are compelled to hold the patent invalid.

Decree affirmed.

Judge LACOMBE heard the arguments, participated in the consultation, and indicated concurrence in the conclusions above expressed, but did not see the text of the opinion.

LOVELL-McCONNELL MFG. CO. v. ORIENTAL RUBBER & SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. February 29, 1916.)

No. 131.

1. PATENTS ⇐18—"INVENTION"—OBVIOUS CHANGES IN CONSTRUCTION.
The taking of two steps in changing a prior device, both obvious and not involving invention, and unpatentable when taken separately, does not involve "invention" and become patentable when taken in unison.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 18; Dec. Dig. ⇐18.

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

2. PATENTS ⇐26(2)—INVENTION—COMBINATION OF OLD ELEMENTS.
A combination of old elements, to be patentable, must produce a new result or effect in the combined forces or processes from that given by their separate parts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 29; Dec. Dig. ⇐ 26(2).]

3. PATENTS ⇐328—INVENTION—AUTOMOBILE HORN.
The Hutchinson patent, No. 1,120,057, for a diaphragm horn for automobiles, *held* void for lack of invention, in view of the prior art.

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

Suit in equity by the Lovell-McConnell Manufacturing Company against the Oriental Rubber & Supply Company. Decree for complainant, and the defendant appeals. Reversed.

For opinion below, see 225 Fed. 74.

This cause comes here on an appeal from a decree of the United States District Court for the Eastern District of New York. The patent in suit relates to automobile horns.

Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., for appellant.

George C. Dean, of New York City (Drury W. Cooper and Irving M. Obrieght, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This is a suit brought under the patent laws of the United States for infringement of the United States letters patent No. 1,120,057. The patent was applied for on August 14, 1914, by Miller Reese Hutchinson, and the patent was issued on December 8, 1914. The application for the patent having been duly assigned to the plaintiff, the patent was issued in its name, and at the time this suit was brought was, and so far as we are informed still is, the owner thereof.

The inventor had on October 26, 1909, filed his original application, which is serial No. 524,762; and the patent in suit was issued upon an application filed as a division of the original application. The invention of the patent in suit "relates to horns or signaling devices

wherein a vibratory member such as a diaphragm is actuated by power derived from a rotatory member or drive shaft, which may be the armature shaft of an electric motor."

In his prior patents, Nos. 923,048, 923,049, and 923,122, Hutchinson had disclosed various means through which movement of a rotary member might be applied to vibrate a diaphragm, so that only a part of the movement of the diaphragm was forced by the driving means, the diaphragm being permitted any desired degree of independent motion preferably on both sides of normal.

In his original application, of which, as we have seen, the application for the patent in suit was filed as a division, the patentee described an arrangement of parts whereby the vibratory motion of the diaphragm could be derived from a drive shaft, when such shaft was arranged at an angle of the plane of the diaphragm, instead of parallel therewith. This he conceived to be particularly desirable in the cases where the armature shaft of an electric motor was utilized as the drive shaft, as it permitted a compact arrangement of the motor within a case which it would not be necessary to extend peripherally outside of the circumference required for inclosing the diaphragm.

He described his invention in the application upon which the patent in suit was issued as follows:

"In the specific arrangement forming the subject of the present application, the shaft is presented endwise to the diaphragm, and is either perpendicular or at a high angle to the diaphragm, and is arranged eccentrically therewith so that its axis does not pass through the center of the diaphragm. With the latter arrangement the diaphragm may have a comparatively small wear piece at its center and presenting a straight line contact surface with which the cams on the face of the rotor may successively engage in the most effective manner and the reaction of the diaphragm on the motor may be taken up by the thrust bearing of the shaft rather than in resistance lateral movement or bending of the shaft. If the shaft be the armature shaft of an electric motor, the latter may be mounted in a casing eccentric to the diaphragm; but its size may not be so great but what it may be disposed entirely within the rearward projection of the periphery of the diaphragm.

"When the device is secured in position with the axis of the diaphragm horizontal, I preferably drop the motor down, but keep its axis in the same vertical plane as the axis of the projector. Thus the center of gravity of the device is low and the device more stable, with less strain on its support, while the projector is on a higher level, and hence somewhat better adapted to project the sound clear of any interfering substructure of the automobile."

There are 14 claims; but in the court below the suit was narrowed down to one claim. It is conceded that the maintenance of the suit depends upon the validity and infringement of claim 12. That claim reads as follows:

"12. In an alarm or signaling device, a diaphragm, a pair of opposed diaphragm clamping members, one of said members having a sound outlet opening therethrough concentric with the diaphragm and the other of said members carrying a rearwardly extending cylindrical motor casing eccentrically disposed in respect to said diaphragm a motor within said casing having its armature shaft presented endwise to said diaphragm, a wear piece on said diaphragm at the center of the latter, a face cam carried by said armature shaft and engaging said wear piece, the eccentricity of said motor casing in respect to said diaphragm being substantially equal to the effective radius of said face cam, and means for adjusting the armature shaft and rotor axial-

ly to vary the degree of overlap of the face cam projections on said wear piece."

The elements of claim 12 have been enumerated and compared with plaintiff's prior patents in the brief of counsel for appellant as follows:

Claim 12 of Patent in Suit No. 1,120,057.	Patent No. 923,122.
1. A diaphragm.	1. A diaphragm, indicated by the numeral *5*, and which is element 1 of claim 12 of the patent in suit.
2. A pair of opposed diaphragm clamping members.	2. A pair of opposed diaphragm clamping members, *2* and *4*.
3. One of said members having a sound outlet opening therethrough concentric with the diaphragm.	3. One of said members, as *4*, having a sound outlet opening therethrough concentric with the diaphragm.
4. The other of said members carrying a rearwardly extending cylindrical motor casing eccentrically disposed in respect to said diaphragm.	4. The other of said members, as 2, carrying a rearwardly extending cylindrical motor casing (concentric with the diaphragm, but no new function is performed by mounting the casing eccentric of the diaphragm).
5. A motor within said casing having its armature shaft presented endwise to said diaphragm.	5. A motor within said casing (having its armature shaft parallel with the diaphragm, but no new function is performed in placing it endwise of the diaphragm).
6. A wear piece on said diaphragm in the center of the latter, a face cam carried by said armature shaft and engaging with said wear piece, the eccentricity of said motor casing in respect to said diaphragm being substantially equal to the effective radius of said face cam.	6. A wear piece on said diaphragm at the center of the latter, a cam carried by said armature shaft and engaging with said wear piece. (The eccentricity of the casing is purely a matter of form or arrangement, and the amount of the eccentricity is purely a matter of taste or design, and the amount specified in this element of the claim is sufficient to make the motor casing fit the motor, which is the natural way any mechanic would design it.)
7. Means for adjusting the armature shaft and rotor axially to vary the degree of overlap of the face cam projection on said wear piece.	7. Means for adjusting the armature shaft and rotor to vary the degree of overlap of the face cam projections on said wear piece. (This adjustment is found in patent No. 923,049. See Figures 4 and 8. See *81*, Figure 8.) The specification, line 16, page 5, says: "The extent of this rearward movement is determined and set by adjusting screw *81* threaded into the back side of the case at *82*, bearing upon *66*. By these means the cam *59* may be adjusted nearer to or farther from the diaphragm cam surface *69*. * * * Locking nut *82* is provided for locking screw *81* in any desired predetermined position."

Three expressions in claim 12 defining arrangement or positions alone are not found in the prior Hutchinson patents. These expressions are:

1. "Eccentrically disposed in respect to said diaphragm" (referring to the casing).
2. "Having its armature shaft presented endwise to said diaphragm."
3. "The eccentricity of said motor casing in respect to said diaphragm being substantially equal to the effective radius of said cam."

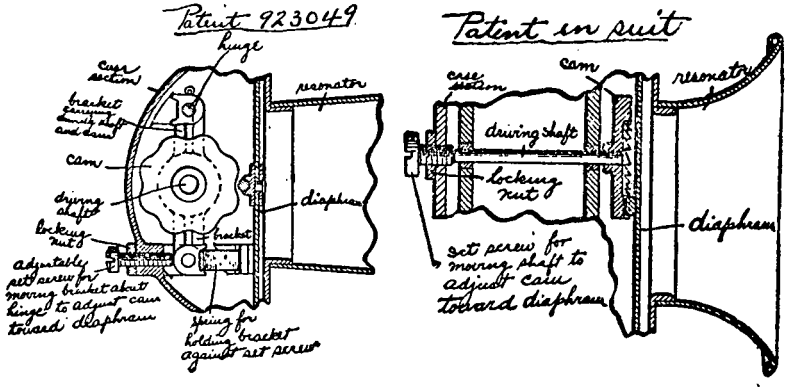
The first defines the position of the casing as *eccentric;* whereas in patent No. 923,122 it is concentric. This, as appellant contends, is purely a matter of form or arrangement, not affecting in any way the operations of the device, nor varying in any way its functions.

The second defines the armature shaft of the motor as presented endwise to the diaphragm and provided with a face cam, whereas it was parallel with the diaphragm in patent No. 923,122. This, too, is a mere matter of form position or arrangement. The movement of the diaphragm is the same, the sound produced is the same, and the instrumentalities for producing it are identical, whether the shaft is parallel with or perpendicular to the diaphragm.

The third defines the eccentricity of the casing as being equal to the effective radius of the cam. The eccentricity of the casing is also purely a matter of form or arrangement. The amount of eccentricity in no way affects the operation of the device.

The comparison already made of the horn of the patent in suit with the horn of the prior Hutchinson patents discloses that the motor shaft of the old "Klaxon" horn of the earlier patent has been turned up to a horizontal position so that the cam wheel will engage the wear piece on its face rather than on its edge. This is well shown in the following drawings:

Right Angle "Klaxon" Horn. Same with Motor Shaft Turned up.



There has been a rearrangement of exactly the same elements found in plaintiff's prior patents. Hutchinson's prior patents show a cam operated horn with an adjustable impact. They also indicate an electrical motor for sounding the horn. Later it occurred to Hutch-

inson that it would be simpler and better to adjust the armature shaft which carried the diaphragm, the actuating device.

[1] 1. Hutchinson changed the arrangement of the prior patents by turning up the motor from a parallel to a perpendicular position relative to the diaphragm; (2) he then provided the armature shaft with an adjustable and thrust screw, not as a part of the motor, but as a part of an outer case, and left the armature shaft loose in the case, so that he could adjust the cam towards the diaphragm with the end thrust screw. The first step, that of turning up the motor to a perpendicular position, was obvious; and after the first step was taken, the second step, that of providing the motor when turned up with means for adjusting it to vary the position of the cam with respect to the diaphragm, was also obvious.

The patent in suit contemplates no new function and accomplishes no new result. No new sound is produced. The substitution of a face cam for a rim cam is not a matter of importance. The two structures are merely mechanical equivalents. And this court is not prepared to hold that the taking of two steps, both obvious and not involving invention, and unpatentable when taken separately, involves invention and becomes patentable when taken in unison.

[2] It is, of course, true that invention may consist in the combination of old elements; the invention being in the combination. But the combination to be patentable must produce a new result or effect in the combined forces or processes from that given by their separate parts. The language of the Supreme Court in Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719 (1876) is applicable here:

"The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements."

And in the same case the court declared:

"The law requires more than change of form, or juxtaposition of parts, or of the external arrangement of things, or of the order in which they are used, to give patentability. Curtis on Patents, § 50; Hailes v. Van Wormer, 20 Wall. 353 [22 L. Ed. 241]. A double use is not patentable. * * * Curtis, §§ 56, 73. An instrument or manufacture which is the result of mechanical skill merely is not patentable. Mechanical skill is one thing; invention is a different thing. * * * The distinction between mechanical skill, with its conveniences and advantages, and inventive genius, is recognized in all the cases."

In the Hutchinson patent No. 923,122, no provision was made for securing an adjustment. But such a provision appears in his patent No. 923,049 in which there is disclosed a hinged bracket, whereby the cam and flexible driving shaft might be adjusted parallel with its own axis, not endwise thereof. The adjustment could not be applied to the motor-driven horn without pivotally supporting the motor and swinging the entire motor about its pivotal support each time an adjustment was made.

[3] In the patent in suit the claim is that Hutchinson has so designed the construction as to avoid the movement of the entire motor in adjusting the cam; that the adjustment does not involve any move-

ment of the body of the motor, and only involves an axial sliding of the armature shaft in its bearings, which are a part of the motor. It seems necessary, in our opinion, that this claim should be established, if any invention is to be found in this patent. The defendant has strenuously denied that the adjustment of the armature shaft through the motor and without movement of the body of the motor is possible in the plaintiff's structure. The defendant insists that the degree of overlap of the cam upon the wear piece of the defendant's horn cannot be adjusted by a movement of the armature shaft through the body of the motor, and that it is only accomplished by a movement of the entire motor itself, as in the case of the prior Hutchinson patent. This court has reached a like conclusion. The plaintiff appears to have adopted the difficult rôle of blowing hot and cold at the same time. To establish novelty and patentability, plaintiff advanced the theory that the patent in suit provided for an adjustment of the armature shaft through the motor and without any movement of the body of the motor. But to make out infringement by the defendant, plaintiff reversed its position, and urged that the patent in suit included a construction in which the adjustment is obtained by a movement of the entire body of the motor. If that be the case, the patent in suit includes the adjustment of the prior patents, in which the entire motor is moved to accomplish the adjustment, and covers the very feature which the patentee says he made the invention to avoid. This certainly would make his patent invalid.

Other models of Hutchinson cam-actuated motor-driven horns have been before this court in previous litigations. In Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., 216 Fed. 146, 132 C. C. A. 240 (1914), the Hutchinson patents, Nos. 923,048, 923,049, and 923,122, for alarm horns on automobiles, were before this court, and as to their broad claims were held void for anticipation by the device of the Pierman patent, granted on March 14, 1899. And the more specific claims were held not infringed. In that case 48 claims were involved. The same Hutchinson patents were again before this court in Lovell-McConnell Mfg. Co. v. Garland Automobile Co., 221 Fed. 634, 137 C. C. A. 358 (1915), and on that occasion only 5 claims were involved, and they were held void for lack of invention in view of the prior art. The plaintiff's horn in the first and second suits was called the "Klaxon" and defendant's horn in the first case was the "Newtone" and in the second case was the "Sparton." The present patent covers what is alleged to be an improvement upon the "Klaxon" of the earlier patents. We have no knowledge as to the time when it occurred to Hutchinson to make the changes he made in the present patent. But the attention of the court has been called to the filing date of the application and that it was about five years after the original filing date. It is suggestive, too, that the application was filed very soon after this court handed down its decision in Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., supra. That decision was filed on June 8, 1914, and two months later, on August 14, 1914, the appellant divided the original application, which he had filed on October 26, 1909, and filed his divided application for the patent in suit. Counsel for appellants say in their brief:

"That it is high time the courts took notice of this practice on the part of the plaintiff's in attempting to ruin competitors and drive them out of the market by patents which have been allowed to remain in the Patent Office for years, and until others, with plaintiff's full knowledge, have built up a business and have large vested rights."

No attempt to ruin a competitor's business or to drive it out of the market by malicious or unfair and unlawful dealings can hope to succeed in a court of justice. No court will be astute to aid an enterprising patentee in an undertaking of that sort. We do not intend to reflect upon the conduct of the particular patentee in the case at bar. He has done nothing unlawful. And we have no evidence that his conduct has been malicious. But a patent issued under the circumstances which attended the issuance of this one, and indeed any patent the validity of which is challenged, will be closely scrutinized for the protection of the public against a monopoly not authorized by the law. The patent in suit fails in this case, as did the prior patents in Lovell-McConnell Mfg. Co. v. Garland Automobile Co., supra, because of lack of invention.

Decree reversed.

Judge LACOMBE heard the arguments, participated in the consultation, and indicated concurrence in the conclusions above expressed, but did not see the text of the opinion.

GENERAL ELECTRIC CO. v. SUNDH ELECTRIC CO. (two cases).

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

Nos. 173, 174.

PATENTS ⊂328—VALIDITY AND INFRINGEMENT—SYSTEM OF TRAIN CONTROL.

The Case patents, No. 736,816, claims 37 and 38, and No. 716,189, claims 12, 13, and 17, both patents being for a system of train control, *held* void for lack of novelty and invention, the combinations claimed being old; also *held* not infringed, if valid.

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

Suits in equity by the General Electric Company against the Sundh Electric Company. Decrees for defendant, and complainant appeals. Affirmed.

On appeal from final decrees dismissing the bills in two actions based upon two patents granted to Frank E. Case for a system of train control. No. 736,816, known in this litigation as the "First Case Patent," is dated August 18, 1903. This patent contains 62 claims, but only two, 37 and 38, are in issue. No. 716,189, known as the "Second Case Patent," is dated December 16, 1902. This patent contains 17 claims, but only 12, 13 and 17 are in controversy. Although No. 716,189 was issued December 16, 1902, eight months prior to No. 736,816, the latter was applied for February 28, 1898, three years prior to the former and has therefore been referred to as the "First Case Patent."

The alleged infringing apparatus is the same in each suit. Judge Hough held, as to the second Case patent, that the claims in issue covered only "a mechanical readjustment of the combination elements shown by the first Case

patent." He found as to the first Case patent that the complainant is limited to a switch actuated by a single current which the defendant does not use; also that the claims in issue, 37 and 38, are invalid for lack of novelty and invention, the combination claimed being old, and that these claims were not infringed.

W. K. Richardson and A. D. Salinger, both of New York City, for appellant.

William B. Whitney, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The first Case patent states that in order to operate a train having a plurality of motor cars successfully, it is necessary that the control be had from a single point on the train, otherwise the amount of work will be unevenly distributed among the motors. To reduce complications to the minimum it is desirable that each car should be a complete unit in itself, provided with a contact device, motor or motors and a suitable controlling mechanism arranged to co-operate with other controlling devices on the train. It is, says the patentee, highly desirable that the contact devices of each car shall take sufficient current for the needs of that particular car and that the heavy currents which actuate the motors should not pass from car to car. The principal object of Case was to provide a system of train control, so that from any point on the train all of the machines may be made to act simultaneously and equally to accelerate the train, maintain it in motion in either direction or retard it evenly and strongly—all of these actions being under the control of a single motorman. The patentee says that he prefers to divide the motors of the train into sets and govern each set of motors by a separate set of controllers. He also provides at a number of selected points on the train master-controllers so arranged that each desired master-controller will actuate all of these controllers. The learned counsel for the appellant says that the switch which is the subject-matter of the first Case patent "is well shown in Figs. 4, 5a and 5b of the patent." This statement is undoubtedly true so far as skilled electricians are concerned but to those who have little expert knowledge on the subject the drawings as shown in Figs. 5a and 5b are inadequate and confusing. The description covering the combinations in controversy is as follows:

"The motor-controller *O* comprises a plurality of separate electromagnetically-actuated contacts or switches of the form shown in Figs. 3, 4 and 5. Each contact is provided with a cup-shaped casting or supporting-frame *A*, arranged to form a part of the magnetic circuit, and within said casting is mounted an energizing-coil or solenoid-winding A^1. Secured to the top of casting *A* is a cover A^2, provided with a downwardly-extending core A^3, slightly hollowed out at its lower end to receive the upper end of core A^4. On the side of casting *A* are lugs A^5, by means of which the contacts or the switches as a whole are secured to a suitable support. Extending downwardly from the casting are lugs A^6, which support pivots B^2 of the switch-blade *B*, at the same time forming a part of the magnetic circuit of the blow-out. Connecting the lower ends of the lugs A^6 is a piece of wood or other insulating material A^7, forming a support for the stationary contact B^1. The core A^4 is pivotally secured at its lower end to switch-arm *B* and under normal conditions—that is, when no current is flowing in coil A^1—is held in the position shown by a compression-spring B^3, and by the weighted arm B^4. The spring B^3 surrounds a

pivoted pin B^5, which acts as a guide for the switch-arm, and at the same time retains the spring in place. The movable core A^4 is surrounded by a non-magnetic bushing A^8 and surmounted by a sheet-metal cap A^9 to prevent it from sticking to the casting and stationary core A^3. The outer and inner ends of the switch-blade are insulated from each other, as indicated in the drawings, and connection is established between the outer end of the switch-blade and the motor-circuit by a flexible cable B^6, which is wrapped around the pin B^2 to further increase the flexibility of the connection. The stationary terminal B^1 consists of a spring-supported piece of metal provided at its outer end with a rounded portion B^7 with which the switch-blade makes contact. The switch-blade and fixed brush are provided with arcing points or projections B^8, as shown in Figs. 3 and 5. The arrangement of the terminal mounted on the switch-blade and the terminal constituting the fixed brush is a particularly desirable one, for it permits a wiping connection between the parts as they are moved to the position shown by the dotted lines, Fig. 4, yet when the parts are free to return to their normal position there is no friction between them tending to retain them in the closed position. On the contrary, there is a decided effort exerted by the brush, tending to force the switch-blade back to its full-line position. The direction of the wiping movement is transverse to the movement of approach of the switch terminals or contacts. When the circuit is first closed between the switch-arm B and brush B^1, the projections B^8 are in contact; but as the switch-blade moves to its final closed position, as shown in dotted lines, Fig. 4, the projections B^8 move away from each other. This particular feature is more fully represented in Figs. 5a and 5b. In the first figure switch-blade B is just making contact with the fixed brush B^1 and the projections B^8 are in contact. These projections being the first to close the circuit are the last to break it. Consequently all of the arcing takes place at this point, and the remainder of the parts are left bright and clean. Fig. 5b represents the final closed position of the switch-blade, the projections B^8 being separated by a definite space. No matter how much arcing takes place at the projections B^8 the contact between the parts will always be good, for it is made at some distance from the point at which the arc forms."

The claims are as follows:

"37. In an electromagnetically-actuated switch, the combination of fixed and moving contacts, an actuating-coil for said moving contact located in a control-circuit independent of the circuit controlled by said contacts, and a resilient mounting for one of said contacts so arranged that the said contacts will make a wiping or sliding connection with one another and will tend to be forced apart when the moving contact is released.

"38. In an electromagnetically-actuated switch, the combination of a fixed terminal, a moving terminal, and a resilient connection between one of said terminals, and the support on which it is mounted, an actuating-soleneid for the support on which said moving terminal is mounted, said solenoid being located in a circuit independent of the circuit in which said terminals are located, the two terminals being so constructed and arranged that as the support carrying the moving terminal is moved to cause said terminals to engage, the resiliently-mounted terminal will be displaced in such a manner as to make a sliding or wiping contact with the other terminal."

The elements of the combination of claim 37 are in an electromagnetically-actuated switch:

First: Fixed and moving contacts.

Second: An actuating-coil for said moving contact located in a control-circuit independent of the circuit controlled by said contacts.

Third: A resilient mounting for one of said contacts so arranged that the said contacts will make a wiping or sliding connection with one another and will tend to be forced apart when the moving contact is released.

The claims are substantially alike. In claim 38 the limitation regarding the spring mounting tending to force the switch open when the moving contact is released is omitted.

The prior art abounds in switches with one or both contacts resilient which make a wiping or sliding engagement. This is shown in the Du Shane patent, 312,985. Other prior switches show the feature of Case's patent of utilizing one part of a contact for arching and interrupting the current and the other for carrying on the work current continuously in the fully closed position of the switch. This is shown in Sibley's patent, No. 552,553, and in other patents. Still other prior patents show switches having an actuating coil or solenoid, as Whightman No. 345,561. This appears from the testimony of Mr. Thomas at page 297 of the first record.

If we were dealing with an ordinary machine where the parts and the motive power are plainly seen and understood, the task of the court would be simple enough. But we are dealing here with an esoteric imponderable force which is unseen and about which comparatively little is known. Confining the claims in controversy to the exact thing shown and the result attained, we are unable to discover any patentable advance over the prior art. The patent must be construed in the light of the language actually employed. We are not concerned with what the patentee might have said or should have said but what he actually did say. If the claims 37 and 38 are given a construction broad enough to include the defendant's switches the complainant will encounter the danger of having his claims held invalid by reason of the Sprague switches and several others of the prior art. If such a construction is given the claims of the Case patents, it will be difficult to sustain them in view of the Sibley, Whightman, Sprague and Du Shane switches. It is said that the Case switch is a "contractor." While many of the defendant's references show switches where small currents are employed, the difficulty with this contention is that there is nothing in either claim involved limiting it to a contractor or any other size of switch. We agree with the conclusion of the District Judge and deem it unnecessary to add further to his opinion.

The decrees are affirmed.

GEAR et al. v. FAIRMOUNT ELECTRIC & MFG. CO. et al.

(Circuit Court of Appeals, Third Circuit. April 4, 1916. Rehearing Denied May 5, 1916.)

No. 2072.

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—CONNECTOR FOR ELECTRICAL CONDUCTORS.

The Williams patent, No. 831,815, for connector for electrical conductors, while not of broad scope, was a step in advance in the art, which turned failure into at least comparative success, and discloses patentable invention in the feature of hermetically sealing the joint. Such element was also within the original application fairly construed; also *held* infringed.

2. PATENTS ⊜157(1)—CONSTRUCTION OF CLAIMS—"HERMETICALLY."

The word "hermetically," as used in a patent claim in describing the sealing of a joint, should be given its popular meaning, as describing a

joint which is practically impervious to air and moisture, and not confined to a rigidly scientific sense.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229, 230; Dec. Dig. ⇐157(1).]

3. PATENTS ⇐172—SCOPE—ADVANTAGES NOT DESCRIBED OR CLAIMED.

That the specification and claims of a patent do not refer to all of the advantages of the invention is not material; the patentee is entitled to the benefit of such advantages, although he may not have mentioned or known of them.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 247; Dec. Dig. ⇐172.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in equity by Harry B. Gear and Paul F. Williams, doing business as Gear & Williams, against the Fairmount Electric & Manufacturing Company and others. Decree for defendants, and complainants appeal. Reversed.

For opinion below, see 225 Fed. 61.

A. M. Belfield, of Chicago, Ill., for appellants.

J. Bonsall Taylor and E. H. Fairbanks, both of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. [1] The patent in suit, No. 831,815, which was issued to Paul F. Williams in September, 1906, was addressed to a problem that had only been imperfectly solved, namely, how to unite satisfactorily the ends of two electric conductors—for example, two cables, or a cable and an overhead conductor. A number of inventors had been busy with the subject, and definite steps had been taken towards success. The state of the art in 1906 is fairly represented by the patents that are referred to in the opinion below (225 Fed. 61), and are relied on now by the appellees—Cobb, 396,543, issued in 1889; Eckert and Gregory, 442,575, issued in 1890; and Tailleur, 593,442, issued in 1897. So far as appears, the first two of these devices did not go into use, and after a year's trial the Tailleur connection was discarded as ineffective. The principal trouble with them all seems to have been that the connection was imperfect, so that air and (especially) moisture were able to enter before long, and thus to cause short-circuiting between the conductor and its surrounding envelope. As such an envelope is usually of lead, and as short-circuiting always does harm, sometimes much harm, to the apparatus and other property, and may also endanger life, a connection that would eliminate these perils as far as possible was evidently most desirable. The device now in question seems to have had much success in this direction; the evidence shows that severe tests have been applied to it with excellent results, while the opinion entertained of its merits by those familiar with the electric current under service conditions is sufficiently indicated by its extensive and rapidly growing use. It has come to have a name of its own, "pot-head," and several varieties are shown in the drawings.

In this suit we are concerned only with the form illustrated in Figures 1 to 4, which will be explained by the following quotation from the specification (in which the reference numbers are omitted):

"The principal object of the invention is to provide a simple, practical, and effective connector or joint of the kind described, and especially to dispense with the use of a solder wipe-joint therein. * * *

"Referring first to Figs. 2, 3, and 4, the device shown comprises a casing and a cover or hood, fitted to the open top of the casing, both made of insulating material—such, for example, as porcelain. A cable is extended up through an aperture in the bottom of the casing and provided with a terminal, which is conveniently in the form of a metallic spindle provided with a socket adapted to receive the end of the conductor of the cable, and also provided with a larger outwardly-facing socket. This terminal is also provided with a laterally-projecting flange to hold its center within the casing, the side portions of this flange being cut away. This terminal is secured to the cable conductor, preferably by soldering such a conductor in the socket provided for it.

"The space between the cable and its terminal and the interior walls of the casing is filled with minerallac or other suitable insulating material. The hood is provided with another terminal conveniently in the form of a plug, having a split end, adapted to fit in the socket of the terminal. The terminal is secured to the end of a conductor, to which the cable is to be connected. As a convenient arrangement the terminal is provided with a socket adapted to receive the conductor, and the latter is soldered therein. The aperture in the top of the hood to receive the terminal is also filled with insulating material—such, for example, as minerallac.

"In using the device the cable is first inserted through the lower end of the casing and pushed up through the same, so that its conductor projects from its open end, so as to be accessible, and then the terminal is soldered to the conductor. The cable with its terminal is then pushed back into the casing, and minerallac or other insulating material is poured into the cavity thereof, until it fills or substantially fills the same, such material passing down below the flange by reason of the cut-away portions thereof. The terminal is then secured to the conductor and the split end thereof secured to said terminal, whereupon the cover is placed upon the top of the casing and the split plug pushed into the socket, thereby connecting the cable with the conductor or other cable. Thus it will be seen that the necessity of a wipe-joint in forming a terminal or connection for the cable is avoided, and at the same time the cable can be disconnected from its connection by merely removing the cover.

"In using the device it may be used as shown in Fig. 1, in which is illustrated a pole or post, along the side of which extends a pipe, containing the cable; the upper end of the latter being provided with the terminal embodying my invention, which for convenience is fastened by a band, attached to a block on the pole. The pole is shown provided with a pair of insulators, to which is connected the overhead conductor, which is extended to and through the same and connected with the cable. In disconnecting the cable the cover, if removed, will hang as shown in dotted lines in Fig. 1. In Fig. 3 is shown the device with the cover partly removed, showing how its separable terminals become disconnected from one another."

The claims are as follows:

"1. A device of the class specified, comprising a pair of separable members composed of insulating material, said members receiving and confining the ends of the conductors to be connected, means for connecting said conductors, and insulating material hermetically sealing the confined ends of the conductors and the connecting means therefor within said separable members.

"2. A device of the class specified, comprising a pair of separable members both made of insulating material and provided with means for engaging and forming a tight joint with one another, means whereby the ends of the conductors within said members can be connected with one another, and insulating cement filling said members and hermetically sealing the conductors and connecting means therein.

"3. A device of the class specified, comprising an insulating sleeve adapted to receive the cable end, said sleeve being made of insulating material, a top also made of insulating material and adapted to fit over the end of said sleeve, connecting devices applied to the ends of the cable and of the conductor, and insulating cement substantially filling said sleeve and hermetically sealing the ends of the cable and the connecting device therefor.

"4. A device of the class specified, comprising an insulating sleeve adapted to receive the cable end, said sleeve being made of insulating material, a top also made of insulating material and adapted to fit over the end of said sleeve, connecting devices applied to the ends of the cable and of the conductor, insulating cement substantially filling said sleeve and hermetically sealing the ends of the cable and the connecting device therefor, the top being provided with a chamber containing a connecting device for a conductor, which chamber opens outwardly and receives the conductor, and insulating cement filling said chamber and hermetically sealing the end of the conductor and the connecting device therefor.

"5. A device of the class specified, comprising an insulating sleeve for the end of the cable, a connecting device to be applied to the end of the cable, comprising a pair of oppositely open sockets and a disk portion, insulating cement filling said sleeve and hermetically sealing the end of the cable and said connecting device therein, a top having a socket adapted to fit over the end of the insulating sleeve, a connecting device consisting of a plug adapted to fit in the socket of said other connecting device, a chamber in the end of the top, said chamber containing the end of the connecting device of the top, and insulating cement filling said chamber and hermetically sealing the end of the conductor and connecting device therein."

We may say at once that we agree with the District Court in seeing nothing novel in this patent except the element of hermetically sealing. This, however, is the vital point; and, while the patent must be regarded as narrow in scope, we think it belongs to that class in which a small, but inventive, step has been sufficient to turn failure into at least comparative success. But we are unable to agree that the element of hermetically sealing was new matter introduced without the sanction of an oath during the progress of the application. On the contrary, although the specification (which has not been changed in any particular) did not use these words, we think its description of the device always implied the fact signified by the phrase, and we have no difficulty in finding this element referred to in several claims of the first two sets, although not in so definite a form as appears in the third and final set.

[2] In our opinion the situation in the Patent Office was such as we continually find. An inventor tries to cover as much ground as possible; the examiner tries to confine him within the precise area in the art still unoccupied; and the result of the struggle is that, after various turns of phrase have been employed in an effort to reach a compromise, the claims at last emerge in their final form. Seymour v. Osborne, 78 U. S. (11 Wall.) 544, 20 L. Ed. 33; De La Vergne Co. v. Featherstone, 147 U. S. 229, 13 Sup. Ct. 283, 37 L. Ed. 138; Hobbs v. Beach, 180 U. S. 395, 21 Sup. Ct. 409, 45 L. Ed. 586. "Hermetically" sealing evidently bears its popular meaning—that is to say, such a sealing as makes the joint impervious, or practically impervious, to air and moisture—and the phrase should not be confined to a rigidly scientific sense. It seems clear to us that the Williams pot-head does accomplish this degree of sealing, and that the patentee taught the art how to make the necessary structure. The heart of his invention

appears to be such an arrangement of parts as will furnish a casing composed of a sleeve or hollow cylinder and a cap fitting over it, both made of insulating material; these two parts being capable of easy separation by hand, and the interior of each being so fashioned and arranged that when insulating material is poured in it will fill the cavity, and will thus surround the conductor and the connecting means completely and will exclude the air and the moisture from the joint.

[3] It is true that the specification and the claims do not refer to all the advantages that seem to accompany the device, but this is not material. If a specification or a claim be sufficient in itself, it need not be all-embracing. It will still be good as far as it goes; and, if it does not go as far as it might have gone, that is the inventor's affair. The evidence before us seems to prove satisfactorily that one advantage of the Williams device is the facility it affords for narrowing the area of search whenever "trouble" occurs in an electric circuit; and another advantage is the more effective protection it affords to men busy with repair or inspection. It is readily installed, is harmless if accidentally touched, and can be easily and safely connected and disconnected without the use of tools. The inventor is entitled to reap the benefits of these advantages, although he may not have mentioned them, or even known of them, provided they come to light in operating the device actually described and claimed. The present invention may be narrow—an improvement, rather than a primary thought—but the presumption of validity exists, and the record is unusually bare of evidence to attack it. At the best, the defendants have done no more than raise a doubt concerning the existence of inventive quality, and we think the scale is turned in favor of the patent by the undisputed evidence in reference to its merits and extensive use.

We shall not prolong the discussion, except to say that infringement has not been successfully disproved. The District Court had no occasion to consider the subject, and we shall only add that, when the two devices are examined side by side, the need for argument disappears. The infringement is contributory, but the evidence discloses all the elements of such an infringement.

The decree is reversed, with instructions to enter a new decree in accordance with this opinion.

KARL KIEFER MACH. CO. et al. v. UNIONWERKE, A. G.

SAME v. HEYMAN.

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

Nos. 168, 169.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—FILTER PULP-PACKING MACHINE.
   The Kiefer reissue patent, No. 12,455 (original No. 797,122), for a filter pulp-packing machine for pressing filter cake for beer filters, *held* valid, but not infringed.
2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—BEER FILTER.
   The Kiefer patent, No. 993,780, for a filter for straining beer, etc., claim 1, is valid, but, in view of the prior art, must be strictly construed, and, as so construed, *held* not infringed.
3. PATENTS ⟸328—INVENTION—BEER FILTER.
   The Kiefer patents, Nos. 1,015,326 and 1,023,254, each for a filter, used in the brewery art, *held* void for lack of invention.

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

Suit in equity by the Karl Kiefer Machine Company and Karl Kiefer against Unionwerke, A. G., and against Nathan H. Heyman. Decrees for defendants, and complainants appeal. Affirmed.

For opinion below, see 218 Fed. 847.

These causes come here upon appeal from decrees dismissing bills for alleged infringement of certain patents; the one suit is against manufacturer, the other against user. Four patents are involved:

Reissue patent No. 12,455, issued February 20, 1906, to Karl Kiefer, for a filter pulp-packing machine.

Patent No. 993,780, issued May 30, 1911, to Karl Kiefer for a filter.

Patent No. 1,015,326, issued January 23, 1913, to Karl Kiefer, for a filter.

Patent No. 1,023,254, issued April 16, 1912, to Karl Kiefer, for a filter.

The suit against Heyman includes a separate cause of action for repeal, under section 4918, Rev. St. U. S., of a patent, No. 1,029,915, issued June 18, 1912, to Heyman as assignee of Bernno Danziger.

The filters are those used in the brewery art. Both suits were tried together in open court before Judge Sanborn, whose opinion will be found in 218 Fed. 847. He very fully discussed the patents, the prior art, and the structure of defendants; his opinion may be consulted for a presentation of the questions which have been argued here.

Henry D. Williams, of New York City, for appellants.

Edmund Wetmore, of New York City, for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Upon the hearing we were inclined to the opinion that the District Judge had unduly limited the two claims of the first patent relied on, Nos. 9 and 10, that they should be taken at their face value, and that, thus construed, they covered, defendants' device. But more careful study of the patent has induced the conclusion that they must be construed as he construed them, or they would not embrace the invention set forth in the specification, and for which Kiefer's patent was granted.

In his discussion of the third patent above enumerated, No. 1,015,326, the District Judge erroneously assumed that Figure 3 of the drawings was not inserted until after renewal, July 13, 1911; it was inserted long prior thereto, September 20, 1907. Without that figure apparently certain channels in the compressing plates could not be made out, and the court sustained the contention of defendant that the patent was void for lack of description, and because new matter was put into the renewal claims without any supplementary affidavit. This, however, was not the only ground on which he dismissed the bill as to this patent. Every one of the claims in issue (14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25) specifies as an element of the claim that the pulp forming the filter layer shall be compressed extraneously of the filter structure. It was quite natural for the patentee to insert these words in each of the claims, because in the final analysis the novelty of his device lies in the circumstance that the filter layers are made (by compression) wholly outside of the filter, and not inside of the filter or in connection with any part (such as a plate) which belongs to the filter as an operative organized structure. We do not think this method of making filter layers is patentable, either as a machine or as a product.

With this brief comment, we are satisfied to affirm the decrees on the opinion of the District Judge.

Decrees affirmed, with costs.

PERLMAN v. STANDARD WELDING CO.

(Circuit Court of Appeals, Second Circuit. February 15, 1916. On Motion to Amend Mandate, March 7, 1916.)

No. 203.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—WHEEL.

The Perlman patent, No. 1,052,270, for a wheel for automobiles, the special feature of which is a demountable rim, *held* not anticipated, valid, and infringed.

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

Suit in equity by Louis H. Perlman against the Standard Welding Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 231 Fed. 453.

This cause comes here upon appeal from a decree in favor of complainant. The suit is in equity for infringement of United States letters patent No. 1,052,270, granted to Louis H. Perlman, February 4, 1913, on application filed June 28, 1906, succeeding application filed May 21, 1906, for improvement in automobile wheels. Claims 8, 11, 12, and 13 were held valid and infringed. Judge Hunt's opinion will be found in 231 Fed. 453.

J. B. Fay and Jno. F. Oberlin, both of Cleveland, Ohio, and Charles Neave, of New York City, for appellant.

Daniel J. Mooney, of New York City (E. M. Kitchin and Melville Church, of Washington, D. C., of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The particular field in which the improvement of Perlman finds its place is that concerned with what is known as the "demountable rim." The pneumatic tire is affixed to a metal rim, which can be slid on and off the metal rim which encircles the felly of the wheel; in the event of a blow-out the tire with its rim is removed and new tire with rim substituted in a brief space of time, leaving the longer operation of detaching the tire from its rim (and its replacement by a new one) to be performed, not on the road, but in the garage, when the run is over. The objects of invention are stated to be "ready application of the demountable rim to and removal thereof from the fixed rim and felly, * * * the demountable rim being constructed to facilitate the application and removal of a shoe (tire)." The patent and all the questions involved are elaborately and carefully discussed in the opinion of the District Judge (231 Fed. 453), there were many decisions in the Patent Office, and the patent was issued only after a decision of Court of Appeals of the District of Columbia. In re Perlman, 39 App. D. C. 447. These opinions may be consulted for a detailed statement of the questions involved.

The crucial question here is the date when Perlman reduced to practice the invention which he describes in his patent. The trial court found that the evidence showed beyond a reasonable doubt that the invention was conceived in 1903 and actually put to use on a car in 1904. Judge Hunt heard the witnesses, for the cause was tried in open court. He had opportunity to weigh their testimony with such appreciation of their individual personal equations as presence at an examination alone can afford. He witnessed with his own eyes the two important tests applied to the physical exhibits—to Exhibits 4, 5, 6 (the plaintiff's wheel) and to Exhibit 65, one of the tools which plaintiff testified he used in its manufacture. Having heard the testimony of an expert that Exhibit 65 was too soft to cut steel, he saw a practical mechanic put it in a lathe and cut steel with it. Having heard the testimony of another expert that Exhibit 4 was a new wheel, because upon removal of a hub plate the wood showed bright, he saw another practical man, using a chemical preparation of his own, remove not only the surface coat of paint, but also, one by one, three more successive coats beneath; the combined strata indicating an age of several years, and disclosing finally the prime coat which had sunk into the wood. On the wood the judge also saw the traces of a trademark of the maker of the wheel which had been adopted early in 1903. Under these circumstances, if we were in doubt as to the identity of the tool and the age of the wheel, we should hesitate to disturb the findings of the District Court; but from an examination of the testimony, as it is presented here in cold type, we are as convinced as

Judge Hunt was that the tool is the one with which plaintiff cut the tapered tips of his bolts, and that the wheel (Exhibits 4, 5, 6) is the identical one he used on his cars in 1904.

The establishment of this date accomplishes more than the removal of Vinet's French patent from the prior art; it disposes of arguments based on the history of Perlman's successive applications in the Patent Office. He and his counsel mistakenly supposed that he was a pioneer in invention of a demountable rim per se. In seeking to obtain a patent for that extremely broad invention, close attention was not at first given to the statement of the details of structure, which embodied the real invention for which the patent finally issued. Therefore, from time to time during his long struggle with the Patent Office, additions were made to specifications and drawings. If there were nothing except these additions and Vinet, there might be force in the argument that Perlman conveyed these suggestions from Vinet, not having theretofore conceived them himself. But when we have the identical wheel made and used in 1904 before us, and see in its structure the embodiment of what the patent, as issued, describes, all doubts as to what Perlman's original invention was, are resolved.

We do not think it necessary to enter upon any further discussion of the case. Judge Hunt's opinion is very full and sufficiently covers all defenses; we fully concur in his reasoning and conclusions.

Decree affirmed, with costs.

On Motion to Amend Mandate.

PER CURIAM. No reason is seen for changing the ordinary language of the mandate. We are not disposed to depart from the practice stated in Edison Electric Light Co. v. United States Electric Lighting Co., 59 Fed. 501, 8 C. C. A. 200.

DE MAYO COALING CO. v. MICHENER STOWAGE CO.

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

No. 145.

1. PATENTS ⊂=35—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.

Commercial success of a patented article is not persuasive evidence of invention as to a claim which covers only a part of the patented device, and in the absence of evidence that such part is what secured general acceptance or even contributed to such success.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. ⊂=35.]

2. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—APPARATUS FOR COALING SHIPS.

The De Mayo patent, No. 797,364, for an apparatus for coaling ships, claim 7, the special feature of which consists of guy devices for maintaining the relative positions of the ship and barge while coaling, if conceded invention, *held* not infringed.

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

Suit in equity by the De Mayo Coaling Company against the Michener Stowage Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 227 Fed. 895.

This cause comes here upon appeal from a decree sustaining the validity of claim 7 of United States patent 797,364, granted August 15, 1905, to Louis A. De Mayo, for improvements in apparatus for coaling vessels, and holding that defendant has infringed said claim. The opinion of Judge Augustus N. Hand will be found in (D. C.) 227 Fed. 895.

Charles S. Champion and Hillary C. Messimer, both of New York City, for appellant.

George B. Holbert, of New York City (Nathan Cohen, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The District Judge evidently was largely influenced by the circumstance that patentee's apparatus was generally accepted and has had a great commercial success. Such a circumstance is frequently persuasive evidence of patentable novelty. In this concrete case, however, the weight of such evidence is much reduced because the single claim in controversy does not cover the whole of patentee's device, but only a part of it, and it cannot be ascertained from the evidence that that particular part is what secured general acceptance. The case is very like the one we had before us in Doig v. Morgan Machine Company, 122 Fed. 460, 59 C. C. A. 616. In that case claims 5 and 6 were concerned with the adjustment of certain railways. We said:

"If it be conceded * * * that all prior box-nailing machines were failures; that the machine of the patent was the first practical and commercially successful one; that it was accepted by the art, and has since monopolized the field—nevertheless such evidence is not helpful to a solution of the question presented on these two claims. There is nothing to show that this minor improvement in one part of the machine contributed at all to any such far-reaching results. Speaking of the prior state of the art concerning the adjustment of the way-plates, complainant's expert is careful to 'emphasize the fact that this feeder way-plate construction is combined with other elements insuring the proper delivery of the nails thereto, and the proper cutting out or cutting off of the nails into the chutes of the nail boxes. In other words, a nail-pan must be provided which will bring the nails in series to the way-plates of the feeder, suspended by their heads in proper position to be delivered to the nailways of the feeder, for, if the nailways of the feeder be not continuously and properly supplied with nails in proper position to be conducted thereto, the machine will not operate properly. In other words, we are dealing here with an entire organism, to wit, a feeding device for inevitably bringing the nails in proper supply to the chutes, so that the feeding mechanism and the nailing mechanism will operate in harmony.' These two claims, however, do not include the nail supply box, nor the devices for securing passage from that box to the nailways, nor the devices for cutting them out at the end of the nailways and delivering them to the chutes, nor the nail chutes, nor the nailing mechanism. Of the 620 lines of the specification, barely 25 deal with the construction and operation of the nailways; and for aught that the record discloses the meritorious features of complainant's box-nailing machine may lie wholly within the other parts of the completed structure."

[2] The De Mayo patent sets forth one prime and several minor objects of invention.

1. The prime one is the means for distributing the coal (when it has been lifted) into the various bunker hatches.

2. Another object is constructing the elevator proper, so that it will not spill coal, but deliver all raised in the buckets. This is effected partly by the form and arrangement of the buckets—partly by a shield on the side of the elevator nearest to the ship.

3. Another object is such arrangement of the delivery chute which leads to the coaling port that it may be readily adjusted to suit the lowering of the coal in the barge.

4. Another object is to provide means for sustaining the elevator proper "flexibly in position alongside of the ship, so that any movement of the barge from which the coal is taken will not destroy or rack any of the parts of the apparatus."

As might be supposed, the record indicates that it was old to suspend the elevator from a davit, or boom, or what not on the ship by a tackle, and, as the coal level sank, to pay out on the tackle, so as to keep the bottom of the elevator on the coal. The improvements of the patent last referred to are the "flexible arrangements" for preventing racking of parts.

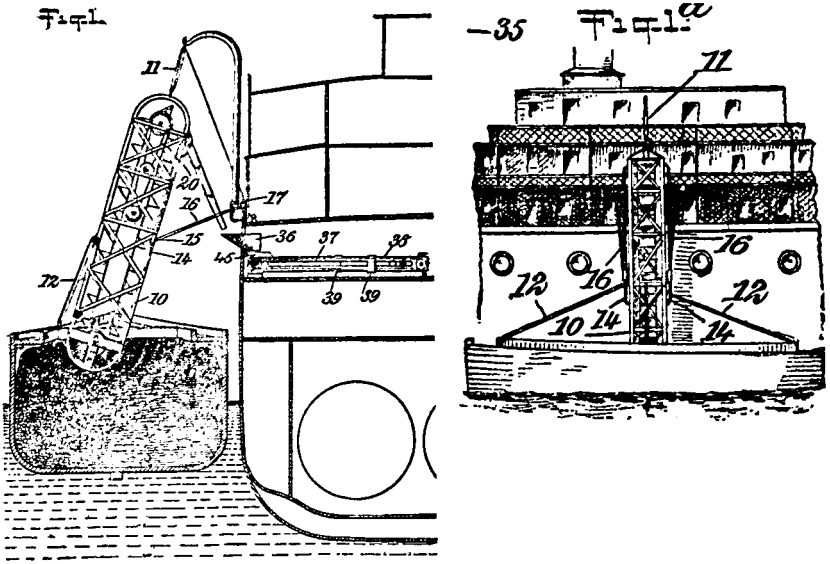
The testimony shows that the whole apparatus is a useful one, an improvement on the old art, greatly facilitating the process of coaling a large ship with numerous bunkers, without loss, wastage, or dust. When this testimony is studied, however, it is apparent that the distributor from the coal port to the several bunkers is a very important feature of the invention; it must be a great time-saver. So is the feature that by shape and arrangement of buckets, apron, and long shield any overflow will drop back into the barge and not be wasted. So, too, the "self-contained motor"; i. e., motor located on the frame itself to elevate the buckets is considered desirable. Such self-contained motors were old.

Incidentally it may be noted that the distributor on the ship is an element of claims 1, 2, 4, 5, 6, 11, and 12. The shield is an element of claims 9 and 10. The details of buckets and apron are elements of claim 13. The location of the motor for raising the buckets on the frame is an element of claims 3, 7, 8, 9, 10, and possibly 2 and 11.

Such a combination of different subimprovements constituting a single structure may have a great commercial success, and yet such success may not be persuasive evidence that some one of the subimprovements discloses patentable invention. The single claim relied on here is No. 7, which reads:

"7. In an apparatus for coaling ships, the combination of a frame and elevating means thereon, means for driving the elevating means, the driving means being mounted on the frame, means mounted on the ship and connected with the upper part of the frame to suspend the same from the ship, and guy devices at each side of the frame said devices being in connection with the frame and with the ship."

A portion of Fig. 1 and Fig. 1a will sufficiently illustrate the devices which are features in claim 7:



It is manifest that an elevator suspended by a tackle from a davit would be likely to sway; even if its lower end rested on the coal or grain to be elevated. A perfectly obvious way of securing its lower end would be by guys, or tackles such as are shown at *12, 12* in Fig. 1a. Such guys form no part of claim 7. But, even if the lower end were secured by guys, there would be swaying of the upper end, induced partly by the operation of the buckets, partly by the motion of the water on which both barge and vessel rest. Such motion might be lengthwise of the vessel; it might also be to and from the vessel; the upper end might even sway so far inward as to rest against the side of the vessel, which would interfere with the overturn of the buckets and delivery of the coal. Equally obvious would be the devising of means, more or less efficient, to remedy the difficulty. Surely any handy sailor man would know that the upper end might be kept off from the side of the ship by the use of some rigid, unyielding device, which would act as a boom does; also that a lengthwise sway could be checked by guys or tackles near the top and leading fore and aft to the side of the ship.

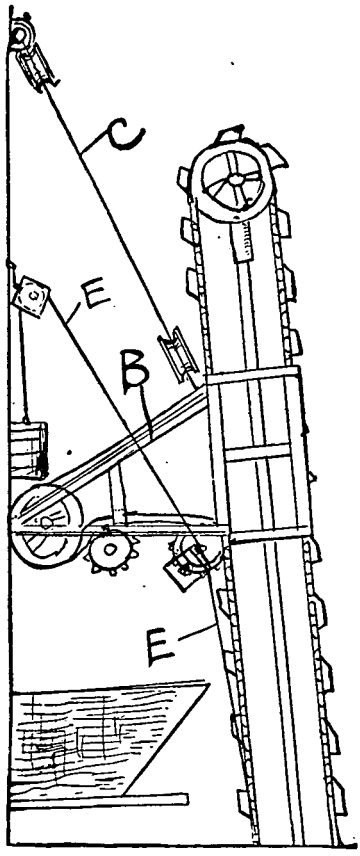
The specific method of booming and guying which De Mayo adopted is thus described in the patent:

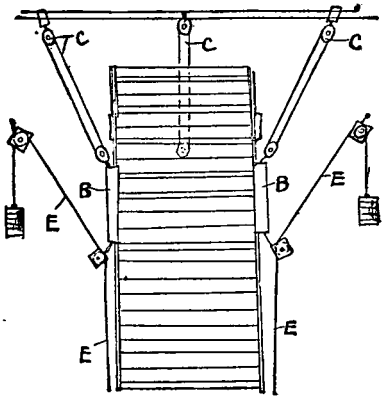
"Attached to each side of the frame on the corners adjacent to the ship are longitudinally extending rails *14* on which fit loosely sleeves, *15*. To these sleeves are pivoted guy rods *16*. Said rods have hooks *17* at their opposite ends, and these hooks are adapted to be engaged with the rail or other convenient part of the ship at each side of the elevator proper in the manner illustrated in Figs. 1 and 1a."

In this structure the rigid guy rods *16* act as a boom to hold the upper end of the elevator off, so that it will not impinge on the side of the ship, but they are so arranged as to secure a give and take

action under pressure, so as to avoid racking of parts. As they are hooked to the ship's rail fore and aft of the elevator they also act as guys to hold against lengthwise swing. The device seems to be a simple one, and it is not shown to disclose patentable invention by testimony as to the great commercial success of the whole structure which makes up the De Mayo elevator. Certainly the increased dispatch with which the coaling of ships is effected—a matter made most of in the testimony—is accomplished by the ingeniously devised distributor (36, 37, 38, 39) which promptly and automatically conveys the coal received at the coaling port to the several bunker hatches. This case, as was said before, closely resembles the Doig Case in that respect; out of upwards of 300 lines in the specification only 16 are devoted to these "guy arms"; out of 13 claims they are made an element in 3 only.

Nevertheless for the purposes of this appeal this specific device may be considered patentable. The two following figures disclose defendant's method of suspending its elevator and counteracting the tendency of its upper end to sway:





The elevator is suspended by a tackle *C* and two guys *CC*; further guys against swaying lengthwise of the ship are shown at *EE*. *B* is a rigid projection or knuckle from the inner side of the frame, which acts as a boom and effectively prevents the upper end of the elevator from itself impinging on the side of the ship. Movements of the barge caused by disturbance of the water may cause this upper end to swing off from the ship, but as it comes back the knuckle alone will strike the ship's side, quite possibly sometimes with a hard rap which might be likely to rack the parts, a result avoided by De Mayo's guy arms, with their give and take action. The two sets of guy ropes *C E* check swing lengthwise of the ship; the suspending tackle will, of course, prevent the upper end from tilting over too far, as would De Mayo's suspending tackle *11*. But this is just the simple set of devices, which as was pointed out above, would naturally occur to any one accustomed to handling weights by the use of tackles. It would be, not a reasonable but an unreasonable application of the doctrine of equivalents which would stretch the claim covering the patentee's specific structure to embrace the cruder use of well known devices which would be perfectly obvious to any one seeking to secure the upper end of a suspended elevator from swaying.

The decree is reversed, with costs.

VOORHEES RUBBER MFG. CO. v. MacDONNELL et al.

(Circuit Court of Appeals, Third Circuit. April 4, 1916. Rehearing Denied April 14, 1916.)

No. 2075.

PATENTS ⊂⊃328—INFRINGEMENT—PNEUMATIC TIRE.

The MacDonnell patent, No. 981,208, for a pneumatic tire which is rendered self-healing in case of puncture by means of a stay strip secured to the tread portion and which is nonstretchable in a direction transversely of the tire, thus holding it in a state of compression, but is capable of stretching in a direction longitudinally of the tire, makes the transversely nonstretchable quality of the stay strip an essential element. As so construed, *held* not infringed.

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Suit in equity by James MacDonnell and others against the Voorhees Rubber Manufacturing Company. Decree for complainants, and defendant appeals. Reversed.

For opinion below, see 227 Fed. 898.

Edwin J. Prindle, Arthur Wright, and Prindle, Wright, & Small, all of New York City, for appellant.

R. W. France and Duell, Warfield & Duell, all of New York City, for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case James MacDonnell and others, owners of patent No. 981,208, granted to him January 10, 1911, for a pneumatic tire, charged the Voorhees Rubber Manufacturing Company with infringement of the second and fourth claims thereof. On final hearing the court below, in an opinion reported in 227 Fed. 898, held the patent valid and the claims infringed. From a decree so adjudging, the defendant took this appeal.

The patent in question concerns the self-healing of a punctured tire. The specification recites that this had been heretofore attempted, viz.:

"It has heretofore been proposed to make a pneumatic tire with a tread portion thickened and made of rubber which is held under compression, so that if the tire is punctured the hole will be immediately sealed up as soon as the puncturing body is withdrawn."

It recited that in so doing nonstretchable stay strips had been used to cause the desired rubber compression, viz.:

"This construction has been secured by molding the tire tread in a normally depressed position and securing firmly to the exterior of the rubber body a stay strip of canvas or similar material, so that when the tire is inflated the *nonstretching qualities of the stay strip will cause the rubber to be compressed.*"

It then states that in these efforts the stay strips have been inelastic both transversely and longitudinally, viz.:

"So far as I am aware, in all prior attempts to make a tire of this type the stay strip or backing has been inelastic, both transversely and longitudinally."

MacDonnell then states that this inelasticity transversely is essential, and that the change he suggests is to retain the transverse inelasticity, but to substitute longitudinal elasticity for prior inelasticity, viz.:

"My present invention is in the nature of an improvement on tires of this class and aims to provide a construction wherein when the tire is inflated the tread portion thereof is held *against stretching in a transverse* direction, thereby securing the desired compression of the rubber, while at the same time said tread portion can expand or stretch longitudinally to permit the tire to assume its inflated shape without subjecting the portion of the tire opposite the tread to any appreciable longitudinal compression. I accomplish my desired object by making the stay strip of such a character *that it is incapable of stretching transversely*, but is on the other hand capable of stretching in a direction longitudinally of the tire."

It will thus be seen that the invention which MacDonnell disclosed embodied two features: First, an inelastic, nonstretching, transverse stay strip variously described as the "nonstretching qualities of the stay strip," "inelastic quality in a direction transversely of the tire is essential," "held against stretching in a transverse direction," and "incapable of stretching transversely"; and second, as contrasted with this nonstretchable transverse stay strip, an elastic, stretchable longitudinal stay strip, described as "on the other hand capable of stretching in a direction longitudinally of the tire." These two features thus described in the specification are carried into claim 2 here in issue, viz.:

"A pneumatic tire of rubber having the material of its tread portion in a highly-compressed state in a direction transversely of the tire, and a stay

strip firmly secured to the outside of the tread portion, *which stay strip is nonstretchable* in a direction transversely of the tire, but is capable of stretching in a direction longitudinally of the tire."

It will thus be seen that MacDonnell's real disclosure was of a stay strip transversely nonstretchable and longitudinally stretchable and that these disclosed and described elements were carried into his claims. But his specification did not stop, as indeed it could not, with the mere announcement of a principle, for, as said in U. S. v. Bliss Co., 224 Fed. 325, — C. C. A. —:

"A principle is not the subject of a patent except through the instrumentalities by which the principle is carried out."

In pursuance, therefore, of the statutory requirement that his specification shall contain a written description of his discovery "and of the manner and process of making, constructing, * * * and using it, in such full, clear, * * * and exact terms as to enable any person skilled in the art * * * to make * * * and use the same" (Comp. St. 1913, § 9432), MacDonnell showed two stay strips which embodied his invention. While stating that his invention was "not limited to the construction herein illustrated," it will be noted that the two stay strips disclosed are alleged to have the two features of nonstretching transversely and stretching longitudinally, which was all the patent disclosed and which were claimed elements. It will also be noted that the means by which nonstretching of the stay strip transversely is effected is specifically set forth in the specification. In that regard MacDonnell says:

"The rubber tire has applied and firmly secured thereto a backing or stay strip *5* which has *special* characteristics as hereinafter described. * * * The stay strip *5* is so made that it is *incapable of stretching transversely* of the tire, but is capable of stretching in a direction longitudinally of the tire. Since the stay strip cannot stretch in a direction transversely of the tire, it will be readily apparent that when the tire is inflated, as shown in Fig. 2, the rubber forming the thickened tread portion of the tire will be put under considerable compression due to the fact that the outer face of the rubber is not permitted to expand because of the presence of the stay strip."

He then proceeds to show in detail how such transversely nonstretchable stay strips can be made in the bias form, viz.:

"The stay strip, having the capacity of stretching longitudinally while *being incapable of stretching transversely*, may be made in a variety of ways. One way of thus making the stay strip is to cut it on the bias; that is, to so form the stay strip that the warp and weft threads extend diagonally across the width of the strip, as seen in Figs. 3 and 4. Where *this construction is employed*, the stay strip is capable of stretching longitudinally as required to accommodate the increasing circumferential length of the tire as it is inflated, and such longitudinal stretching results in tending to draw the edges *8* of the stay strip together, as will be obvious. This tendency not only counteracts any tendency of the strip to stretch transversely, and thus makes the stay strip inelastic transversely, but also tends to actually decrease the width of the stay strip and thus augments the compression under which the rubber forming the tread portion *4* is placed."

And he then shows the use of the slit form, viz.:

"In Figs. 5 and 6 I have shown another embodiment of my invention, wherein the stay strip is provided with slits through its central portion to permit of the necessary longitudinal stretching of the portion which overlies the tread

of the tire. In this case the warp threads extend longitudinally of the *stay strip and the weft threads extend transversely thereof*, but the slits *20* formed in the stay strip permit the necessary elongation thereof at the tread portion of the tire."

In conclusion he sums up his whole disclosure as follows:

"From the above it will be seen that my invention comprehends the use of a stay strip for securing the desired compression of the tread portion of the tire, *which stay strip is incapable of stretching transversely*, but which is capable of stretching longitudinally to permit of the natural inflation of the tire."

From the above it will be seen that MacDonnell's disclosure was of a transversely nonstretchable stay strip and that this feature was made a claim element. Such being the case, it necessarily follows that any tire whose stay strip is stretchable, and which, when in use, is extended, is at variance with his disclosure and does not infringe his claim. The proofs and demonstrations in court make it clear that the defendant's stay strip does, when inflated, stretch transversely a material distance. It follows, therefore, that defendant's stay strip does not embody the very feature which MacDonnell disclosed and claimed.

The decree below must therefore be reversed, and the bill dismissed, on the ground of noninfringement.

ELEVATOR SUPPLY & REPAIR CO. v. NEW & BEAVER ARCADE CO. et al.

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

No. 139.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—ELEVATOR SIGNALING APPARATUS.
   The Payne patent, No. 1,108,782, for electric signaling device for elevators, covers only improvements on the prior art, and the claims must be strictly limited to the devices described and shown. Claim 3, as so limited, *held* not infringed.

2. PATENTS ⟸328—INFRINGEMENT—ELEVATOR SIGNALING APPARATUS.
   The Andren patent, No. 1,109,950, for an elevator signaling apparatus, *held* not infringed.

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

Suit in equity by the Elevator Supply & Repair Company against the New & Beaver Arcade Company and Franz A. Boedtcher. Decree for defendants, and complainant appeals. Affirmed.

On appeal from a decree dismissing the bill alleging the infringement of the Payne and Andren patents, owned by the complainant. No opinion was delivered in the court below.

Newell & Neal, of New York City (Emerson R. Newell, of New York City, of counsel) for appellant.

James H. Griffin, of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The Payne and Andren patents in controversy are owned by the complainant. They relate to signal apparatus for elevators. The alleged infringing devices were installed by the defendant Boedtcher in the elevator system in the New & Beaver Arcade Building, New York. Claim 3 of the Payne patent and claims 1, 3, 4, 5, 10, 12, 14, 15, 18 and 19 of the Andren patent are involved.

[1] The Payne patent No. 1,108,782 relates to the same subject-matter covered by the earlier patents granted to McLean and to Payne himself. It is at best only an improvement over what is disclosed in the prior patents. McLean has a single door switch with two circuits passing through it; Payne has dispensed with one of these circuits and utilizes a single circuit for controlling the up and down restoring magnets which was the method employed by many of the prior art commutator systems. The patent in suit embodies only minor changes over the prior patent to Payne No. 756,275, viz., the manually operated door switches which were old and are shown in the McLean patent No. 728,409.

The Payne patent contains 43 claims, but one only—claim 3—is involved; it is as follows:

"3. In an elevator signaling apparatus in combination, a car, electrically-operated signaling means, means for operating the same comprising an up and a down passenger's-button at a floor and mechanism corresponding to and set by each button, an electrically-controlled restoring means for each passenger's-button-set mechanism, a single normally open switch controllable by the car-operator, and a circuit-shifting switch serving to connect said single normally-open switch with said restoring means alternately."

We have here a combination containing the following elements:

1. A car;
2. Electrically-operated signaling means;
3. Means for operating the same comprising an up and a down passenger's-button at a floor;
4. Mechanism corresponding to and set by each button;
5. An electrically-controlled restoring means for each passenger's-button-set mechanism;
6. A single normally open switch controllable by the car operator;
7. A circuit-shifting switch serving to connect said single normally-open switch with said restoring means alternately.

It is not pretended that this combination produced any broadly new results or in any way revolutionized the art. The patentee distinctly says that his object is "to improve upon constructions heretofore used, and particularly to improve upon the construction set forth in my prior patent."

In other words, the patent is intended to cover the improvements which the patentee contends he has contributed to an art which was occupied by many skillful and ingenious electricians. So far as the patent in suit is concerned, Payne cannot be considered as a pioneer, but only an improver upon existing structures and methods. Claim 3, if sustained, must be limited, in view of the prior patents to Payne and McLean, to the structures having the elements enumerated above. There is no room for the application of the doctrine of equivalents.

One of the features of the plaintiff's system is "a maintaining circuit" which the defendant does not use; neither does it use the "single normally open switch"; it employs two switches. It does not employ the Payne maintaining circuit or the fourth or seventh element of the combination, as stated above.

[2] But little need be said regarding the Andren patent. During the trial the counsel for the complainant frankly stated as follows:

"We are perfectly free to admit that prior art patents, prior to Payne and Andren has commutators; commutator apparatus to set and restore signals. That is old. We all know that.

"The Court: That is a selective apparatus?

"Mr. Newell: Yes, sir; selective for setting and selective for restoring."

The first claim is as follows:

"In an elevator car signaling apparatus, the combination of a signaling device, means for automatically and selectively restoring the signal, and a centrifugal governor operated by the car and controlling said restoring means."

It is unnecessary to recite them all. All of these claims have as an element, in somewhat differing language, automatic means for selectively restoring the signals. Claim 14 has an element, "a switch controllable by the operator of the car,'" which the defendant does not have. We think the court properly construed the words "governed by the stopping of the car," etc., as not applicable to the defendant's system.

We are of the opinion that these causes were correctly decided and that the decrees should be affirmed.

KLAUDER-WELDON DYEING MACH. CO. v. GILES et al.

(District Court, N. D. New York. March 29, 1916.)

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—YARN DYEING MACHINE.
The Weldon patent, No. 659,906, for a yarn dyeing machine, discloses invention and is valid, but in view of the prior art is entitled to only a limited range of equivalents. As so limited, it is not infringed by the machine of the Giles patent, No. 1,146,324, which, while also an improvement on the prior art and producing the same result, does so by a different combination of old elements, some of which are neither the elements of the Weldon machine nor their equivalents.

2. PATENTS ⟸22—INFRINGEMENT—"EQUIVALENT" PARTS.
To be equivalents, two elements found in different machines or devices in the same art must not only perform the same function in the respective combinations, but must perform that function in substantially the same manner.

[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.]

In Equity. Suit by the Klauder-Weldon Dyeing Machine Company against John H. Giles and the John H. Giles Dyeing Machine Company. On final hearing. Decree for defendants.

See, also, 224 Fed. 515; 228 Fed. 512, —— C. C. A. ——.

This is a suit in equity to restrain alleged infringement of Weldon patent No. 659,906, for improvements in yarn dyeing machines, and for an accounting. Claim 1 is in issue.

Duell, Warfield & Duell, of New York City, for complainant.
A. D. Salinger, of Boston, Mass., for defendants.

RAY, District Judge. The patent in suit, United States letters patent No. 659,906, was issued October 16, 1900, to Leonard Weldon, for improvements in yarn dyeing machines, and is now owned by the complainant.

There was a contest in the Supreme Court of the state of New York over this ownership, which was made by the present defendant; but, beaten in that litigation, it is now contended that the invention and letters patent are worthless. The defendants having devised and constructed a competing machine, with some differences in construction and improved somewhat, but one acting on the same general principles to produce precisely the same result or accomplish the same object, now contend they do not infringe. The plaintiff and its predecessors have been in business in the same plant at Amsterdam, N. Y., for some 30 years, and from early in 1908 to the spring of 1913 the defendant John H. Giles was the vice president and general manager and director of, and a stockholder in, the plaintiff corporation. Some 50 per cent. or more of its business has been in the machines in suit, and about 70 to 75 per cent. of all the dyeing machines in use in the United States has been of the complainant's production. This patent has been acquiesced in by the general public and by the defendant Giles until he severed his connection with the complainant.

Soon after this suit was commenced, on motion of complainant, this court granted a preliminary injunction, its issue and operation being suspended pending appeal, but on appeal the order granting the injunction was reversed. Judge Lacombe, writing the opinion of the Circuit Court of Appeals (Klauder-Weldon Dyeing Mach. Co. v. Giles et al., 228 Fed. 512 —— C. C. A. ——), held that *on the record presented* infringement was not shown. The complainant contends it has now made and presented a record showing infringement.

[1] The claim in issue of the patent in suit reads as follows:

"1. In a rotary dyeing machine, the combination with the dye tub, of a pair of wheels mounted on a shaft to turn in bearings on the dye tub, an outer and inner circular series of sticks to hold the skeins, the inner series of sticks having bearings for their ends in revoluable adjustable parts, a lever connected with each of the parts to revolve the same, a bolt on the lever, and a rack to engage the bolt secured upon each of the wheels, as set forth."

The complainant contends that all the elements of this claim are present in defendants' device. The defendants claim their device does not have "a lever *connected* with *each of the parts* to revolve the same, a bolt on the lever, and a rack to engage the bolt secured upon each of the wheels, as set forth."

Two large wheels or rings are, at a considerable distance from each other, mounted on a single axle or shaft and revolve with it. In the rim at the periphery of each ring or wheel are sockets which receive

"sticks" or bars of wood extending from the one to the other and these "sticks" hold one end of the skeins of yarn. Movably attached to each of these two large wheels or rings is a smaller ring or wheel provided with sockets which receive other bars of wood or "sticks" extending from the one to the other and receiving the other end of the skein of yarn. There is a tub of dye on which the shaft is mounted in suitable bearings into which the wheels or rings pass as they turn carrying the yarn to be dyed. By suitable appliances and by partially turning these smaller rings or wheels the tension on the skein is varied. In complainant's device this partial turning of these smaller wheels or rings on the larger ones is effected by means of a *lever* "connected with each of the parts to revolve the same, a bolt on the lever, and a rack to engage the bolt secured upon each of the wheels." These large rings or wheels have arms or spokes similar to the ordinary wagon wheel, only a lesser number, and the "lever" shown in the patent in suit is pivoted at its lower end on a bar of wood or iron extending from one spoke or arm to another, and at a distance above its pivoted end is attached to the smaller ring or wheel, so as to move the same when the lever is operated. The rack is a toothed piece of curved iron, the curve corresponding with that of the periphery of the wheel, also attached to the same spokes or arms of the large wheel, but at a considerable distance above the *bar* before mentioned. This lever can be swung or moved on its pivot from and towards each of the two spokes or arms mentioned, and when so moved it of course carries the smaller ring or wheel with it back and forth. If, now, we provide this lever with means for engaging the toothed rack, we have locking means, so that the "sticks" connected with the smaller wheels are held in position. This locking means consists of "a bolt on the lever," which may be moved up and down; that is, into and out of engagement with the rack. Each large wheel has a lever and a rack. Taking into consideration this combination as a whole and the state of the art as it was when this patent was granted, there was disclosed utility and patentable novelty. The main object was to first properly tension the yarn and then maintain proper tension. It was essential, of course, to provide for locking the smaller rings in position. In the dyeing process it is essential that the skeins of yarn on the two sticks be in loose tension and still so taut that the yarn will travel or move on or around the sticks themselves to secure an uniform action of the dye on the entire skein of yarn. The skeins must not be too loose on the sticks, for, if so, they will tangle.

Infringement.

As stated, the results obtained by the two machines in operation are precisely the same. Each has the dye tub; each has the two large wheels mounted on a single axle or shaft, with a smaller ring or wheel movably attached to each of such wheels. These wheels of defendants' machine have the sticks for the skeins of yarn mounted on or connected with the wheels in substantially the same manner as in the patent in suit. The differences relate to the means for adjusting the one set of sticks relatively to the other set, so as to maintain suitable tension of the skeins of yarn.

As defendants' machine was patented July 13, 1915, it is well to insert here the claims of that patent, to show the differences in construction. Such claims of patent to John H. Giles and Donald M. Giles, No. 1,146,324, are as follows:

"1. A dyeing machine having an inner and an outer set of stick-supporting members and means for simultaneously adjusting the relation of one set with reference to the other, comprising racks carried by the members of one set, an actuating shaft journaled on the other members, pinions on the actuating shaft in engagement with the racks, a worm gear on said shaft, an operating shaft on a member of the latter set, and an operating worm on the operating shaft in operative engagement with the worm gear.

"2. A dyeing machine having an inner and an outer set of annular stick-supporting members, the inner of said members being journaled to move relative to the outer members, racks on the inner members, an actuating shaft carried by the outer members, pinions on the actuating shaft in mesh with the racks, a worm gear on the actuating shaft, a radially arranged operating shaft suitably journaled, and an operating worm on said shaft in engagement with the worm gear to effect simultaneously the adjustment of the inner supporting members relative to the outer supporting members for varying the distances between the sticks.

"3. A dyeing machine having an inner and an outer set of annular stick supporting members, the inner of said members being journaled to move relative to the outer members, racks on the inner members, an actuating shaft carried by the outer members, pinions on the actuating shaft in mesh with the racks, a worm gear on the actuating shaft, a radially arranged operating shaft suitably journaled, and an operating worm on said shaft in engagement with the worm gear to effect simultaneous adjustment of the inner supporting members relative to the outer supporting members, and a squared end portion on the operating shaft for the application of a detachable wrench, substantially as described.

"4. A dyeing machine having an inner and an outer set of stick-supporting members and means for simultaneously adjusting the relation of one set with reference to the other, comprising racks carried by the members of one set, an actuating shaft journaled on the other members, pinions on the actuating shaft in engagement with the racks, a worm gear on said shaft, a radially arranged operating shaft on a member of the latter set, an operating worm on the operating shaft in operative engagement with the worm gear, and a squared end portion on the operating shaft for the engagement therewith of a detachable wrench for manually adjusting the position of the parts."

This is an improvement, I think, on the complainant's machine, and such improvement constitutes patentable invention;. but this fact does not defeat infringement, if defendant has complainant's combination operating in substantially the same way to produce the same result, made up of allowable equivalents. Here, of course, comes in the question of the limitations, if any, imposed on complainant by the state of the prior art, as the breadth and scope of complainant's patent must be determined on a consideration of that art.

The defendant's machine has the large wheels carried by the one shaft and the two inner or smaller wheels *movably* mounted on the larger wheels, respectively, and each of these smaller wheels has a rack for engagement with a pinion, the teeth of which act as levers when in engagement with the rack on the small wheels, and when the pinions are turned the small wheels turn. As a necessary consequence, when the pinion is in engagement with the rack and revolved any distance, the relative position of the two sets of sticks is changed and the tension of the skeins of yarn is regulated. There is a lever, there-

fore, for each part—that is, each wheel. There is an actuating shaft carrying these pinions, extending from one large wheel to the other and mounted in suitable bearings at each end on a bar extending from one spoke or "spider arm" to another and attached thereto. Hence the levers (pinions) at each end of this actuating shaft carrying them are supported by and on the large wheel. This actuating shaft, and consequently the pinions, is actuated or moved by the operator at one end of the machine by means of a larger pinion or worm gear mounted on this actuating shaft, and this larger pinion or worm gear is operated or made to turn (thereby operating the smaller pinions or levers and consequently turning the smaller wheels) by means of an "operating worm" engaged with the worm gear mounted on one of the bars supporting one end of the actuating shaft, and which operating worm therefore meshes with this large pinion or worm gear on the actuating shaft. This operating worm has detachable means, a crank handle, for turning or operating it.

It should be mentioned that in defendant's machine the smaller pinions carried by the actuating shaft are always in engagement or in mesh with the racks on the two smaller wheels. The racks on the smaller wheels may be integral with them, respectively, or may be detachable.

The claim in issue of the patent in suit has the following elements in combination: (1) The dye tub (common to both machines). (2) A pair of wheels mounted on a shaft to turn in bearings on the dye tub (common to both machines). (3) An outer and inner circular series of sticks to hold the skeins, the inner series of sticks having bearings for their ends in revoluble adjustable *parts* (common to both machines). (4) A lever connected with each of the *parts* to revolve the same. (5) *A bolt on the lever.* (6) A rack *to engage the bolt* secured upon each of the wheels.

Considering element No. 4, "a lever connected with each of the parts to revolve the same," in complainant's structure, its lever, a straight arm lever pivoted, is connected not only with the large wheel, but with the small wheel for the purpose of moving or revolving it, and there are two levers, one at each large wheel and its companion small wheel. In defendants' structure the pinions mounted on the actuating shaft (not the shaft carrying the large wheels) are levers, and there is one at each of the large wheels and its companion small wheel, and their purpose, or function, is to revolve the small wheels on the large wheel. Here is identity of purpose, and operation and result, but a difference in the form of the levers. The one is a straight arm pivoted lever and the other is a pinion mounted on an actuating shaft, but the one is clearly the equivalent of the other. The complainant's patent shows the straight arm pivoted lever, but the claim is not limited in this respect. Any mechanical dictionary shows that a pinion is a lever.

Considering element No. 5, "a bolt on the lever," in complainant's patent, the object or function of this bolt is to engage and lock the lever with the rack, and is so constructed as to permit disengagement and unlocking except at the will of the operator. In defendants' ma-

chine the levers are always engaged with the racks respectively. There is no bolt on the lever, unless the "operating worm" attached to the large wheel and meshing with the "worm gear," forming a part of the actuating shaft which carries the levers (pinions), can be considered as such "bolt"; that is, is the well-known equivalent of "a bolt on the lever," as understood by a reference to the drawings and specifications of the patent in suit. The result accomplished is the same, but can it be said such result is obtained in substantially the same way or by substantially the same means operating in substantially the same way or in obedience to the same mechanical laws? In defendants' machine the rack is transferred to the small wheel itself where it engages with the teeth of the pinion on the actuating shaft.

Considering element No. 6, "a rack to engage the bolt secured upon each of the wheels," we find in defendants' machine "a rack" surely. There is a rack on each of the smaller wheels, made integral with it, as shown in the model, not in the patent; but this is immaterial, as it is adding a rack to the wheel of the patent in suit, whether made separate and attached or integral. The location of the rack is changed from the large to the small wheel. The complainant contends, however, that neither of these racks shown with which the pinions mesh is the rack of the claim, but that the rack is the "operating worm" *e* of the large drawing in evidence and which operates as a locking device when at rest, and is not the "worm gear" of defendants' patent. But, if the "operating worm" *e* is the rack of the infringing machine, it seems to be quite different from the rack of the patent in suit and hardly an equivalent. It is not secured upon each of the wheels, except quite indirectly, and how does it engage the bolt? What is the bolt? Complainant says it is the "worm gear" (*81* of the drawing), and which is carried by or forms a part of the "actuating shaft," and meshes or engages with such operating worm. Mr. Hammer said:

"Q. 118. Now in this question please recognize that the parts referred to are the inner wheels of the dyeing machine; that is, the revoluble parts. Now, if it be assumed that 'Weldon's contribution to the art is a lever connected with each of the parts to revolve the same, a bolt on the lever, and a rack to engage the bolt secured upon each of the wheels, as set forth,' please state to what extent, if any, you find that contribution present in defendants' machine disclosed in the drawing marked defendants' machine? A. Those features are present in that machine, both as matter of fact and as matter of language. For example, the language quoted calls for a lever connected with each of the parts to revolve the same, those parts being the revoluble rings *E*, and it will be seen that each of those rings, revoluble rings, has in connection with it a gear wheel *H* mounted upon its axle *80*. That is a lever. That is true of each of them—each of those wheels *E* has its own gear wheel *H* and its own axle. The fact is that the axle is common to both of them, but that does not remove the construction from the actual text of the language that each of these revoluble parts shall have a lever to revolve the same. If you did not have the lever, you could not revolve the parts. Such language also calls for a bolt on the lever. That bolt is the tooth *d* of the worm gear *81*, which co-operates with the rack of the worm. The language calls for a bolt on the lever. That is the bolt *d* mounted upon the axle *80*, which is the axle of the lever.

"By the Court: Q. 119. Which is the bolt? A. The bolt is to be considered the tooth which happens to be in engagement with the rack or worm when that worm is still, because it is that bolt, that projection, which goes down into

the teeth of the rack or worm, which prevents movement and locks the lever in place. That language calls for a bolt on the lever, and that bolt *d*, as indicated by this drawing in the upper right-hand corner of the large diagram, shows that that bolt is mounted on the shaft *80* of the lever.

"Q. 120. Which is the bolt on the lever here? A. In this model of the specific structure of the patent in suit the bolt is the small right angle member which is made to project down in between the teeth of the rack.

"Q. 121. The bolt is the means used to lock in the rack? A. That is true. * * *

"Q. 123. Because that part of the worm engages with the tooth? A. To prevent movement, and inasmuch as that bolt is mounted on the shaft *80*, it is mounted on the lever, because the shaft *80* is a part of the lever. The shaft *80* is the axle of the gear wheel *H* of either the right-hand or left-hand small revoluble ring, and by reason of its locking function it prevents those gear wheels from turning, and it prevents the small rings, *E*, from turning when things have been adjusted to their working position. Now we can go on with that quotation just a little further. It calls for a rack to engage the bolt secured upon each of the wheels as set forth. It will be seen in accordance with my explanation that the bolt *d*, which is one of the teeth of the gear wheel *81*, engages with the rack surface of the worm *86*, so that we have there a rack to engage that bolt, and that rack, which is the worm *86*, is secured here—it is secured upon bearings attached to the right-hand big wheel. When you turn that worm you operate the right-hand small ring *E* with respect to the right-hand wheel. You do more than that. You revolve the left-hand wheel *E* with reference to the left-hand big wheel. The left-hand big wheel and the right-hand big wheel are on the same axis. They are on the same shaft; they are connected together. What you put on one you put on the other, of necessity. It is part and parcel of the same structure, so that if you have a rack secured to the right-hand wheel, you have a rack secured to the left-hand wheel. If you cut that ring directly in half you could not work the left-hand mechanism—you could only work the right-hand mechanism; but by reason of the fact that they are brought together and tied together by being put on a common shaft, what you fasten to one you fasten to the other, so that it has a rack. It happens to be the same rack, but each has a rack nevertheless."

I think it is going far to undertake to transform this "operating worm" into the rack of the patent in suit and the "worm gear" into the bolt of that patent. It seems to me difficult to apply the doctrine of equivalents to structures which differ so radically as do the machine of the complainant and that of defendants in this respect. In complainant's machine the operator, if there be but one, changes one end of the sticks supported by the small wheels, and then goes to the other end or side of the machine and changes or adjusts that end, while in defendants' machine both ends, by turning the "operating worm," are adjusted simultaneously. It requires but one operator to do this, and thus time and travel are saved. If the operating worm be the rack and the worm gear be the bolt of the patent in suit, or the allowable equivalents therefor, then infringement may be conceded.

[2] But equivalency is made up of more than one element. To be equivalents the two elements found in different machines or devices in the same art must not only perform the same function in the respective combinations, but perform that function in substantially the same manner. Walker on Patents (4th Ed.) 312, §§ 354, 355. Here Weldon was not a pioneer in this art, and therefore the complainant is entitled, in view of the prior art as it was when the patent was issued, which was not meager, to a somewhat narrow range of equivalents. I think

the language of complainant's patent in suit, in view of that prior art and its disclosures, and in the light of which we must construe it, forbids the adoption of the contention made by Mr. Hammer, which would be quite convincing in the case of a pioneer patent.

The additions made by Giles do not avoid infringement, nor do changes in form or the substitution of *allowable* equivalents in each and every element, even if the machine be vastly improved thereby. The grant of the Giles *patent* has little bearing on the questions involved here, as it is an improvement, as has been pointed out, and probably the patentees were entitled to the patent for the improvement.

If it be true that the operating worm of defendants' structure is the rack, and the worm gear the bolt, and the allowable equivalents of the rack and bolt of the patent in suit, then we find but *one* rack and *one* bolt in defendants' machine, instead of the *two* racks and the *two* bolts shown and described in and called for by the patent in suit. In the patent in suit, if we remove the rack and bolt from either set of wheels (a set being the large wheel and the small wheel attached to it), the machine becomes inoperative. When you operate the bolt and rack at one set of wheels, you do not affect those at the other. Hence the defendants' machine has eliminated one rack and one bolt, accepting the definitions of parts given by Hammer as correct, and an element essential to the operation of complainant's machine is wanting in defendants' machine, as the plaintiff's patent shows, plainly describes, and I think calls for a lever, a rack, and a bolt, all co-operating, at each set of wheels. In complainant's machine the bolt is in engagement, and in locked engagement, with the rack, except when it is desired to move the small wheel. Then by hand the bolt is lifted out of engagement, and the lever arm, carrying the bolt to which it is attached, is pushed by hand in the direction and for the distance desired, and then the bolt by hand or a spring attached thereto is dropped again into engagement with the rack. This construction and these parts, lever, rack, and bolt, are found and must be found at each pair of wheels, or the machine is inoperative as already stated. In defendants' machine, conceding the operating worm to be the rack, and the worm gear to be the bolt, the one is *always* in engagement with the other, and in operative and operating engagement when the operating worm is turned or revolved. As the operating worm is in engagement with the worm gear, or so-called bolt (so called because it has teeth engaged with the worm, or so-called rack) by friction it holds, except as against force applied, the actuating shaft, and consequently the pinions thereon and the small wheels connected therewith, by means of their teeth or racks which are in engagement with the pinions. Apply initial force to the operating worm (rack) by turning it, and this force is communicated to the worm gear (bolt) and turns it, thereby overcoming the holding power of such bolt, and thence to the two pinions on the actuating shaft, causing them to revolve, and thence by the leverage of such revolving pinions to the smaller wheels, causing them to revolve the required distance. This actuating shaft, carrying the pinions and the worm gear integral with it, is in fact one ele-

ment in the defendants' combination, and may properly be described as an actuating shaft provided with two pinions and a worm gear to connect or engage with an operating worm and with the small rings or wheels. We cannot cut this actuating shaft into two parts, or leave off either pinion. If we do, the machine is inoperative. In the combination of an operating worm and a worm wheel or gear, movement of the operating worm is automatically prevented when force is applied to the worm gear; but movement is very easy when force is applied to the operating worm. It is therefore true that, if the operating worm is left alone, the whole structure carried by the main shaft carrying the large wheels is locked against movement. If complainant's theory is correct, then the operating worm must be also the main lever, *the* lever, for by its tooth connection with the worm gear lifting force is applied to the latter, and thus the operating shaft is turned and the two pinions with it simultaneously, and by means of their toothed connection with the smaller wheels, respectively, the same lifting force first applied to the operating worm is applied or transmitted to them, and they are moved to the desired position by the leverage of the pinions. In complainant's machine or structure the force is applied directly to the long arm of the lever, after lifting the bolt, and communicated directly to the small wheel, with which the lever is directly connected.

In the prior Weldon patent, No. 566,258, of August 18, 1896, we have the main rotatable shaft carrying the two large wheels (spiders), which carry one set of "sticks" and also the two smaller wheels (rings), one at each wheel, and which smaller rings carry the inner dye sticks. These small wheels or rings are rotatable on the large wheels, respectively, and on the outer edge each is provided with teeth, which engage or "mesh" with the teeth of a small "cogwheel" carried by a cage attached to one arm of the spider (large wheel), which cage also carries a spring catch (or bolt) to engage with this cogwheel. When this spring catch is lifted out of engagement with the cogwheel, the latter is turned or rotated by means of a key inserted therein, and by means of the tooth engagement of the cogwheel with the teeth on the small wheel or ring the latter is rotated. If the cage and spring catch had been dispensed with, except at the operating end, the cogwheels mounted on an operating shaft journaled to the large wheels, so as to engage with the teeth on the small wheels, both of these wheels might have been rotated simultaneously by the operator, located at one end or side of the machine, by means of a key inserted in one of such cogwheels. This in substance is what Giles did, except that he substituted the operating worm and the worm gear for a key as a means for moving the cogwheels and locking the mechanism, and he located the teeth on the inside instead of the outside of the rims to the small wheels, so as to get this operating shaft carrying the pinions (cogwheels) away from the yarn. Giles improved on this former Weldon patent. That patent also shows a worm gear and an operating worm, but for another purpose. Giles was familiar with both these prior patents, and from them probably got his ideas or patentable conception. I do not find it necessary to discuss the prior Berger patent. Here is what Weldon says in his specifications of the invention claimed here:

"To provide means for increasing or decreasing the distance between the sticks that carry the skeins, to accommodate skeins varying in length or to tighten the skeins after they are placed in position upon the sticks, I place the bearings for the inner circular series of sticks upon rings *E E*, loosely journaled in the arms of the large wheels *C C*, or spiders, or on wheels loosely journaled on the spider shaft, and provide means to move or rotate these rings or wheels, and thus rotate all the bearings at once on each ring toward or from their outer mates or sticks *D*. Said adjustable rings are held loosely in place by small angular pieces *b b*, etc., secured upon the inner faces of the arms of the large wheels. A lever *H* is pivoted upon a bar *h*, extending between two spokes on each large wheel, and is provided with a small slot *l* to receive a pin *l'*. Near and upon the outer end of said lever is a spring bolt *d*, which is adapted to engage a curved rack *e* on a bar *f*, also secured to and connecting the two spokes together. When it is desired to revolve one of the rings in either direction, it is only necessary to raise the bolt *d* and turn the lever *H* on its pivot to one side or the other, and release the bolt, to engage the rack and to hold the lever and ring in the required position."

It is clear, I think, that Giles made a new combination of old elements, and that, while he produces the same result as does complainant, he does not have the same combination of elements, or a combination made up in part of equivalents differently located, or elements changed in form and construction merely. There is not sufficient identity in the performance of their functions between the elements of the two machines. I am constrained to the conclusion that defendants do not infringe. I have considered the case on the record now made, entirely independent of the conclusions reached on the former record by the Circuit Court of Appeals. There are equities in the case which create a desire to reach a different conclusion, but I am unable to do so.

There will be a decree dismissing the bill of complaint, with costs.

BARBER v. OTIS MOTOR SALES CO.

(District Court, N. D. New York. March 31, 1916.)

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—VALVE AND VALVE GEAR FOR MOTOR ENGINES.

The Barber patent, No. 781,802, for a valve and valve gear for explosive engines, of such construction that the valves of a motor engine may be readily and quickly removed and replaced when necessary for cleaning, repairing, etc., is for a new and useful combination of old elements, was not anticipated, and discloses patentable invention of a high order. Claims 8 and 9 also *held* infringed.

2. PATENTS ⇐235—INFRINGEMENT—INFERIOR OR SUPERIOR OPERATION.

That another structure is superior to that of a patent, or that it performs some other function, does not avoid infringement, when the same elements perform the same functions in substantially the same way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. ⇐235.]

In Equity. Suit by William Barber against the Otis Motor Sales Company. On final hearing. Decree for complainant.

This is an action in equity to restrain alleged infringement of United States letters patent No. 781,802, dated February 7, 1905, for "valve

and valve gear for explosive engines," and which patent was applied for February 24, 1902. The complainant also asks an accounting.

Fred F. Weiss, of New York City (Samuel E. Darby, of New York City, of counsel), for complainant.

Coudert Bros., of New York City (R. A. Parker, of Detroit, Mich., of counsel), for defendant.

RAY, District Judge. Claims 8 and 9 of the patent issued to William Barber, of Brooklyn, N. Y., assignor to Ada S. Barber, No. 781,802, dated February 7, 1905, applied for February 24, 1902, are in issue. These claims read as follows:

"8. In an explosive motor, the combination with an explosion chamber having a T-shaped gas passage the main central or stem portion of which forms the explosive vapor inlet, of a valve seat ring provided with gas passages located in the end of the head portion of the T-passage adjacent to the explosion chamber, a puppet valve carried by the valve seat ring opening toward the explosion chamber, a spring normally keeping the valve in the closed position, and a screw plug provided with a perforate peripheral wall and a closed outer and an open inner end closing the outer or air end of the head portion of the T-shape passage and holding the valve seat ring in position thereof, through the perforations in the wall of which the explosive vapor passes from the main or stem portion of the T to the valve at the open end of such plug, substantially as shown and described.

"(9) In an explosion motor, the combination with an explosion chamber having a T-shaped gas passage the main central or stem portion of which forms the exhaust orifice of the explosion chamber of a screw plug closed at the outer end, open at the inner end, and having a perforated peripheral wall, so as to give free communication between the central hollow thereof and the main stem or central passage and the explosion chamber located in the head portion of the T-shaped passage, a puppet valve, the stem of which projects outward through the head of the plug seated upon the inner end of the plug, so as to cut off communication between the main stem portion of the T-passage and the explosion chamber, except when the same is forced away from the seat and toward the explosion chamber, a spring for normally keeping the valve in the closed position and means for forcing the valve stem inward, so as to open the valve actuated by the motor and adapted to be removed from contact with the valve stem without removal from the support thereof, so as to permit of removal of the plug and valve by the unscrewing of the plug, substantially as shown and described."

Title to this patent is conceded to be in the complainant. The Otis Motor Sales Company is a dealer in the alleged infringing device, but the Reo Motor Car Company is the manufacturer and also a seller of such device, and that company is in fact defending this action.

[1] The complainant has proved the utility and operativeness of his device. In view of the prior art, does it disclose patentable invention? This court thinks it does. A large number of prior patents have been introduced in evidence, but I am unable to find anything which anticipates, or which demonstrates that an ordinary mechanic skilled in the art would have produced what Barber did.

Claim 8 calls for the combination in an explosion motor of the following elements, viz.: (1) An explosion chamber which has a T-shaped gas passage, the main central or stem portion of which forms the explosive vapor inlet. (2) A valve seat ring provided with gas passages located in the end of the head portion of the T-passage adjacent to the explosion chamber. (3) A puppet valve carried by the valve seat ring

opening toward the explosion chamber. (4) A spring normally keeping the valve in the closed position. (5) A screw plug provided with a perforate peripheral wall and a closed outer and an open inner end closing the outer or air end of the head portion of the T-shaped passage and holding the valve seat ring in position thereof through the perforations in the wall of which the explosive vapor passes from the main or stem portion of the T-shaped passage to the valve at the open end of such screw plug.

Claim 9 calls for the combination in an explosion motor of the following elements, viz.: (1) An explosion chamber having a T-shaped gas passage the main central or stem portion of which forms the exhaust orifice of the explosion chamber. (2) A screw plug closed at the outer end, open at the inner end, and having a perforated peripheral wall, so as to give free communication between the central hollow thereof and the main stem or central passage and the explosion chamber located in the head portion of the T-shaped passage. (3) A puppet valve, the stem of which projects outward through the head of the plug, seated upon the inner end of the plug, so as to cut off communication between the main stem portion of the T-passage and the explosion chamber, except when the same is forced away from the seat and toward the explosion chamber. (4) A spring for normally keeping the valve in the closed position. (5) Means for forcing the valve stem inward, so as to open the valve actuated by the motor, and adapted to be removed from contact with the valve stem without removal from the support thereof, so as to permit of removal of the plug and valve by the unscrewing of the plug.

It will be seen that these claims describe the object and purpose or function of certain of the elements. In the specifications of the patent the patentee said:

"The object of my invention is to provide a motor-engine of the explosion vapor type of a simple and cheap form of construction, so made that the inlet and exhaust valves thereof may be quickly and easily removed from the body of the motor without disturbance of the other parts, and quickly cleaned, adjusted, or renewed as occasion may require, and returned to position, and also to provide motors of such type with a combined electric circuit making and breaking and speed-regulating device of improved form."

In this litigation we have nothing to do with the electric circuit making and breaking and speed-regulating device of improved form. The patentee then says:

"To such ends my invention consists, in substance, of a cylinder, a piston, reciprocating in the cylinder, a crank shaft in actuative connection with the cylinder by means of a connecting rod, an explosion chamber adjacent to the cylinder in communication with inlet and exhaust passages, an exhaust valve plug located in the exhaust passage, a normally spring-closed exhaust valve carried by the exhaust valve plug, a gear wheel carried by the crank shaft, a combined gearing and a cam wheel rigidly mounted upon an idler shaft meshing with a wheel carried by the crank shaft, and a rod reciprocating in a slip journal actuated by the cam, so as to open the exhaust valve, such rod being adapted by rotation upon its axis to be thrown out of engagement with the rod of the exhaust valve, * * * an inlet valve bushing adapted to be secured in the casing of the explosion chamber, so as to be in communication therewith, with the atmosphere, and with the explosive vapor supply source, and an inlet valve plug carrying a normally closed inlet valve adapted to inclose the inlet bushing, although it is not to be understood that my in-

vention is limited to a device comprising at once all of the devices and parts before mentioned, as the same consists of the construction of certain devices and parts, and the construction, combination, and arrangement of certain devices and parts, all as hereinafter more particularly set forth in the description and pointed out in the claims."

In the specifications we also find the following:

"Above the cylinder *A* proper is the explosion chamber *G*, usually of the elongated form, shown extending at right angles to the axis of the cylinder *A* and having on the side of the extension forming the outer end of such cylinder the exhaust orifice *H* and on the opposite side the inlet orifice *I*, and formed in the explosion chamber wall at the end of the extension thereof between the inlet and outlet orifices is the ignition plug orifice *K*."

It is thus plain that the explosion chamber is elongated or extended from side to side of Fig. 1, and that upon the upper side of the left-hand end of the explosion chamber, as shown in Fig. 1, is what is called the "inlet orifice *I*," and on the lower side and opposite *I* is what is called the "outlet orifice *H*." By inlet orifice and outlet orifice I think the patent means the whole of the space above the inlet valve and below the outlet valve respectively. Of course, the inlet orifice proper and the outlet orifice proper connect directly with these two spaces respectively. The patentee goes on to say in substance that:

"In such devices as heretofore used the larger proportion of accidents thereto and stoppages thereof when in operation are caused by clogging of either the exhaust or inlet valves, and in order to clear the same it has heretofore been necessary to remove numerous parts and uncouple the same one from another in order to put the motor in condition for operation again. This difficulty I obviate by so constructing and securing the inlet valve to the casing of the explosion chamber that by the unscrewing of a single screw part such valve, together with its seat, may be removed bodily from the casing, cleaned, adjusted, or renewed, and again returned to position by reversal of this process, and by also providing an exhaust valve plug carrying the exhaust valve screwed into the casing, so as to close the outlet or exhaust orifice thereof, which exhaust valve plug and valve may be removed bodily from the casing by simply unscrewing the same after a set screw has been removed from the cam rod actuating the same, and such rod given a quarter-revolution, the valve then being movable from its seat by the removal of a key."

The evidence shows and it is well known that the valves of motor engines frequently get out of order and require cleaning and repairs of various kinds. A construction which is safe and of reasonable cost, which will enable the owner to remove and replace these valves speedily and cheaply and without injury to the motor engine, is therefore of great value. Here was the problem which confronted Mr. Barber, the inventor in this case, and the evidence shows that he solved the problem satisfactorily, and that his invention went into use, and that this defendant and others have appropriated it, to his damage and injury. Mr. Barber has not been guilty of any laches in endeavoring to enforce his rights. He is not a man of wealth but this is no reason why courts should not give him the same consideration they would give wealthy men or wealthy corporations. I find and hold that the structure of the patentee discloses patentable invention in view of the prior art and that there is no anticipation.

The defendant placed in evidence more than 20 different patents, but no one of them shows the combination of Mr. Barber, and no one

of them shows a combination of elements which solves the problem presented to Mr. Barber, and which he successfully solved. There is no one element in the combination of Mr. Barber which is absolutely or entirely new; but he has a new combination and a useful combination of old elements, and the making of this combination discloses patentable invention of a high order. His invention has been availed of by others, and several have taken a license under his patent, while others are boldly infringing. The defendant in this case struggled vainly to show a combination in any prior patent which solves the problem presented to this complainant. The defendant presented patents which disclosed one or more of the elements found in the Barber patent, but it has been held again and again that a new and useful combination of old elements which results in a new structure of utility, and which the ordinary mechanic skilled in the art would not have produced, constitutes patentable invention.

Claim 8.

In the structure of claim 8, we have an explosive motor with a cylinder and a piston in the cylinder. When in operation this piston is drawn from the cylinder away from the combustion chamber by the action of a crank shaft. As it is drawn out a charge of explosive vapor is taken in through a pipe and through the perforations in the walls of a screw plug to a valve, the inlet valve, which valve is normally closed, and kept closed by a spring on the stem thereof, and which valve is opened by air pressure from the outside to permit this explosive charge of vapor to pass into the explosion chamber. One part of the screw plug receives the valve, which is sustained in position by a ring or seating in the cylindrical plug and adjacent to an extension of the explosion chamber. This gas passage is T-shaped. With the model before us, or the drawing, the T is on its side thus, |—, with the head portions extending upwardly and downwardly respectively, and this T-shaped gas passage is closed at its upper end by the head of a screw plug, and at its lower end by the valve itself when in a normally closed position. This valve is adjacent to the extension of the explosion chamber. This main stem portion of the T-shaped passage leads to the outer air, or, more properly, leads to and is connected to a conduit for the introduction of the explosive vapor. Next we have the valve seat ring provided with gas passages and this valve seat ring is located in the end of the head portion of the T-shaped passage and next to the explosion chamber; that is, at the lower end of the head of the T when on its side. Next we have the puppet valve, which is carried or supported by this valve seat ring, and this valve by reason of pressure from the outside opens toward the extension of the explosion chamber; that is, when pushed or pressed upon, the valve moves towards the explosion chamber. The spring on the stem of this valve keeps it normally in a closed position. Then we have the screw plug, which has a perforated peripheral wall and the outer (or upper) end is closed, and this closure terminates the upper end of this T-shaped gas passage. The inner or lower end nearest the valve itself is open. This screw plug closes the outer or air end of the head portion

of the T-shaped passage, and also holds the valve seat ring (by a shoulder thereon) "in position thereof," and through the perforations in the walls of this screw plug the explosive vapor passes from this main or stem portion of the T-shaped passage directly to the valve, or at a right angle to its course when entering.

On the trial there was considerable contention as to what was meant by and what constitutes this T-shaped gas passage. Taking either the model in evidence or the drawings of the patent there is no room for question or conjecture, unless we would pervert the meaning of words, change the location of things described, and put the claims and specifications and drawings in conflict to destroy the patent. It was contended by the defendant on the trial that the T-shaped gas passage consisted of the main explosion chamber and the extension thereof and the passages upward to the gas explosive inlet and the passage downward to the exploded gas outlet, the one containing the inlet and the other containing the outlet valves, respectively. This contention cannot be sustained, and as I read and understand the brief of the learned counsel for the defendant this claim is substantially abandoned, or at least is not urged and insisted on.

It will have been observed that claim 8 deals mainly with the inlet and inlet valve construction.

Claim 9.

In this structure of claim 9 (the cylinder and explosion chamber is common to both claims) we have a T-shaped gas passage also, but not the one mentioned in claim 8, and here the main central or stem portion forms the exhaust orifice having connection with the explosion chamber. Here we have a screw plug closed at its outer end; that is, closed at its lower end as it screws in from below. This screw plug is open at its inner end (upper end) adjacent to the extension of the explosion chamber, and has a perforated peripheral wall, and as a result we have free unobstructed passage from its open central portion and also from the main stem or outlet passage to the explosion chamber, or, what is the same thing, between the explosion chamber and the outlet passage by way of the central portion of the screw plug. This claim speaks of the explosion chamber as located *in* the head portion of the T-shaped passage. This means that the explosion chamber extension is at the head portion of the T-shaped passage, if the claim is now describing the location of the explosion chamber; but I am of opinion this description should and does apply to the location of the "central hollow thereof"—that is, the central hollow of this screw plug—inasmuch as there the exhaust opening *(30')* is located. Then we have the puppet valve of the exhaust mechanism, which shuts off communication between the "main stem portion" or outlet of the T-shaped passage and the explosion chamber, except when the valve ("the stem") is forced away from its seat and towards the extension of the explosion chamber. This valve has a spring on its stem to keep it normally closed. Then we have means for forcing this valve stem inwards (pushing it upwards, as we look at the model or the drawing) and this is done by the motor, and opens the valve for the escape of the exploded gases. These "means" for forcing the valve stem

inward, so as to open the valve, which is actuated by the motor, are adapted to be removed from contact with the valve stem without removal from the support thereof by simply making a quarter turn of the push rod which is the support thereof. When this is done, the plug may be unscrewed and removed, taking the valve with it.

Here we have a construction which is efficient and durable, and which enables the owner of the motor or its user, when the valves are out of order from any cause, to remove both valves by unscrewing a valve plug and lifting out the inlet valve in the one case, and by giving a quarter turn to the push rod and unscrewing and removing the valve plug and outlet valve in the other case, first removing a small set screw which holds the push rod in position. It is vain to search the prior art for a construction and combination like this. Each and every patent in evidence, which shows a valve cage, or a screw plug, or a combination of both, has one or more obstructions to a removal of these parts, which interfere with the removal of the valves. Various of these patents show that efforts had been made in the direction of securing a quick removal of the valves, but no one had fully solved the problem until Barber came into the field. In a sense and to an extent, at least, he is a pioneer. In but one or two of the prior patents is any reference made to the problem which Barber sought to solve.

On the trial and in defendant's brief much was and is said about push rods with tappets of both the fixed and movable types of tappets. This, in my judgment, has little to do with this litigation. Push rods with a bent-over end forming a tappet are of course old; but this is one of the elements merely in complainant's combination. His claims are for a combination, and the patentable invention disclosed resides in the combination as a whole, and not in a single element thereof. Valve cages are old; but Barber's invention does not reside in a valve cage merely. That is but one of the elements of his combination. A French patent was put in evidence, which had a flexible push rod; but there is no evidence that such a structure was ever used, or that it could be practicable. Clearly to my mind such a structure with a flexible push rod would be inoperative.

Infringement.

That the defendant infringes the complainant's patent cannot be successfully denied. The defendant has an explosion motor with the explosion chamber—the chamber into which the explosive vapor mixture is introduced and in which the explosion takes place. The defendant has a valve seat ring—a ring-shaped portion in which is formed the seat against which the inlet valve is held normally closed by means of a spring, and this valve is of the puppet type and opens towards the explosion chamber. The valve seat ring of defendant is provided with gas passages to permit the gases of the explosive mixture to pass through the openings controlled by the valve and into the explosion chamber. The defendant has a screw plug, the peripheral wall of which is perforated, and the inner end of which plug is open, and the outer end is closed, and the function of this screw plug is to hold the valve seat ring in position. The function of the perforations

in the peripheral wall of the plug is to allow the passage of the explosive mixture into the interior of the plug, and to the inner end thereof, and through the valve seat ring, and thence on into the explosion chamber. In the Barber patent, shown in the drawings, the screw plug is made separately from the valve seat ring. In defendant's structure, the screw plug and the valve seat ring are integral. This is immaterial. The two, put together, are the same as defendant's, and defendant's is the same as the two pieces of complainant, when put together so as to be operative. The function of each is the same, and they operate in precisely the same way to produce the same result. The valve seat ring in both structures forms a seat against which the valve is seated. The screw plug of the Barber patent, with its perforated peripheral wall, closes the outer or air end of the passage in which it is located, and which the patent calls "inlet orifice *I*," and this is an opening through the cylinder casting to receive the valve structure.

[2] Secondly, this screw plug holds the valve seat ring in its position against a shoulder formed in the orifice referred to. In defendant's device the screw-threaded portion is integrally connected to the valve seat ring, and performs the function of holding the valve seat ring in position, and is seated against the seat formed to receive it in the opening through the cylinder casting. We have the same structures, with the same functions, substantially. The perforations in the wall of the screw plugs in both cases are to permit the passage of the explosive mixture to the interior of the plugs, and thence to the inner open end and through the valve, and thence to the explosion chamber. If it be true that defendant's structure is inferior to complainant's, this does not avoid infringement, so long as there is legal identity of structure, operation, and result. Patentable invention in Barber does not reside in the T-shaped passage necessarily. But Barber has a T-shaped passage, and whether it be a perfect T or not is immaterial. It is clear that defendant has a T-shaped passage. This passage may include others in a way and to an extent; but this addition, if it be such, does not avoid infringement, as the defendant still has the equivalent of complainant's T-shaped passage. In fact, the misnomer of a thing plainly shown and described in a patent will not defeat the patent, unless it be misleading and so confusing that a person skilled in the art would not know what was meant, and could not or naturally would not understand and be able to avoid infringement.

It is suggested by defendant, rather than argued, that claim 9 of the patent in suit is not infringed, for the reason it refers to the exhaust valve and plainly describes the exhaust valve of the Barber patent; whereas in the defendant's structure the mechanically operated valve adapted to be removed without removal from its support or the means which actuate said value is the inlet valve. In motor engines sometimes the inlet valve, and sometimes the exhaust valve, and sometimes both, are mechanically operated. The difference is immaterial here, for the fact is that the defendant uses the structure of the Barber patent, and mere changes of form or location, without change of mode and principle of operation and result, will not avoid infringement. In the Barber patent the exhaust valve is mechanically

operated by mechanism which it is not necessary to remove from its support, to the end that the valve cage and valve may be removed and replaced. In the defendant's structure the same or equivalent mechanism is employed in connection with the inlet valve, and this mechanism includes a rock arm engaging the valve stem and a push rod for rocking the arm. The valve cage and valve are removable from the seat in the cylinder casting without removing from its support the rock arm which engages the valve stem to operate the valve. I do not see that infringement can be avoided by applying the invention of Barber, so far as removal from the seat, etc., is concerned, to the inlet valve, and making the outlet valve after the principle adopted by Barber as to the inlet valve. The point of the invention in this respect is to make these valves removable without dismantling the machine. Ordinarily it is as essential to remove the one as it is to remove the other. It is true that claim 9 refers to an exhaust valve, but the defendant has appropriated that identical combination and has secured all its advantages and benefits in its inlet valve structure.

On the trial defendant's expert pointed out certain claimed advantages secured by the defendant's construction. This is immaterial, so long as the defendant uses the complainant's combination or equivalents therefor. Added advantages in some cases may show patentable improvement over the infringed structure or combination; but these advantages, when they exist, even if patentable, do not justify the use of the prior patented combination. When a device has the same elements performing the same functions in substantially the same way as a prior patented device, it is immaterial that the alleged infringing device performs some other function. I think it clear, as before stated, that the defendant has used and is using a structure which has all the elements of the Barber combination combined in the same way, for the same purpose, and producing the same result.

I have found it unnecessary to go through the prior patents in detail. I have examined them all carefully and am satisfied:

1. That the Barber patent is valid, and was not anticipated; that it discloses patentable invention, in view of and in the face of the prior art.
2. This is true of all the claims in issue.
3. The defendant infringes the claims in issue.

There will be a decree for the complainant, with costs.

RICE v. PALISADES REALTY & AMUSEMENT CO. et al.

(District Court, D. New Jersey. July 12, 1915.)

1. PATENTS ⇐167(1)—CONSTRUCTION OF CLAIMS—NEGATIVE LIMITATIONS.
A specification in the claims of a patent of a "short rail" as an element of an amusement device consisting of a vehicle in the form of an automobile running on a circular track, the purpose of such rail being to engage certain idler wheels on the car and cause them to rotate "at certain points in the travel of the car," to carry out the illusion that the vehicle is an automobile when approaching and leaving the station, con-

stitutes a valid and effective negative limitation, which excludes from the invention a track having a continuous rail which causes the idler wheels to rotate during the entire run of the car.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. ⊂⊃167(1).]

2. PATENTS ⊂⊃328—INFRINGEMENT—AMUSEMENT VEHICLE.
The Rice patent, No. 822,302, for an amusement vehicle, construed, and *held* not infringed.

In Equity. Suit by Robert F. Rice (Walter Ottel, as administrator, substituted) against the Palisades Realty & Amusement Company and another. On final hearing. Decree for defendants.

Decree affirmed 231 Fed. 997, — C. C. A. —.

Rudolph Schroeder, of Hoboken, N. J., and John M. Bovey, of New York City, for plaintiff.

Edmund W. Wakelee, of Englewood, N. J., and Edwin J. Prindle and Wendell J. Wright, both of New York City, for defendants.

HAIGHT, District Judge. This suit was originally instituted by Robert F. Rice for an alleged infringement of patent No. 822,302, issued to him on June 5, 1906. He died pending the suit, and Walter Ottel, who was appointed administrator of his estate, was substituted as plaintiff. The patent relates to an amusement device. The defendant Palisades Realty & Amusement Company operates an amusement park at Palisades, N. J., of which the defendant Nicholas M. Schenck is the general manager. It is claimed that an amusement device which is installed and operated in that park infringes the plaintiff's patent. The defendants have interposed the usual defenses of invalidity for want of novelty and lack of invention and noninfringement.

[1] The view which I entertain makes it unnecessary for me to consider the first two defenses. The patent states that the object of the invention is:

"To provide an *inexpensive*, but attractive, vehicle in the form of an *imitation automobile* or touring car, which shall be especially adapted to be operated upon pleasure railways similar to those found at pleasure resorts and for the amusement and pleasure of patrons."

The specifications explain that the vehicle may be propelled by any suitable means, as, for instance, electricity employed through a third rail. The body is mounted upon ordinary flanged car wheels, designed to run upon rails constituting an endless track. In order to give the appearance of an automobile, four regular automobile wheels are provided, which are designated in the patent as "idler wheels." They perform no function, except to give to the vehicle the appearance of an automobile. At the station or platform where it was intended that the patrons should enter and alight from the cars, the patentee provided what he termed a "short rail," parallel with the rails upon which the car wheels rest, and in the line of travel of the "idler wheels." This was designed to engage the "idler wheels" when approaching and leaving this part of the track and cause them to rotate, thus creating the illusion of an automobile moving on regular automobile wheels.

The specifications state that the "idler wheels" are "designed to operate *only* as the car is passing the station, and are carried idle throughout the remainder of the run of the car, invisible from the patrons in the car," and in referring to the function of the "short rail" state that it causes the idler wheels "to turn only by reason of their engagement with said rail and for the *length of said rail only.*" All of the claims of the patent, except the fifth, are claimed to be infringed. In the second, third, fourth, and sixth claims the "short rail" is an element. In the second claim it is described as "a short rail to be engaged by the said idler wheels to rotate the same at *certain* points in the travel of the car"; in the third claim, as "a spring-actuated short rail in the path of travel of the said idler wheels adapted to be frictionally engaged thereby"; in the fourth claim, as "a short rail beside the track, in line with the travel of the said idler wheels, to engage and operate the same while the car is passing over said short rail"; and in the sixth claim, as "a short rail to be engaged by the said idler wheels for operating the same." In the first claim, the short rail is not specifically mentioned, but there is substituted the phrase "means for engaging said idler wheels at *certain* times to insure their rotation."

While the defendants contend with some force that there are substantial differences between the vehicles used in their device and that of the patent, which, in view of the limitations of the claims, are sufficient to avoid infringement, I have found it unnecessary to consider them, and it has been assumed for the purposes of this decision that the respective vehicles are substantially the same. The essential difference between the complete device of the patent and that used by the defendants is the rails or tracks which operate or rotate the so-called "idler wheels." The defendants employ wooden rails or tracks extending around the complete circle which the vehicle covers in its run, and which are designed to engage the so-called "idler wheels" at all times, and thus cause them to rotate during the entire run of the car. As the "short rail" is specifically an element of each of the claims in suit, except the first, the defendants do not infringe these claims, unless they employ in their device the "short rail" of the patent or an equivalent thereof. The "short rail" is described in the patent as "the means by which these wheels (the idler wheels) are operated while passing a station." This description, taken in connection with the parts of the specifications above referred to, and the further statement in the patent that at the particular *location or station in the road where patrons are to* get in and out *special means* are provided for carrying out the illusory effect of a touring car, "which feature, in connection with the special construction of the car, comprises the *substance of the invention,*" leads to the inevitable conclusion, I think, that the "short rail" mentioned in the claims is not a rail or track extending throughout the length of the course the car is to travel, as in the defendants' device, but is in fact a short rail, when compared with the length of the whole track, designed to rotate the "idler wheels" only at a certain point and thus create the illusion only at that point

[2] The patentee, having limited his claims to such a rail, has excluded from his invention a rail or track such as is used in the de-

fendants' device, to the same extent as though he had stated that the invention did not cover a rail extending completely around the track. Nor do I think that the rail used in the defendants' device can be considered an equivalent of the "short rail" of the patent, for two reasons: First, because that which, by the patent, is excluded from the invention cannot be an equivalent of the element of the invention which excludes it; and, second, because they do not perform the same functions. I think that the short rail of the patent was designed to serve two purposes, viz.: (1) To create the illusion of an automobile traveling on regular automobile wheels where it was exposed to public view; and (2) at the same time to make the construction and operation of the vehicle inexpensive.

The first purpose, standing alone, is undoubtedly served by the rail of the defendants' device; but I cannot find that the second is. One of the objects of the invention, as stated in the patent, was "to provide an *inexpensive* vehicle." As before shown, the "short rail" was to be constructed, according to the design of the patent, only at the place where the patrons were to enter and alight from the car, and consequently its construction would be inexpensive as compared with a wooden track extending throughout the entire length of the course to be traveled by the automobile, as would also the wear and tear on the tires, caused by engagement of the "idler wheels" with the "short rail," be necessarily very small as compared with that on tires continuously engaging the surface of the rail throughout the length of the run of the car. There is an additional reason why claim 3 is not infringed. It calls for a spring-actuated short rail. The defendants' device has nothing of that kind.

As before stated, although claim 1 does not specify a short rail, it does contain as an element "means for engaging said idler wheels at *certain* times to insure their rotation." This is the short rail of the other claims or an equivalent thereof. Here, as in the claims where the short rail is specified, the patentee, by providing the limitation of "certain times" in the claim, when the specifications and objects of the invention are considered, has excluded from his invention means for engaging the "idler wheels" *at all times,* such as is used in the defendants' device. Hence the defendants' device does not have this element of the claim, and, for the reasons before given in discussing the other claims, it does not have an equivalent thereof. If the patentee, by his own limitation, has made his claims narrower than his actual invention, it is well settled that it is not permissible for the courts to broaden the claims to correspond with the actual invention. I am therefore constrained to find that none of the claims in suit are infringed. Even if it were possible to construe the claims broadly enough to include the defendants' device, I doubt that the patent would then involve invention, in view of the disclosure in patent No. 789,973, issued to Hartung in 1905.

The bill must therefore be dismissed, with costs.

THE ERSKINE M. PHELPS (three cases).

(District Court, N. D. California, First Division. October 22, 1915.)

Nos. 15397, 15403, 15406.

1. SHIPPING ⟸132(3)—SUIT FOR DAMAGE TO CARGO—CONDITION OF GOODS WHEN RECEIVED—RECITALS OF BILLS OF LADING.
The recital in bills of lading of the receipt on board in good order and condition of a stated number of "crates iron bath tubs" has reference to the bath tubs and not to the crates, and casts the burden on the ship to show that they were not in good condition when received.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 479–481; Dec. Dig. ⟸132(3).]

2. SHIPPING ⟸123—LIABILITY FOR DAMAGE TO CARGO—IMPROPER STOWAGE.
Where the crates containing bath tubs shipped from Philadelphia to San Francisco around Cape Horn were such as customarily used, and as had been used with safety on other, but different, voyages, and they were accepted without objection, although their character was plainly manifest, it was the duty of the ship to stow the tubs with reference to such crating, and it cannot avoid liability for their injury on the voyage, largely by reason of their having been stowed one upon another in tiers from 6 to 9 high, on the ground that the crating was insufficient to withstand the weight upon the lower tubs.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 454, 455, 466; Dec. Dig. ⟸123.]

3. SHIPPING ⟸141(3)—LIABILITY FOR DAMAGE TO CARGO—PERILS OF THE SEA.
A ship is not relieved from liability for damage to cargo on the ground of perils of the sea, where the cargo was accepted with full knowledge of its character, the manner in which it was packed, and the storms encountered were no more severe than were reasonably to be expected, in view of the voyage and the season.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 498; Dec. Dig. ⟸141(3).]

In Admiralty. Suits by Holbrook, Merrill & Stetson, a corporation, by the George H. Tay Company, and by the Crane Company against the American ship Erskine M. Phelps; Union Oil Company, claimant. Decrees for libelants.

See, also, 209 Fed. 141.

Samuel Knight, of San Francisco, Cal., for libelant Holbrook, Merrill & Stetson.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for libelant George H. Tay Co.

Denman & Arnold, of San Francisco, Cal., for libelant Crane Co.

Andros & Hengstler, of San Francisco, Cal., for claimant.

DOOLING, District Judge. These cases, consolidated and tried together, are for damage to merchandise shipped at Philadelphia on the Erskine M. Phelps, and destined to San Francisco by way of Cape Horn. The merchandise consisted for the most part of enameled bath tubs and lavatories and was delivered at San Francisco in a damaged condition.

[1] The claimant's first contention is that libelants have failed to

show that the merchandise was received by the ship in good condition. The bills of lading issued by the master recite:

"Shipped in good order and condition by Standard Sanitary Mfg. Co. 559 crates iron bath tubs, 1,311 boxes lavatories, * * * and are to be delivered in the like good order and condition at the port of San Francisco (the dangers of the seas only excepted) unto Holbrook, Merrill & Stetson."

"Shipped in good order and condition by Standard Sanitary Mfg. Co. 575 crated iron bath tubs, 1,237 boxes lavatories, * * * and are to be delivered in the like good order and condition at the port of San Francisco (the dangers of the seas only excepted) unto Geo. H. Tay Co."

"Shipped in good order and condition by Standard Sanitary Mfg. Co. 1,625 crates iron bath tubs (3 rusty outside), 1,850 boxes lavatories, * * * and are to be delivered in the like good order and condition at the port of San Francisco (the dangers of the seas only excepted) unto Crane Co."

It is claimant's contention that these only acknowledge that the crates were in good order and condition, and that libelants were bound to prove that the contents of the crates were in like good condition before they could recover. Manifestly, as to the second bill of lading, in so far as it applies to bath tubs, this contention is unsound, for it is therein stated "575 crated iron bath tubs" were shipped in good order and condition.

I am of the opinion that the contention is equally unsound as to the other articles and the other bills of lading. There is no reservation made in any of the bills of lading. They all recite, not that the crates were shipped in good order and condition, but that the *crates of bath tubs,* were so shipped, and this recital relieves the shipper from making any further proof, until the ship shall have controverted the facts recited, by evidence tending to show that the contents of the crates were not in good condition. If the ship had qualified the bill of lading by reciting that the contents of the crates, or their character or condition, was unknown, the burden of proof as to such condition would have been upon the libelants. In the absence of such qualification, the presentation of the bill of lading was prima facie proof that the articles were in good order and condition when received by the ship.

[2] The second contention of claimant is that, if any damage occurred while the articles were on board ship, it was due to the insufficient character of the crating. But the crating was such as was then in general use for articles of this kind, and the character of the crates was plainly to be seen when they were taken on board. It is in evidence that crates of the same kind, containing like articles, had been carried without injury on other occasions, though not on a voyage around Cape Horn. The character of the crates being plainly manifest, and such crates not being unfitted for carriage by the ship, it was the duty of the ship to stow them in view of the length of the voyage and the character of the seas and weather likely to be encountered. The crating was not intended to be subjected to great weight, yet the bath tubs, weighing from 300 to 350 pounds were stowed in tiers, in some places six, in other places seven to nine, high. The pressure thus exerted on the lower tubs would account to a great degree for the injury sustained.

There were no latent defects in the crates. Their strength or weakness was apparent when the ship accepted them, and, indeed, the

master testifies that the tubs were not heavily enough crated to stand a voyage around the Horn. If this be true, he should not have received them for such a voyage. But it seems to me that this statement means no more than that they were not heavily enough crated to stand a voyage around the Horn in tiers from six to nine high. The burden is upon the ship to account for the injury in such a way as to relieve it from liability. It has not done so by its claim of insufficient crating, in view of the manner in which the tubs were stowed.

[3] The third contention of the claimant is that the injury was the result of "dangers of the sea, to wit the natural action of storms of unusual severity." But the storms encountered were not greater than might reasonably have been expected in rounding the Horn at that season, and in accepting this shipment it must be presumed that it was accepted in view of the character of the goods, the character of the crating, and the weather likely to be encountered. With all these elements before it, claimant accepted the shipment and agreed to deliver it in San Francisco in good order and condition. If the crating, which was designed in order that the tubs might stand on end, was an insufficient crating to stow flat and in tiers, the ship should not have accepted the consignment with the purpose of so stowing them. If stowage on end were impossible, and stowage in tiers unsafe, the consignment should not have been received at all.

The ship has not shown a sufficient reason for not delivering the cargo in good order and condition as agreed. A decree will therefore be entered, referring the causes to the commissioner to ascertain and report the amount of damage. The difficulties suggested as to the proofs of damage must be met as they arise.

TWIN FALLS SALMON RIVER LAND & WATER CO. v. TWIN FALLS COUNTY et al.

(District Court, D. Idaho, S. D. March 23, 1916.)

No. 495.

TAXATION ⊜234—EXEMPTIONS—CAREY ACT IRRIGATION SYSTEMS—IDAHO STATUTE.

Sess. Laws Idaho 1899, p. 221, as amended by Sess. Laws 1913, p. 173, exempts from taxation "irrigation canals and ditches and water rights appurtenant thereto when no water is sold or rented from any such canal or ditch, only to the extent that the water conveyed by such canal or ditch is used to irrigate lands within this state: Provided that in case any water be sold or rented from any such canal or ditch to irrigate lands within this state, then, and in that event, such canal or ditch shall be assessed for taxation to the extent that such water is so sold or rented." *Held* that, under such statute as construed by the Supreme Court of the state, which construction is binding on the federal courts, a corporation organized for the promotion and construction of an irrigation system under Carey Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 (Comp. St. 1913, § 4685), is not taxable upon any part of its system, either as to water rights sold or such as remain unsold.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 381, 382; Dec. Dig. ⊜234.]

In Equity. Suit by the Twin Falls Salmon River Land & Water Company against Twin Falls County, Idaho, W. J. Young, Treasurer, and E. J. Finch, Auditor and Trustee, of said county. On rehearing. Decree for complainant.

Richards & Haga and McKeen F. Morrow, all of Boise, Idaho, for plaintiff.

A. M. Bowen and A. R. Hicks, both of Twin Falls, Idaho, for defendants.

DIETRICH, District Judge. Broadly speaking, the question is of how far the property embraced in a Carey Act irrigation system is exempt from taxation under the Idaho statutes. The complaint was apparently framed upon the theory that the plaintiff had sold water rights up to the full capacity of its system prior to the making of the assessment, and that therefore it retained no taxable interest, and such was the theory upon which the case was originally submitted. Indeed, until recently, if I am not misinformed, the rule in actual practice has been generally recognized both by Carey Act companies and public officers that to the extent of the unsold portion of the irrigating system, and to that extent alone, such property is subject to taxation. Assuming that to be the correct view of the law, I found in substance that the county officers had attempted to tax only the unsold portion of the plaintiff's system, and that, while it later developed that it had no unsold capacity, it had not conceded such fact at the time, and I therefore held that the finding of the board of equalization was conclusive and the plaintiff was without present remedy in the courts. However, before a decree dismissing the bill was entered pursuant to such conclusion, the Supreme Court of the state decided the case of Idaho Irrigation Co. v. Lincoln County, 152 Pac. 1058, apparently holding that such projects are wholly exempt from taxation, and thereupon the plaintiff filed herein a petition for rehearing, which was granted. The submission is now upon a reargument.

The primary question is whether such a system or any interest therein is at any time subject to taxation; and there is the further inquiry as to how far we are here bound by the decision of the state court. The original of the exemption statute under consideration, enacted in 1899 (Session Laws 1899, p. 221), was as follows:

"All irrigating canals and ditches and water rights appurtenant thereto, when the owner or owners of said irrigating canals and ditches use the water thereof exclusively upon land or lands owned by him, her or them: Provided, in case any water be sold or rented from any such canal or ditch, then, in that event, such canal or ditch shall be taxed to the extent of such sale or rental."

In 1912 this provision was amended to read as follows:

"The following property is exempt from taxation: * * *

"L. All irrigation canals and ditches and water rights appurtenant thereto, when the owner or owners of said irrigating canals or ditches use the water thereof exclusively upon land or lands owned by him, her or them and situated wholly within this state: Provided, in case any water be sold or rented from any such canal or ditch, then, in that event, such canal or ditch shall be taxed to the extent of such sale or rental." Session Laws 1912 (Sp. Sess.) p. 23.

And again there was an amendment in 1913, so that the provision now reads:

"Irrigation canals and ditches and water rights appurtenant thereto when no water is sold or rented from any such canal or ditch, only to the extent that the water conveyed by such canal or ditch is used to irrigate lands within this state: Provided, that in case any water be sold or rented from any such canal or ditch to irrigate lands within this state, then, and in that event, such canal or ditch shall be assessed for taxation to the extent that such water is so sold or rented." Session Laws 1913, p. 173.

It is not improbable that the first amendment had its origin in the facts disclosed in the case of Spokane Valley Land & Water Co. v. Kootenai County (D. C.) 199 Fed. 481 (decision rendered August 19, 1912), and it is also not improbable that the second amendment was made to give greater precision to one of the ambiguous features pointed out in that decision. However that may be, the provision as it now stands expressly declares what in that case the original section was construed to mean, and otherwise the law remains substantially unchanged. In all of the provisions the intent of the Legislature to divide irrigation systems into two classes, one exempt from and the other subject to taxation is clear. As is said in the Lincoln County Case, it is plain "that it was the intention of the Legislature to place ditches and canals from which water was sold or rented in one class, and those from which no water is sold or rented in a different class." And all the time, it may be added, both under the original provision and under the amendment, the principle of classification has been the same. This principle is that until a water right, by sale or dedication and use, becomes appurtenant to the land, and is owned directly or indirectly by the owner of the land, it shall be separately assessed, and that thereafter it shall be exempt; the reason for the exemption doubtless being that after the water right becomes attached to the land, it contributes its value thereto, and thus bears its proper burden of taxation in the assessment of the land.

Now, underlying the plaintiff's contention, if I rightly apprehend it, is the assumption (apparently indulged in the Lincoln County Case) that a Carey Act company is not the owner of the works that it constructs, or of its water rights. If the term "owner" is used in its ordinary sense, and such must be its meaning if the argument is to be given any validity at all, not only do I fail to see how the view can be maintained (so long as the water rights in the system are unsold), but to recognize it in all of its logical consequences will, as it seems to me, bring chaos into a branch of the law which already presents questions of the most perplexing character. That the holding or operating company to which the irrigating works ultimately pass never becomes the owner thereof in any real sense is to be admitted; for, after such transfer is made, its status is substantially that of the older type of co-operative canals referred to in Spokane Valley Land & Water Company v. Kootenai County (D. C.) 199 Fed. 481. It is only the holder of the naked title. And properly I think a like view may be taken of the status of the title in the promoting company after the water rights are sold, but before a formal transfer of the system is made to the operating company. In such case the promoting company has ceas-

ed to have any beneficial interest; the system equitably belongs to the owners of the lands.

But how can such a view be legitimately taken before water rights are sold? If at that time the promoting company does not hold and own the title and the entire beneficial interest, what is its relation to the property? It is suggested that its interest is represented by a lien, under section 1629 of the Revised Codes; but section 1629 does not purport to create or to relate to a lien upon the system for the cost of the construction thereof as fixed by the contract with the state, or a lien for the actual cost of construction, or to any lien upon the system. The liens therein provided for are given to the promoting company, as vendor, to secure the deferred payments due to it from the vendees of water rights; until a water right is sold, it is the owner of the entire system, and neither has nor needs a lien. As water rights are sold it is given a lien only in case the purchase price is not paid in cash, and then only upon each water right separately, for the deferred payment on account of the purchase price thereof, and upon the specific land for which such water right is sold and to which it becomes appurtenant. The language of the statute is:

"Any person, company or association, furnishing water for any tract of land shall have a first and prior lien on said water right and land upon which said water is used for all deferred payments of said water right."

It therefore appears that on making the sale of a water right the promoting company does not release such water right from a general lien covering the entire system, but alienates its title to the water right, and as security for the purchase price acquires a lien thereon, and upon the farm to which the water right attaches. It is the owner of, not a lienor upon, the system; it sells—it does not release—to the settler.

It is further suggested that serious complications might arise from the taxation of the system, because, in the case of delinquency, it would be sold, and the purchaser would be relieved from the obligations of the contract with the state; but it has become the established doctrine of this jurisdiction, both in the state and federal courts, that the promoting company may mortgage the system, and it may enter into contracts relative thereto by which laborers' and materialmen's liens will attach, and such mortgages and liens may be foreclosed, and title thus passed to a purchaser. It is not apparent how or why complications would be more serious in the case of a tax sale than in the case of a sale on foreclosure of a mortgage or other lien.

Now, bearing in mind that admittedly a corporation which owns an ordinary irrigating system in which water rights are sold is bound to pay taxes thereon, what substantial distinction, if any, can be drawn between such company and one which promotes a Carey Act project? While the latter is, for convenience, frequently referred to as the construction company, it is in my judgment more aptly termed a promoting company, for it not only constructs the works, but preliminarily it must acquire and assemble the essential elements of the system, such as water rights, rights of way, and reservoir sites, and, furthermore, it is under the necessity of negotiating the sale of water rights, which

in actual practice constitutes one of its most onerous functions. In short, the project is its enterprise, in the success or failure of which it alone is financially interested, and for the success or failure of which it is primarily responsible.

It will further be borne in mind that, while such a company is referred to as a Carey Act company, it is not meant thereby that it is a peculiar species of corporation. The designation implies only that the corporation happens to be engaged wholly or in part in providing water for the irrigation of lands under the Carey Act. There is nothing distinctive in the origin or in the form of the organization of such a company; it comes into being under, and exists by virtue of, the general corporation laws of the state. Section 1615 of the Idaho Revised Codes provides that "any person, company of persons, association, or incorporated company, constructing or having constructed, or desiring to construct, ditches, canals," etc., may enter into a contract with the state. It thus appears that an ordinary corporation, provided its purpose as defined in its articles be broad enough, may engage, either exclusively or partly, in Carey Act projects, and a system fully constructed under the general law of the state may after construction become a Carey Act project as the result of the execution of an appropriate contract between the owner and the state.

Now, in the light of these considerations, let us suppose a case: A corporation is organized with a purpose broad enough to authorize it to provide water for irrigating purposes, either by open sale, upon such terms as may be agreed upon with settlers whom it may persuade to settle upon the lands to which it proposes to conduct the water, or under the procedure prescribed by the Carey Act. Suppose, further, that this company decides to bring the water to township 4 under the former plan, and to the adjacent township 5 under the latter plan. It goes to a neighboring stream, makes two surveys as the bases for applications for water permits, makes the applications, and secures the two permits, one for the one system and the other for the other. After the necessary surveys, it acquires by purchase and by proceedings in eminent domain rights of way for the necessary dams, ditches, and reservoirs for each system. Thus far its procedure is precisely the same in both cases, and its rights and titles are identical. It thereupon applies to the state land board and secures the segregation of the lands in township 5, under the Carey Act, and enters into the usual contract, the distinctive feature of which (for such is the gist of the Carey Act) is that, in consideration of the assurance that no one will be permitted to acquire lands in this township who has not first purchased a water right from the corporation, thus eliminating the possibility of a competitive enterprise, it will sell water rights to all actual settlers at not to exceed $40 per acre. Thereupon it completes its system and offers for sale its water rights at $40 per acre, with the further understanding, as is the custom, that the purchaser acquires an undivided proportionate interest in the canal system and the water right, the same to be evidenced by stock in the operating corporation, to which the legal title will be conveyed when the capacity of the system has been fully sold.

Now suppose, further, that the corporation, being in control of what it deems to be the only feasible right of way by which water can be carried to township 4, and therefore being without fear of competition, sees no advantage in contracting with the state under the Carey Act relative to this project, and hence proceeds independently to construct the other system under the general laws of the state, and upon its completion advertises that it will sell water rights at the same rates and upon the same terms as under its Carey Act project, and that the purchasers will acquire proportionate interests in the system and water right, the legal title to which will be conveyed to an operating company, in which they will hold all of the stock, as soon as all of the rights are sold, just as in the case of the Carey Act project. Now undoubtedly this latter system, upon its completion, and at least until the water rights are sold, falls within the taxable class of canals as defined in the statute. Indeed, at this stage it is typical of that class. But in what respect is it different from the other system owned by the same company, and why should it be taxed and the other go free? Is not the ownership in both cases of precisely the same origin and quality, and is not the sale of water rights identical in all essential respects? If it be said that on the Carey Act system the corporation does not become the absolute owner of the water rights, because it does not and cannot apply the water to a beneficial use, the statement is equally true of the other project. Hard v. Boise City, etc., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407.

Let us carry the illustration a little further, and suppose that, after the corporation has fully completed its system for the irrigation of the lands in township 4, it does not find a ready sale for its water rights, and it learns that there is another feasible source from which the lands may be irrigated, and it is threatened with a competitive system. Accordingly for protection it applies to the state land board for a segregation of the lands, and enters into a contract with the state by which the project is turned into a Carey Act project. Its system is taxable the moment before it enters into such contract. Upon what theory does it cease to be taxable the moment after? The contract, presumably, is not burdensome, but beneficial, to the company. It is the owner of its dam and diverting works, its rights of way, canals, and reservoirs, the moment before the contract is executed. In what manner does it become divested of such ownership the moment after? If it loses title, either legal or equitable, to whom does such title pass? The project is dedicated to a public use before the contract is entered into, and is charged with the burdens and obligations of such use; it continues to be so charged. Before the contract, upon receiving reasonable compensation therefor, the corporation is under obligation to furnish water to all persons in need thereof. Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134; Shelby v. Farmers' Co-op. D. Co., 10 Idaho, 723, 80 Pac. 222; Bardsly v. Boise City, etc., 8 Idaho, 155, 67 Pac. 428. Such is its obligation after the contract with the state, the only difference being that in the latter case it agrees beforehand that the reasonable compensation will not exceed a specified amount. In either case it is the sole beneficiary of the entire value of the system. The

proceeds of the sale of all water rights without diminution go into its treasury and belong to it absolutely. If the water rights are not all sold, it, and it alone, suffers the loss. Even in case of a forfeiture of its contract it is entitled to the net proceeds of the sale of the system. Revised Codes Idaho, § 1623. It may mortgage, incur liens upon, and transfer the property, the same in one case as in the other. In either case it may bring and defend actions affecting its title as well to its water right as to its rights of way and constructed works. Its relation to the project is as essentially that of ownership in the one case as in the other. In both cases such relation has all the attributes of ownership; the only qualification being that in the one case interests in the nature of water rights are to be sold for a stipulated price, presumably a reasonable price, in consideration of the protection which the company thus gets against competition. But this limitation upon the power of disposition in no wise affects the quality of or impairs its title. The state of Idaho is none the less the owner of its grant lands because there is attached to the grant the condition that the land shall not be sold for less than $10 per acre. An absolute grant to a railroad company is not held nontaxable because of the condition that the land shall be sold to settlers for $10 per acre.

In no real sense is a Carey Act corporation an agent of the state, or a trustee for the state or for the settlers. Its obligations are such, and such only, as it assumes in its contracts, or such as are imposed upon it by the law relating to public service corporations. To it, of course, is applicable the fiction that in the administration of a public use the corporation is the agent of the state, as, for example, in the acquisition of rights of way, through proceedings in eminent domain; but that consideration is quite immaterial.

While it thus appears that I still adhere to the view upon which the cause was originally submitted and decided, I am inclined to think that, in so far as concerns the present issue, the Lincoln County Case should be regarded as controlling. The general rule is that the federal courts will follow the decisions of the highest court of the state in the construction of a local statute. The rule is subject to certain exceptions, but here no vested rights of the private citizen are involved, and no other reason for making an exception is apparent. The revenue laws of a state are peculiarly of a local character, and it is of the highest importance that they operate uniformly and be enforced against all alike; with a variance in the judicial decisions this, of course, would be impossible. In deference, therefore, to this rule, I must, upon the authority of the Lincoln County Case, grant the relief prayed for. It may be added that the result works no injustice, for when the levy was made it is thought that in fact the plaintiff had no residual beneficial interest in the system. I have been at some pains to make plain my views upon certain phases of the controversy only in order to avoid misapprehension touching related questions, which are more or less constantly arising out of Carey Act transactions, and as to which the general rule here followed is not deemed to be controlling.

Let a decree go for the plaintiff as prayed.

THE TRANSFER NO. 22.

(District Court, E. D. New York. March 30, 1916.)

COLLISION ⊂⊃71(2)—LANDING OF CAR FLOATS AT TERMINAL—DUTY AND LIABILITY OF TUG.

A transfer tug, which attempted to land two car floats at the same time in the night at the terminal bridges of a railroad company at Jersey City, *held* in fault and liable for an injury caused by one of the floats to another already moored, in the absence of evidence which established an agreement or custom which made it the duty of the railroad employés or those in charge of moored floats to attend to the landing of approaching floats and to look after the safety of those already moored, further than to do what they could to prevent an injury which seemed impending.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⊂⊃71(2).]

In Admiralty. Suit by the Lehigh Valley Transportation Company against the steam tug Transfer No. 22, the New York, New Haven & Hartford Railroad Company, claimant, with the Lehigh Valley Railroad Company impleaded. Decree for libelant, against the Transfer No. 22.

Harrington, Bigham & Englar, of New York City (T. C. Jones, of New York City, of counsel), for libelant.

Charles M. Sheafe, Jr., of New York City, for claimant.

B. F. La Rue, of New York City (T. C. Jones, of New York City, of counsel), for respondent.

CHATFIELD, District Judge. On the morning of February 15, 1915, Transfer No. 22, of the New York, New Haven & Hartford Railroad, received a signal to put two car floats loaded with freight cars which it had in tow into bridges 5 and 6, at the Lehigh Valley Terminal in Jersey City. The Transfer was between the two floats and went ahead in what is testified to be the customary manner, so as to divide the float upon her port hand from the one upon her starboard hand by the center pin or rack between the two bridges.

The tide was running strongly ebb and the intention of the captain of the Transfer was to move the float upon his starboard hand in toward bridge No. 6, to a point where the bow of the float would come against the upper or northern rack of bridge No. 6, while the port side of the float would rest against the center pin. By running out lines, this float could be maintained in that position while the tug took the other float into bridge No. 5 and had it secured in place.

The maneuver occurred at 1:35 a. m., and according to the testimony not many of the force of railroad men were on duty, as it was Monday morning and the force had been small during the evening of Sunday, February 14th. But this makes no difference, as men were present to perform all of the duties which the railroad company undertook and which it claims that it was liable to attend to.

In bridge No. 4 a float belonging to the Lehigh Valley Transportation Company was moored. There had been a floatman upon this

float, but at this precise moment he had gone to the railroad office upon the pier.

The floats are moored to the bridges by two lines, one at each side of the bow, and by four toggle pins, which pass into sockets or rings so as to exactly register the up and down position of the boat and to cause exact meeting of the track rails when the boat is held firmly to the dock by tightening the side lines.

No great amount of side motion is possible at the outer end of the car float, unless one of these side lines be loosened and the boat withdrawn from the toggle pins. But in order to hold the float securely in her position, a breastline is run out to the rack on each side, and the testimony shows that on occasion these breastlines are loosened or eased up, if another boat comes in contact with the float moored to the bridge. This is done with the double purpose of easing the blow and also preventing the breaking of the line, and it appears from the testimony that considerable dispute has arisen between the car floats and the Lehigh Valley Railroad Company as to responsibility for broken lines under such circumstances.

The Lehigh Valley Railroad Company disavows liability for such broken lines and for the safety of the floats, when properly moored, in case of injury by other vessels being brought into or warped into the terminal.

In this case the libelant has brought its action against the tug, which upon invitation and by business arrangement with the Lehigh Valley Railroad Company was bringing a car float to the Lehigh Valley Railroad terminal, in order to continue the transfer of the freight cars upon the float, over the Lehigh Valley Railroad.

The New York, New Haven & Hartford Railroad Company as owners of this tug have brought in the Lehigh Valley Railroad Company as a defendant, and the issue comes down substantially to a question of responsibility between the two railroad companies, as the New York, New Haven & Hartford Railroad Company offers testimony seeking to show a custom on the part of the Lehigh Valley Railroad Company to send men to ease off the lines or to care for the floats in the terminal, when other floats are being brought in on an ebb tide.

The Lehigh Valley Railroad Company not only denies the existence of any such custom, but stands upon the broad proposition that it owed no duty of that sort to either the float already moored or to the tug and float coming into the terminal, and that the obligation to so maneuver the moving boats as not to injure those already in place rests upon the moving boat. In other words, if the float already moored (or the railroad) sees that another boat is coming in contact and eases off a line to prevent breaking of the line or force of the blow, the Lehigh Valley Railroad Company contends that this is not an admission of responsibility or obligation to provide some one to perform such a service, but that it is rather the usual obligation resting upon any person to avert injury to property in any way under the control or care of the person when impending injury is brought to that person's attention. The Express, 212 Fed. 672, 129 C. C. A. 208; The Jersey Central, 221 Fed. 625, 137 C. C. A. 349.

No substantial difference arises in the present case because of the ownership by the Lehigh Valley Transportation Company of the float in bridge No. 4, from that which would be presented if this float had been the property of the Lehigh Valley Railroad. If the New York, New Haven & Hartford tug can rely upon a duty, of either the floatman upon the float or the railroad employés at the bridges, to pay attention to the whistle announcing the arrival of the tug, and to man the various lines of the float in the bridge, so as to assist the New Haven tug in bringing its floats into place, and to prevent injury to the floats already moored, then the New Haven tug is not responsible for such injuries as might result from lack of care on the part of the men protecting the moored boat, and would be bound only to handle the moving floats so as to create no negligent or unusual risk.

If an established custom to perform this service of looking out for the moored boats was established on the part of the railroad company, then the railroad company maintaining the terminal would of course be liable to the boats in the bridges for broken lines, etc. Similarly, the existence of such a custom, if that custom went to the extent of requiring the boat moored to the bridges to maintain a watchman to attend to its own lines, would absolve the railroad company maintaining the terminal, and the loss would fall upon the boat which was injured.

But if the obligation resting upon the tug in charge of the moving boats requires it to so navigate as to use reasonable precautions in avoiding danger, under the conditions which must be taken into account at the time, to vessels which are moored at the time, then all that the moving vessel can expect from either the men at the terminal or upon the moored float is to do whatever may be in their power to prevent an avoidable injury, if such an injury is impending, or to give warning of danger, if the dangerous condition is not apparent to the moving vessel.

This would not absolve the moving vessel from the necessity of so navigating as to avoid inflicting injury upon the moored vessel, in case no one happens to be at the precise point where his services might be of some assistance in making the maneuver easier for the moving vessel. Nor would the moving vessel have the right to depend upon the observance and help of the employés of the railroad at the terminal, in accomplishing that which the tug undertakes to do.

The signal from the terminal, that the boat may be brought in, and the indication as to what bridge is to be used, and the preparation of the terminal only go so far as to require removal of such obstacles or conditions as would prevent the free and proper use of the bridges by the tug which is handling the floats which are to be brought in.

In the absence of express agreement or of custom which would indicate that the railroad company operating the terminal actually attended to the moving, landing, and mooring of the floats, and that the tug became merely the agent of the terminal company in so doing, it is impossible to shift the responsibility for the natural and probable results of what the tug undertakes, either to the helpless float already

in the terminal, or to the railroad company, which stands ready to receive the boat which the tug is bringing in.

According to the testimony in this case, at the terminal in question, upon an ebb tide, it is substantially impossible to put two floats into the upper (Nos. 5 and 6) bridges at the same time, without causing the lower of these floats to come in contact with the float in the bridge below.

Inconvenience in taking the floats in one at a time is the alternative, but if, in order to save this time, the tug attempts to land the two floats at once without injury, and if it is not so fortunate as to receive help from some other person by which consequences of danger may be avoided, it cannot escape liability by suggesting that it expected or hoped for the help which it did not receive, and that it should not be blamed, inasmuch as in most instances the help might have been obtained.

The libelant may have a decree against the Transfer No. 22, and the petition to bring in the Lehigh Valley Railroad Company should be dismissed.

ST. LOUIS INDEPENDENT PACKING CO. v. HOUSTON, Secretary of Agriculture, et al.

(District Court, E. D. Missouri E. D. March 20, 1916.)

No. 4156.

1. CONSTITUTIONAL LAW ⊂=73—MEAT INSPECTION ACT—REGULATIONS BY DEPARTMENT.
Under the power conferred on the Secretary of Agriculture by Meat Inspection Act March 4, 1907, c. 2907, 34 Stat. 1260 (Comp. St. 1913, § 8681 et seq.), to make regulations to carry out the purposes of the act to prevent the sale in interstate commerce of food which is unsound, unwholesome, or otherwise unfit for human use, the determination by the Secretary that an article is within such prohibition is not reviewable by the courts.

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

2. FOOD ⊂=1—MEAT INSPECTION ACT—REGULATIONS BY DEPARTMENT.
Order No. 211, promulgated by the Secretary of Agriculture July 15, 1914, under the Meat Inspection Act, which provides that sausage shall not contain cereal in excess of 2 per cent. nor water or ice in excess of 3 per cent., is within the powers of the Secretary, valid, and enforceable; also *held* on the evidence as a matter of fact that the addition of cereal or water in larger quantities tends to render the sausage unwholesome, especially if it is kept any considerable length of time before use.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 1, 2; Dec. Dig. ⊂=1.]

In Equity. Suit by the St. Louis Independent Packing Company against David F. Houston, Secretary of Agriculture, A. D. Melvin, Chief of the Bureau of Animal Industry, and James J. Brougham, Chief Inspector of such Bureau at St. Louis. On final hearing. Decree for defendants.

For prior opinion, see 215 Fed. 553, 132 C. C. A. 65.

Franklin Ferriss, J. H. Zumbalen, and Henry T. Ferriss, all of St. Louis, Mo., for plaintiff.

Arthur L. Oliver, U. S. Atty., and W. H. Woodward, Asst. U. S. Atty., both of St. Louis, Mo., for defendants.

DYER, District Judge. The complainant's bill now stands as it did when first presented to the court on an application for a mandatory injunction to restrain the defendants from refusing to mark as "Inspected and passed" all sausage manufactured by complainant, and to have the court declare void

a regulation promulgated by the Secretary of Agriculture on February 28, 1913. There has been no change whatever in any of the averments. It was upon the bill as it now stands that the court refused an injunction, and it was upon the averments in that bill alone that the Court of Appeals acted in reversing the judgment of this court. The Court of Appeals, in the opinion filed by it (215 Fed. 553, 132 C. C. A. 65), said:

"Basing all our statements upon the allegations of the bill, *which have never been controverted*, sausage and cereal which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, and unfit for human food, and which is not by any other reason unsound, unhealthful, unwholesome, or unfit for human food, is not subject to condemnation under the meat inspection law, except as hereafter indicated. * * * The question is simply: Could he [the Secretary of Agriculture] prohibit the making of a compound, which was sound, healthful, wholesome, and free from dyes, chemicals, preservatives, or ingredients which render such unfit for human food by a mere regulation? We are constrained to say that he cannot."

The converse of this proposition is necessarily this: That if such product in the opinion of the Secretary be unsound, unhealthful, unwholesome, and unfit for human food, it is within the power conferred upon him by law to prohibit, by regulation, such product from being sent in interstate commerce. Assuming that all the foregoing statements be true, what is the present attitude of the case now before the court? After the cause came back to this court, the defendant Houston (who had not prior thereto been served with process, and who had not entered his formal or voluntary appearance), was duly served with process. Thereafter, on the 21st of June, 1915, Houston, with his codefendants, filed answers to the bill. Then for the first time the allegations of the bill were "*controverted.*" The cause was then brought to a hearing on the bill, answers, and proof. The answers of the defendants, while separate, are practically one and the same. Oral arguments by counsel were made and briefs by counsel were submitted.

The answer of the defendant Houston seems to be full and complete, and puts in issue nearly all of the material allegations of the bill. It will be only necessary to consider what seem to be the most important issues to be determined by the bill and answer. The answer to the fifth paragraph of the bill is as follows:

"Fifth. The defendant, for answer to the fifth paragraph of the bill, admits that a portion of the saugages manufactured by plaintiff are compounds and mixtures composed and manufactured in part from meat of hams, pork, spices, and cereals, if the sausage is of the type known as 'fresh pork sausage,' and from beef, ham, pork, cereals, spices, and other ingredients, if under the style known as 'Bologna' or 'Frankfurt' sausage; that the amount of cereal used in said compounds and mixtures composing said sausage is as much as from 1 to 10 per cent. of cereals, and that varying amounts of water are also used. And defendant alleges that the amount of water so used by plaintiff often equals 20 to 40 per cent. of the finished product.

"And the defendant, further answering said paragraph, *denies* that the cereal so used by plaintiff is wholesome, denies that the amount of water used depends upon the meat used, or the amount necessary for the compounding or mixture of the various ingredients; denies that said cereal is composed of ground grain; *denies that the sausages manufactured by plaintiff as alleged therein are sound, healthful, or wholesome; and denies that said sausages contain no ingredients which render the sausages unsound, unhealthful, unwholesome, or unfit for human food.*

"And defendant, further answering said paragraph, states that cereal is a substance which is inferior to the other ingredients composing the sausages manufactured by plaintiff."

Answering the eleventh paragraph of the bill, the answer in part contains the following:

"Defendant *further denies that the amount of cereal and water so used in the manufacture of said sausage did not in any way impair the food value of the product or its healthfulness or wholesomeness as a food.*"

The following denial is made to the twelfth paragraph of the bill:

"Defendant further *denies* that the said meat food products mentioned in said paragraph are *sound, healthful,* wholesome, or *fit for human food.*"

Answering the fourteenth and last paragraph of the bill, the defendant Houston says:

"Defendant, further answering, states that the manufacture and sale of a product as sausage, which product contains added cereal and water in quantities as described in plaintiff's bill, or in any quantities in excess of the amount designated in said regulation, effective April 1, 1913, is false and deceptive; that the ordinary consumer of sausage manufactured by this plaintiff has no knowledge or information that sausage contains cereal and added water, that such information is not conveyed to persons who purchase plaintiff's sausage at retail by any method of marking or branding now or heretofore in use by plaintiff, and that it is impracticable and impossible in the ordinary course of manufacture and distribution of sausage to mark or brand the same so that the purchaser at retail or the consumer will be informed as to the amount of cereal and water added thereto.

"Defendant, further answering, states that the addition of cereal and water to sausage has for many years been condemned and disapproved by many authoritative writers and various well-known organizations familiar with and concerned in the manufacture and sale of sausage in this country and other countries; that such views and opinions of such writers and organizations have been widely published and discussed, and that this plaintiff knew, or in the reasonable and lawful conduct of its business ought to have known, of such views and opinions; and that such use of cereal and water in the manufacture of sausage constitutes a fraud and deception upon the purchaser and consumer, and the plaintiff as a manufacturer of sausage was and is in duty bound to conform its business to the requirements and provisions of said act of Congress and of said regulations of the Secretary of Agriculture, and that because of these facts no surprise, hardship, or injustice has been or will be sustained by or done to this plaintiff by the enforcement of this regulation.

"Defendant, further answering, states that since the filing of this suit, and previous to the service of the subpœna on him in said cause, the regulations set forth in paragraph 9 of the bill had been superseded by regulations governing the meat inspection of the United States Department of Agriculture, contained in B. A. I. Order 211, which were promulgated on July 15, 1914, by the Secretary of Agriculture, pursuant to the authority conferred upon him by the said Meat Inspection Act, and effective on and after November 1, 1914, and that a copy of said regulations will be produced at the hearing of this cause."

The evidence shows that the regulations effective April 1, 1913, were annulled and superseded by other regulations effective November 1, 1914. The latter were in force at the time the defendant Houston was served with process and at the time he filed his answer. The regulations made effective April 1, 1913, were preceded by the following:

"Washington, D. C., Feb. 28, 1913.

"For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the act of Congress, approved June 30, 1906 (34 Stat. 674), Regulation 18 is hereby amended by the addition of sections 15 and 16, to read as hereinafter set out. James Wilson, Secretary of Agriculture."

Counsel for complainant in his brief says:

"The regulation itself shows that it was not based on unwholesomeness, but on the question of name."

And he then refers to the preamble above referred to as proof of that fact. It appears from the evidence in the case that regulations (including the preamble) effective April, 1913, are no longer in force, but were superseded by regulations effective November 1, 1914. These latter regulations were adopted and in force when Houston was served with process and at the time the

answer was filed. The *preamble* to the regulations of 1913 is entirely omitted from the regulations of 1914, now in force. This omission, in view of the complainant's contention, seems significant. It is true that certain paragraphs of the regulations of 1913 are retained in the regulations of 1914. They are as follows:

Section 16, paragraph 1: "Sausage shall not contain cereal in excess of two per cent. When cereal is added its presence shall be stated on the label or on the product."

Paragraph 2: "Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping, or mixing, in which case the added water or ice shall not exceed three per cent., except as provided in the following paragraph."

Paragraph 3: "Sausages of the class which are smoked or cooked, such as Frankfurt style, or Vienna style, and Bologna style, may contain added water in excess of three per cent., but not in excess of an amount sufficient to make the product palatable. When water (in excess of three per cent.) and cereal are added to this class of sausages, the statement 'sausage, water and cereal' shall appear on the label or on the product, but when no cereal is added the addition of water need not be stated."

If the Secretary had said in so many words that sausage containing more than 2 per cent. of cereal and 3 per cent. of water was unwholesome and not fit for food, and for that reason could not be shipped in interstate commerce, would there be any doubt that his action was well within the power conferred upon him by Congress? Not having in explicit terms so declared, what is the fair and reasonable deduction to be made from the regulations and all attendant facts? Why did he limit the amount of cereal and water to be used in the sausage? It cannot be fairly said, I think, that he had in mind only a "false or deceptive name." If this were true, there would have been no need of omitting the "preamble" to the regulations of 1913.

The evidence in this case shows very clearly that the product called "sausage" which contains more than 2 per cent. of cereal and more than 3 per cent. of water is a much inferior and a much cheaper product. This is sought to be excused or explained on the grounds: First, that without the addition of cereal in excess of 2 per cent. and water in excess of 3 per cent. the complainant and those engaged in like business, to wit, Armour, Swift, and others, would not be able to compete with those engaged alone in *intrastate* business. Second. That it is really a philanthropic product, in that the poor and the laboring man and the laboring woman could obtain such food cheaper, and thereby be able to hold body and soul together.

I am free to confess that such contentions have very little weight with me. Centuries ago our Master said:

"What man is there of you, who, if his son ask him for bread will he give him a stone? Or if he ask for a fish will be give him a serpent?"

Here in this case one asks for meat, and he is given a larger quantity of meal and water. This may not have much, if anything, to do with the ultimate question to be decided in the case; but for some reason or other witnesses were questioned by counsel in reference to these matters and their testimony is in the record.

[1] It is insisted that the Court of Appeals settled every possible controversy that has arisen or can arise in this case. If that were true, it would be the plain duty of the court to accept such settlement and enter a judgment in accordance therewith. As I understand the decision of the Court of Appeals, it decided one question, and that question is:

"Could he [the Secretary] prohibit the making of a compound which was sound, healthful, wholesome, and free from dyes, chemicals, preservatives, or ingredients which render such product unfit for human food, by a mere regulation?"

The Court of Appeals said that he could not. If the product is not healthful and wholesome, who is to be the judge? Is it the court or the Secretary? If the discretion has been lodged in the Secretary to determine such questions, and he has exercised such discretion, the court has no power to compel him to change his judgment. Taking into consideration the regulations made

in 1914, together with all the facts and circumstances in evidence, I am satisfied that the Secretary, in the exercise of the discretion given him by law, has determined not only that the product mentioned was being sold under a false and deceptive name, but that it was not a healthful or a wholesome food.

[2] However this may be, the question as to whether the product containing more than 2 per cent. of cereal and more than 3 per cent. of water is in fact a wholesome food product must be determined under the bill and answer by the court from all of the evidence in the case. Upon this question the issue between the complainant and defendant is sharply drawn. It is a simple question of fact. The complainant affirms and the defendant denies. It was practically conceded upon the hearing that sausage could be and was made without the use of cereal in many instances, especially in shipments to points in the state of Pennsylvania, where by the laws of that state cereal was prohibited from use in a sausage product.

The evidence in this case showed or tended to show that sausages made without cereal and water had superior keeping qualities to sausages made with cereal and water. The use of cereal reduces the price of the product and disguises the addition of water. The evidence in this case satisfies the court that the addition of water on account of cereal accelerates fermentation, and consequently tends to make the product unwholesome. It is insisted, however, that the sausage reaches the stomach of the consumer within 12 hours after it is made, and before it has time to ferment, sour, or decompose, That is a race in which the chances seem to be against the consumer.

I am asked to find that the addition of from 5 to 10 per cent. of cereal and from 10 to 20 per cent. of water does *not* render "sausage" unwholesome or unfit for food. Conceding that the meat, cereal, and water used in making a product called sausage are in themselves sound and wholesome constituents, yet when they are put together in quantities ranging from 70 to 80 per cent. of meat, 5 to 10 per cent. of cereal, and 10 to 20 per cent. of water, is the product wholesome and fit for human food? I cannot bring myself to believe that such a product, under all of the evidence in the case, is a *wholesome* food. I must therefore find the issue, made by the pleadings in that regard, in favor of the defendants.

To sum up the conclusions reached by the court, they are as follows:

1. The regulations promulgated by the Secretary in *1914* were within his province and power to make, in determining the question as to whether the product of more than 2 per cent. of cereal and 3 per cent. of water rendered such product unwholesome and unfit for human food.

2. The evidence in the case, without regard to the regulations, satisfies the court that upon the issue joined the finding must be for the defendants.

It is so ordered. The bill is dismissed.

HISTORICAL PUB. CO. v. JONES BROS. PUB. CO.

JONES BROS. PUB. CO. v. HISTORICAL PUB. CO.

Nos. 2071, 2076.

(Circuit Court of Appeals, Third Circuit. June 23, 1916.)

APPEAL AND ERROR ⊂=339(1)—FINAL DECREE—WHAT CONSTITUTES.

In a suit to restrain the infringement of two copyrights, a decree dismissing the bill as to one is final as to that portion of the controversy, though it be interlocutory as to the other, and therefore complainant may appeal from that portion of the decree which is final at any time within six months, there being no reason why a decree may not in part be final and in part interlocutory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1883; Dec. Dig. ⊂=339(1).]

On reargument. Rehearing denied, and former opinion affirmed.

For former opinion, see 231 Fed. 638, — C. C. A. —.

PER CURIAM. This motion for reargument raises one question that may need a short explanation. The Historical Publishing Company's appeal was taken within 30 days from the entry of the decree below, but the Jones Publishing Company did not appeal until about four months thereafter. The Historical Company now urges that the plaintiff's appeal was too late, and asks us to revise our own decree accordingly. We neither noticed nor considered the point before, and hence the language of Historical Publishing Co. v. Jones Publishing Co., 231 Fed. 638, — C. C. A. —, must be understood as used without reference to the time when the Jones Company's appeal was taken. Undoubtedly in that opinion we assumed the appeal to be taken from an interlocutory decree, but in the answer to the pending motion the Jones Company contends that the decree of the District Court dismissing the bill as to the School History was final, and that its appeal was in time because it was taken under the act allowing six months therefor. We think this position is correct (Hill v. Railroad, 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331; Scriven v. North [C. C. A. 4th] 134 Fed. 366, 67 C. C. A. 348), and therefore hold that the Jones Company's appeal, being taken from a final decree affecting a separable subject in controversy, was properly taken and should not be dismissed. As the cases cited decide, there seems to be no good reason why part of a decree should not be interlocutory, and part be final, for purposes of appeal, and, as we have already said in Ward v. Weber, 230 Fed. 155, — C. C. A. —, relief by injunction cannot be more effectively refused than by dismissing so much of the bill as asks for such relief. Nothing more final on that subject can be conceived.

The Jones Company also asserts that the red volume—Columbus and Columbia—contains more infringing material than is found in part 3; and this contention may be correct. We leave the matter to be determined by the court below, with permission so to mold its decree as to cover whatever portion of the red volume is found to be made up of infringing material.

In other respects the motion for reargument does not seem to need further attention.

The motion is dismissed.

GRANDISON v. ROBERTSON et al.

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

No. 127.

1. INSOLVENCY ⟸61(1)—PREFERENCES—VALIDITY.

At common law, and except as forbidden by statute, an insolvent debtor can prefer one creditor over others by a payment made in good faith and in satisfaction of a real debt.

[Ed. No.—For other cases, see Insolvency, Cent. Dig. §§ 79–85, 88, 90–95; Dec. Dig. ⟸61(1).]

2. BANKRUPTCY ⟸166(2, 4)—"PREFERENCES"—VALIDITY—STATUTE—"VOIDABLE PREFERENCE."

Under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (Comp. St. 1913, § 9644) providing that a person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition, or after the filing of the petition and before the adjudication, made a transfer of property, the enforcement of which will enable any of his creditors to obtain a greater percentage of his debt than any other creditor of the same class, and section 60b, as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1913, § 9644), providing that if a bankrupt shall have made a transfer within four months before the filing of the petition, or after the filing and before the adjudication, while insolvent, and the transfer then operates as a "preference," and the person receiving it had reasonable cause to believe that the enforcement thereof would effect a preference, it shall be voidable by the trustee, a preference, to be "voidable," must have been received by one who had reasonable cause to believe that it would effect a preference; but under Bankr. Act, § 67e, as amended in 1903 (Comp. St. 1913, § 9651), providing that all conveyances by a debtor within four months prior to the filing of a petition in bankruptcy against him, and while insolvent, which are void as against creditors under the laws of the state in which the property is situate, shall be void under the Bankruptcy Act and Stock Corporation Law N. Y. § 66, providing that no conveyance by a corporation which has refused to pay any of its notes or obligations when due, with intent to give preference to any particular creditor, shall be valid, it is only necessary that the corporation be insolvent, and that the payment be made, not received, with intent to give a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 256; Dec. Dig. ⟸166(2, 4).

For other definitions, see Words and Phrases, First and Second Series, Preference; Voidable.]

3. BANKRUPTCY ⟸303(3)—PREFERENCES—EVIDENCE—KNOWLEDGE OF CREDITOR.

In an action by the trustees in bankruptcy to recover payments as preferences, evidence *held* not to show that the creditor receiving the payments knew or had reasonable cause to believe that preferences were intended by such payments.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec Dig. ⟸303(3).]

4. BANKRUPTCY ⟸303(3)—PREFERENCES—EVIDENCE—INSOLVENCY AND INTENT OF DEBTOR.

In an action by trustees in bankruptcy to recover alleged preferences, evidence *held* to show that a corporate debtor was insolvent when it made payments to the creditors within four months prior to the filing of

the petition in bankruptcy, and that it intended thereby to give a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⊂⊃303(3).]

5. BANKRUPTCY ⊂⊃303(2)—ACTIONS BY TRUSTEE—ADMISSIBILITY OF EVIDENCE —INSOLVENCY.

In an action by trustees in bankruptcy to recover alleged preferences, the admission of testimony given by the president of another creditor in a suit against it, over the objection by defendants that statements of such president could not be binding on it, was not error, where it was received for the purpose of showing insolvency of the creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 460, 461; Dec. Dig. ⊂⊃303(2).]

6. APPEAL AND ERROR ⊂⊃232(2)—PRESENTING QUESTIONS IN LOWER COURT—OBJECTIONS TO EVIDENCE—GROUNDS—WAIVER.

Where the only objection made to such testimony when it was offered was that it could not in any way bind the defendants, the objection that the defendants were thereby deprived of their right of cross-examination was waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1430, 1431; Dec. Dig. ⊂⊃232(2); Trial, Cent. Dig. §§ 211–213.]

7. APPEAL AND ERROR ⊂⊃231(3)—PRESENTING QUESTIONS IN LOWER COURT—OBJECTIONS TO EVIDENCE—GENERAL OBJECTIONS.

General objections to evidence are sufficient, where the ground therefor is manifest; but, where it is not manifest, the objection must state the specific ground on which it is based.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⊂⊃231(3); Trial, Cent. Dig. §§ 194–200, 223, 226.]

8. BANKRUPTCY ⊂⊃182—PREFERENCES—STATE LAWS—"PURCHASER FOR VALUABLE CONSIDERATION WITHOUT NOTICE."

A bank to whom payments were made by an insolvent corporation with intent to give a preference, and which, without knowledge of the corporation's insolvency, applied such payments to a demand note indorsed by an officer of the corporation, and surrendered the note, and thereby lost its right against the indorser by failing to make presentment and give notice of nonpayment within a reasonable time, as required by Negotiable Instruments Law (Consol. Laws N. Y. c. 38) § 131, was a purchaser for value in good faith, against whom the preference was not void, under the Stock Corporation Law (Consol. Laws N. Y. c. 59), and the trustee could not recover the payments under Bankr. Act, § 67e.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 255–258; Dec. Dig. ⊂⊃182.

For other definitions, see Words and Phrases, First and Second Series, Purchaser for Valuable Consideration.]

9. BILLS AND NOTES ⊂⊃402, 414—LIABILITY OF INDORSER—PRESENTMENT AND NOTICE—OFFICER OF CORPORATION.

The president and treasurer of a corporation, who indorses its note, is entitled to presentment and notice of nonpayment to fix his liability.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1074–1080, 1142, 1148–1155; Dec. Dig. ⊂⊃402, 414.]

10. BILLS AND NOTES ⊂⊃397—LIABILITY OF INDORSER—PRESENTMENT AND NOTICE—INSOLVENCY OF MAKER.

The insolvency of the maker of a note does not excuse presentment and notice of dishonor, though the indorser knew of the insolvency.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1029–1044; Dec. Dig. ⊂⊃397.]

11. BANKRUPTCY ⇐182—PREFERENCES—BONA FIDE PURCHASER.

Where the indorser of a note, paid by preferences given by a corporation which subsequently became bankrupt, was secured by property of the corporation assigned to him before the indorsement was made, his right to presentment and notice and demand before his liability is fixed is doubtful; but inasmuch as he was not clearly liable without them, the possibility of the loss of the right to proceed against him by applying the payments to the note and surrendering it to the corporation is sufficient to make the holder of the note a purchaser for value, against whom, if bona fide, the payments were not void under the New York Stock Corporation Law, and therefore could not be recovered by the trustee in bankruptcy, under Bankr. Act, § 67e.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 255–258; Dec. Dig. ⇐182.]

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

Suit by Wilbur B. Grandison, as trustee of the estate of the O. L. Gregory Vinegar Company, bankrupt, against Frederick Robertson and another. Decree for complainant (220 Fed. 985), and defendants appeal. Modified and affirmed.

This cause comes here on appeal from a decree entered on March 9, 1915. The facts are stated in the opinion.

Dirnberger & Augspurger, of Buffalo, N. Y. (M. F. Dirnberger, Jr., and George A. Orr, both of Buffalo, N. Y., of counsel), for appellants.

Thomas C. Burke, of Buffalo, N. Y. (Thomas C. Burke, Frank Gibbons, and Henry W. Pottle, all of Buffalo, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This suit was commenced by the trustee in bankruptcy against the defendants to recover certain payments claimed to have been made preferentially by the bankrupt within four months before the filing of the petition in bankruptcy. The District Court has found that certain payments were preferential and has entered a decree directing defendants to pay over to complainants the sum of $8,576.73.

The defendants are members of the firm of Frederick Robertson & Co. They are private bankers at North Tonawanda, N. Y. The O. L. Gregory Vinegar Company is a corporation organized under the laws of the state of New York, and was engaged in the business of manufacturing cider and vinegar in North Tonawanda in this state. It will be hereinafter referred to as the company.

On February 15, 1910, an involuntary petition in bankruptcy was filed against it, and on March 4, 1910, it was duly adjudicated a bankrupt. On March 28, 1910, the complainant was appointed trustee of the estate of the bankrupt. The trustee alleges in his bill that the company was insolvent at all of the times between October 15, 1909, and the time of the filing of the petition in bankruptcy. On October 15, 1909, it was indebted to defendants on two promissory notes of

$5,000 each. One of these notes was made by the company. The other was made by the Albion Fruit Produce Company and was indorsed by the company. On November 1, 1909, the company renewed the note which it had made and gave a new note for $5,000, indorsed by O. L. Gregory and O. L. Alexander. This note was payable on demand, but no demand has ever been made. There was paid, on the note last given, $508.53 on November 20, 1909; $1,000 on December 1, 1909; $1,000 on December 9, 1909; and $2,534.47 on January 18, 1910. In addition, certain other payments were made which are hereinafter stated.

It may be said that O. L. Alexander, the indorser of the note for $5,000 above mentioned, was at the time of his indorsement the president and treasurer of the company which gave the note, and that he continued as president and treasurer down to the time this suit was brought. He was elected president on October 12, 1909, and at that meeting of the board of directors a resolution was adopted which recited that as defendants herein and the Rochester bank had refused to grant to the company further credit unless its notes were indorsed by an additional indorser, and that as Mr. Alexander was willing to indorse the renewal notes "provided certain security, as hereinafter stated, is given to him:" "Now, therefore, be it resolved, that this company assign to the said O. L. Alexander, as collateral security for the indorsements, as above stated, accounts receivable of this company and the proceeds thereof aggregating an amount not exceeding twenty thousand dollars ($20,000)."

After the adoption of that resolution, and, as we have seen, on November 1, 1909, Mr. Alexander indorsed the note for $5,000. The assignment of accounts was not made at the time the resolution was adopted, nor at the time the note was indorsed. But thereafter, and as the products of the company were sold, the accounts were assigned to him, and as the accounts were realized upon the proceeds were deposited in bank to the credit of the O. L. Alexander Collateral Account, and thereafter were applied by him on the note due to the defendants, and which are now claimed by the trustee as preferential payments.

[1] At common law, and except as forbidden by statute, an insolvent debtor had the right to prefer one creditor over others. If a payment was made in good faith and in satisfaction of a real debt, the fact that it operated to prevent other creditors from collecting their debt was not regarded by the common law as making it a voidable payment. Whatever right the trustee in bankruptcy, therefore, has to recover in this suit any payments made to these defendants by this bankrupt company, he must derive from some provision in the Bankruptcy Act.

[2] The Bankruptcy Act of 1898, as amended in 1903, provides in section 60a as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will

be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." 32 Statutes at Large, 799.

And the act, as amended in 1910, provides in section 60b as follows:

"If a bankrupt * * * shall have made a transfer of any of his property, and if, at the time of the transfer, * * * and being within four months before the filing of the petition in bankruptcy or after the filing * * * and before the adjudication, the bankrupt be insolvent and the * * * transfer then operates as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." 36 Statutes at Large, 842.

And the act, also as amended in 1903, provides in section 67e as follows:

"That all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." 30 Statutes at Large, 564; 32 Statutes at Large, 800.

But the trustee in his bill claims that payments made to the defendants were also made in violation of the Stock Corporation Law of the state of New York, and that he is, therefore, entitled by virtue of the provisions in Bankruptcy Act, § 67e, to recover any payments which are made preferential and void under the New York act. The Stock Corporation Law (Consolidated Laws N. Y. 1909, vol. 5, p. 5782) provides in section 66, among other things, that:

"No conveyance, assignment or transfer of any property of any such corporation (one that has refused to pay any of its notes or other obligations, when due, in lawful money) by it or any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. * * * Every person receiving by means

of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. * * * Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void."

The above act also provides that every director or officer of a corporation, who shall violate or be concerned in violating any provision of the section referred to, shall be personally liable to the creditors and stockholders of the corporation of which he shall be a director or an officer to the full extent of any loss they may respectively sustain by such violation. With this last provision we are not, however, now concerned. The act also prohibits the defaulting corporation from transferring any of its property "to any of its officers, directors or stockholders, directly or indirectly for the payment of any debt, or upon any other consideration than the full value of the property paid in cash."

This Stock Corporation Law appears to be a re-enactment of section 48 of Laws 1890, c. 564, as amended by Laws 1892, c. 688, and by Laws 1901, c. 354, adding the exception that laborers' wages for services shall be preferred claims and a provision prohibiting general assignments by railroad, banking or insurance corporations.

It is to be observed that under the Bankruptcy Act a preferential payment, to be voidable, must have been received by one who had "reasonable cause to believe" that it would effect a preference; while under the New York Stock Corporation Law the invalidity of the payment is not made to depend upon the knowledge of the one receiving the payment that it is a preferential payment, or upon his having reasonable cause to believe that it is a preferential payment. It depends upon whether the corporation or its officers in making the payment did so with the intent of giving a preference to any particular creditor over other creditors. Under the New York statute the invalidity of the payment is conditioned on two facts: (1) The corporation must have been at the time of payment insolvent, or its insolvency must have been imminent. (2) The payment must have been made (not received) with the intent of giving a preference to a particular creditor over other creditors of the corporation.

[3] Did the defendants at the time they received any of the payments made to them have reasonable cause to believe that a preference was intended or would result therefrom? The court below answered this question in the negative. This brings us to inquire whether the trustee can maintain this suit under Bankruptcy Act, § 60b. The suit cannot be maintained under that section of the act unless the defendants knew or had reasonable cause to believe that a preference would result from the payments the trustee now seeks to recover.

The evidence discloses that the indebtedness of the bankrupt to the defendants commenced in November, 1908. At that time a loan of $5,000 was made, and on December 3, 1908, a second note for a like amount was discounted. The total indebtedness at that time was $10,000, and it so continued through the winter, spring and summer of the following year. No collateral was deposited to secure the payment of the notes, but the latter bore the individual indorsement of

some of the officers of the company. When the notes became due they were renewed from time to time. One of the defendants testified that he was told in the spring of 1909 by Mr. Gregory, then president of the company, that either he or a man by the name of Martin, who was one of the officers of the company, would have to get out. He also remembered that he had been told by Martin that Gregory could not live within his salary and overdrew his account, and that he (Martin) would not stand for it. The defendants knew that dissensions existed among the officers of the company, and that after a time Gregory got out and Alexander became president. But they were never informed that there was any intention of winding up the business. They knew that there was a mortgage for $25,000 against the property of the company at the time they made their first loan, and they knew that the mortgage was held by the National Bank of Commerce of Rochester, but they did not know the total amount of the indebtedness to that bank.

Frederick Robertson, the active member of defendants' firm, could not recollect that he had inquired at any time as to the amount the company owed general creditors. He, however, did make some investigation of the standing of the company and of the indorsers at the time of the first loan. That investigation satisfied him as to the financial standing of the parties. He made a personal examination of the company's plant and regarded it as worth at that time between $50,000 and $75,000, and he testified that he never saw a manufacturing plant in finer condition, and that he had had considerable experience in the examination of manufacturing plants, covering a period of 17 years. He testified he did not know at any time prior to the adjudication of bankruptcy that bankruptcy proceedings were imminent or even pending, and that he knew nothing of the matter before the proceedings were brought. The main banking business of the company (the bankrupt) was done, as defendants all the time knew, with the Rochester bank, and the company's account with defendants was small and local. The president of the bankrupt company testified that he did not think he ever discussed with defendants the amount of the company's liabilities to general creditors and that he did not think he had ever told them what the amount was; that the payments made upon the defendants' notes were made by him voluntarily and not pursuant to any request from them; and that he had never been asked for a specific payment of $1,000, or $500, or any other amount. The company had been asked, however, to reduce its indebtedness, for reasons elsewhere stated.

In the District Court, Judge Hazel stated that in his opinion the evidence was not sufficient to justify the conclusion that the defendants knew or had reasonable cause to believe that at the time the payments complained of were made a preference was intended. The evidence, however, discloses that these defendants were too easily satisfied as to the financial soundness of this company. It is strange that they did not at any time call for a statement from it of its assets and liabilities. But we do not think that the failure of the bankrupt to promptly pay the notes to the defendants at maturity is to be accepted

by us as sufficient to charge the latter under the circumstances of this case with notice of the impending insolvency. We do not doubt the entire good faith of the defendants. They were without notice of the impending insolvency and without sufficient facts to cause them to believe that a preference would result from the payments which they received within four months of the bankruptcy. As the defendants did not know or have reasonable cause to believe that a preference would result from any of the payments made to them, the trustee cannot maintain this suit under section 60b of the Bankruptcy Act.

[4] This brings us to inquire whether the payments made violated the provisions of section 66 of the New York Stock Corporation Law; for if they are invalid under the provisions of that law the trustee is entitled to recover them into his possession as a part of the bankrupt's estate by virtue of section 67e of the Bankruptcy Act. That the company was insolvent at the time the payments complained of were made seems beyond controversy. Indeed, the company appears to have been insolvent from the time it began business in July, 1908. Its liabilities at that time were in excess of its assets. From the beginning it did business on borrowed capital. In August, 1908, it borrowed $25,000 from the National Bank of Commerce in Rochester. In February 1909, the Rochester bank had under discount paper made or indorsed by the company amounting to $44,189.28. And in October, 1909, its indebtedness amounted to over $92,000. During the period when the alleged preferential payments were being made the company paid to the defendants and to the Rochester bank on the indebtedness owing to them the sum of $55,795.47, while paying little or nothing to general creditors. Its funds were so reduced that on August 6, 1909, 11 checks, aggregating $379.45, were drawn by the company to pay small invoices which had become due in May and June, but the checks were never delivered to the payees because of lack of funds. The trustee on taking possession of the property converted into cash all the personal property which came into his hands and realized only $879.78, which was insufficient to pay the expenses of administration. The unpaid indebtedness amounts to $41,909.52.

In October, 1909, these defendants and the Rochester bank were pressing the company for payments on the notes. The reason defendants asked to have payments made does not seem to have been due to doubts as to the solvency of the company, but was occasioned by the small balances that it maintained in defendants' bank. Their account was an unsatisfactory account. The company was giving defendants very little business, and the latter naturally objected to tying up $10,000 without a more active business and a better balance. The company, however, was unable to make any payments. All that it could do or did do was to renew the notes. The general creditors were also pressing their demands and were being paid nothing. Notes were allowed to go to protest. Eleven went to protest at the Rochester bank; three in October, 1909, two in November, four in December, and two early in January, 1910. A note for $688.52, which fell due on October 18, 1909, and went to protest, was allowed to lie under protest until November 9th, when it was renewed for its full amount. The re-

newal note went to protest on December 16th, and laid under protest until January 12, 1910, when it was paid. In the fall of 1909 the company bought no apples, having no money with which to do so. From October, 1909, to January, 1910, it was simply converting the old stock which had been left over from the year previous. During the whole period of four months from October 15, 1909, to February 15, 1910, when the petition in bankruptcy was filed, the company was hopelessly insolvent, not being able to pay its debts as they became due; and during that period of four months it was engaged in converting substantially all of its personal property into cash, and in seeing that the proceeds were used in paying the debts of two secured creditors, these defendants and the Rochester bank, and during the same period the company was avoiding the payment of anything to general creditors.

The result was that in the four months prior to the filing of the petition in bankruptcy these defendants were paid sums aggregating $6,500, and the Rochester bank $49,300, and the general creditors got nothing. The intent to prefer is as clearly disclosed in the facts of this case as in any case with which we are familiar. Every person is to be presumed to intend the natural and probable consequences of his own acts. In what was done a preference was given, and the corporation knowingly and purposely gave it. The testimony of the president that he felt that the assets were ample to take care of all the creditors, and that he figured paying the general creditors out of the real estate and the book accounts, is not convincing, in view of the fact that, when the trustee converted into cash all of the personal assets which came into his hands, he realized only $879.78 therefrom, and in view of the farther fact that, although he used every endeavor to find a purchaser for the company's real estate at Tonawanda, he was unsuccessful in his endeavor.

[5, 6] The conclusion we have reached can be supported without the testimony of the witness Swanton. There is, however, no reason why that testimony should be disregarded. It appears that that witness was the president of the National Bank of Commerce of Rochester, and as such had testified in a suit brought by the trustee of the bankrupt against that bank to recover certain payments made to it and which the trustee claimed were preferential and void as to him. In the case at bar this witness did not appear upon the stand to give his testimony in propria persona. But the counsel for the trustee stated that he desired "to offer as evidence in this case the testimony taken yesterday" of Swanton, taken in the other case, and the exhibits received upon his examination. Thereupon the counsel for the defendants said:

"We object to that, on the ground that whatever the transactions might have been between this bankrupt concern and the National Bank of Commerce can in no way be binding upon us."

The court allowed it to come in, stating that the testimony was received tentatively, "subject to being ignored when I come to examine the cases." Prior to the offer of this testimony, counsel for the trustee had offered the evidence given by the trustee in the other case, and with it certain exhibits. The court thereupon asked whether counsel

for defendants wished to cross-examine him on it. The counsel replied that he did not, saying:

"No sir, it is satisfactory; there is no objection to it, except whatever objections were made by Mr. O'Grady at that time I desire to make now."

Attention is called to the course followed respecting the reception of the trustee's testimony, and counsel's explicit declaration that he had no objection to offer, except such as he made when the testimony was originally given, and that he had no wish to cross-examine. The District Judge might well have understood, in view of what was said, that there was no other objection to the reception of the Swanton testimony than that the testimony was not material and relevant to the issue involved. And the formal assignment of error reads that the judge erred "in overruling the objection of the defendants to the admission of the testimony of Thomas J. Swanton on the ground that the same could in no way be binding upon these defendants." But on the argument in this court counsel contended that the admission of Swanton's evidence constituted reversible error, because he was thereby deprived of the right to cross-examination. That objection cannot now be raised, as a specific objection was raised below which did not include, and which therefore waived, the objection now suggested. If the objection now raised had been called at the time to the court's attention, the testimony would not have been received in the form it was offered.

[7] General objections to the admission of evidence are sufficient, where the ground therefor is so manifest that the trial court cannot fail to understand it. Deering Harvester Co. v. Kelly, 103 Fed. 261, 43 C. C. A. 225. But if the ground of the objection is not so manifest, then the objection must state the specific ground on which it is based. Patrick v. Graham, 132 U. S. 627, 10 Sup. Ct. 194, 33 L. Ed. 460. And when the objection is specific it is deemed to be limited to the ground or grounds specified, and it does not cover others not specified. Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641. It has been held that where specific grounds are stated the implication is that there are no others, or, if others, that they are waived. Texas, etc., R. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057. The rule is established in New York, as in all the other states, the rule being of universal application, that the statement of a specific ground of objection to the introduction of evidence is a waiver of all other grounds of objection. Evans v. Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 30 L. R. A. 651, 51 Am. St. Rep. 681; Commonwealth v. Mead, 153 Mass. 284, 26 N. E. 855; Plumb v. Curtis, 66 Conn. 154, 33 Atl. 998; Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575; Hathaway v. Goslant, 77 Vt. 199, 59 Atl. 835. In this case, the objection raised being specific, no other can be considered. The court below admitted the testimony, not as showing the intent with which the payments were made to the defendants, but for the purpose of showing the insolvency of the company. Under the circumstances its admission does not constitute reversible error.

[8] We are, however, asked to decide that the trustee is not entitled

in any event to recover the $5,000 represented by a note dated November 1, 1909, which was indorsed by O. L. Gregory and O. L. Alexander, and which was payable on demand. The balance due on that note was paid on January 18, 1910, and was then handed back by the defendants to the bankrupt without knowledge of the company's insolvency at the time and in entire good faith. It seems to be assumed that, while O. L. Gregory was financially irresponsible, O. L. Alexander was sound; and the argument is that in surrendering this note the defendants were purchasers for a valuable consideration and without notice of the property transferred to them for this note. The New York Stock Corporation Law, after declaring void transfers of property made in violation of the terms of the act, provides that:

"No such conveyance, assignment or transfer shall be void in the hands of a purchaser for a valuable consideration without notice."

The New York Court of Appeals in 1908 construed this statute in Perry v. Van Norden, 192 N. Y. 189, 84 N. E. 804. The court decided that where a trust company, holding notes of a corporation subsequently adjudged a bankrupt, which notes were indorsed by a perfectly good indorser in consideration of the transfer to it by the corporation of certain property, and without knowledge or notice which forbade it from doing so, surrendered its notes and thereby lost the security of the indorsements, it could not be required to return the property under the act. The trust company in that case held three notes made by the corporation which subsequently became bankrupt, which were not due and were indorsed by one who was solvent and responsible. The corporation assigned certain of its accounts and assets to the trust company, and obtained thereby the notes which had ever since remained in its possession. The result was that when the notes became due they were not presented for payment and were not protested. The court said:

"Thus it appears that the appellant, having notes made by a corporation subsequently adjudged a bankrupt, but indorsed by a perfectly good indorser, and having no knowledge or notice which forbade it from so doing, in consideration of the transfer of certain property, has given up its notes and lost the security of its indorsement, and is now asked to return the property which it received in the place of such indorsement. * * * The object and result of what was done was doubtless the protection and relief of the indorser. But, however this may be, we see no escape from the conclusion that the appellant in perfectly good faith has surrendered its notes and lost a perfectly good indorsement in consideration of the transfer to it of other property by the maker of those notes, and that under such circumstances it is not subject to the provisions of the statute prohibiting preferences, but is within the protection of those other provisions enacted for the benefit of purchasers for a valuable consideration and without notice."

The defendants rely upon the above decision, and assert that in surrendering the note on January 18, 1910, which note was payable on demand and had never been presented for payment, and in respect to which no notice of nonpayment had ever been given, they have now lost all right to proceed against the indorser, and so are within the principle of Perry v. Van Norden, supra.

The New York Negotiable Instruments Law, in section 131, provides that:

"Where it [the instrument] is payable on demand presentment must be made within a reasonable time after its issue. * * *"

And the New York Court of Appeals in Crim v. Starkweather, 88 N. Y. 345, 42 Am. Rep. 250, in referring to what is to be regarded as "reasonable time," said:

"This is not to be defined by any general term, but no case has been found holding that 3½ years may elapse without discharging the indorser."

Moreover, if Alexander was entitled to the presentment and notice of dishonor, he has not received any such notice.

[9] We have seen that Alexander was the president and the treasurer of the bankrupt. So that the question arises whether the president and treasurer of a corporation, who indorses in his individual capacity the note of his corporation, is an indorser entitled to presentment of the note for payment and notice of nonpayment. The question is somewhat analogous to that which arises in the case of an indorser who has become the executor of the maker of a note, who died before its maturity. The latter question came before the Supreme Court of Pennsylvania in 1827 in Juniata Bank v. Hale, 16 Serg. & R. (Pa.) 157, 16 Am. Dec. 558, and it was held that the indorser was entitled under such circumstances to notice of nonpayment.

"Policy and the convenience of the public," said the court, "require a rigid adherence to the rule; for, otherwise, exception would creep in after exception, and leave the law, which ought to be certain, open to speculation and to doubt."

In Magruder v. Union Bank of Georgetown, 3 Pet. 87, 7 L. Ed. 612 (1830), the maker of the note died before it became payable and letters of administration were taken out by one who had indorsed it. No notice of the nonpayment of the note was given to the indorser, and no demand of payment was made until the institution of the suit. The Supreme Court, Chief Justice Marshall writing the opinion, held that the indorser was discharged and that the fact that he had become the administrator of the drawer did not relieve the holder from his obligation to demand payment of the note and to give notice of nonpayment to the indorser. The court below had held otherwise, and the argument was that under the circumstances presentment for payment and the giving of notice of dishonor was totally useless. The Chief Justice declared that the indorser's contract was conditional, and that his undertaking could become absolute only upon compliance with the condition. The case came before the court again in 1833. Union Bank of Georgetown v. Magruder, 7 Pet. 287, 8 L. Ed. 687. The opinion in the second case was written by Mr. Justice Story, who, referring to the decision rendered when the case was up before, declared: "We are entirely satisfied with that decision." It seems to be well settled that such is the law as to the right of an indorser who becomes the executor or the administrator of the maker to have notice that he is looked to personally for payment. 2 Daniel on Negotiable Instruments (6th Ed. 1913) § 1175. We are unable to see any distinc-

tion in principle between the case of an executor and that of a president or treasurer of a corporation. Each is entitled to notice and for similar reasons.

[10] The fact that the maker of a note is insolvent constitutes no excuse for neglect to make due presentment or to give notice of its dishonor. The reason is (1) that the contract of the indorser is conditional and not absolute, and (2) that without presentment it cannot be definitely settled that the instrument will be dishonored, as the means of payment may be furnished through friends. The English and the American authorities are agreed in this opinion. In Russell v Langstaffe, 2 Doug. 514 (1780), it is stated that:

"As to the bankruptcy, it had been frequently ruled by Lord Mansfield, at Guildhall, that it is not an excuse for not making a demand on a note or bill, or for not giving notice of nonpayment, that the drawer or acceptor has become a bankrupt; as many means may remain of obtaining payment, by the assistance of friends or otherwise."

In 1794 in the court of common pleas it was held that an accommodation indorser who knew when he indorsed that the maker was insolvent was not discharged because the note was not presented for payment when it became due or because notice of refusal to pay was not given him. Buller, J., said:

"It is said that the insolvency of the drawer does not take away the necessity of notice; that is true where value has been given, but no further."

Lord Chief Justice Eyre in the same case said:

"I agree that, if the drawer is not known to be insolvent, the fact of insolvency will not excuse the want of an early demand; but the fact of knowledge excludes all the presumptions that would otherwise arise." De Bordt v. Anderson, 2 H. Black, 336.

In Barton v. Baker, 1 Serg. & R. (Pa.) 334, 7 Am. Dec. 620 (1875), the Supreme Court of Pennsylvania held that an indorser was entitled to notice, even though the fact of the insolvency of the maker was known to him when he indorsed and when the note became due. The Chief Justice said:

"Besides, if a man has nothing of his own he may have friends, who, to relieve him from pressure, will do something for him. The indorser, therefore, has a chance of securing himself at least in part. The only reason that can be assigned for insolvency taking away the necessity of notice is that notice could be of no use to the indorser. But it is almost impossible to prove that it might not have been of use. Therefore it is necessary."

And Yeates, J., said in the same case:

"It seems now settled that, notwithstanding it sounds harsh that a known bankruptcy should not be equivalent to a demand or notice, the rule as to both is too strong to be dispensed with." 2 Daniel on Negotiable Instruments (6th Ed.) §§ 1171 and 1172.

[11] But this brings us to inquire what effect upon the rights of the parties is to be given to the fact that prior to the indorsement and in authorization thereof the company had adopted the resolution before mentioned "that this company assign to the said O. L. Alexander as collateral security for the indorsements, as above stated, accounts re-

ceivable of this company" to the amount of $20,000. This was to take care of notes to the amount of $10,000 in the Rochester National Bank of Commerce and the two notes of $5,000 in the bank of the defendants. In Corney v. Da Costa, 1 Esp. 302 (1795) Mr. Justice Buller held that where an indorser had taken by assignment the effects of the bankrupt maker of a note he was not entitled to notice of the default in payment of the maker. That was a case at nisi prius. But in 1812 in the Court of King's Bench in Brown v. Maffey, 15 East, 215, 222, Bayley, J., alluding approvingly to that case, said:

"It would have been fraud in the indorser to call upon the maker of the note because before it became due the maker had deposited effects in his hands to answer the amount of his indorsement, and therefore he had no right to complain of the want of notice."

And in Mechanics' Bank v. Griswold, 7 Wend. (N. Y.) 165, 169 (1831), the case was cited approvingly by Judge Samuel Nelson, afterwards of the Supreme Court of the United States. In Perry v. Green, 19 N. J. Law, 61, 38 Am. Dec. 536 (1842), the Supreme Court of New Jersey cites a number of cases and declares that:

They "all show that where the indorser takes an assignment of all the estate of the maker, for the purpose of meeting his responsibilities, or has received effects into his hands to satisfy the amount of the indorsement, no demand or notice is necessary. The indorser, in such case, has made the debt his own, and he has no right to complain of the want of notice."

In Prentiss v. Danielson, 5 Conn. 175, 13 Am. Dec. 52 (1823), the Supreme Court of Connecticut declared that:

"If an indorser receives security to meet a particular indorsement, he waives a demand and notice, in respect of that indorsement, but not as to any other."

Justice Story, in his work on Promissory Notes (section 357), states that:

"If the security be to the full amount of the note, the indorser will be liable, without notice, for the full amount of the note; if the security be partial, he will be bound pro tanto."

And in his Commentaries (volume 3, page 113) Chancellor Kent declares that:

"If the indorser, before or at the maturity of the bill, has protected himself from loss by taking sufficient collateral security of the maker of the note, or an assignment of his property, it is a waiver of his legal right to require proof of demand and notice."

And Daniel on Negotiable Instruments, § 1128, volume 2, 6th edition, says:

"In the first place, the receiving by the drawer or indorser of money from the acceptor, maker, or other party for whose benefit the bill or note was made, for the avowed purpose of taking up the bill or note at its maturity, dispenses as to such drawer or indorser with the necessity of a presentment to the acceptor or maker for the obvious reason that the indorser becomes himself the person who should meet it. And so receiving any other property, with the agreement that he shall apply its proceeds to paying the bill or note at its maturity, has the same effect."

We think, without deciding the point, that there is some reason for holding that Alexander, in taking these accounts in pursuance of the

resolution referred to, assumed responsibility for the note of $5,000 given to the defendants by the company and indorsed by him, and that the necessity of presentment and notice was dispensed with. But we do not regard the matter as so free from doubt that this court should require the defendants to surrender now to the trustee the funds they received when they gave up the note. It is quite conceivable that, if an action were brought by the defendants against Alexander in the courts of the state of New York to recover on the note, the courts of that state might reach the conclusion that his taking of the securities did not amount to a waiver of presentment and notice, and that he is no longer liable on the note. The doctrine is not altogether free from criticism, and it is one upon which the courts may differ. See Daniel on Negotiable Instruments, §§ 1134, 1135. Indeed, in Taylor v. French, 4 E. D. Smith (N. Y.) 458 (1855), it was said by Judge Ingraham in the New York Court of Common Pleas:

"Mere security for the indorsement affords no reason for dispensing with demand. On the contrary, it furnishes a stronger reason why the indorser, who holds security, should be informed of the nonpayment. Without notice thereof, he might suppose it to have been paid, and in consequence of such neglect have parted with his security."

In that case the security was given at the time of the indorsement. In Seacord v. Miller, 13 N. Y. 55 (1855), the indorser was given as security a chattel mortgage, and the New York Court of Appeals held that this did not dispense with the necessity of presentment and notice. The court referred to the prior case of Spencer v. Harvey, 17 Wend. (N. Y.) 489, where demand and notice were held to be necessary notwithstanding a judgment had been confessed to the indorser to indemnify him against the payment of the note. And it was said:

"There must be something more, such as taking into his possession the funds or property of the principal, sufficient for the purpose of meeting the payment of the note, or he must have an assignment of all the property, real and personal, of the makers, for that purpose."

We are therefore compelled to hold that the trustee is not entitled to recover the moneys the defendants received for the note of $5,000. The surrender of the note and the possible loss of the security of Alexander's indorsement bring the case in our opinion within the principle announced in Perry v. Van Norden Trust Co., supra. The moneys so received—$508.53 on November 20, 1909; $1,000 on December 1, 1909; $1,000 on December 9, 1909; and $2,534.47 on January 18, 1910—are within the protection of that clause in the New York Stock Corporation Law which provides that no transfer shall be void in the hands of a purchaser for a valuable consideration without notice.

The amount of the decree entered against the defendants must be modified, so as to conform to this opinion as respects the above-mentioned payments, and is in all other respects affirmed.

It is so ordered.

GRANDISON v. NATIONAL BANK OF COMMERCE OF ROCHESTER.

In re O. L. GREGORY VINEGAR CO.

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

No. 142.

1. BANKRUPTCY ⟸159—PREFERENCES—RIGHT OF TRUSTEE.

A trustee in bankruptcy can recover property transferred when the debtor was insolvent, if the transfer was made within four months before the filing of the petition, or after the filing and before the adjudication, if the transfer enabled the creditor to obtain a greater percentage of his debt than other creditors of the same class, and the person who received it had reasonable cause to believe that it would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 262, 268–281; Dec. Dig. ⟸159.]

2. BANKRUPTCY ⟸163—PREFERENCES—"TRANSFER."

An assignment by an insolvent corporation to its president of accounts receivable as security for his indorsement of notes of the corporation, which accounts, when collected, were deposited in a separate fund and applied by the president to the payment of the notes indorsed by him, is a "transfer" by the corporation to the creditor, within the Bankruptcy Act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. ⟸163.

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

3. BANKRUPTCY ⟸303(3)—PREFERENCES—EVIDENCE—INSOLVENCY OF CREDITOR.

In a suit by the trustee in bankruptcy to recover payments alleged to have been preferences, evidence *held* to show that the bankrupt was insolvent at the time the payments were made, and that a statement, showing its assets to have exceeded its liabilities, placed an exaggerated value on its assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⟸303(3).]

4. BANKRUPTCY ⟸54—PREFERENCES—"INSOLVENT"—"FAIR VALUATION."

Under Bankr. Act July 1, 1898, c. 541, § 1, cl. 15, 30 Stat. 544 (Comp. St. 1913, § 9585), declaring that a person shall be deemed "insolvent" whenever the aggregate of his property, exclusive of that conveyed or concealed with intent to defraud creditors, shall not at a fair valuation be sufficient in amount to pay his debts, the "fair valuation" of the assets is the fair market value or the fair cash value of the property as between one who wants to sell and one who wants to buy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 84, 85; Dec. Dig. ⟸54.

For other definitions, see Words and Phrases, First and Second Series, Fair Value; Insolvent.]

5. BANKRUPTCY ⟸161(2)—PREFERENCES—TIME OF TRANSFER—ASSIGNMENT TO SECURE INDORSER.

Where a corporation, by a resolution adopted more than four months before the filing of a petition in bankruptcy against it, authorized the assignment of certain accounts receivable to its president to secure him for indorsing notes of the corporation to be given in renewal of other notes as they should fall due, but no such notes were indorsed by him until within the four months' period, it will be presumed that the assignment was made at the same time as the indorsement, so that the transfer of the

property, which was later applied by the president to the payment of the notes, could not be held to have taken place more than four months before the filing of the petition, under the state rule that, where an assignment of property is made for the protection of the surety, the courts will treat it as a trust for the benefit of the creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 263; Dec. Dig. ⊂⊃161(2).]

6. BANKRUPTCY ⊂⊃165(1)—PREFERENCES—EFFECT OF TRANSFER.

Where a creditor to whom transfers of property were made received full payment of its claims, while other general creditors received nothing, unless those transfers and certain others were set aside, there can be no question that the effect of the transfer was to give the transferee a greater percentage of its debt than was received by other creditors of the same class.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 260; Dec. Dig. ⊂⊃165(1).]

7. BANKRUPTCY ⊂⊃166(5)—PREFERENCES—KNOWLEDGE OF CREDITOR.

Where the president of a bank was one of the incorporators of the bankrupt corporation, and knew the cost of its real estate, on which the bank held a mortgage, knew that the indebtedness of the corporation had greatly increased, that it was producing no more, but merely selling off what it had produced the previous season, that drafts drawn by it had gone to protest, and that the bank was pressing the corporation for payment of the indebtedness due it, and was having accounts assigned to it in order to collect its notes, the bank had knowledge or reasonable cause to believe that a preference was intended by payments made to it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 258; Dec. Dig. ⊂⊃166(5).]

8. NOTICE ⊂⊃6—CONSTRUCTIVE NOTICE—FACTS PUTTING ON INQUIRY.

Notice of facts which would put a man of ordinary prudence on inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose.

[Ed. Note.—For other cases, see Notice, Cent. Dig. §§ 4–7; Dec. Dig. ⊂⊃6.]

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

Suit by Wilbur H. Grandison, as trustee of the estate of the O. L. Gregory Vinegar Company, bankrupt, against the National Bank of Commerce of Rochester. Decree for complainant (220 Fed. 981), and defendant appeals. Affirmed.

James M. E. O'Grady, of Rochester, N. Y., for appellant.

Thomas C. Burke, of Buffalo, N. Y. (Thomas C. Burke, Frank Gibbons, and Henry W. Pottle, all of Buffalo, N. Y., of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This suit is brought by a trustee in bankruptcy to recover certain sums of money which it is alleged the defendant received preferentially, and which it is therefore not entitled to retain as against the complainant. The facts in this case are in some respects similar to those in the case of Grandison v. Robertson, 231 Fed. 785, — C. C. A. —, decided at this term, although in certain particulars they are dissimilar. In both cases the same plaintiff

brings the suit as trustee of the same bankrupt corporation. In both cases the court below adjudged certain payments to have been preferential and void, and required defendants to pay over to the trustee the payments thus found to have been preferential and void.

The bankrupt, the O. L. Gregory Vinegar Company, was and is a stock corporation existing under the Business Corporations Law of the state of New York. It was organized to carry on the business of manufacturing cider and vinegar in the city of Tonawanda, N. Y. An involuntary petition in bankruptcy was filed against it on February 15, 1910, and on March 4, 1910, it was adjudged a bankrupt, and on March 28, 1910, the complainant was appointed trustee of its estate. The transactions out of which the preferences arose were as follows:

Subsequent to October 15, 1909, four months prior to the filing of the petition in bankruptcy, the bankrupt assigned to O. L. Alexander, its president, certain accounts receivable belonging to it, and thereafter the said Alexander collected on the assigned accounts certain moneys which he deposited with the defendant in an account known as the "O. L. Alexander Collateral Account." It is averred that defendant knew that the moneys so deposited were the proceeds of the assigned accounts, and that it also knew that the accounts had been assigned to Alexander by the bankrupt in pursuance of a certain resolution adopted on October 12, 1909, which resolved:

"That this company assign to the said O. L. Alexander as collateral security for the indorsements, as above stated, accounts receivable of this company and the proceeds thereof aggregating an amount not exceeding twenty thousand dollars ($20,000)."

The moneys received from these assigned accounts were deposited in defendant's bank in the manner above stated. The defendant credited the account with the amounts so received and debited it with the amounts taken from it to apply upon the notes made by the bankrupt and indorsed by Alexander and held by defendant. This was done pursuant to Alexander's direction. On January 12, 1910, defendant had received out of this account $10,950 and applied it on the bankrupt's indebtedness. On or about January 17, 1910, the bankrupt paid to defendant to apply on its indebtedness the farther sum of $4,266.90.

The claim is, as to this last sum, that the bankrupt had sold in bulk to Wallace & Co. on January 17, 1910, its entire stock of goods, wares, and merchandise with the knowledge and consent of defendant, and upon the understanding and agreement that defendant would discount the notes of Wallace & Co. and apply the same in payment of the notes of the bankrupt held by defendant, and that the arrangement was made for that purpose. The amount so received and applied by defendant, with interest thereon, aggregated $19,917.74, which, with costs, brought the amount up to $20,017.44, and judgment for that sum was entered.

The preferential payments were alleged in the bill of complaint to have been "in violation of the provisions of the laws of the state of New York and of the United States of America."

[1] A trustee in bankruptcy is entitled under the Bankruptcy Act to recover a transfer of property if the following circumstances concur: (1) That a "transfer" of the property of the debtor has taken place. (2) That the debtor at the time of the "transfer" was insolvent.

(3) That the transfer was made within four months before the filing of the petition in bankruptcy, or after the filing and before the adjudication. (4) The transfer must enable the creditor to obtain a greater percentage of his debt than other creditors of the same class. (5) The person receiving it must have had reasonable cause to believe that the enforcement of the transfer would effect a preference.

If the record discloses that in this case the defendant has received transfers from the bankrupt under the circumstances above stated, the trustee is entitled to his decree by virtue of the act of Congress, and without reference to the New York Stock Corporation Law. That act only becomes important as respects this case if it appears that the defendant, at the time it received the transfers, did not have reasonable cause to believe a preference would result, and that the bankrupt made the payments with the intention of giving a preference; for under the New York statute a preference is void if made with an intent to give a preference, without reference to the state of mind of the party who received the payment. A very large part of the argument and brief of the defendant's solicitor has been devoted to a consideration of the New York Stock Corporation Law (Consol. Laws N. Y. c. 59). He maintains that the trustee in bankruptcy cannot, under the circumstances of this case, maintain an action under the New York act. We see no reason for considering that act at all. In this case the facts come within the provisions of Bankr. Act, § 60 (Comp. St. 1913, § 9644), and the trustee is not under the necessity of relying upon section 67e (section 9651), which enables a trustee to reclaim transfers made by a bankrupt when the transfers are null and void as against creditors "by the laws of the state, territory, or district in which such property is situate."

[2] I. That a "transfer" of the property of the debtor was made is certain. That several transfers were made to Alexander, and through him to defendant, is not denied. It is not essential that the transfers should have been made directly to defendant. Any method of depleting an insolvent fund is sufficient. See Remington on Bankruptcy, § 1300. As stated in National Bank of Newport v. National Herkimer County Bank, 225 U. S. 178, 184, 32 Sup. Ct. 633, 635 (56 L. Ed. 1042) (1912):

"To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another, for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it."

And in the same case the court, speaking through Mr. Justice Hughes, said:

"The 'accounts receivable' of the debtor—that is, the amounts owing to him on open account—are, of course, as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference, whether he procures the payment to be made on his behalf by the debtor in the account, the same to constitute a payment in whole or part of the latter's debt, or he collects the amount and pays it over to his creditor directly. This implies that, in the former case,

the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent, and is simply complying with the directions of the latter in paying the money to his creditor."

[3, 4] II. That the debtor was insolvent when the transfers were made is well established upon the record. The Bankruptcy Act has not left to the courts to define the meaning of the term insolvent. But it expressly declares that:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Section 1, cl. 15.

To this definition the courts must strictly adhere. Counsel for defendant calls attention to a statement furnished by the bankrupt on September 1, 1909, which shows assets of $230,826.26 and liabilities exclusive of capital stock and profit of $100,803.46. Counsel, however, does not think this statement should be accepted at its face value, inasmuch as he insists that certain liabilities have been included which should have been excluded, and which would reduce the amount of liabilities to $76,208.06. We do not agree with him. The valuation placed upon land, buildings, and equipment, $109,380.00, was not "a fair valuation" of the property. When the bankrupt bought the property it made the purchase for $30,000. It paid $5,000 down and gave a mortgage for $25,000. This mortgage was afterwards assigned to defendant, the president of the defendant bank being one of the incorporators of the bankrupt. It is difficult to define what constitutes "fair valuation." It is much easier to say what is unfair valuation. In a case in the Southern district of New York in 1899, In re Martini, 93 Fed. 990, Judge Addison Brown thought that "fair valuation" was determined by the amount the property brought at a sale on execution shown to have been in all respects fair and reasonable. The debtor's stock in trade was sold under judgment and execution, and the court held that the debtor was bound by the result as to the valuation of the goods, and could not prove his solvency by higher estimates of their value if they had been free from levy and sold at retail, or in the ordinary course of business. In Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666 (1901), the Court of Appeals of the Third Circuit, speaking through Judge Gray, said:

"We think that the present market value of the property in question would be a fair valuation of the same, but there is nothing in this section of the act that authorizes that market value to be ascertained by what a purchaser would give who desired to take advantage of the necessities and embarrassments of the owner, in order to procure the same at a price less than its real or market value."

The term "fair valuation," as used in the Bankruptcy Act, means the fair cash value or the fair market value of the property as between one who wants to purchase and one who wants to sell the property. If the bankrupt had wanted to sell its property, the price it could have obtained for it upon the market from parties who wanted to buy and would give its fair value is the fair valuation which the

statute refers to. The price which the property would bring or does bring when forced off at auction under the hammer cannot be regarded as always fixing its fair market value. See Lawrence v. City of Boston, 119 Mass. 126 (1875).

On September 22, 1910, there was due and unpaid on the mortgage which the bankrupt had given on its plant $18,567.51. The mortgage was foreclosed, and on October 15, 1910, sold to defendant at the referee's sale for $14,000. In making up the bankrupt's schedule of assets the president of the bankrupt testified:

"We put our plant in at $25,000. We also placed in our schedule here the machinery, tanks, and equipment used in the conduct of the business at Tonawanda, N. Y., $5,000, so that the plant and equipment is in the bankruptcy schedules at $30,000; office furniture and fixtures are in at $500; that is what I thought the property would bring under a forced sale."

Bankrupts are not inclined to underestimate the value of the real estate they schedule. It appears that some time in 1908, before Alexander became connected with the bankrupt, a proposition was made to sell him the plant for $25,000. The purchase was not made, and apparently for the reason that Alexander could not borrow the money to pay for it. We are able to get some idea of the fair market value of the real estate from the testimony of the trustee. His testimony follows:

"I made an effort to sell the real estate and plant at Tonawanda. We obtained from the Board of City Despatch of New York a list of responsible cider and vinegar manufacturers in the United States; there were about 600 on the list, and we sent them advertisements of the property and when it was to be sold. The date fixed for the sale was June 24, 1910; the usual advertisement of that sale was given. We received no bids at the time of the sale; then I adjourned the sale in order to obtain private bids. I did not obtain any. The property was afterwards foreclosed by the defendant, so that I have at the present time converted into cash all the assets to the bankrupt."

The value of the accounts receivable entered on the statement of September 1, 1909, at $48,205.47, was much in excess of their real value. The testimony showed that in December, 1909, Alexander made a trip through the country to collect accounts. This he did upon the suggestion of the president of the defendant bank. Alexander testified:

"I found in collecting these accounts a great many of them shrunk a great deal. * * * The debtors disputed the accounts. In straightening up these accounts and collecting them, we made concessions; we simply had to settle on the basis of the man's understanding and agreement as to the manner in which they [the goods] were purchased."

And Swanton, in his testimony, referring to this attempt of Alexander to get in the accounts, said:

"I should say that the falling off in the amount of the accounts that were assigned to the bank directly, concerning which no question is raised here, was discovered on that trip of Mr. Alexander's to be somewhere between 30 and 40 per cent. I do not recall exactly what the gross amount in dollars of the losses amounted to. My recollection is that it was about $20,000."

There were several explanations given for this condition respecting the accounts. One was that in making sales Mr. Gregory, the for-

mer president, had agreed to allow certain discounts unknown to the home office; also that Gregory had agreed with the purchasers to furnish salesmen to push the goods in certain localities. This statement, therefore, made by the bankrupt as of September 1, 1909, cannot be accepted either as to the value of the real estate or as to the value of the accounts. The testimony shows that, whatever the accounts receivable may have been worth, such of them as were permitted to reach the hands of the trustee in bankruptcy amounted, along with his other receipts, to only $879.78. Of that amount $232 was realized from the sale of personalty; from "cash in drawer at plant" was realized 37 cents; from balance in bank was received $10.82. Common carriers paid back $166.50. There was a rebate on insurance of $128.25, and a returned premium of $6.72. The Merchants Despatch paid in $17.75 for damage to cider. All these several items aggregated $562.41. There are only three small items credited as having been received from "accounts," and they aggregate $79.47.

This is a very illuminating statement. Whatever may have been the value of the accounts receivable, that value had gone to this defendant and to the Robertsons. There was nothing left for the trustee, and nothing left for the general creditors, who had received nothing. The trustee testified that accounts which he had not collected he had found uncollectible. He said:

"Some of the reasons were that the goods were of no value, and there were misrepresentations as to the quality of the goods; the goods were received in broken casks and a large amount of leakage."

In view of the fact that after the payments made to defendants and the payments made to the Robertsons there still remains an indebtedness of $41,909.52, with nothing in the hands of the trustee except a balance of $144.18, which is not enough to defray the expenses of administration, we feel convinced, not only that the financial statement made by the bankrupt on September 1, 1909, did not place a fair valuation on the assets, but that it placed a much exaggerated value thereon. And we are also convinced that upon a fair valuation the assets were much below the total amount of the debts. In Grandison v. Robertson we said that this bankrupt was in our opinion insolvent from the time it began business in July, 1908. There is nothing in the present record which changes that conviction. But, however that may be, there certainly is no doubt that insolvency existed for four months prior to the filing of the petition in bankruptcy.

[5] III. This brings us to inquire whether the transfers sought to be recovered were made to defendant within the four-month period. That period began on October 15, 1909. It was subsequent to that date, as the trial court has correctly found, that the accounts were assigned by the bankrupt to Alexander. The proceeds of those accounts were paid into the Alexander collateral account between November 9, 1909, and February 14, 1910; and the defendant applied these proceeds to the payment of the bankrupt's indebtedness as follows: On January 12, 1910, $9,900; on February 14, 1910, $1,055.60; on March 2, 1910, $123.80; on March 11, 1910, $73.94; total, $11,153.34. But while the actual proceeds of these accounts were applied by the defendant

to the indebtedness of the bankrupt after October 15, 1909, the defendant insists that it obtained an equitable lien on the accounts on October 12, 1909, by the adoption of the resolution authorizing the assignment of the accounts. The resolution of October 12th authorized an assignment of the accounts to Alexander as collateral security for the indorsement of the renewals of certain notes to become due and discounted at defendant's bank. The claim is that whatever accounts were thereafter assigned in pursuance of this resolution to Alexander he took in trust for the defendant.

In Moses v. Murgatroyd, 1 Johns. Ch. (N. Y.) 119, 7 Am. Dec. 478 (1814), Chancellor Kent had before him a case where an assignment had been made "to be a security only to the intestate for his indorsement of the notes in question. "This being the case, the plaintiffs, as holders of the notes, are entitled," the Chancellor said, "to the benefit of this collateral security, given by their principal debtor to his surety; and the case of Maure v. Harrison, 1 Eq. Ab. 93, K, 5 Mich. 1692, is directly to this point. These collateral securities are, in fact, trusts created for the better protection of the debt; and it is the duty of this court to see that they fulfill the design. And whether the plaintiffs were apprised, at the time, of the creation of this security, is not material. The trust was created for their benefit, or for the better security of their debt, and when it came to their knowledge they were entitled to affirm the trust, and to enforce its performance. This was the principle assumed in the case of Neilson v. Blight, 1 Johns. Cas. [N. Y.] 205." And it is a settled rule in equity in New York that a creditor shall have the benefit of any collateral securities which the principal debtor has given to the surety for his indemnity. Such securities are regarded as trusts for the better security of the debt, and chancery will compel the execution of the trusts for the benefit of the creditor. Vail v. Foster, 4 N. Y. 312 (1850); National Bank of Newburgh v. Bigler, 83 N. Y. 51 (1880); Merchants', etc., Bank v. Cummings, 149 N. Y. 360, 44 N. E. 173 (1896). And the law of New York is the law of the states generally. See Brandt on Suretyship (3d Ed.) § 357 et seq.

We are, however, unable to agree with counsel for defendant that it is immaterial when the actual assignment of the accounts occurred, and that the individual assignments date back to the agreements for the assignment as embodied in the resolution of October 12, 1909, by which the bankrupt became bound to assign the accounts. As the adoption of that resolution antedated by three days the four-month period, the defendant, it is asserted, cannot be compelled now to return any of the proceeds realized from those accounts. The resolution was not an assignment of the accounts, but an authorization of an assignment, and the agreement was with Alexander. When Alexander indorsed the notes, he had a right in equity to have the accounts assigned. The exhibits in the case show that after the adoption of this resolution the defendant accepted on October 19, 1909, a renewal note of the bankrupt for the amount of $4,998.24, and on the same date a second renewal note for the amount of $6,450.26, and also on that date a third renewal note for the amount of $4,000, and that each of these

notes were indorsed by Alexander. In the absence of evidence to the contrary, it may be assumed that Alexander indorsed the notes at the time of their renewal, and not on October 12, 1909, when the resolution was passed. And there were no notes renewed after the adoption of the resolution prior to the notes above mentioned.

In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341 (1907), the Court of Appeals in the Eighth Circuit held that a transfer of property by an insolvent debtor within four months of a filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so made more than four months before the filing of the petition. The matter was very fully considered in that case. The court said:

"Any other course of decision opens a new and enticing way to secure preferences, nullifies every provision of the law to prevent them, and invites fraud and perjury. Hold that transfers within four months in performance of agreements to make them before that time do not constitute voidable preferences, and honest debtors would agree with their favored creditors before the four months that they would subsequently secure them by mortgages or transfers of their property, and just before the petitions in bankruptcy were filed they would perform their agreements. Dishonest men, who made no such contracts, might falsely testify that they had done so, and thus by fraud and perjury sustain preferential transfers and mortgages made within the four months to relatives or friends. The great body of the creditors would be left without share in the property of their debtor and without remedy, and a law conceived and enacted to secure a fair and equal distribution of the property of debtors among their creditors would fail to accomplish one of its chief objects. This court will hesitate long before it approves a rule so fatal to the most salutary provisions of the Bankruptcy Law."

And this court in Re Mandel, 135 Fed. 1021, 68 C. C. A. 546 (1905), had reached the same conclusion, affirming without opinion a decision to that effect in (D. C.) 127 Fed. 863 (1903). A like decision has been made by the Court of Appeals in the Fourth Circuit in Pollock v. Jones, 124 Fed. 163, 61 C. C. A. 555 (1903). In that case at the time the debt was incurred, the debtor promised to give a mortgage to secure it. The court held that the subsequent giving of the mortgage when the debtor was insolvent and within four months of his bankruptcy constituted a transfer of property to secure an antecedent debt and created a preference. In Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147 (1901), the debtor had given an irrevocable power of attorney to the creditor to confess judgment many years before. Judgment was confessed under it within four months, and the Supreme Court held it to be a voidable preference. There is therefore no escape from the conclusion that within the four-month period the defendant received from the assigned accounts $10,950 to apply on the bankrupt's indebtedness, and the farther sum of $4,266.90 from the proceeds of the discount of drafts and notes given for the merchandise of the bankrupt sold about January 17, 1910.

[6] IV. That the effect of the payments or transfers received by the defendant in the manner above stated and after October 15, 1909, enabled it to obtain a greater percentage of its debt than other creditors of the same class is so clearly established upon the record that

discussion of the matter is really unnecessary. The president of the defendant testified that its debt had been paid in full. "All the indebtedness," he said, "owing to the bank on notes or whatever indebtedness was owing by the O. L. Gregory Vinegar Company has been paid." The amount paid during four months prior to the filing of the petition has been already considered. It only remains to point out in this connection that with the exception of the Robertsons who conducted a private bank at Tonawanda the general creditors have received nothing and there remains an unpaid indebtedness of $41,909.52, with no assets whatever to discharge it, except such amounts as the trustee, in this suit and in the independent suit brought against the Robertsons, may recover from preferential payments.

[7] V. This brings us to inquire whether in receiving the payments defendant had reasonable cause to believe that they were intended to give a preference. The record discloses that the president of the defendant bank had an intimate knowledge of the bankrupt's affairs from the time it began business. The bankrupt did its banking with defendant. Its president knew that it bought its property for $30,000 and paid only $5,000 down. He knew that the mortgage remained unpaid, and that the indebtedness to the defendant was gradually increasing until on January 15, 1909, it amounted to $41,000. In September, 1909, the defendant declined to loan the bankrupt money to buy apples for the fall grinding. The president of the defendant bank knew that the bankrupt did no grinding that fall. He knew it was simply selling off the cider and vinegar that remained over from the previous season. All the time the defendant was pressing for the payment of its indebtedness and was having accounts assigned to it that they might be applied when collected on the debt. He knew also that drafts drawn by the bankrupt had gone to protest and were lying unpaid in his bank; and he knew that notes of the bankrupt were being protested and left to lie for days in his bank unattended to. If the defendant did not know of the insolvency, it certainly knew enough to put it upon inquiry.

[8] As the Court of Appeals for the Eighth Circuit said in Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99 (1907):

"Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose."

This was quoted approvingly in an opinion of this court written by Judge Coxe in Wright v. Skinner, 162 Fed. 315, 89 C. C. A. 23 (1908). See Pittsburgh Plate Glass Co. v. Edwards, 148 Fed. 377, 78 C. C. A. 191 (1906). No principle of law is better settled or more universally accepted.

We think that under all the circumstances of this case the conclusion is irresistible that defendant knew or had reasonable cause to know that in receiving the payments made to it between October 15, 1909, and February 15, 1910, it was receiving a preference. In Grandison v. Robertson we thought that the defendants in that case did not have reasonable cause to believe that a preference was intended or would result from the payments made to them. But the defendant in the

case at bar was very differently situated from the defendant in that case and knew much more intimately than did those defendants the entire situation concerning the bankrupt's affairs.

The defendant claims that it loaned the bankrupt $5,000 on November 6, 1909. Swanton testified that he loaned the bankrupt that amount on that date. The evidence stands uncontradicted, and indeed appears to be corroborated by certain documentary evidence. It appears, however, that a payment of $3,950 on the renewal note for this $5,000 was paid on January 12, 1910. That payment was made out of the proceeds of accounts assigned directly to defendant prior to the four-month period, and is not claimed as preferential, nor included in the decree as entered. The balance of the note, $1,050, was paid from the proceeds of accounts assigned to Alexander and is held to have been preferential. The defendant cannot set off this sum, or any part of it, against the amount the trustee is entitled to recover. Bankruptcy Act, § 60c (Comp. St. 1913, § 9644), provides:

"If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

To obtain the set-off under the above provision the credit must have been given in "good faith." If the purpose of advancing this $5,000 was to enable the bankrupt to convert juice into cider and vinegar and market the same, we cannot say that the loan was not made in good faith. The Supreme Court said in Kaufman v. Tredway, 195 U. S. 271, 275, 25 Sup. Ct. 33, 34, 49 L. Ed. 190 (1904), that the clause as to good faith "meant that the creditor should not act in such a way as to intentionally defeat the bankrupt act, but should let the debtor have the money or property for some honest purpose." The money was not given with a view to its secretion or for a dishonest purpose.

But the right to offset a new credit given in good faith is restricted to the amount of the new credit remaining unpaid at the time of the adjudication. See Remington on Bankruptcy (2d Ed.) § 1416. And at the time of the adjudication no part of this new credit as we have seen remained unpaid.

We do not find it necessary to pass upon other objections raised. We find no reversible error.

Decree affirmed.

UNITED STATES v. POLAND et al.

(Circuit Court of Appeals, Ninth Circuit. March 27, 1916.)

No. 2621.

1. PUBLIC LANDS ⇐35(2)—HOMESTEAD ENTRIES—AMOUNTS SUBJECT TO ENTRY—"SINGLE BODY."

Comp. Laws Alaska 1913, § 101 (Act Cong. March 3, 1903, c. 1002, 32 Stat. 1028 [Comp. St. 1913, § 5046]), provides that the provisions of the homestead laws not in conflict therewith are thereby extended to Alaska; that no indemnity, deficiency, or lieu land selections shall be made and

no land scrip or land warrant shall be located except as provided by law; that no more than 160 acres shall be entered in any single body by such scrip, soldier's additional homestead right, etc.; that no such location along any navigable or other waters shall be made within 80 rods of any lands along such waters theretofore located by means of any such scrip or otherwise; that no entry shall be allowed extending more than 160 rods along the shore of any navigable water, and along such shore a space of at least 80 rods shall be reserved from entry between all such claims; and that every qualified person shall be entitled to enter 320 acres or less of unappropriated public land. *Held*, that where a party entered 160 acres under one survey as assignee of a soldier's additional homestead right, and also entered under another survey an adjoining tract of about 160 acres as assignee of another soldier's additional homestead right, and only one of such tracts touched any navigable water, there was no violation of the provision that no more than 160 acres shall be entered in any "single body," as they were two separate and distinct entries and separate and distinct bodies of land under our system of land measurement, and they did not violate the statute, as the statute seeks to protect the shores of navigable waters and not to prohibit the entry of more than 160 acres and less than 320 acres elsewhere than along the shore.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 73; Dec. Dig. ⟸35(2).]

2. STATUTES ⟸16(1)—HOMESTEAD ACT—ENACTMENT—CONFERENCE—AMOUNTS SUBJECT TO ENTRY.

In view of the report of the House conference committee to the House of Representatives, the provision of Act Cong. March 3, 1903 (Comp. Laws Alaska 1913, § 101), that no more than 160 acres shall be entered in any single body by land scrip, soldier's additional homestead right, etc., added to the bill in conference, must be regarded as intended to be germane to the Senate amendment that no entry shall be allowed extending more than 160 rods along the shore of any navigable water, as it is a rule of parliamentary law that a conference committee is not authorized to consider matters neither incorporated in Senate amendments nor brought before the House unless germane to something in the bill.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 14; Dec. Dig. ⟸16(1).]

3. STATUTES ⟸217—AIDS TO CONSTRUCTION—HISTORY AND PASSAGE OF ACT.

In construing a statute, the court could refer to the proceedings in Congress at the time of its passage and the report of a conference committee by which a provision in controversy was added.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. ⟸217.]

4. PUBLIC LANDS ⟸35(2)—HOMESTEAD ENTRIES—STATUTORY PROVISIONS.

Act Cong. May 14, 1898, c. 299, § 1, 30 Stat. 409, providing relative to lands in Alaska that no entry shall be allowed extending more than 80 rods along the shore of any navigable water, and that along such shore a space of at least 80 rods shall be reserved from entry between all such claims, merely requires the reservation of at least 80 rods along the shore of the navigable water between claims along such shore, and does not require the reservation of such space between an entry on the shore of a navigable water and an adjoining entry however situated with respect to the navigable water.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 73; Dec. Dig. ⟸35(2).]

Rudkin, District Judge, dissenting.

Appeal from the District Court of the United States for the Third Division of the District of Alaska; Fred M. Brown, Judge.

Suit in equity by appellant, the United States (plaintiff in the court below), against William B. Poland and another, to cancel patent for certain lands, issued by the United States to William B. Poland, appellee; and to cancel deed from the latter to Frederick William Low, appellee, conveying the above-mentioned lands. Demurrer to complaint. Demurrer sustained, and bill dismissed. Decree affirmed.

William N. Spence, U. S. Atty., of Valdez, Alaska, and William A. Munly, Asst. U. S. Atty., of Valdez, Alaska.

S. O. Morford, of Seward, Alaska, and Ira Bronson, J. S. Robinson, and H. B. Jones, all of Seattle, Wash., for appellees.

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

MORROW, Circuit Judge. The United States brought suit in the court below on a date not disclosed in the transcript of record; but an amended complaint was filed October 15, 1914. The object of the suit is to vacate, cancel, and declare null and void a patent of the United States for a tract of land of 160 acres, embraced in United States survey No. 242, in the Kenai recording precinct in the district of Alaska. The patent was issued to one William B. Poland on March 22, 1909, and seems to be regular on its face in every particular. The complaint also prays that a deed executed by Poland, dated May 25, 1909, conveying the land to Frederick William Low, be vacated, canceled, and declared null and void. The amended complaint was not filed until the statute of limitations of six years (section 8 of Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099 [Comp. St. 1913, § 5114]) had nearly run.

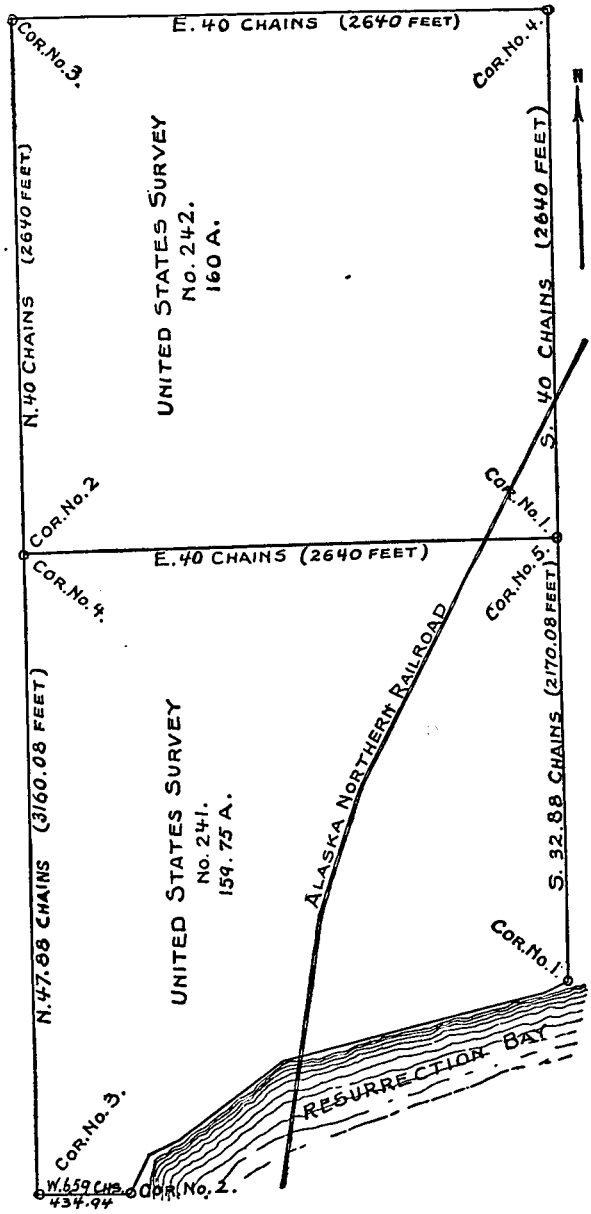
The defendant Poland entered the above-mentioned tract of land at the United States land office at Juneau, Alaska, on April 26, 1906, as the assignee of a certain soldier's additional homestead right, under the general homestead laws, and section 101 of the Compiled Laws of Alaska (Act of March 3, 1903, c. 1002, 32 Stat. 1028 [Comp. St. 1913, § 5046]).

On the same day Poland also made an entry at the land office at Juneau, as assignee of a soldier's additional homestead right, under the same acts of Congress as the previously described entry, of a tract of land containing 159.75 acres, embraced in United States survey No. 241. All this appeared upon the face of the record and must have been known to the officers of the Land Department at the date of the entries. Upon this survey and entry, a patent of the United States was issued to Poland on January 20, 1908. The tract of land described in survey No. 242 adjoins the tract of land described in survey No. 241 on the north.

In both the surveys and in the patents issued by the United States for these two tracts of land, their boundaries were described fully and accurately by monuments, courses, and distances. In survey No. 242 and in the patent issued upon that survey, the first call of the description is:

"Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, United States survey No. 241, an iron pipe three inches in diameter, marked S. 242, cor. No. 1."

The description concludes with the recital, "containing one hundred and sixty acres, being the land embraced within United States survey No. 242, according to the official plat of said survey returned to the general land office by the Surveyor General." The two tracts are shown on the annexed plat:



Nearly the entire length of the southern boundary of survey No. 241 follows the shore line of Resurrection Bay. Survey No. 242 does not touch Resurrection Bay or any other navigable water.

The vacation and cancellation of the patent dated March 22, 1909, issued upon survey No. 242, is sought upon the ground that the patent was obtained in violation of section 101 of the Compiled Statute Laws of Alaska (Act of March 3, 1903, 32 Stat. 1028), which provides that "no more than one hundred sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right"—referring to the soldier's additional homestead right under which entries Nos. 241 and 242 were made by the defendant Poland.

It is also contended that the patent was obtained in violation of the further provision of the statute:

> "That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims."

[1] With respect to the first alleged violation of the statute, it is contended that, although the patent issued upon survey No. 242 embraces but 160 acres, the patent issued upon survey No. 241 embraces 159.75 acres, and that the two together constitute an entry of more than 160 acres in a single body. The defendant Poland did not by his soldier's additional homestead right enter more than 160 acres of land in a single body under survey No. 242. Did he enter more by making the additional entry of the adjoining tract of 159.75 acres under survey No. 241? Technically, he did not. They were two separate and distinct entries and two separate and distinct bodies of land under our system of land measurement. But did he violate the intent and purpose of the statute by making the additional entry when the two together would exceed 160 acres? We think not. What the statute was seeking to protect was the shores of the navigable waters of Alaska, and not to prohibit the entry of a tract of land of more than 160 acres and not more than 320 acres elsewhere than along the shore.

This is plain from the provisions of the act relating to homesteads. Prior to this act, the homestead right was limited in Alaska to 80 acres. Section 1 of Act of May 14, 1898, c. 299, 30 Stat. 409. This area was found insufficient for homestead purposes in that district, and by this act (of March 3, 1903, 32 Stat. 1028) it was expressly increased to 320 acres, subject to the limitation that no entry should extend more than 160 rods along the shore of any navigable water. The term "single body" is not defined in the statute of March 3, 1903, nor by any previous statute; but it refers to acres of land, and must be held to refer to the bodies of acres of land dealt with in the statute. The statute deals with the entries of two bodies of land and qualifies them both; one of "one hundred and sixty rods along the shore of any navigable water," and the other a homestead of "three hundred and twenty acres." With respect to the first body: One hundred and sixty rods is one side of a quarter section of land inclosing 160 acres; that is to say, under our system of land measurement it is the determining measurement of one of four equal sides of 160 acres. The statute adopts this measurement as the descriptive limitation of 160

acres "along the shore of any navigable water." If, on the other hand, the body of land is elsewhere than along the shore of any navigable water, then the limitation of the entry is to an area of 320 acres under the other provision of the statute. It follows that the limitation as applied to these two bodies of land is in entire harmony with their location, and, whichever location we take, the entry or entries are within the limitations of the statute and not in conflict with it.

The next question is: Was the entry by Poland as assignee of two soldiers' additional homestead rights in violation of the statute?

The statute of March 3, 1903, extended all the privileges of the homestead laws of the United States, not in conflict with the provisions of the act, and all rights incident thereto, to the district of Alaska, subject to such regulations as might be made by the Secretary of the Interior. It further provided that no land scrip, nor land warrant of any kind whatsoever, should be located or exercised upon any lands in the said district, except as then provided by law.

The law at that time (Act of May 14, 1898, 30 Stat. 409) extended to the district of Alaska the right to enter surveyed or unsurveyed lands under the provisions of the law relating to the acquisition of title through soldiers' additional homestead rights, but limited each entry under that act to 80 rods along the shore of any navigable water and reserved along such shore a space of at least 80 rods between all such claims. It also limited every homestead in the district to 80 acres in extent. The act of August 30, 1890, c. 837 (26 Stat. 391), had provided that:

"No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws."

In Kiehlbauch v. Simero, 32 L. D. 418, the Secretary of the Interior had held that the limitation in this statute did not apply to an entry made by the assignee of a soldier's additional homestead right, and that such an entry might be made without reference to the assignee's entry of or claim to other lands under any statute whatever. This decision was referred to by the Assistant Secretary of the Interior in the case of William P. Wall, 38 L. D. 566, as declaring the law upon that subject. In Webster v. Luther, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. Ed. 179, it was held that persons entitled under section 2304 of the Revised Statutes (Comp. St. 1913, § 4592), to enter a homestead who may have theretofore entered under the homestead laws a quantity of land less than 160 acres, and who had the right under section 2306 (section 4594 [soldiers' additional homestead right]) to make an additional entry, may assign and transfer that right, and in the hands of an assignee it was without restriction as to quantity.

This was the state of the law at the time of the passage of the act of March 3, 1903, containing the provision "that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

[2] This provision was not contained in the original bill (H. R. No. 12098) as reported to the House on December 6, 1902 (Cong. Rec.

57th Cong., 2d Sess., p. 81). That bill amended section 1 of the act of May 14, 1898, by striking out "eighty" in the last line thereof and inserting "three hundred and twenty," making the statute to read "that no homestead shall exceed three hundred and twenty acres." This was all there was in the bill, and it passed the House in that form without any other change or amendment to the act of May 14, 1898.

In the Senate, the House bill was amended in certain particulars, among others an amendment taking out of the operation of the law the right to commute a homestead entry and the right to enter surveyed or unsurveyed lands under the provisions of the law relating to the acquisition of title through soldiers' additional homestead rights. There was also an amendment providing that no entry should be allowed extending more than 160 rods along the shore of any navigable water. This latter amendment was to take the place of the provision in the act of May 14, 1898, providing that no entry should be allowed extending more than 80 rods along the shore of any navigable water.

The House provision, enlarging the homestead entry from 80 acres to 320 acres in extent, was retained in the bill. The provision that "no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right" was not added in the Senate; in other words, this provision was not in the bill when it was returned to the House for concurrence.

In the House, the Senate amendments were nonconcurred in, and a committee of conference was requested upon the disagreeing votes of the two Houses. A committee of conference was appointed. The provision was not in the bill when the bill was sent to conference. The conference committee reached an agreement and so reported to the two Houses. In this report appears for the first time the provision "that no more than 160 acres shall be entered in a single body."

It is a rule of parliamentary law that a committee of conference is not authorized to consider matters which had neither been incorporated in Senate amendments nor brought before the House, unless germane to something in the bill. Hinds' Parliamentary Precedents, §§ 1414–1417. It will be presumed that the conference report was in accordance with parliamentary law.

Mr. Lacey, chairman of the House conference committee, in his report to the House concerning the amendments, said:

"This is what has been known as the Alaska homestead bill. The proposition is to give homesteads in that country to the extent of 320 acres. The principal matter of difference between the House and the Senate conferees was upon the question of commutation and the use of scrip in Alaska. Upon the question of the use of scrip the agreement leaves these matters substantially as they are now, excepting to make the law clear that scrip shall not be located upon streams in such a way as to make a continuous location, but that a quarter of a mile between any two locations will be reserved. There can be no monopoly of the shores of the water courses. As to commutation, it provides that there may be commutation on a quarter section, but not on the whole amount of 320 acres."

In reply to questions propounded by members of the House, Mr. Lacey said:

"Mr. Speaker, as the bill left the House it was 320 acres. As agreed on now, it is 320 acres. As to commutation, the amount to be commuted is limited to 160 acres."

Mr. Stephens of Texas: "Mr. Speaker, the question I would like to ask is whether or not it changes the law with reference to settlements on these lands?"

Mr. Lacey: "Not at all. It leaves the law the same as it is in other parts of the United States." Congressional Record, 57th Cong., 2d Sess., pp. 2859, 2860.

[3] This reference to the proceedings in Congress in the passage of the act of March 3, 1903, and the report of the conference committee is justified by similar references made by the Supreme Court in Holy Trinity Church v. United States, 143 U. S. 457, 464, 12 Sup. Ct. 511, 36 L. Ed. 226; Binns v. United States, 194 U. S. 486, 495, 24 Sup. Ct. 816, 46 L. Ed. 1087; Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320, 333, 29 Sup. Ct. 671, 53 L. Ed. 1013; Northern Pacific v. Washington, 222 U. S. 370, 380, 32 Sup. Ct. 160, 56 L. Ed. 237; McLean v. United States, 226 U. S. 374, 380, 33 Sup. Ct. 122, 57 L. Ed. 260.

In the light of the report of the committee of conference, we must hold that the limitation that "no more than one hundred and sixty acres shall be entered in a single body" was germane to the Senate amendment that "no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water," and that it was so intended.

[4] It is contended, further, that the Act of May 14, 1898 (30 Stat. 409) provides, in section 1:

"That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims."

Survey No. 242 does not extend along the shore of any navigable water 80 rods, or any distance, or at all. It does not touch any navigable water, and what we have said concerning the first objection to the entry is applicable to this objection. The provision, that "along such shore a space of at least eighty rods shall be reserved from entry between all such claims," means plainly that a space of at least 80 rods shall be reserved from entry along the shore of the navigable water between claims along such shore. It cannot mean that there shall be reserved a space of 80 rods from any other entry, however situated; such construction would be obviously contrary to the intent and purpose of the statute and inadmissible. We are of the opinion that the complaint did not state a cause of action.

The decree of the court below is therefore affirmed.

RUDKIN, District Judge (dissenting). As will appear from the plat attached to the majority opinion, the appellee Poland has entered and acquired title to approximately 320 acres of land in the district of Alaska, in a single body, by soldier's additional homestead right. It occurs to me that this was a plain and palpable violation of the Act of March 3, 1903 (32 Stat. 1028), extending the homestead laws of the United States to the district of Alaska, and providing, among other things, that:

"No more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

A brief reference to the legislative history of this right and to the decisions of the department thereunder will throw some light on the object of the proviso in question. Section 2304 of the Revised Statutes (Comp. St. 1913, § 4592) provides that every private soldier and officer who served in the army of the United States during the Rebellion for 90 days, and who was honorably discharged, and has remained loyal to the government, shall be entitled to enter and receive patents for a quantity of public lands not exceeding 160 acres on certain terms and conditions not material here. Section 2306 (section 4594) provides:

"Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

In Webster v. Luther, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. Ed. 179, it was held that this additional right was transferable without restriction.

In the case of Ole B. Olsen, 33 Land Dec. 225, it was held that the assignee of two or more soldiers' additional homestead rights may locate them as one right upon the same tract of land, provided they equal in the aggregate the amount of land so located.

In the case of Kiehlbauch v. Simero, 32 Land Dec. 418, it was held that the quantity of land which an assignee of a soldier's additional right may enter is not restricted by the Act of August 30, 1890, c. 837 (26 Stat. 391), providing that:

"No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act."

Or by the Act of March 3, 1891, c. 561 (26 Stat. 1101), providing that the act of August 30, 1890, supra, "shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under mineral land laws."

By letter of instructions from the Secretary of the Interior to the Commissioner of the General Land Office under date of June 29, 1905 (33 Land Dec. 606), the same view is again asserted.

The Act of May 14, 1898, entitled "An Act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes" (30 Stat. 409), provides that:

"The homestead * * * laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said district of Alaska shall be located within or taken

from lands in said district. Provided, that no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims, and that nothing herein contained shall be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said district. And it is further provided, that no homestead shall exceed eighty acres in extent."

By letter of instructions from the Secretary of the Interior to the Commissioner of the General Land Office under date of December 4, 1902 (31 Land Dec. 442), it was declared that this proviso did not limit the number of entries that might be made by an assignee of several additional soldier's rights under section 2306 of the Revised Statutes (Comp. St. 1913, § 4594). The letter in question reads as follows:

"This department is in receipt of your letter of November 21, 1902, requesting instructions as to whether or not the last proviso to section 1 of the Act of May 14, 1898 (30 Stat. 409), places a limitation upon the right of the assignee of a soldier's additional right of homestead entry under section 2306 of the Revised Statutes, so as to prevent the assignee of several of such additional rights from making several entries of eighty acres each thereunder of public lands in the district of Alaska. Said proviso is as follows: 'And it is further provided that no homestead shall exceed eighty acres in extent.'

"You express the opinion that the number of entries that may be made by an assignee is not limited by the terms of this proviso, and in this conclusion the department concurs. The limitation is placed upon the acreage that may be included in a single homestead entry, and cannot apply to an assignee who in the exercise of the additional right does not seek to take in any one entry more than eighty acres."

These instructions were followed in a very few months by the Act of March 3, 1903 (32 Stat. 1028), containing the proviso above quoted "that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

From the foregoing it will be seen that prior to the passage of the act of March 3, 1903, there was (a) no limitation on the quantity of land an assignee of soldiers' additional homestead rights might acquire in the district of Alaska, and (b) no limitation on the quantity of land that might be embraced in a single application or location, provided the assigned rights equaled in the aggregate the quantity of land located upon. The appellee, Poland made two applications for approximately 320 acres of land in a single body on the same day, as assignee of four separate soldiers' additional homestead rights, and has received patents therefor. There in no reason why the four rights might not have been embraced in a single application or location, and had they been the violation of the statute would be too obvious to admit of question. The statutory prohibition is against acquiring more than 160 acres in a single body by soldier's additional homestead right, not merely a prohibition against acquiring more than 160 acres in a single application or under a single location. Could then the appellee, by making two applications or locations instead of one, and by drawing an imaginary line between the two surveys, thwart the will of Congress and defeat its declared policy? The question suggests its own answer. I see no connection between the proviso that no more than 160 acres of land shall be entered in any single body and the further pro-

viso that no entry shall be allowed, extending more than 160 rods along the shore of any navigable water. The former proviso is complete in itself and speaks for itself. It first appeared in the amendment of 1903 and was intended to accomplish some purpose. How it got there is not material. Suffice it to say it is the law of the land. The purpose of the amendment, however, is disclosed in the legislative history of the act set forth in the majority opinion. The Senate favored the abrogation of the additional homestead right entirely in the district of Alaska; but as a matter of compromise, no doubt, the right was retained, limited, however, to the right to acquire 160 acres in any single body. As already stated, if this legislation only compels the assignee of such rights to so marshal them that not more than 160 acres will be included in a single application or entry, the act accomplishes no useful purpose. The manifest object was to prohibit the acquisition of large bodies of land in the district of Alaska under soldiers' additional homestead rights, and if the majority opinion prevails that object can readily be defeated. I am also of opinion that the affidavit to the effect that survey No. 242 "is more than eighty rods distant from any other survey or entry under the provisions of said act of May 14, 1898," was false whether intentionally so or not; but, if not false, the second patent issued through a manifest mistake which is equally within the corrective power of a court of equity.

The decree should be reversed.

NEW YORK & PORTO RICO S. S. CO. v. GUANICA CENTRALE.

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

No. 60.

1. TRIAL ⟸260(9)—ACTIONS FOR BREACH OF CONTRACT—INSTRUCTIONS.

After defendant's steamship had sailed for Porto Rico with a cargo for a number of ports, the first of which named on her cargo report was San Juan, and the last Guanica, about 12 hours' sail from San Juan, quarantine regulations to prevent the spread of bubonic plague were promulgated, under which steamers docking at San Juan were prohibited from going alongside a dock at any other port. Though the San Juan cargo could have been lightered, while there were no lighters at Guanica, and though the vessel might have been stopped, and sent to Guanica and other ports before docking at San Juan, it docked at San Juan, and thus made it necessary to discontinue its voyage to Guanica. In an action for failing to deliver the cargo destined to Guanica, the court charged that defendant was not liable if it did what the ordinarily prudent man would have done, considering the facts presented to its captain and agent, and that the jury should consider whether a part of the cargo was entitled to greater consideration than any other part, and left it to them to determine whether it acted with reasonable prudence for the interests of all concerned. *Held* that, the court having fully and fairly presented the case to the jury, it was not error to refuse to charge that the consignee at San Juan was entitled to immediate delivery at the dock, and that, unless it was reasonably apparent that reasonable prudence for the interests of all concerned required such course, defendant would have no right to proceed first to Guanica, nor to discharge the San Juan cargo by lighters.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 658; Dec. Dig. ⟸ 260(9).]

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2. NEGLIGENCE ⟸136(2)—QUESTIONS OF LAW OR FACT.
Negligence is a question of law and fact; the question whether a particular act has been performed or omitted being one of fact, and the question whether its performance or omission was a breach of a legal duty one of law.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 279, 281; Dec. Dig. ⟸136(2).]

3. NEGLIGENCE ⟸1—NATURE AND ELEMENTS.
"Negligence" is the failure to perform some act required by law.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. ⟸1.
For other definitions, see Words and Phrases, First and Second Series, Negligence.]

4. SHIPPING ⟸115—DUTY OF CARRIER TO SHIPPER.
The duty of a steamship carrier having a cargo destined for various ports in Porto Rico, at one of which ports bubonic plague existed making quarantine regulations necessary, was a duty to all of the shippers, and an action by one of the shippers for failure to deliver its cargo at destination could not be disposed of as though its goods were the only goods on board, and the extent of the carrier's duty to it was to be determined by a consideration of all the surrounding circumstances.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. ⟸115.]

5. NEGLIGENCE ⟸136(2)—QUESTIONS OF LAW OR FACT.
The question of negligence must be submitted to the jury as one of fact, not only where there is room for a difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such a difference as to the inferences which might fairly be drawn from conceded facts.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 279, 281; Dec. Dig. ⟸136(2).]

6. SHIPPING ⟸115—ACTIONS FOR BREACH OF CONTRACT—QUESTIONS FOR JURY.
In an action against a steamship carrier for failure to deliver a cargo destined to Guanica, Porto Rico, due to the fact that, after docking at San Juan, quarantine regulations prohibited the steamer from docking at Guanica, evidence *held* to make a question for the jury as to whether defendant was negligent in docking at San Juan, instead of first sending the steamer to other ports, or lightering the San Juan cargo.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec Dig. ⟸115.]

7. APPEAL AND ERROR ⟸999(3)—REVIEW—QUESTIONS OF FACT.
Where the question of defendant's negligence was one which could properly be submitted to the jury, the jury's conclusion that defendant was negligent could not be reviewed.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923, 3924; Dec. Dig. ⟸999(3).]

8. SHIPPING ⟸115—ACTIONS FOR BREACH OF CONTRACT—BURDEN OF PROOF.
A steamship company, failing to deliver a cargo as agreed, had the burden of justifying its failure to perform the contract.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. ⟸115.]

9. SHIPPING ⟸115—CARRIER OF GOODS—BREACH OF CONTRACT—EXCUSES.
That quarantine regulations in force in Porto Rico under which a steamer, after docking at San Juan, would not be permitted to dock at any other port, did not excuse the failure of a steamship company to deliver a cargo at Guanica, if in the exercise of ordinary prudence quaran-

tine could have been avoided, as by lightering the San Juan cargo, or proceeding to other Porto Rican ports before unloading the San Juan cargo; and when the company, with full knowledge through its agent of the circumstances, permitted the vessel to dock at San Juan, it assumed the risk of the damages which would result if a jury should find that its conduct was negligent.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. ⟸115.]

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

Action by the Guanica Centrale against the New York & Porto Rico Steamship Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Burlingham, Montgomery & Beecher, of New York City (Norman B. Beecher and Roscoe H. Hupper, both of New York City, of counsel), for plaintiff in error.

Rounds, Hatch, Dillingham & Debevoise, of New York City (Edward S. Paine and John Fine, both of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This action has been brought to recover damages in the sum of $35,023.41 because of the failure of the plaintiff in error, hereinafter called defendant, to perform its contract as a common carrier and safely transport from New Orleans, La., to Guanica, Porto Rico, and there deliver to defendant in error, hereinafter called plaintiff, certain merchandise. The merchandise consisted of 5,373 bags of fertilizer known as sulphate of ammonia, together with two parcels of other freight. The plaintiff obtained a verdict in its favor and judgment was entered in the sum of $2,517.06.

The defendant is a steamship company organized under the laws of the state of Maine and it owns vessels plying between the United States and Porto Rico. Its steamship, Pathfinder, sailed from New Orleans for Porto Rico on June 18, 1912. It carried a cargo of 2,378 tons, of which 543 tons consisted of bags of fertilizer. Its cargo was destined for 10 Porto Rico ports, the first of which named on her cargo report was San Juan and the last of which was Guanica. San Juan is on the north side of the island and Guanica is on the south side, the two ports being about 12 hours' sail apart. The defendant's principal office in the island was maintained at San Juan, where its chief representative and superintendent on the island resided.

The bubonic plague was currently reported as existing at San Juan on June 15, 1912, and on June 19th its existence in the city was officially announced. On that day the representatives of the steamship companies in San Juan were called to the quarantine office by the chief quarantine officer for Porto Rico, who was stationed in San Juan, and the requirements of quarantine were explained to them. A representative of the defendant was at the meeting. On June 23, 1912, a quarantine was declared by the Marine Hospital Service of the government, and

an official circular was issued, which formally notified the steamship companies that a quarantine was in effect. A copy of this circular was sent to defendant, who probably received it on the next day. The circular read as follows:

"The following are the general regulations for water traffic between San Juan and other Porto Rico ports:

"These regulations are intended to be general and the quarantine officer at each port must use his best judgment in the management of individual cases.

"The precautions will be directed entirely against the introduction of rats from San Juan. Vessels will be fumigated for rats at San Juan when empty, and loading will be done by lighters or under sufficient precautions at wharf.

"At other ports discharge of freight may be allowed by lighters only, and crews of such vessels as have fumigation certificates not over two weeks old may be allowed on shore after passing inspection. Passengers may go ashore after passing inspection and may go aboard without inspection. The only absolute rule is that no vessel in San Juan trade is allowed at any wharf.

"You will do everything possible to expedite business, remembering that restrictions are against rats almost entirely."

In explanation of the circular it is necessary to refer to the method by which bubonic plague is transmitted. It appears that the source from which it is transmitted to human beings is the rodent family, of which the commonest species is the ordinary rat. Rats have fleas, and when a rat becomes infected and dies the fleas seek other means of support. If an infected flea comes in contact with a human being, the disease may be transmitted. Inasmuch as fleas do not leave the rat until the rat is dead, the question of preventing the spread of bubonic plague becomes a question of preventing the transfer of rats from a place where the disease exists to a place where it does not exist. Rats are fond of ships, and if an opportunity to board a vessel presents itself they are disposed to take advantage of it, and frequently do so. The quarantine regulations accordingly provided for the immediate quarantine of any vessel which had been alongside a dock in San Juan, even though she had not taken on any cargo there. On the other hand, if a vessel did not come in contact with the wharf, but remained more than a rat-jump away from it, there was no danger that she would carry infection to other places and no necessity for her being quarantined. For these reasons vessels which had docked at San Juan were prohibited from thereafter going alongside a dock at any other port, and vessels which had not docked at San Juan, but had lightered their cargo, could dock at other ports in the island.

The steamship Pathfinder, with plaintiff's consignment on board, arrived in the harbor of San Juan on June 25, 1912, between 7 and 8 o'clock in the morning. The defendant's superintendent was on the dock as the vessel came up the harbor, and first saw her when she was coming inside the bay about 15 minutes before she docked. He knew she had cargo on board for Guanica, and although he could have signaled her to stop before coming alongside the dock, he failed to do so. He testified that he had received the circular; that it was no surprise to him; that he read it at the time, but did not notice the sentence in it that said, "The only absolute rule is that no vessel in San Juan trade is allowed at any wharf;" that he did not notice that until the captain

of the Pathfinder told him that he had heard the Pathfinder would not be able to discharge at Guanica wharf; that the movements of the Pathfinder were under his control, and if he had directed her to stay out in the bay, instead of docking, she would have done so.

On June 24th, the day before the ship's arrival, one of the plaintiff's lawyers had consulted the surgeon in command of the public health department in Porto Rico, and found that no vessel that docked at San Juan could thereafter dock at any other port in the island, but would be obliged to discharge cargo elsewhere around the island by lighters, unless she discharged her cargo at San Juan by lighters without docking there. He thereupon on the same day conferred with defendant's superintendent for Porto Rico and discussed the situation with him, explaining to him that it would be practically impossible to discharge cargo at Guanica by lighters, inasmuch as there were no lighters at that port, and that it would be a matter of considerable expense as well as difficulty to procure lighters from either Ponce or Mayagnez, the nearest ports where lighters were used. Ponce is about 30 miles, and Mayagnez from 45 to 55 miles, from Guanica. There is a deep-water dock at Guanica, and the port on that account supported no lighters. The defendant's representative was therefore asked to arrange to have the Pathfinder dock at Guanica before docking at San Juan. But he refused his assent. The testimony showed that there were a number of lighters at San Juan.

The Pathfinder docked at San Juan. This made it necessary to discontinue the voyage to Guanica, and the whole cargo of fertilizer was put ashore at San Juan and stored for the account and risk of the plaintiff.

1. The defendant's superintendent might have stopped the Pathfinder far enough from the dock to have made it impossible for a rat to jump aboard, and then lightered the San Juan cargo, and the vessel could then have continued on her voyage.

2. Or he might have stopped the vessel before she docked, and sent her to Guanica and other island ports first, and then returned to San Juan and docked.

3. Or he might have done what he did do, dock the vessel, and thereby make it impossible for her to proceed farther on her voyage.

He chose to adopt the last course. This enabled him to deliver the San Juan cargo, amounting, as has been stated, to 843 tons out of a total of 2,378 tons she had on board and was to have delivered at other Porto Rico ports.

There is no question but that it is a carrier's duty and obligation to make delivery, in accordance with its contracts, of goods which have been delivered for shipment and accepted, unless delivery is prevented by an act of God, or of the public enemy, or by some cause against which it has protected itself by stipulation in the bill of lading. In the case at bar the contract was not performed, and the defense interposed is that stipulated for in the bill of lading, the quarantine regulation which prevented the ship from leaving San Juan.

The District Judge in his charge called the attention of the jury to the provision in the bill of lading, "That if the ship is prevented by

quarantine from reaching her destination or making due delivery of the goods, or is detained at quarantine," the goods could be discharged, etc., and pointed out that that was the defense upon which the defendant rested. He then instructed the jury that if the steamship company, by its master or its agent, negligently allowed the ship to run into quarantine, the defendant could not avail himself of that defense, and said:

"The plaintiff had a right to have the steamship company deliver its goods at the point of destination, but that if the steamer ran into quarantine the law imposed upon the master or its agent or the agent of the company at San Juan, the duty of exercising ordinary care, that is, that care which an ordinarily prudent person would exercise under all the conditions as they then and there existed at the time. And if you find—this is your only question—that the steamship company did what the ordinarily prudent man would do, considering all of the facts as they were then presented to the captain and to the agent of the steamship company, if they then exercised the ordinary care of an ordinarily prudent person, then of course the plaintiff could not recover. But if on the other hand you should find from all of this evidence, analyzing it, considering the motives and drawing fair conclusions from it, that the agent at Porto Rico did not exercise ordinary care, that is, that care which an ordinarily prudent person would exercise, in the day and time of it, cognizant of all the conditions—that if he did not exercise that ordinary care then the defendant is liable."

He charged:

"It is in evidence as to the question of which cargo was entitled to greater consideration. If there was a part of that cargo entitled to greater consideration than any other part, that is a fact or circumstance to be taken into consideration. The question of being able to lighter it at Ponce has been raised; you will take that into consideration. The general character of the cargo destined for all the ports should be taken into consideration. I make this point as impressive as I can to you, that it is not proper for you to determine, gentlemen, in the light of past events, as to what a person should have done then and there, but you are to decide what they should have done as the conditions then and there presented themselves to this defendant, and of course acting by its agents."

He charged:

"If you find that the defendant's representative at San Juan could, by the exercise of reasonable diligence or care, have prevented the steamship Pathfinder from docking at San Juan and could have directed the master to proceed to other ports on the island, including Guanica, and discharge at docks there, before docking at San Juan, and that this was reasonable under all the conditions and circumstances as they then presented themselves to the defendant's agent, this would be a fact or circumstance for you to take into consideration in determining the question as to whether they then and there acted negligently."

He charged:

"The defendant must act with reasonable prudence for the interest of all concerned. It must endeavor to hold the balance between ship and cargo and between the cargo owners at different ports when their interests conflict. The existence of the quarantine in Porto Rico constitutes a complete defense to any claim by reason of nondelivery at Guanica, unless the defendant failed to exercise reasonable prudence for the interests of all concerned in docking the Pathfinder at San Juan."

He charged:

"Unless you find that the situation as it then appeared when the Pathfinder arrived at San Juan was such as not to warrant the defendant in concluding

reasonably that it was for the interest of all concerned under the conditions then and there presented, that the San Juan cargo be discharged at the San Juan dock, you must find for the defendant."

He charged:

"In considering whether the defendant acted with reasonable prudence for the interest of all concerned, you are to consider the situation then existing as to lighterage at Ponce, the cost of lightering at San Juan and the added risks therefrom, the character of the cargoes, the added cost and delay that would have resulted if the Pathfinder had proceeded to Guanica first, the quantity and character of the freight consigned to the two places, and all the facts which would affect it, and consider these in determining that same question of whether the defendant acted then and there as an ordinarily prudent man would have done under the conditions."

[1] The following request to charge was refused:

"The consignees at San Juan were entitled to demand immediate delivery at the dock of their goods, and unless upon the Pathfinder's arrival at San Juan it was reasonably apparent that reasonable prudence for the interests of all concerned required such a course the defendant would have had no right to proceed first to Guanica and there discharge the fertilizer, nor to discharge the San Juan cargo by lighters."

The refusal of this request was justified. The court had fully and fairly presented the case to the jury, and the refusal to give this particular request would not justify this court in sending the case back for a new trial.

[2-4] Negligence is a question of law and fact. It arises from a failure to perform a legal duty, and it includes two questions: First, whether a particular act has been performed or omitted. Second, whether the performance or omission of this act was a breach of a legal duty. The first question is one of fact. The second is one of law. "The law determines the duty; the evidence shows whether the duty was performed." Nolan v. New York, N. H. & H. R. R. Co., 53 Conn. 461, 471, 4 Atl. 106 (1885). So that negligence is the failure to perform some act required by law. The duty in this case was to make delivery of the cargo to this plaintiff at Guanica. A similar obligation, however, rested on defendant to deliver a portion of the cargo to consignees at San Juan and portions to consignees at other ports. The consignees at San Juan were as much entitled to receive their cargo at San Juan as plaintiff was to receive its at Guanica. The duty resting on the carrier was a duty to all the shippers and the case cannot be disposed of as though the plaintiff's goods were the only goods on board. As said by Judge Addison Brown in The Bohemia (D. C.) 38 Fed. 756 (1889), "The rights of each and all must be considered." The extent of defendant's duty must be determined by a consideration of all the surrounding circumstances, and the court so charged.

[5] The rule on the subject of negligence is stated in Shearman & Redfield on Negligence, § 54, as follows:

"The question of negligence must be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such a difference as to the inferences which might fairly be drawn from conceded facts. Where this is the case the issue must go to the jury, no matter what may be the opinion of the court as to the value of the evidence, or the credibility of the witnesses."

[6] We think that this is a correct statement of the rule, and that in accordance therewith the District Judge left it properly to the jury to determine whether the defendant was or was not negligent in the course it pursued.

[7] The jury by its verdict has found that the defendant was negligent in the course it adopted, and as the question of defendant's negligence was one which could properly be submitted to the jury, we cannot review the conclusion which the jury reached.

[8, 9] The defendant had agreed to deliver plaintiff's cargo at Guanica. It did not do so, and the burden of justifying its failure to perform the contract rested upon it. The fact of quarantine did not excuse the failure to perform, if in the exercise of ordinary prudence quarantine could have been avoided. The defendant's agent could have stopped the ship before she docked, and the San Juan cargo might have been lightered and at comparatively small expense, which might well have been assumed under the circumstances. Or the vessel might have proceeded directly to Guanica, a few hours distant, unloaded the cargo for that port, and then returned with the remaining cargo to Porto Rico. When defendant, with full knowledge, through its agent, of the circumstances, permitted the vessel to dock, knowing that the moment she did so she would be quarantined, it assumed the risk of the damages which would result if a jury should find that its conduct was negligent.

Judgment affirmed.

DANIEL v. ELECTRIC HOSE & RUBBER CO. *

(Circuit Court of Appeals, Third Circuit. January 27, 1916. On Petition for Reargument, April 14, 1916.)

No. 2053.

TRADE-MARKS AND TRADE-NAMES ⇐11—FORM OF ARTICLE—EFFECT OF EXPIRED PATENT.

Where a corrugated rubber hose as a new article of manufacture was patented in 1872, and it was shown that the corrugations were useful and functional, on the expiration of the patent the right to make such hose became common to all, and no one manufacturer, by making hose with corrugations for any length of time, could convert the article itself into a trade-mark, and thereby acquire the exclusive right to make it in perpetuity.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 15; Dec. Dig. ⇐11.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in equity by the Electric Hose & Rubber Company against Charles A. Daniel, individually and trading as the Quaker City Rubber Company. Decree for complainant, and defendant appeals. Reversed.

The following is the opinion of Thompson, District Judge, on final hearing:

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

* Rehearing denied.

The plaintiff, Electric Hose & Rubber Company, is engaged in the business of the manufacture and sale of rubber hose as the successor of the Chicago Electric Wire Company, to which on August 3, 1897, letters patent No. 587,545 were issued as assignee of Henry B. Cobb, inventor of a method of manufacturing rubber hose in long lengths, consisting in forming, about a tube of alternate layers of rubber and fabric, an inelastic mold within which the product was vulcanized and the mold then removed. The Chicago Electric Wire Company assigned all its right to the manufacture and sale of hose to the Chicago Electric Hose Company, which is the plaintiff herein, its name having been changed, by amendment to its charter, to Electric Hose & Rubber Company. To distinguish the hose invented by Cobb, the Chicago Electric Wire Company adopted a device consisting of external longitudinal corrugations, and that device, as a distinguishing mark of hose made under the Cobb invention, was continued down to the filing of the bill on December 2, 1913. The hose so marked by corrugations was known to the trade as "Electric" hose, and from 1897 until some time in 1907 was exclusively made and sold by the plaintiff and its predecessors. The defendant up to 1912 was a customer of the plaintiff, and purchased for his trade the plaintiff's "Electric" hose having the external longitudinal corrugations; also hose manufactured by the plaintiff with a smooth exterior surface. The plaintiff manufactured and sold its corrugated hose exclusively under its own name, but manufactured the smooth hose for the defendant and others and sold it to them with their respective names impressed upon it.

Marking the hose by longitudinal corrugations was not an element of the Cobb patent. It was recognized generally by the trade and public as an attractive feature in the appearance of the hose and as a distinguishing mark of the so-called "Electric" hose. The corrugated hose had obtained a wide popularity and was successfully sold to the trade and to the public. During the period from 1907 down to the filing of the bill, several competitors of the plaintiff produced hose with corrugated marking, but, upon demand by the plaintiff, adopted spiral or longitudinal bands or other distinguishing features with the manufacturer's name at close intervals, in order that the hose might not be mistaken for that of the plaintiff.

The defendant had unsuccessfully endeavored for a number of years to obtain from the plaintiff corrugated hose with the defendant's trade-name upon it. Thereupon the defendant, finding that there was a large demand for the corrugated hose, obtained through his employé, Frank R. Neff, a patent, as assignee of Neff, having the following claim: "A hose comprising an outer covering of rubber having longitudinally extending closely spaced ribs forming corrugations extending longitudinally of the hose, said ribs terminating in solid annular sections, equally spaced along said hose, the outer faces of said ribs and the outer faces of said annular sections being substantially in alinement." In the specification of the Neff patent, it was set out: "By the above construction, it will be therefore noted that a hose is formed wherein the rubber outer surface is so shaped as to greatly strengthen the hose against lateral strains and to increase the life of the hose as to surface wear, and furthermore a visible indication is provided whereby definite lengths of hose may be quickly determined."

After the Neff patent, No. 1,026,598, was issued May 14, 1912, the defendant began to manufacture a long-length hose by another method than that covered by the Cobb patent. This hose contained longitudinal corrugations and was made in close imitation of that sold by the plaintiff. At spaces of one foot, however, the longitudinal ribs, in accordance with the claim of the Neff patent, terminated in an uncorrugated annular section about one-eighth of an inch in width. While the specification of the patent claims that the annular sections strengthen the hose against lateral strains, increase its life as to surface wear, and provide a visible indication for quickly determining definite lengths of the hose, the purpose of the defendant in causing the patent to be obtained by Neff was to produce a hose which he could manufacture and sell so closely imitating that of the plaintiff as to derive from its production the advantage of the demand in the market for the plaintiff's corrugated hose. The defendant has accordingly placed upon the market and sold a hose made

under the Neff patent with his trade-name, "Quaker City Rubber Co.," and the words, "Ringmeter Reg. U. S. Pat. Off. Philadelphia, Pa. U. S. A.," placed upon it at irregular intervals.

The defendant has set up as a defense the Mayall patent No. 125,596, issued April 9, 1872, for improvement in vulcanized India rubber hose or tubing. As described in the specification, this invention is directed to the production of vulcanized India rubber hose or tubing formed with an ornamental pattern or configuration in relief upon its exterior. The method consists of forming an ornamental pattern or configuration in relief on the rubber while it is passing in sheet form from the calender rolls, using for this purpose a pattern roll pressing up against one of the calenders, so that the rubber sheet passes between the pattern roll and the calender, and is consequently impressed with the configuration or ornamental design formed in intaglio, or engraved in the pattern roll. The claim is as follows: "As a new manufacture, vulcanized India rubber hose or tubing, made with fluting or other ornamental configuration in relief upon its exterior, substantially in the manner herein described."

The Mayall patent is clearly for a method of manufacturing hose or tubing with any sort of fluting or ornamental configuration upon it, and is not confined to the fluting which appears in the drawings and is mentioned in the claim and in the specification. There is no evidence that Mayall, or any one deriving rights under him as licensee or assignee, used the process described in his invention, nor is there any evidence that any one put into use the external longitudinal corrugations upon hose prior to their adoption by the plaintiff in 1897. Mayall does not claim any structural value in the fluting. While the evidence of structural value in the device is somewhat conflicting, it is found as a fact, from the weight of the evidence upon the record here presented, that the corrugations add no structural value to the product, and that their use is merely for ornamentation. The evidence intended to show structural advantage from the corrugations, resulting in what was termed at the hearing "non-kinkability," and the quality of preventing abrasion by friction, is not convincing. The opinions of witnesses that the corrugations were useful in preventing kinking and abrasion were not based upon actual tests made in comparison with smooth-surfaced hose, except in the case of the defendant's witness called as an expert. Tests made by him were upon sections of hose produced by the defendant for the purpose. Tests of such isolated specimens cannot fairly represent results upon which opinions of value can be based.

The corrugations having no structural value, and there being no evidence of the use of the corrugations under the Mayall patent, or of their appropriation and user as a trade-mark for rubber hose of others, prior to the appropriation and user by the plaintiff, the invention of Mayall in 1872 of a method by which hose may be fluted is not material as affecting the plaintiff's right to its use as an indicium of its product.

The validity of a trade-mark does not depend upon either novelty, invention, or discovery, but is founded upon mere priority of appropriation and user as a trade-mark for a particular class of goods. Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997. Abandoned trade-marks may be appropriated by others and become their exclusive property, even as against the original user. Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526.

The adoption of the corrugations by the plaintiff's predecessor occurred in 1897, years subsequent to the expiration of the Mayall patent in 1889. Upon its expiration, the method and whatever incidents appertained thereto became open to the public, subject to appropriation and user by any one. Unless the plaintiff's predecessor adopted it to confuse its product with that of others, it was entitled, even though Mayall had conceived fluting upon hose in 1872, to adopt longitudinal corrugation as indicating the origin of its hose.

The defendant has shown that, prior to the adoption of corrugation by the plaintiff, corrugated tubing was manufactured and sold by other rubber manufacturers. The evidence shows, however, that rubber hose and rubber tubing are entirely separate and distinct articles in commerce and in domestic

use, and are so recognized generally by the trade and the public. They are used for entirely separate and distinct purposes, and there is no confusion or possibility of mistaking the one for the other. When the plaintiff adopted its device therefor, it was unused by the trade in the manufacture or marketing of rubber hose.

The defendant contends, however, that the Cobb patent having expired in August, 1914, and the patented hose having been known to the trade and the public by the longitudinal corrugations adopted by the plaintiff as indicating the origin and manufacture of its hose, the monopoly in the corrugated marking of the hose became public property upon expiration of the patent and passed to the public along with the patented method. The general principle of law underlying this contention is too well settled to admit of contradiction or discussion, and the question, therefore, arises as to whether, upon abandonment to the public of the plaintiff's patent, the defendant became entitled under the facts of this case to the appropriation of the plaintiff's device, which had during the life of the patent indicated the origin of the hose manufactured by the plaintiff. With the limitation that the defendant must not so use the device as to deprive the plaintiff of its rights or to deceive the public, the defendant, upon the expiration of the patent, was at full liberty to manufacture under the method of the expired patent, and to appropriate any device or form in connection with which the patented article had been made which was designative in a generic manner of the distinctive style of hose manufactured by the plaintiff.

In the present case the defendant is not manufacturing its hose in accordance with the plaintiff's patent, but is using another method, which permitted it, prior to the expiration of the patent, to manufacture hose in long lengths. Its purpose in adding the corrugations was to closely imitate the plaintiff's patented hose under the guise of the Neff patent. The hose produced by the defendant is calculated to deceive the public as to the identity of the article produced by him, and, although the plaintiff's patent has expired, it is entitled to be protected from any injury arising from such imitation produced with the deliberate intent of deceiving the public by passing off the defendant's hose for that manufactured by the plaintiff. While the defendant is not to be prevented from constructing long-length hose with corrugations, still he cannot be permitted to do any act the necessary effect of which would be to imitate or to make any one believe that the hose which he manufactures and sells is manufactured by the plaintiff; neither has he the right to use any device which may be properly considered a trade-mark, so as to induce the public to believe that the hose has been manufactured by the plaintiff. 'Singer Manufacturing Co. v. June Manufacturing Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

The defendant's contention, however, is that it is protected by the Neff patent. A reading of the entire testimony of the defendant leads to the conclusion that this patent was frivolously obtained by him as a makeshift, for the purpose of putting upon the market an imitation of the hose made and sold by the plaintiff under cover of the structural utility asserted in the Neff specification and claim by reason of the addition to the plaintiff's corrugations of the annular band. While the record in the case establishes the fact that longitudinal corrugations add no structural value or utility to the hose, the presumption arising from the grant of the patent that corrugated hose with the annular band has the advantage over corrugated hose without such band disclosed by the specification is unrebutted, and the defendant is entitled, until the validity of his patent is made the subject of successful direct attack, to manufacture hose under the method disclosed in accordance with his patent. It is entirely possible, however, for him to manufacture hose with such distinctive markings as will preclude the probability of his hose being passed off as that of the plaintiff. To that extent the plaintiff should be protected in equity.

A decree will be entered in favor of the plaintiff and against the defendant for an injunction in accordance with this opinion and for an accounting for profits and damages.

Joseph C. Fraley and Henry N. Paul, Jr., both of Philadelphia, Pa., for appellant.

William W. Porter and Porter, Foulkrod & McCullagh, all of Philadelphia, Pa., for appellee.

Before BUFFINGTON and McPHERSON, Circuit Judges, and BRADFORD, District Judge.

BUFFINGTON, Circuit Judge. In the court below the Electric Hose & Rubber Company, a corporation and citizen of Delaware, filed this bill against Charles A. Daniel, who was trading as the Quaker City Rubber Company, a citizen of Pennsylvania, charging him with unfair competition and violating its trade-mark. The court, in its opinion as set forth above, sustained complainant's contention and entered a decree:

"That the use of external longitudinal corrugations in the sale of rubber hose * * * is a good and valid trade-mark to the plaintiff, and is the sole and exclusive property of the plaintiff," and "that the defendant has occasioned unfair trade competition by manufacturing and selling rubber hose corrugated longitudinally."

From such decree defendant took this appeal.

Stripped of incidental matters, the underlying question in this case is whether the longitudinal corrugations on rubber hose can be made a trade-mark monopoly. The proofs show that on April 9, 1872, patent No. 125,596 was granted to Thomas J. Mayall for an improvement in vulcanized rubber tubings. In his specification Mayall stated that:

"Tubing of this kind has never, so far as my knowledge extends, been hitherto made, owing, undoubtedly, to the difficulty, or rather impossibility, of preserving the external pattern or ornamental configuration during the several processes at present employed in order to vulcanize and finish hose or tubing."

He disclosed a method of making such hose or tubing, and a claim was allowed him, as follows:

"As a new manufacture, vulcanized India rubber hose or tubing, made with fluting or other ornamental configuration in relief upon its exterior, substantially in the manner herein described."

Accompanying his specification, his corrugated hose was shown by the accompanying drawing:

It goes without saying that at the expiration of Mayall's patent, in 1889, the public acquired the right to make such fluted hose. The defendant has availed himself of that right, and has embodied Mayall ribs or longitudinal corrugations in hose he makes under patent No. 1,026,598, granted to Neff on May 14, 1912. The single claim of that patent is:

"A hose comprising an outer covering of rubber having longitudinally extending closely spaced ribs forming corrugations extending longitudinally of

the hose, said ribs terminating in solid annular sections, equally spaced along said hose, the outer faces of said ribs and the outer faces of said annular sections being substantially in alinement."

The hose of Neff's patent has, it will be observed, the longitudinal fluting of Mayall, and in addition certain spaced annular rings at cross-angles thereto. Its contour is shown in the accompanying illustrations taken from Neff's patent:

FIG. I.

FIG. II

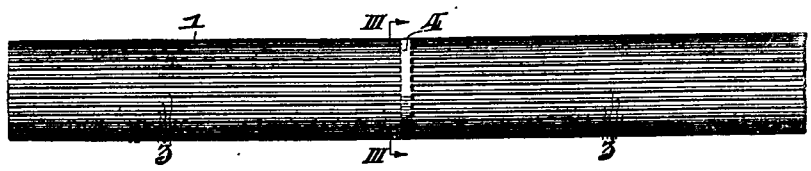
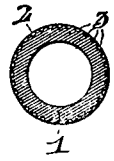


FIG. III



Under these facts, the burden is on the plaintiff to show by what means the defendant or any other hose manufacturer is to be deprived of the right to make corrugated hose, which right accrued to the public when Mayall's patent expired. The pertinent facts on which the plaintiff bases its alleged right we extract from the opinion of the court below, as follows:

"The plaintiff, Electric Hose & Rubber Company, is engaged in the business of the manufacture and sale of rubber hose as the successor of the Chicago Electric Wire Company, to which on August 3, 1897, letters patent No. 587,545 were issued as assignee of Henry B. Cobb, inventor of a method of manufacturing rubber hose in long lengths, consisting in forming, about a tube of alternate layers of rubber and fabric, an inelastic mold within which the product was vulcanized and the mold then removed. The Chicago Electric Wire Company assigned all its right to the manufacture and sale of hose to the Chicago Electric Hose Company, which is the plaintiff herein, its name having been changed, by amendment to its charter, to Electric Hose & Rubber Company. To distinguish the hose invented by Cobb, the Chicago Electric Wire Company adopted a device consisting of external longitudinal corrugations, and that device, as a distinguishing mark of hose made under the Cobb invention, was continued down to the filing of the bill on December 2, 1913. The hose so marked by corrugations was known to the trade as 'Electric' hose, and from 1897 until some time in 1907 was exclusively made and sold by the plaintiff and its predecessors. * * * Marking the hose by longitudinal corrugations was not an element of the Cobb patent. It was recognized generally by the trade and public as an attractive feature in the appearance of the hose

and as a distinguishing mark of the so-called 'Electric' hose. The corrugated hose had obtained a wide popularity and was successfully sold to the trade and to the public. During the period from 1907 down to the filing of the bill, several competitors of the plaintiff produced hose with corrugated marking, but, upon demand by the plaintiff, adopted spiral or longitudinal bands or other distinguishing features with the manufacturer's name at close intervals, in order that the hose might not be mistaken for that of the plaintiff. * * * After the Neff patent, No. 1,026,598, was issued May 14, 1912, the defendant began to manufacture a long-length hose by another method than that covered by the Cobb patent. This hose contained longitudinal corrugations and was made in close imitation of that sold by the plaintiff. At spaces of one foot, however, the longitudinal ribs, in accordance with the claim of the Neff patent, terminated in an uncorrugated annular section about one-eighth of an inch in width. While the specification of the patent claims that the annular sections strengthen the hose against lateral strains, increase its life as to surface wear, and provide a visible indication for quickly determining definite lengths of the hose, the purpose of the defendant in causing the patent to be obtained by Neff was to produce a hose which he could manufacture and sell so closely imitating that of the plaintiff as to derive from its production the advantage of the demand in the market for the plaintiff's corrugated hose. The defendant has accordingly placed upon the market and sold a hose made under the Neff patent with his trade-name, 'Quaker City Rubber Co.,' and the words, 'Ringmeter Reg. U. S. Pat. Off. Philadelphia, Pa. U. S. A.,' placed upon it at irregular intervals. * * * There is no evidence that Mayall, or any one deriving rights under him as licensee or assignee, used the process described in his invention, nor is there any evidence that any one put into use the external longitudinal corrugations upon hose prior to their adoption by the plaintiff in 1897. * * * The adoption of the corrugations by the plaintiff's predecessor occurred in 1897, years subsequent to the expiration of the Mayall patent in 1889. Upon its expiration, the method and whatever incidents appertained thereto became open to the public, subject to appropriation and user by any one. Unless the plaintiff's predecessor adopted it to confuse its product with that of others, it was entitled, even though Mayall had conceived fluting upon hose in 1872, to adopt longitudinal corrugation as indicating the origin of its hose."

The court further found that the corrugations of hose had no structural value, and held that:

"There being no evidence of the use of corrugations under the Mayall patent, or of their appropriation and user as a trade-mark for rubber hose of others, prior to the appropriation and user by the plaintiff, the invention of Mayall in 1872 of a method by which hose may be fluted is not material as affecting the plaintiff's right to its use as an indicium of its product."

In that regard we are of opinion the court erred. In the first place, the evidence clearly shows the corrugations of the hose are of structural value. In that regard the proof of several witnesses satisfied us that the corrugations enable the hose to be better made, to be made stronger, that such hose lasts longer and minimizes kinking. In the next place, the patent of Mayall was not for a method of fluting a hose, but it was for the fluted hose or tubing as a new article of manufacture; the method disclosed being only the statutory requirement of illustrating how the new article could be made. The testimony being clear that the longitudinal corrugations on the tube are useful and functional, the authorities (Marvel v. Pearl, 133 Fed. 160, 66 C. C. A. 226; Diamond Match Co. v. Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59; Globe Co. v. Macey, 119 Fed. 996, 56 C. C. A. 304) are clear that such useful features are common property, may be made

by any manufacturer of such an article, and cannot be appropriated as a trade-mark. Where the article itself is one which any one of common right may make, no person by making that article for any period of time—no matter for how long—can convert that article itself into a trade-mark and thereby acquire an exclusive right to make it in perpetuity. To allow this would be to destroy the 17-year limitation of the patent system. The purpose of a trade-mark is, as its name signifies, to provide a mark for an article in which one trades. It is the evidence of the article's genuineness, but is not the article itself.

Applying these principles to the case in hand, it is clear that plaintiff could never acquire an exclusive right to make longitudinally corrugated hose. That right became a public one on the expiration of Mayall's patent, open alike to plaintiff and defendant. The plaintiff exercised that right, called its product electric hose, and has established a valuable trade. The defendant has also exercised its right to make longitudinally corrugated hose. These it has marked with its own name and with the word "Ringmeter" as a registered trademark. There is no proof of any confusion of goods, no proof that defendant sold its hose to any one as the plaintiff's hose, or that any one purchased it thinking he was buying the plaintiff's goods. Indeed, in the last analysis the whole case of the plaintiff rests on the unwarranted assumption that, by being for some years the maker and vender of a patent-expired article, it thereby could acquire and had acquired an exclusive and perpetual right to make it. Were this the law, it would follow that if Mayall, after the expiration of his patent, had been the only maker of his hose for some years following, he could by his own act turn his patent, which the law limited to 17 years, into a perpetual patent.

The decree below will be reversed, and the record remanded, with instructions to dismiss the bill.

On Petition for Reargument.

PER CURIAM. We have carefully considered the petition for reargument, but see nothing to be gained by granting the motion. In our view there was no proof of any confusion of goods, or that any purchaser of the plaintiff's goods had been, or was likely to be, led to buy the defendant's under the belief he was getting plaintiff's.

The petition for reargument is therefore denied.

MEMPHIS TELEPHONE CO. v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. March 17, 1916.)

No. 2681.

1. TELEGRAPHS AND TELEPHONES ⟸16—TELEPHONE COMPANIES—EXCHANGE OF BUSINESS WITH OTHER COMPANIES.
   In the absence of any statute or contract requiring connection to be maintained between the lines of two telephone companies at a common point, it is within the right of either company to sever such a connection.
   [Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 10; Dec. Dig. ⟸16.]

2. TELEGRAPHS AND TELEPHONES ⟸69—EXEMPLARY DAMAGES—ACTS DONE THROUGH MISTAKE.
   That a division superintendent of defendant telephone company, in carrying out orders from its general manager to sever the connection between one of its lines and a line of plaintiff, by mistake made the severance beyond the point of connection, removing several hundred feet of wire from plaintiff's line and retaining two of its instruments, in the belief that they were the property of defendant, affords no ground for recovery from defendant of punitive damages.
   [Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 71; Dec. Dig. ⟸69.]

3. WORDS AND PHRASES—"TRUTH."
   There are three conceptions as to what constitutes "truth": Agreement of thought and reality; eventual verification; and consistency of thought with itself.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by the Memphis Telephone Company against the Cumberland Telephone & Telegraph Company. From the judgment, plaintiff brings error. Affirmed.

J. W. Canada, of Memphis, Tenn., for plaintiff in error.

W. L. Granbery, of Nashville, Tenn., Hunt Chipley, of Atlanta, Ga., and Wright, Miles, Waring & Walker, of Memphis, Tenn., for defendant in error.

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

COCHRAN, District Judge. This writ presents for decision a single question, and that is whether the lower court erred in refusing to submit to the jury the issue in the case as to plaintiff's right to recover punitive damages. The action was in tort. The plaintiff sought to recover $25,000 therefor, of which $650 was on account of compensatory damages, and the remainder punitive. The defendant confessed the tort and tendered $225 as the actual damages sustained. The plaintiff admitted that this sum covered those damages, and the court instructed the jury to find for plaintiff in that amount. It refused to submit the question as to punitive damages, and this is the sole error complained of. We begin the consideration of this question with a

presentation of the nature of the tort and how it came to be committed.

The plaintiff, a Tennessee corporation, owned and operated a telephone system located in Memphis, Shelby county, with a long-distance line or connection extending down into Mississippi. The Tri-State Telephone & Telegraph Company, an Arkansas corporation, owned and operated such a system, located mainly in Arkansas, but extending into Missouri and Tennessee, whence its name, with headquarters at Osceola, Ark., to the north of Memphis. Its line in Tennessee extended to Munford, Tipton county, about 30 miles northeast or north of Memphis. September 9, 1910, the two companies entered into a contract to connect the two systems by a line from Memphis to Munford and to interchange business for a period of 25 years. Plaintiff was to build so much thereof as lay between Memphis and Millington, in Shelby county, about 16 miles from Memphis, and the Tri-State Company so much as lay between Millington and Munford. This line was so built. The point of junction was not in Millington, but at the north end thereof; plaintiff's portion of the line passing therefrom through Millington on to Memphis. The Tri-State Company's portion passed at about three miles from such point through Kerrville, and at about eight miles through Tipton, and thence on to Munford. Plaintiff built for the Tri-State Company so much of its portion as was between the point of junction and Tipton, and furnished a telephone instrument, not only at Millington, on its portion, but also at Kerrville and Tipton, on the Tri-State Company's portion. The work was completed July 31, 1911, and one paid message passed over it that day or the next morning. The next morning—i. e., the morning of August 1st—two laborers of defendant by direction of Foster Hume, a division superintendent of defendant, severed and took possession of about 1,000 feet of wire in plaintiff's portion of the connecting line in Millington, possibly as much as three-quarters of a mile on the Memphis side of the junction point, and took possession of the telephone instruments at Millington, Kerrville, and Tipton, which wire and telephone instruments seem never to have been returned to plaintiff. This is the tort complained of.

The defendant owned and operated a telephone system covering several states, including Tennessee, and the city of Memphis, with headquarters apparently at Nashville. Hume, its division superintendent, was located at Memphis, and had jurisdiction over western Tennessee and northern Mississippi. The direction of Hume which resulted in the commission of the tort came about in this way. The Southwestern Telephone & Telegraph Company, a Texas corporation, owned and operated a telephone system in Texas and Arkansas, and the Missouri Bell Telephone Company owned and operated such a system in Missouri. Shortly before the completion of the connecting line between plaintiff and the Tri-State Company's system, the Southwestern Company purchased the entire capital stock of the Tri-State Company and placed its officers and employés in charge thereof as directors and they proceeded at once to wreck the Tri-State Company. This they did by disposing of its system in separate parts and then dis-

solving the corporation and distributing its assets. The portion thereof in Tennessee was sold and conveyed to defendant, that in Missouri to the Missouri Bell Telephone Company, and that in Arkansas to the Southwestern Company. The sale and conveyance to defendant took place before the commission of the tort complained of. Upon the acquisition by defendant of this portion of the Tri-State Company's system, defendant's general manager at Nashville instructed Hume to take possession thereof and to sever all connections with other companies. It was in acting under this instruction that Hume gave the direction heretofore stated. He took it that the point of junction between the two portions of the connecting line was at the end nearest Memphis of the 1,000 feet which he severed, and that the three telephone instruments which he took possession of had been the property of the Tri-State Company. His reason for not merely making a severance at what he took to be the junction point, but removing the 1,000 feet of wire, was that it extended over the tracks of the Illinois Central Railroad Company, and he thought it might be dangerous not to remove it. In taking such to be the point of junction, he acted upon his own judgment. He had theretofore been told by some representative of plaintiff that it had built the line to Millington and that the Tri-State Company was to meet it there. The consideration which led him to so take was the character of the pole thereat. It was what is usually called a junction pole. His action was not within the instruction which defendant's general manager had given him, and he had no other authority to act at all; and there was no ratification of his action.

It would seem that the plaintiff did not know of the Southwestern Company's purchase and the change in ownership of the Tri-State Company's portion of the connecting line until after the severance had been made. It is possible that defendant had something to do with the Southwestern Company's wrecking the Tri-State Company other than merely purchasing the portion of its system in Tennessee. It and that company belonged to what is known as the "Bell Telephone System," and the name of the Missouri Company seems to indicate that it belonged thereto also. Thereby—i. e., by the wrecking of the Tri-State Company—the Missouri and Southwestern Companies got rid of competition therefrom, the former in Missouri and the latter in Arkansas, and the defendant got rid of competition from plaintiff for Memphis business destined for Arkansas and Missouri. On August 8th plaintiff caused defendant's two laborers to be indicted, but the indictment does not seem to have been prosecuted. It took the position that the action of the Tri-State Company in disposing of the portion of its system in Tennessee to defendant was a repudiation and breach of its contract with it, in that thereby it put it out of its power to comply therewith, and on November 10th it sued the Southwestern Company in Arkansas to recover $250,000 therefor. It based its right to recover on two theories, to wit—that that company had taken over and received the entire assets of the Tri-State Company, and that it had willfully induced and procured the Tri-State Company to commit a breach of its contract.

This suit resulted in the court where it had been brought in a decree for $34,500; i. e., $7,000 loss on the construction of its portion of

the connecting line and $27,500—i. e., $1,100 for each of the 25 years which the contract was to run—lost profits. This decree was entered April 29, 1913. On appeal therefrom the Supreme Court of Arkansas on February 16, 1914, reduced the amount of recovery to $10,300, it being held that plaintiff was entitled to recover for only 3 years on account of lost profits, which decree was subsequently paid. The amount paid was stated in the evidence below to have been about $16,000; but, if it was so great, it must have been due to the costs. The plaintiff claimed therein that it was entitled to punitive damages, but this was denied it on the ground that the Southwestern Company had purchased and paid for a controlling interest in the Tri-State Company before it knew of its contract with plaintiff. Southwestern Telegraph & Telephone Co. v. Memphis Telephone Co., 111 Ark. 474, 163 S. W. 1153. Portions of the record in that case were introduced in evidence on the trial below by defendant to show that there had been a breach of the Tri-State Company's contract with plaintiff before any action on its part other than purchasing the portion of its system in Tennessee. The account of the case in the Arkansas Reports has been drawn on to a certain extent for some of the facts stated above in order to clearness of presentation of the question involved here and the considerations relevant thereto.

After plaintiff had obtained the decree for $34,500, and before its reduction by the Supreme Court of Arkansas, and more than two years after the commission of the tort complained of (i. e., on October 11, 1913), plaintiff turned its attention to defendant and brought the action against it which presents the question before us. In disposing of that question we are confronted by two subordinate ones. One is whether, in order for plaintiff to have been entitled to punitive damages, it was essential that the quality of Hume's conduct should have been such that punitive damages would have been recoverable of him had he been sued instead of defendant. It was such that he was suable; but, to say the least, it is questionable whether it was such that he was liable for such damages had he been sued. As, then, it may turn out that he was not liable therefor, it is important to determine whether matters other than the quality of Hume's conduct can be taken into consideration in disposing of the question as to defendant's liability therefor. Had Hume been sued instead of defendant, plaintiff would necessarily have been shut up to the quality of his conduct. No other consideration would have been relevant to the question of his liability for punitive damages. Was plaintiff limited thereto in its action against defendant? In other words, if, under the evidence, defendant had been guilty of wrongful conduct towards plaintiff otherwise than through Hume, can such conduct be taken into consideration in determining its liability for punitive damages on account of Hume's wrongful conduct, which it neither authorized nor ratified, and for which it cannot be made liable, except on the ground which makes every employer responsible for the wrongful conduct of his employé within the scope of his employment?

There are two ways in which it is possible that defendant was guilty of wrongful conduct towards plaintiff otherwise than through Hume.

In saying that it was guilty of wrongful conduct through Hume, nothing more is meant than that it was constructively so. One of these ways is in being a party to the wrecking of the Tri-State Company and the breach of its contract with plaintiff, otherwise than as a mere purchaser of the portion of its system in Tennessee. It is possible that the purchase of the capital stock of the Tri-State Company by the Southwestern Company and the subsequent sale and conveyance of the portions of its system in the three states as hereinbefore set out was the outcome of a conspiracy between the three companies advantaged thereby, so that it can be said that defendant was a party with the Southwestern Company in procuring a breach of the Tri-State Company's contract with plaintiff. The other is in causing a severance to be made in the connection between the Tri-State Company and plaintiff's systems. The question as to whether defendant was guilty of wrongful conduct towards plaintiff in this way exists apart from its having been a party to procuring the breach of that contract.

In the case of Townsend v. N. Y. C. & H. R. R. Co., 56 N. Y. 295, 15 Am. Rep. 419, the defendant corporation was held not liable for punitive damages for the wrongful conduct of one of its representatives within the scope of his employment because the quality of that wrongful conduct was not such that the representative would have been liable therefor had he been sued. The plaintiff had purchased a ticket on defendant's line from S. to R. and took passage on a train which went only a part of the way. The conductor on the train took up and retained the ticket without giving any check or other evidence of a right to passage on the next train. Plaintiff took the next train on defendant's line for R., and when called on for his ticket informed the conductor that the conductor of the preceding train had retained it. The conductor thereupon demanded the fare, and, it being refused, ejected the plaintiff. It was held that the defendant was liable for compensatory damages, but not for punitive. Judge Grover said:

"It must be kept in mind that the injury for which a recovery was sought was the forcible ejection of the plaintiff from the car by the conductor of the train, not the wrongful taking from the plaintiff of his ticket by the conductor of the other train. The latter was regarded as material only as making the former act wrongful as against the plaintiff. The court, in substance, charged that in putting the plaintiff off the car the conductor acted in what he believed was the performance of his duty to the company. This being so, it is clear that no punitory damages could have been recovered against him, had he been sued instead of the company. In Hamilton v. Third Avenue Railroad Company, 53 N. Y. 25, it was held by this court that a master was not liable for punitory damages for the act of his servant, done under circumstances which would give no such right to the plaintiff as against the servant, had the suit been against him instead of the master."

The necessities of this case, however, do not require that we determine the question which we have put. This is because the evidence was not sufficient to call for a submission to the jury as to whether defendant had been guilty of wrongful conduct in either particular. The most that can be said as to its bearing on defendant's connection with the breach by the Tri-State Company of its contract with plaintiff, other than as purchaser of the portion of its system in Tennessee, is that it created a suspicion that it was so connected. Possibly it is

unjust to defendant to say that it goes this far, and reliance must be had on the report of the Arkansas case to even suggest such a thought. It is because plaintiff seems to be imbued with the idea that a great wrong was done it by the trespass on its property, which it could have been only on the basis that defendant was so connected with such breach, that we have felt impelled to deal with the possibility that it was.

[1] As to the severance of the connection between the two systems, had it been at the point of junction of the two portions of the connecting line or on the Tri-State Company's side thereof, no wrong would have been committed of which the plaintiff could complain, as is practically conceded. In the case of Home Telephone Co. v. People's Telephone & Telegraph Co., 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550, the Supreme Court of Tennessee held that the making and maintenance of a connection between two telephone companies in the absence of a contract between them depends on statute. In Tennessee there is no statute covering the matter. Hence it was held therein that, if a connection is made under a contract which does not specify any time for it to run, the connection can thereafter be severed by one without the concurrence of the other. In this case the contract specified that the contract was to run 25 years. But defendant was no party to the contract. Its action in severing the connection was not, therefore, a breach of contract or other wrong on its part towards plaintiff. At the time it severed the connection the Tri-State Company had already breached the contract. The maintenance of the connection was of no value to plaintiff. The control which the Southwestern Company acquired of the Tri-State Company and repudiation of the latter's contract with plaintiff put an end to all interchange of business between the two companies. Possibly, as the contract was to run for a definite period of time, to wit, 25 years, plaintiff may have been entitled to its specific enforcement as against defendant as well as the Tri-State Company. But otherwise plaintiff had no other claim on defendant as to the maintenance of the connection and this claim was never asserted.

Of necessity, therefore, plaintiff's claim as to punitive damages against defendant is shut up to the question whether the quality of Hume's wrongful conduct was such that punitive damages were recoverable of him, had he been sued instead of defendant. There is no other possible basis on which his right to recover such damages of defendant can be placed. This presents us with the other subordinate question, heretofore referred to, and that is whether, if Hume's wrongful conduct was of such quality, that was sufficient to entitle plaintiff to punitive damages. Some courts hold that such damages may be recovered of a corporation for the wrongful conduct of any of its representatives within the scope of his employment, if it is of such quality as to render the representative liable therefor in a suit against him; whereas, others hold that such is not the case as to certain of the corporation's representatives. The ground of the position taken by the latter class is that one should not be punished vicariously; i. e., for the wrongdoing of another.

The Supreme Court of the United States, whose position is binding on this court, belongs to this class. In the early case of The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456, it held that punitive damages could not be recovered against the owners of an American privateer for the illegal and wanton seizure and plunder of a neutral vessel and maltreating her officers and crew by a subordinate officer and certain of the crew of such privateer. It is to be noted that it did not appear that the commander of the privateer was a party to the wrongdoing, but seemingly it would have made no difference in the decision if he had been. In the later case of Lake Shore & Michigan So. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, it held that recovery of such damages could not be had against a railroad corporation for an illegal, wanton and oppressive arrest of a passenger by the conductor of one of its railway trains. The citation of this case in the opinion in that of Washington Gaslight Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543, may lead to the misapprehension that the doctrine thereof was applied therein, which was a suit against the Gaslight Company to recover damages because of the wrongdoing of its general manager. But it was held therein that the company was not liable at all and that because the general manager's action was not within the scope of his employment.

On the other hand, in the case of D. & R. G. Ry. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146, a railroad corporation was held liable in punitive damages for the acts of an armed force of several hundred men acting as its agents and employés and organized and commanded by its vice president and assistant general manager, which consisted in attacking with deadly weapons the agents and employés of another company in possession of a railroad and forcibly driving them out. In distinguishing the decision in this case from that in the Prentice Case Mr. Justice Gray said:

"The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself; but the conductor of a train, or other subordinate agent or servant of a railroad company occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce."

In the case of Post Pub. Co. v. Hallam, 59 Fed. 530, 8 C. C. A. 201, this court held that a newspaper corporation was liable to punitive damages for the malicious conduct of its general manager. Judge Taft said:

"He so far represented the defendant corporation as its general manager that his malice was in law the malice of the defendant."

And in the case of Pac. Packing & Navigation Co. v. Fielding, 136 Fed. 577, 69 C. C. A. 325, the Ninth Circuit Court of Appeals held that a corporation owner of a vessel could not be subjected to punitive damages because of the unlawful, oppressive, and malicious action of

the master in imprisoning a member of the crew, while at sea, which action was not authorized nor ratified by the corporation. The plaintiff pressed upon the court the view that the case came within the Harris Case and its approval in the Prentice Case. Judge Ross said:

"It is contended that this principle is applicable to the master of a ship at sea, who is for the time being in the sole and absolute command of the ship and of everybody in it; but we do not feel justified in so extending it, especially in view of the decision of the Supreme Court in the case of The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456, the doctrine of which case was expressly approved in Lake Shore, etc., Railway Company v. Prentice."

If there are any other pertinent decisions by the appellate federal courts, they have eluded search. An attempt should be made at generalizing these. Certainly the nonliability of the corporation is not limited to cases where the wrongful act was committed by a representative of it who is a mere underling. No liability may exist where he is a superior servant and that of considerable responsibility, as in the case of a conductor of a passenger train or the master of a vessel. On the other hand, liability exists where the act was committed by the president or board of directors. But it cannot be said that no liability exists as to all representatives short of the president and board of directors, for there is liability if the act was committed by the general manager, as in the case of a general manager of a newspaper corporation. Where, then, is the line to be drawn between those superior servants as to whom no liability exists and those as to whom there is liability? Possibly these decisions are not sufficient to fix the line exactly. But they do suggest that it is to be drawn between those who are over a part only of its affairs, as in the case of a conductor of a passenger train or the master of a vessel, and those who are over all its affairs, as in the case of a general manager of a newspaper corporation. And in the extract from Judge Gray's opinion in the Prentice Case, quoted above, it is to be noted that he places on the one side the president and general manager, or in his absence, the vice president in his place, actually wielding the whole of the executive power of the corporation, which suggests that the distinguishing characteristic of that side is that the representative wields the whole executive power of the corporation, and on the other side the conductor of a train or other subordinate agent or servant of a railroad corporation, which suggests that the distinguishing characteristic of this side is that the representative is a subordinate. But, at any rate, wherever the line is to be drawn, if it is to be held that defendant is liable for punitive damages because Hume was its division superintendent, this position must be reconciled with the position that a railroad corporation is not liable for such an act on the part of the conductor of one of its trains or ship corporation is not liable therefor on the part of the master of one of its vessels.

[3] There are three conceptions as to what truth is. Agreement of thought and reality, eventual verification and consistency of thought with itself. Thought should be consistent with itself if nothing else. And it would seem that these positions cannot be reconciled on the idea that Hume was over all defendant's affairs in a particular locality,

for this is true also of the conductor of a railroad train, in the one case, and possibly more so, of a vessel in the other. The necessities of this case, however, do not require that we determine whether, if Hume's conduct was of such quality as to render him liable for punitive damages, defendant was liable therefor also. We simply content ourselves, therefore, with developing the question. What relieves us of determining this question is that we feel constrained to hold that Hume's conduct was not in and of itself of such quality as to call for punishment.

[2] The rule as to what is essential to justify awarding punitive damages is well settled. To have it before us in estimating Hume's conduct we quote from 8 R. C. L. On page 586 it is said:

"Such damages may be recovered in cases and only in such cases where the wrongful act complained of is characterized by some such circumstances of aggravation as willfulness, wantonness, malice, oppression, brutality, insult, recklessness, gross negligence, or gross fraud on the part of the defendant."

On pages 588–590 a separate consideration is given to gross negligence as a basis for the recovery of such damages. And on page 591 the matter is put negatively thus:

"Exemplary damages are not authorized where a tort is committed unintentionally or through mistake or ignorance."

These expressions, save as to gross negligence, find justification in the decisions of the Supreme Court. In Milwaukee, etc., R. R. Co. v. Arms, 91 U. S. 495, 23 L. Ed. 374, it was held that gross negligence was not sufficient to warrant recovery of punitive damages. Mr. Justice Davis, in referring to what was essential, said:

"There must have been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences."

How far, then, did the evidence tend to establish such misconduct or want of care on the part of Hume? To justify the submission of the question as to whether he had been guilty thereof, there must have been substantial evidence to that effect. Judge Severens in Minahan v. Grand Trunk Western Ry. Co., 138 Fed. 37, 70 C. C. A. 463, defined what is meant by substantial evidence by saying:

"Something of substance and relevant consequence, and not vague, uncertain, or irrelevant matter not carrying the quality of proof or having fitness to induce conviction."

It is clear that Hume did not intentionally trespass on plaintiff's property. It was through a pure mistake that he did so. August 23, 1911, he saw plaintiff's general manager, Polk, and assured him that it was through a mistake that he cut the line at the wrong place. Polk did not question this, and there is every indication that he accepted the statement as true. He admitted that he did not think that Hume knew that plaintiff claimed the telephone instruments and stated that he brought to him the bill that plaintiff rendered the Tri-State Company for the work which it did for it, to try and prove that the latter owned them. Plaintiff introduced Hume as a witness on its behalf, as well as Polk, and these were the only witnesses who testified in

the case. Hume testified that he thought that he was dealing with what he believed to be defendant's property.

The only just criticism that can be made of his conduct is that he did not exercise due care to ascertain where the junction of the two portions of the connecting line was. It is claimed that he should have consulted plaintiff, which it was convenient for him to do, before acting. His explanation of why he did not do so was because he thought that he knew where the junction was. He was led to think that it was where he made the severance by the statement of plaintiff's representative, which was calculated to make him think that the point of junction was in Millington, rather than at its north end, and by the character of the pole. So far as he was guilty of a want of care, it does not measure up to the requirement. It was not such as to indicate "a conscious indifference to consequences." Some point is made of the fact that Hume refused to deliver up the telephone instruments to plaintiff, except on condition that plaintiff dismiss the prosecution against defendant's two laborers who actually did the work, and that Polk made affidavit that they belonged to plaintiff. It is not certain that Polk on that occasion did more than state that the instruments belonged to plaintiff or Hume more than state the terms on which he would deliver them up. Whilst it was Hume's duty to deliver them up without any condition, his position was not unnatural. He claimed that plaintiff's bill rendered to the Tri-State Company showed that they belonged to it, and he felt that if there was to be any criminal prosecution for what had been done that it should be directed against him, rather than the innocent laborers, who acted under his directions, and so stated to Polk. It is true, also, that Hume made no effort to restore the line. But there is no indication that a restoration thereof would have been of any value to plaintiff, the line having been erected as a connecting line between the two systems, or that plaintiff desired it restored. It is not unlikely that it did not.

Besides the plaintiff's declaration is liable to the construction that it sought punitive damages solely on the ground of willful misconduct. Three times therein it alleged that the tort was committed for the purpose of affecting plaintiff's business. The allegations are that it was committed "for the purpose of injuring the plaintiff in its business," "for the deliberate purpose of crippling, hindering and embarrassing this plaintiff in the carrying on of its business as a competitor of said defendant," and "for the deliberate purpose of stifling competition and crippling the business of this plaintiff." But there is an entire absence of evidence that Hume committed the tort for any such purpose and it had no real relation to the accomplishment thereof. Plaintiff's interchange of business with the Tri-State Company had theretofore been put an end to by its repudiation of its contract with plaintiff.

The judgment of the lower court is affirmed.

MALLEN et al. v. RUTH OIL CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1916.)

No. 4566.

GUARDIAN AND WARD ⇐=44—LEASE—DURATION.

Under Const. Okl. art. 7, §§ 11–13, and Rev. Laws Okl. 1910, §§ 3330, 3335, 6532, 6554, 6569, which define the probate jurisdiction of the county courts and authorize them to permit the sale and disposal by guardians of the lands owned by minors, without restrictions as to duration of estate, and section 6547, which empowers guardians to lease and grant oil and gas under the same procedure in the county court as now authorized, a guardian can, with the consent of the court, make a lease of the oil and gas under the lands of the minor for so long as those minerals may be found in paying quantities, which will be valid after the ward attains his majority.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 192–201; Dec. Dig. ⇐=44.]

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

Action by William D. Mallen, Jr., a minor, by his next friend, and others, against the Ruth Oil Company and others, to recover possession of a tract of land. Judgment for defendants on demurrer to the petition (230 Fed. 497), and plaintiffs bring error. Affirmed.

Samuel V. O'Hare, of Muskogee, Okl., for plaintiffs in error.

A. J. Biddison, of Tulsa, Okl., and George S. Ramsey, of Muskogee, Okl. (Biddison & Campbell, of Tulsa, Okl., on the brief), for defendants in error.

Before ADAMS, Circuit Judge, and REED and ELLIOTT, District Judges.

ADAMS, Circuit Judge. The plaintiffs in error, who are the heirs at law of one Jesse D. Mallen, deceased, brought this action in the District Court of the United States for the Eastern District of Oklahoma to recover possession of a certain described tract of land located in the county of Nowata, in the state of Oklahoma. They alleged in their petition that on April 7, 1912, William Mallen, who before then had been duly appointed by the county court of Nowata county legal guardian of Jesse D. Mallen, who was then a minor, executed an oil and gas lease to the defendant, Ruth Oil Company, which was duly approved by the county court of Nowata county, whereby he demised, for a consideration specified, to the lessee all the oil and gas in and under the land, "for the term of minority of said minor, and so long thereafter as oil or gas is found on said premises in paying quantities"; that Jesse D. Mallen, had he lived, would have reached the age of 21 years on September 1, 1913; that the term of the lease executed by his guardian therefore expired, by limitation, on that date; that the county court of Nowata county had no jurisdiction or power to authorize the guardian to execute a lease of his ward's land for oil and gas mining purposes for a term extending beyond the minority of the

ward; and that the plaintiffs, as the heirs at law of the deceased minor, were entitled to the possession of the demised premises and a judgment for rents, incomes and profits accruing since the 1st day of September, 1913.

To this petition the defendants demurred, alleging that it failed to state a cause of action. This demurrer was sustained, and, the plaintiffs declining to plead further, judgment was rendered for the defendants, for the reversal of which plaintiffs prosecute this writ of error.

The sole question raised by the assignment of error is this: Is an oil and gas mining lease, executed by a guardian of a minor in the state of Oklahoma under the authority and direction of the county court, containing this habendum clause, "To have and to hold the above-described premises for the term of minority of said minor, and so long thereafter as oil or gas is found on said premises in paying quantities," a valid lease in so far as its term extends beyond the minority of the ward?

Although the ward was an Indian, the question is not embarrassed by any Indian statute, or law specially applicable to Indians, but is one of general law, and is to be considered accordingly. It is well settled by the authorities, and so conceded by counsel, that a lease of that kind as between parties sui juris is valid for the term as stated, namely, "so long thereafter as oil or gas is found on said premises in paying quantities"; but the plaintiffs in error contend that this rule does not prevail in leases executed by a guardian in right of his ward, that such leases are valid as conveyances for the term of minority only, and voidable thereafter. Defendants in error, on the contrary, contend that such leases are valid conveyances for the full term "so long thereafter as oil or gas is found on said premises in paying quantities." Which is right?

Section 11 of article 7 of the Constitution of Oklahoma provides for the establishment of a county court in each county of the state, and that it shall be a court of record; and section 12 of that article provides that the county court shall have original jurisdiction coextensive with the county in all probate matters. Section 13 of that article is as follows:

"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 relevant statutes of the state are as follows:

Section 3330 (Revised Laws of Oklahoma 1910) provides 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."

Section 3335 is as follows:

"A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property,

nor make any *sale* of such property without the order of the county court. * * *"

Section 6532 requires that the guardian, before the issuance of letters of guardianship to him, shall execute a bond with sufficient sureties, conditioned that he will make an inventory of all the estate, real and personal, of his ward, *dispose of* and manage the estate according to law and for the best interest of his ward, faithfully discharge his trust in relation thereto, and render an account, on oath, of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management *and disposition* of the same.

Section 6554 is as follows:

"When it appears to the satisfaction of the court, upon the petition of the guardian, that *for the benefit* of his ward *his real* or personal estate, or some part thereof, *should be sold*, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian *may sell* the same for such purpose, upon obtaining an order therefor."

Section 6569 is as follows:

"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."

The foregoing constitutional and statutory provisions (other than section 6547, to which attention will be given later) disclose, in our opinion, that the organic law of the state and many legislative enactments in harmony therewith, confer upon the county court of the state very general and comprehensive supervision over the "management," "control," "sale," and "disposition" of the estates of minors under guardianship. They confer upon such courts, among other specific provisions, jurisdiction: (1) To appoint guardians for minors; (2) to transact all business appertaining to their estates; and (3) to control the guardian in the management, control and disposition of the property of his ward; and they specifically confer upon guardians of a minor the right to petition the county court for leave to sell his real estate and reinvest the proceeds of such sale whenever it shall be made to appear to the court that such sale would be for the benefit of his ward, and in express terms confer upon the court power to make such an order upon the petition of the guardian, making a showing of that kind, and require the guardian to file a bond, conditioned for the faithful discharge of his duties, including rendering an account for all moneys coming into his hands or interest derived from the management and disposition of his ward's property, and in express terms confer upon county courts the power to 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.

These provisions would seem, on a proper and harmonious consideration of them all taken together, if not, indeed, upon the consideration of several of them severally and independently, to afford ample authority for the sale or other disposition by the guardian, when authorized by the appropriate county court, of any and all property, whether real or personal, belonging to the ward, whenever such sale or other disposition would be beneficial to his ward's estate, or whenever, in view of all the circumstances surrounding the case, the best interests of his estate would require. And this authority does not appear to be limited in any manner, either as to quantity or duration of the estate sold or disposed of. They have empowered the guardian to make such sale or disposition of the ward's property "as circumstances require," "for the best interests of the ward," etc. In neither the Constitution nor statutes is there any suggestion of a sale or disposition for and during the time of minority only suggested, but in all the provisions authorizing the sale or disposition of the ward's property general and comprehensive language is used without any limitation whatsoever as to the quantity of the estate to be sold or disposed of. In fact, the general language authorizing the sale and disposition of the ward's property would most naturally include authority to sell or otherwise dispose of any portion or all of it, especially as no limitation is expressed or suggested.

But this is not all: In recent years a peculiar kind of property was discovered and developed in many parts of the state of Oklahoma, consisting of oil and gas, which has become notoriously valuable. This kind of property, as disclosed by the judicial history of its development in this and other courts (see Kemmerer v. Midland Oil & Drilling Co., 229 Fed. 872, —— C. C. A. ——, and cases cited), is fugitive in its character and liable to seepage and in other ways to be drained away from its original location to parts of contiguous or neighboring land. As was said by the learned District Judge who tried this case, and who, by reason of his proximity to and familiarity with the property now involved, is specially qualified to speak on the subject:

"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 1 or 2 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 1 or 2 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 disposition 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."

Moreover, Congress, by section 2 of the act of May 27, 1908 (35 Stat. 312, c. 199), has provided that leases for oil, gas, or other mining purposes may be made with the approval of the Secretary of the Interior, thereby, as said by this court in Kemmerer v. Midland Oil & Drilling Co., supra, making a "severance of the oil and gas right from the surface, * * *" recognizing the existence of an estate therein, separate and distinct from the surface of the land, and making provision for its separate disposition. It does not seem reasonable to curtail the right of free and unrestricted alienation of this peculiar kind of property by or on behalf of an infant, when it is freely admitted to adults. This would place the infant and his property at considerable disadvantage in the sharp competition with respect to such property.

In view of the peculiar character and quality of the property in oil and gas, as just indicated, the Legislature of the state of Oklahoma was not content to leave it, when belonging to minors, subject to the disposition or control of county courts under any general laws or to be determined by construction or intendment, but has made specific provision concerning it, in section 6547 Revised Laws of Oklahoma 1910, which reads as follows:

"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."

This section seems to us to afford explicit authority for the leasing of oil and gas lands belonging to minors by guardians of such minors, when authorized so to do by the appropriate county court. It is noticeable that this section makes no limitation upon terms during which such leases may be made. This seems to be controlled by other provisions of the statutes, to which reference has already been made, which, among other things, empowers the guardians to make such sales and dispositions of the property of the ward as under all the circumstances the best interests of the ward may require. The determination of what the best interests of the ward requires is left to be determined by the county court, upon such hearing as is appropriate in such cases.

Manifestly, for reasons stated by the learned District Judge, terms of considerable duration would be justified, and in many cases imperatively demanded, if the interests of the ward were alone to be considered.

To enforce the rule contended for by the plaintiffs in error in this case, that a guardian of a minor has no power to lease oil or gas properties for terms extending beyond the minority of the minor, might in many cases deprive the ward of the substantial advantage of the ownership by him of land bearing oil and gas. It may be, on account of its fugitive character, entirely dissipated or drained from his land before he reaches the age of majority, or it may be, as suggested by the District Judge, impracticable to make leases for the short period of minority only.

The Supreme Court of Arkansas which, by reason of the fact that

the laws of that state governed many of the rights of citizens of the Indian Territory before statehood, in the case of Beauchamp v. Bertig, 90 Ark. 350, 370, 371, 119 S. W. 75, 23 L. R. A. (N. S.) 659, had occasion to give consideration to the questions involved in this suit, employed the following language:

"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 Digest. It also gives the probate court power to sell or lease for purposes of reinvestment or putting proceeds on interest. Section 3801, Kirby's Digest. * * * Under the common law, or statutes simply declaratory thereof, leases made by the guardian to extend beyond the term of the guardianship are voidable [citing cases]. * * * 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 Digest, 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."

In the case of Huston v. Cobleigh, 29 Okl. 793, 119 Pac. 416, the Supreme Court of Oklahoma had before it the validity of an oil and gas mining lease executed before statehood by a guardian, and extending beyond the minority of his ward. It was there said by Mr. Justice Williams, in delivering the opinion of the court:

"It is contended by counsel for plaintiffs in error that said court [the United States court] was sitting in the exercise of probate jurisdiction only. If so, certain acts as contained in Mansfield's Digest of the Statutes of Arkansas (1884), apply. Such statutes then in force in the Indian Territory are as follows: Mansfield's Digest, section 3502 (section 2398, Ind. Ter. Stat. 1899), empowered the United States Courts in the Indian Territory, sitting as probate courts, to authorize the guardian to lease the lands of a minor according to the best interests of the ward, subject to the approval of the court; and sections 3509, 3510, and 3511, Mansfield's Digest, * * * authorize the probate court to sell and lease for purposes of reinvestment or putting proceeds on interest."

The court then cites, with approval, the case of Beauchamp v. Bertig, supra, reviews certain sections of Kirby's Digest, finds the same to be identical with the sections of Mansfield's Digest in force in the Indian Territory, and then says:

"The statutes in force in the Indian Territory were fully as comprehensive in empowering the guardian, with the permission of the court, to execute a lease to extend beyond the minority of the minor, as those of Arkansas at the time of the delivery of the opinion in Beauchamp v. Bertig, supra, which was on April 26, 1909."

In Cowles v. Lee, 35 Okl. 159, 128 Pac. 688, the same question which was involved in Huston v. Cobleigh was again before the Supreme Court of Oklahoma, and that court then held that under the Arkansas statutes the United States courts, sitting as courts of probate, had power to approve oil and gas mining leases extending beyond the

minority of a ward. See, also, Cabin Valley Mining Co. v. Mary Hall (Okl.) 155 Pac. 570, just decided by Supreme Court of Oklahoma, opinion handed down February 15, 1916.

We think the language and necessary intendment of the provisions of the Constitution and statutes of Oklahoma, taken singly or all together, make it clear that a guardian's lease, made with the approval of the county court, demising oil and gas land of his ward for a term extending beyond his minority, and even "so long thereafter as oil or gas is found on said premises in paying quantities," is valid; and this conclusion appears to be the view of the Supreme Courts of the states of Arkansas and Oklahoma, as disclosed, in effect, by their decisions supra.

The judgment of the District Court is affirmed.

PENNSYLVANIA CO. v. FANGER et al.

(Circuit Court of Appeals, Sixth Circuit. April 10, 1916.)

No. 2680.

1. APPEAL AND ERROR ⟸966(1)—CONTINUANCE ⟸7—REVIEW—DISCRETION OF COURT.

The ruling of the trial court on an application for a continuance is a matter of discretion, not subject to review unless it clearly appears that the discretion has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. ⟸966(1); Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. ⟸7.]

2. APPEAL AND ERROR ⟸500(1)—REVIEW—MATTERS NOT APPEARING OF RECORD—DENIAL OF CONTINUANCE.

Where the record does not show that the motion for continuance because of the absence of a witness was presented to the trial court, and other circumstances appearing in the record tend to show that it never was presented or ruled upon, plaintiff in error has failed to show an abuse of discretion in overruling the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2295; Dec. Dig. ⟸500(1).]

3. TRIAL ⟸29(1)—CONTINUANCE—PREJUDICE OF JURY.

Where, in the trial of a personal injury case, a juror was withdrawn and the case adjourned because on that day plaintiff was menstruating, so that defendant's physician could not examine her as her counsel had agreed, a remark of the judge to the jury that, owing to the condition of the plaintiff the case would be continued, did not prevent the securing of an impartial jury from the same panel, so as to show an abuse of discretion in denying a continuance for the term, where none of the jurors was questioned as to having heard the remark, since it would be ordinarily understood by them as not referring to plaintiff's injuries.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80, 508; Dec. Dig. ⟸29(1).]

4. APPEAL AND ERROR ⟸1046(5)—HARMLESS ERROR—REMARK OF TRIAL JUDGE.

Even if that remark was understood by the jury as referring to plaintiff's injuries, it could not have caused the jury to reach an erroneous conclusion as to her injuries as disclosed by the evidence, under a charge which clearly left the jury to determine as questions of fact the nature and extent of the injuries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134; Dec. Dig. ⟸1046(5).]

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5. APPEAL AND ERROR ⟸263(1)—PRESENTING QUESTIONS IN LOWER COURT—INSTRUCTIONS—EXCEPTIONS AND REQUEST.

An assignment of error to a portion of the charge cannot be sustained, where no exception was taken to the charge on that ground, no modification of it was suggested, and no instructions on the subject requested.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1516; Dec. Dig. ⟸263(1).]

In Error to the District Court of the United States for the Northern District of the Eastern Division of Ohio; William L. Day, Judge.

Action by Kathryne Fanger, by her next friend, Margaret Fanger, against the Pennsylvania Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

Squire, Sanders & Dempsey, of Cleveland, Ohio (Thos. M. Kirby and W. C. Boyle, both of Cleveland, Ohio, of counsel), for plaintiff in error.

Anderson & Lamb, of Youngstown, Ohio (D. F. Anderson, of Youngstown, Ohio, of counsel), for defendant in error.

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

SANFORD, District Judge. This is an action at law brought by Kathryne Fanger, a citizen and resident of Ohio, by next friend, against the Pennsylvania Company, a Pennsylvania corporation, to recover damages for alleged personal injuries received by the plaintiff in a collision while a passenger on defendant's train. The trial resulted in a verdict and judgment in favor of the plaintiff; and the defendant has brought this writ of error.

The chief contention in behalf of the plaintiff in error is that there was an abuse of discretion on the part of the trial judge in denying it a continuance. The facts in reference to this matter, which appear only imperfectly in the record, are, so far as they may be definitely determined, these:

On the day when the case was regularly called for trial and after a jury had been impanelled, the defendant, pursuant, as appears from an affidavit filed in support of the defendant's motion for a new trial, to a previous consent given by the plaintiff's attorney, requested that its physician, Dr. J. F. Hobson, who was present in the court, be granted an opportunity to make a physical examination of the plaintiff; but it appearing that the plaintiff was then menstruating and not in such condition as to permit a physical examination, this request was refused by the plaintiff's counsel. Thereupon, on motion of the defendant's counsel, a juror was withdrawn and the case continued; the trial judge stating to the jury at the time that owing to the condition of the plaintiff the case would be continued as a physical examination could not be made. No entry appears of record as to this continuance; but apparently, as appears from the memorandum handed down by the trial judge on the motion for new trial, in which it is also referred to as "an adjournment of the first partial trial," the case was not continued until the next term, but the trial was merely postponed to a

later date in the same term. It is also alleged in the foregoing affidavit that at the time this continuance was had, it was "made known that Dr. Hobson was leaving that day for Europe"; but it is not specifically averred that this was brought to the attention of the trial judge.

Thereafter, on the same day, for a cause not appearing in the record, the trial judge reinstated the case, and set it for trial on the following day. It is alleged in the foregoing affidavit that this reinstatement was made over the defendant's objection, but there is no entry of record in reference to this matter.

On the following day the defendant filed a motion for continuance supported by the affidavit of its counsel. This affidavit set forth, among other grounds for a continuance:

That Dr. Hobson, the regularly employed surgeon for the defendant, had, as such, been acting as consultant in the preparation of the defense in the case; that his testimony was material to the defense, and without it the defendant would be unable to properly present its defense; that upon the calling of the case the day before he was present in court, and upon the case being continued had left for New York and was then absent from the jurisdiction of the court;

That it would be impossible to obtain a jury from the panel which could impartially and fairly try the case, for the reason that the jurors called the day before to try the case were informed by the court that the physical condition of the plaintiff would not permit of a physical examination, from which they might infer that such physical condition was one due to injury, rather than to natural causes, and that it was probable that all the jurors upon the panel had heard these transactions in the case the day before; and

That upon the continuance of the case, all the defendant's witnesses living at Fort Wayne, Indiana, and westward, had been advised that their presence would not be necessary, and it was, upon the short notice between the continuance and reinstatement, impossible to obtain these witnesses, without whose testimony it would be impossible to successfully present the defense.

While this motion and supporting affidavit were filed in the case there is nothing in the record affirmatively showing that either this motion or supporting affidavit were ever brought to the attention of the trial judge or acted on by him; there being no entry of record in regard thereto and no reference thereto in the bill of exceptions. And, on the other hand, the bill of exceptions shows that after the case had been again set for trial and a new jury impanelled on the second day, the defendant, by its counsel, entered an objection on behalf of the defendant to going into the trial, based upon one ground only, namely, the alleged impossibility of getting a fair and unprejudiced jury from the panel by reason of the remark made by the trial judge on the preceding day in reference to the plaintiff's physical condition. This specific objection was overruled by the court, and exception reserved by the defendant.

It furthermore appears from affidavits submitted in support of the defendant's motion for new trial that Dr. Hobson did in fact leave the city on the first day; that it was impossible for the defendant to have

obtained his testimony on the trial; and that he would have been an important witness for the defendant as a medical expert, in connection with the character of the plaintiff's injuries; but it is not disclosed that he had himself any personal knowledge as to the plaintiff's condition. Furthermore, while other physicians were examined by the defendant as medical experts on the trial, the affidavit of defendant's counsel filed in support of the motion for new trial states that these other physicians were not sufficiently advised and peculiarly qualified to give evidence in a case of the character in issue. It does not appear, however, that any witness living at Fort Wayne, or westward, whose testimony was material to the defendant, was not in fact present at the trial; the bill of exceptions showing, on the contrary, that several witnesses were in fact examined at the trial and testified for the defendant who lived at Fort Wayne, including various members of the train crew, and one passenger.

[1, 2] It is well settled that the action of a trial court upon an application for a continuance, is purely a matter of discretion, which is not subject to review unless it clearly appears that this discretion has been abused. Isaac v. United States, 159 U. S. 487, 489, 16 Sup. Ct. 51, 40 L. Ed. 229, and cases cited. Assuming, however, for present purposes, that if the defendant's motion for a continuance and its supporting affidavit had been brought to the attention of the trial judge, there would, in view of the facts set forth in the affidavit, especially in reference to the departure on the preceding day of Dr. Hobson, the consulting physician assisting the attorney in the defense of the case, have been an abuse of judicial discretion in reassigning the case and setting it for trial after his departure, without reference to the other witnesses who had been released by the defendant, it is clear that we cannot assume such abuse of discretion on the part of the trial judge, but can only find it to exist upon plain and satisfactory evidence that the motion and affidavit in question were in fact called to his attention and ruled on adversely by him.

After careful consideration of the entire record, however, we think it is not shown that this motion and affidavit were in fact brought to the attention of the trial judge or acted on by him. We reach this conclusion for several reasons: 1st, the improbability that the trial judge would have overruled this motion, with this supporting affidavit, if it had been brought to his attention; 2nd, the fact that it nowhere appears by any entry of record, recital in the bill of exceptions, or otherwise, that it was in fact brought to his attention and acted on by him; 3rd, the fact that the application for continuance made in open court, as shown by the bill of exceptions, did not refer either to this motion or the supporting affidavit, but was based solely upon one ground alone, namely, the remark made by the trial judge as to the physical condition of the plaintiff; 4th, the fact that although the defendant's motion for new trial set forth eight specific grounds, it contained no reference to the overruling of a motion for continuance; 5th, that while in an affidavit of the defendant's attorney filed several months later and evidently intended as a supplemental statement of the grounds for a new trial, it was insisted that it was an abuse of dis-

cretion upon the part of the trial judge to force the defendant to trial when the testimony of Dr. Hobson was unavailable, it was not even alleged in this affidavit that any application for continuance had in fact been made to the trial judge upon this ground; and, 6th, the fact that in the memorandum handed down by the trial judge in overruling the motion for new trial no reference is made to any application for a continuance as having been made to him upon this ground.

We therefore conclude that as this motion and supporting affidavit do not appear to have been called to the attention of the trial judge or overruled by him, no abuse of discretion is shown in this behalf.

[3-5] We are furthermore of opinion that there was no abuse of discretion on the part of the trial judge in overruling the defendant's application for continuance as made in open court, on account of the remark that had been made by the trial judge on the preceding day as to the physical condition of the plaintiff. It is stated in the memorandum of the trial judge that the jury impanelled on the second day was an entirely new one. And while some of them may have been in the court room on the previous day when this remark was made to the first jury, this does not specifically appear; the defendant at the time the second jury was impanelled not having questioned any of the jurors as to this matter or made any effort to show either at that time or later on the motion for new trial that any of them had in fact heard the remark in question. Furthermore, we do not think that the remark in question naturally bore the construction sought to be placed upon it by the defendant, and think it more reasonable to believe that if any of the jurors placed upon the second jury had incidentally heard this remark the day before in connection with the transactions in the court room they would have correctly understood it as referring, in the light of all that had happened, merely to the physical condition of the plaintiff due to her menstruation. And even if they had not so understood it, still, in view of the fact that on the trial testimony was given by physicians as to the physical injuries of the plaintiff, and she herself testified and was seen and heard by the jury, we cannot assume that such an incidental remark, even if heard and misconstrued, would have caused the jury to have reached an erroneous conclusion as to the physical injuries of the plaintiff, as disclosed by the evidence, under a charge which clearly left them to determine as questions of fact the nature and extent of her injuries.

We therefore conclude that there was no abuse of discretion in overruling the application for continuance based upon this ground; and that it cannot be assumed, and certainly is not shown, that any prejudice resulted to the defendant therefrom.

The defendant has also assigned error as to a portion of the charge to the jury, which, it is insisted, is in conflict with the rule which, it is urged, was recently laid down in Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905, in reference to the burden of proof in cases of injuries to railway passengers. However, at the trial no exception whatever was taken to the charge on this ground, no modification of it suggested and no other instructions upon the subject requested; hence, this assignment of error cannot now be

considered. Pacific Express Co. v. Malin, 132 U. S. 531, 536, 10 Sup. Ct. 166, 33 L. Ed. 450; St. Louis Railroad v. Shepherd, 240 U. S. 240, 36 Sup. Ct. 274, 60 L. Ed. — (Feb. 21, 1916); Wabash Screen Co. v. Lewis (6th Cir.) 184 Fed. 260, 261, 106 C. C. A. 402.

The defendant does not now rely upon any of the other grounds of error originally assigned. The judgment below will hence be affirmed, with costs.

KINSER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1916.)

No. 4502.

1. CRIMINAL LAW ⟸1169(5)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY STRIKING OUT.

Error in admitting evidence, which was not specially prejudicial, was cured by striking the testimony from the record before the witness left the stand.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3141; Dec. Dig. ⟸1169(5).]

2. CRIMINAL LAW ⟸696(1)—EVIDENCE—MOTION TO STRIKE.

Where a witness, in reply to a question whether he knew who paid the prosecuting witness' fare, answered that defendant did, which testimony defendant moved to strike, as not responsive to the question, and no foundation being laid for it by showing his means of knowledge, and the court overruled the motion, with the statement that the defense could test it on cross-examination, but the cross-examination did not show that he did not have the knowledge, and the motion to strike was not renewed at the end of the cross-examination, there was no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1639; Dec. Dig. ⟸696(1).]

3. WITNESSES ⟸391 — EXAMINATION — CROSS-EXAMINATION — IMPEACHING WITNESSES.

A witness who testified to contradictory statements made by the prosecuting witness can be cross-examined as to whether he communicated such statements to defendant, and as to what he communicated.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1248; Dec. Dig. ⟸391.]

4. CRIMINAL LAW ⟸1170½(6)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE BY INSTRUCTION.

Error in permitting improper cross-examination of an impeaching witness was cured by a charge that it was incompetent, except as to testimony that the contradictory statements were communicated to defendant, that it was stricken from the record, and that the jury were admonished not to consider it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3134; Dec. Dig. ⟸1170½(6).]

5. CRIMINAL LAW ⟸371(9)—EVIDENCE—COMMISSION OF OTHER OFFENSES—INTENT.

In a prosecution for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1913, §§ 8812–8819]), where the defense contended that there was no evidence that defendant furnished the transportation with the intention that the prosecuting witness should engage in prostitution, it was not error to permit the government to show that

defendant had brought other women into the state for the purpose of prostitution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830, 831; Dec. Dig. ⊂⊃371(9).]

6. CRIMINAL LAW ⊂⊃1168(2)—REVIEW—DISCRETION OF COURT—ORDER OF PROOF—REBUTTAL.

Error by the trial court in holding competent evidence admissible as rebuttal, but not in chief, is not reversible, since the order of the evidence is wholly within the trial court's discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3124½, 3129–3136; Dec. Dig. ⊂⊃1168(2).]

7. CRIMINAL LAW ⊂⊃1168(2)—HARMLESS ERROR—REBUTTAL EVIDENCE—CURE.

Error, if any, in admitting evidence competent in chief as rebuttal was cured by permitting defendant in surrebuttal to introduce evidence as fully as if the government's case in chief had just closed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3124½, 3129–3136; Dec. Dig. ⊂⊃1168(2).]

8. CRIMINAL LAW ⊂⊃1178—APPEAL—BRIEF—SPECIFICATION OF ERRORS.

Under Circuit Court of Appeals Rules for the Eighth Circuit, rule 24 (188 Fed. xvi, 109 C. C. A. xvi), requiring counsel for plaintiff in error to file briefs containing, among other things, a specification of the errors relied on, which shall state specifically the errors to be argued, and a brief argument, with reference to the pages of the record, and providing that errors not specified according to the rule will be disregarded, but that the court may, at its option, notice a plain error not assigned or specified, the court will not consider alleged errors in permitting accused as a witness to be cross-examined beyond the scope of his examination in chief, where there was no specification of errors in the brief for accused, and no reference to the pages of the record on which the testimony can be found, and where the evidence leaves no room for doubt as to defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011–3013; Dec. Dig. ⊂⊃1178.]

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

William C. Kinser was convicted of violating the Mann White Slave Act, and he brings error. Affirmed.

Edward E. Wagner, of Sioux Falls, S. D. (John E. Tipton, of Geddes, S. D., and Gamble, Wagner & Danforth, of Sioux Falls, S. D., on the brief), for plaintiff in error.

Robert P. Stewart, U. S. Atty., of Deadwood, S. D. (Edmund W. Fiske and George Philip, Asst. U. S. Attys., both of Sioux Falls, S. D., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. The defendant, William C. Kinser, was indicted under White Slave Act June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. 1913, §§ 8812–8819). The indictment was in four counts. The defendant was tried and convicted on the second count, and acquitted upon the others, and, having been sentenced on the second count, brings error.

Count 2 of the indictment charged that the defendant—

"did knowingly, willfully, and feloniously cause to be transported in interstate commerce from Sioux City, in the state of Iowa, to and into Geddes, in the state of South Dakota, upon and over the route of the Chicago, Milwaukee & St. Paul Railway Company, a corporation, then and there being a common carrier, operating a line of railway as such and engaged in interstate commerce between the said Sioux City, in the state of Iowa, and the said Geddes, in the state of South Dakota, one certain woman, to wit, Frances Wilmott, with the intent and purpose then and there on the part of him, the said William C. Kinser, to induce, entice, and compel her, the said Frances Wilmott, at said Geddes, in the state of South Dakota, to become a prostitute and to give herself up to debauchery and to engage in other immoral practices."

Without reference for the present to whether all of the evidence was admissible, it showed that the defendant was conducting a hotel at Geddes, S. D., known as the Padley Hotel. The latter part of July, 1914, he either wrote or telephoned to the Fritz Stavrum Employment Agency at Sioux City to send him a cook and chambermaid. The agency sent both employés, the chambermaid being Mrs. Frances Wilmott. An employé of the employment agency bought a ticket for Mrs. Wilmott from Sioux City, Iowa, to Geddes, S. D., over the line of the Chicago, Milwaukee & St. Paul Railway, and she traveled on that ticket to Geddes. After her arrival in Geddes the defendant refunded the expense of her ticket to the employment agency. She testified that about 11 o'clock in the forenoon of her second day at Geddes Mr. Kinser came to her in room No. 11 and said:

"'I have a couple of live wires down stairs, if you think you can handle them.' I said, 'I don't quite catch your meaning.' He said, 'You can see by the hotel that I am not doing business enough here to pay you wages;' he says to me, 'If you want extra money, you will have to get your money from the men;' and he went on and told me the price that I was to charge, providing that I did, and he said it would be $2 a trick for a single trick or $5 for the whole night. He said to keep the money up to $6 a week for myself; the house was to get a dollar out of every trick I turned, but I was to keep the dollar until I had taken in my $6. He said he himself would send up men to my room, the ones he wanted in particular—traveling men. After this statement by Mr. Kinser about 1 o'clock that day men came to my room and I had intercourse with them. I had no funds of my own. I was there just five weeks, and the same practice was engaged in, not very often. I got money and left there. These men paid me according to the prices fixed by Mr. Kinser. Mr. Kinser did not pay me any wages for services rendered for him for the five weeks as chambermaid. The defendant said, if I was in fear that I was going to get into trouble, to tell him, and he would help me out."

[1] The first assignment of error is with reference to the admission of certain evidence by the witness Ola Meyers, but just before she left the stand the court struck all her testimony from the record, except the statement that she received a check and its identification and turned it over to Mr. Stavrum. Her evidence was not specially prejudicial, and this order striking it out was sufficient in any event to cure any error that had been made in admitting it.

[2] The second assignment is that Fritz Stavrum was asked:

"Q. And do you remember, after she went, as to who paid her fare, if you know?"

To which he replied:

"A. Mr. W. C. Kinser paid her fare."

Defendant moves to strike out this answer as not responsive to this question, no foundation being laid for it, the means of knowledge is not shown.

"The Court: I thing he may answer. You can test him with cross-examination."

Upon its face the question propounded to this witness was not subject to the objection made, and no cross-examination of him revealed otherwise, and no motion of a similar character was made at the end of the cross-examination.

[3, 4] Charles W. Bundy was called by the defendant to impeach Frances Wilmott. He testified to a conversation with her and was then interrogated on cross-examination whether he had communicated this conversation to Kinser and just what had been so communicated. Permitting this cross-examination is assigned as error in the twenty-second assignment. We see no objection to the line of cross-examination, but at its conclusion the court, upon its own motion, instructed the jury that the testimony was incompetent, except that he did communicate the conversation with the girl to Kinser, and stated that any further answers were entirely incompetent to the development of the testimony,

"And your attention is called to the fact that something was mentioned in that conversation with reference to pulling the house. All of that is stricken from the record, and you are admonished not to consider it, and to exclude it entirely from the consideration of this witness' testimony."

This certainly cured the error, if any, in the admission of the evidence.

[5] The government in chief called Esther King, who was sent by the Fritz Stavrum Employment Agency from Sioux City to the Padley Hotel at Geddes to act as a waiter, and sought to show by her that shortly after her arrival she was instructed substantially as Mrs. Wilmott claimed she was, but the court sustained an objection. At the close of the government's case in chief the defendant filed a motion for a directed verdict for the following, among other, grounds:

"4. There is no evidence in this case that the defendant procured or furnished transportation for said Frances Wilmott to go in interstate commerce from Sioux City, Iowa, to Geddes, S. D., with the intention that she should engage in prostitution or other immoral practices."

This motion was overruled. The court allowed Esther King in rebuttal to testify to the matter sought to be elicited in chief, that she yielded to the defendant's solicitations and acted as a prostitute at the hotel. Darlene Dayoe was also called and testified to a similar experience. Bertha Townsend was called and testified that she was employed at defendant's hotel, and he made the same proposition to her testified to by Mrs. Wilmott, Miss King, and Miss Dayoe, and she declined to accede to his wishes, and went up to her room that

evening, and found her clothes had been moved out of her room and into the room of a traveling man, and she took them and left the hotel.

Without reference to whether the evidence was properly rebuttal or not, it was clearly admissible in chief, especially in view of defendant's contention that there was no evidence that his intention was that Mrs. Wilmott "should engage in prostitution or other immoral practices." The admissibility of evidence of other transactions showing intent has been fully considered by this court. Withaup v. United States, 127 Fed. 530, 62 C. C. A. 328; Olson v. United States, 133 Fed. 849, 67 C. C. A. 21; Exchange Bank et al. v. Moss, 149 Fed. 340, 79 C. C. A. 278; Thomas v. United States, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; Schultz v. United States, 200 Fed. 234, 118 C. C. A. 420. In view of these authorities it seems entirely a work of supererogation to cite those from elsewhere. Nor do we find anything in People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, in conflict with our previous rulings. In that case it is said:

"Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish: * * * (2) intent; * * * (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others."

[6, 7] It is the settled law that the determination of the order of the evidence is in the discretion of the trial court, and even if the court erred in holding this evidence was admissible in rebuttal, rather than in chief, it was a matter wholly within its discretion, and no exception to it is of any validity; but after the government had closed in rebuttal, when the first witness was called in surrebuttal, the court said:

"I think the record may show, at the close of the testimony of the plaintiff in rebuttal, that counsel for the defendant are informed that—to the end the answer to the testimony of the witnesses, King, Dayoe, Wilmott, and Townsend may be with continuity, if they desire, the case is fully open for the answer of the defendant, as fully as if the plaintiff had just closed his original case, without regard to what has been offered. I think counsel understands what I mean."

Even if there was error committed in admitting the evidence of the witnesses King, Dayoe, and Townsend in rebuttal, rather than in chief, the opportunity given the defendant by the court was ample to rectify any error which may have been made.

[8] By numerous assignments of error the defendant contends that the court erred in permitting a cross-examination of the defendant beyond the limitations of the examination in chief. Rule 24 of this court (188 Fed. xvi, 109 C. C. A. xvi) provides:

"Briefs.

"1. The counsel for the plaintiff in error * * * shall file with the clerk of this court, at least forty days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

"2. This brief shall * * * contain, in order here stated: * * * Second. A specification of the errors relied upon, which in cases brought up

by writ of error, shall set out separately and particularly each error asserted and intended to be urged. * * * Third. A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record. * * *

"4. * * * Errors not specified according to this rule will be disregarded; but the court at its option, may notice a plain error not assigned or specified."

No specification of errors appears at all in the brief for the plaintiff in error, and there is no reference at all to the pages of the record where the alleged errors can be found. This alone is sufficient to warrant the affirmance of this case on these points. City of Lincoln v. Sun Vapor Street Light Co. of Canton, 59 Fed. 756, 8 C. C. A. 253; Orr & Lindsley Shoe Co. et al. v. Needles et al., 67 Fed. 990, 994, 15 C. C. A. 142, 147; Chicago Great Western Ry. Co. v. Egan, 159 Fed. 40, 46, 86 C. C. A. 230; Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works, 181 Fed. 38, 44, 104 C. C. A. 52; Illinois Central R. Co. v. Nelson, 212 Fed. 69, 75, 128 C. C. A. 525, 531; Whitfield v. Krawza, 214 Fed. 83, 130 C. C. A. 523; Colorado Yule Marble Co. v. Collins, 230 Fed. 78, — C. C. A. —.

All the evidence has been carefully read, examined, and digested, and leaves no room for doubt as to the defendant's guilt. It has been said:

"Under such circumstances only some glaring and obviously harmful error would justify a reversal." Myers v. United States (Circuit Court of Appeals. 2d Circuit) 223 Fed. 919, 926, 139 C. C. A. 399, 406.

See Rev. St. §§ 1011, 1025 (Comp. St. 1913, §§ 1672, 1691).

There has existed in this court ever since Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. 668, 64 C. C. A. 180, and Balliet v. United States, 129 Fed. 689, 64 C. C. A. 201, a difference of opinion between the judges of this court as to the latitude to be allowed on cross-examination and what constitutes a reversible abuse of discretion on the part of the trial court in permitting a cross-examination beyond the scope of the examination in chief. That difference still exists among the judges to whom this case was submitted, and we are thus unwilling to exercise the option to consider these questions, where they have not been raised as required by our rules. Some other questions are sought to be raised, but they are either wholly without merit or covered by the point just considered.

The case is affirmed.

MASON & HANGER CO. v. SHARON.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 171.

1. EVIDENCE ⟸389—PAROL EVIDENCE—CORPORATE RECORDS—"PRINCIPAL OFFICE."

Under General Corporation Law N. Y. (Consol. Laws, c. 23) § 3, subd. 9, defining the term "office" of the corporation as its principal office within a state, or principal place of business within the state if it has no principal

office therein, the "principal office" of a foreign corporation, where a notice of claim for injuries to an employé may be served under New York Employers' Liability Act (Consol. Laws N. Y. c. 31, §§ 200–204), is not synonymous with its principal place of business, which it is required by the New York General Corporation Law to designate in the certificate filed with the secretary of state, and parol evidence is admissible to show that its principal office is at a place different from its designated principal place of business.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1718; Dec. Dig. ⊂⊃389.

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

2. MASTER AND SERVANT ⊂⊃276(1)—INJURIES TO SERVANT—NOTICE OF CLAIM—SUFFICIENCY OF EVIDENCE—PLACE OF SERVICE.

In an action for personal injuries under the New York Employers' Liability Act, evidence *held* sufficient to warrant the jury in finding that the office of the corporate employer, where the notice of claim required by that act was served, was its principal office.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950, 954; Dec. Dig. ⊂⊃276(1).]

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

Action for personal injuries by Michael Sharon against the Mason & Hanger Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 219 Fed. 526, 135 C. C. A. 276.

Everett, Clarke & Benedict, of New York City (Herman S. Hertwig, George M. Clarke, and George W. Martin, all of New York City, of counsel), for plaintiff in error.

Sydney A. Syme, of Mt. Vernon, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This action was brought under the Employers' Liability Act of the state of New York. The complainant alleges that he was at the time of the accident employed by the defendant, a foreign corporation organized under the laws of the state of West Virginia—that while so employed he was engaged in working in a certain shaft maintained by defendant in connection with the work being done by defendant in the construction of the new aqueduct for the city of New York; that on August 22, 1913, while working in the shaft he was struck by a rock which fell from the roof and threw him to the ground and crushed him; that the injuries he received were caused by the negligence of defendant and the carelessness of the persons intrusted by it with the superintendence of the work. It is also alleged that as a result of his injuries his leg was amputated, his arms fractured, and that he suffered permanent injuries to his head, back, spine, hips, and internal organs. The jury found the defendant guilty of negligence and awarded the plaintiff the sum of $21,500, which the trial judge later reduced to the sum of $15,000.

The case has previously been before this court. At that time the plaintiff had obtained a verdict for $5,000. We reversed the judg-

ment upon the ground that the notice of claim which the New York act required to be served had not been served at the principal place of business of the defendant company. See 219 Fed. 526, 135 C. C. A. 276. The case went back for a new trial and is again brought to this court, and the main assignment of error is now as it was then that the notice of claim was not served as required by the act. The provision of the act on this subject is set forth at length in our former opinion. It is unnecessary therefore to incorporate it herein. We need say simply that it provides that no action can be maintained until a notice in writing signed by the person injured or by some one in his behalf is given to the employer and "when the employer is a corporation, notice shall be served by delivering the same or by sending it by post addressed to the office or principal place of business of such corporation." The act expressly declares that the notice may be served by post.

There is no dispute but that notice was served within the time fixed by the statute. Neither is there any question but that it was served in the proper manner. The question is whether it was served "at the principal office" of the defendant. The record in this case differs from the record in the former case in the evidence bearing upon this question.

The trial judge left it to the jury to determine whether the notice had been served at defendant's "principal office" when it was mailed to the Van Cortlandt Park office and charged that there could be no recovery unless the Van Cortlandt Park office was defendant's "principal office" at the time of the service. The instruction of the court on this matter was full and clear, covering more than five printed pages. On this question the court charged in part as follows:

"What does 'principal office' mean? I should say that an office that they themselves regarded as their real headquarters, and that in itself is to be determined by the things that they did there, and at any other office. The comparative importance of the things they did at the two places, not the actual work that is being done under the contract, because a man can have his principal office downtown and have his work away uptown. But the office. The office is the place for correspondence, it is the place for the bookkeeping. It is the place for the people themselves to regard as their headquarters. The place for the executive officers of the corporation.

In your judgment did these parties, the officers of the defendant, on September 4, 1913, consider, and were they in reason justified in considering Van Cortlandt Park as their real headquarters and principal office, or did they consider and were they justified in considering Cornwall on the Hudson as their principal office?"

The verdict shows that the jury were satisfied that the Van Cortlandt Park office was at the time of service the principal office.

[1] It is assigned as error that the court erred in receiving parol evidence on the question of the location of defendant's principal office. The reason for this assignment of error is based on the fact that the General Corporation Law of the state of New York requires a foreign corporation coming into the state to do business to file with the secretary of state a certificate stating where within the state the corporation is to have its principal place of business. As such a certificate had been filed by the defendant, and as Cornwall on the Hudson

was designated therein, the claim is made that the statement therein is conclusive and cannot be contradicted by parol evidence. The certificate stated:

"That the place within the state of New York which is to be its principal place of business is Cornwall on the Hudson, Orange county, New York."

Now no parol evidence was introduced to contradict the certificate in the particular referred to and to show that defendant's "principal place of business" was not Cornwall on the Hudson. On the contrary, the parol evidence introduced was admitted to show, not where defendant had its "principal place of business," but to show where it had its "principal office." The terms "principal place of business" and "principal office" are by no means synonymous and are not used as synonymous in the New York General Corporation Law. That the two terms are not used as synonymous is clearly shown by the phraseology of the act which states that:

"The term 'office of the corporation' means its principal office within the state *or* principal place of business within the state *if* it has no principal office therein." Laws of 1909, c. 28 (Consol. Laws, c. 23) § 3, subd. 9.

The parol evidence was properly received; and the question whether the Van Cortland Park office was at the time of service the principal office of defendant was one of fact which was properly submitted to the jury.

[2] The evidence showed that defendant had only two contracts within the state of New York. One of these was for work at Cornwall on the Hudson, known as contract No. 20. The other was for work at Van Cortlandt Park, known as contract No. 63. At the time of the injury complained of the work under contract No. 20 had been completed and accepted by the city. The plaintiff was employed upon the work done under contract No. 63. On August 30, 1911, the defendant addressed a letter to the "Board of Water Supply, City of New York," saying:

"We have established our city office at Van Cortlandt Park, to be used during the construction of contract No. 63, and we respectfully ask that in the future you will kindly address us at that address on all matters pertaining to this contract, instead of Cornwall on Hudson, N. Y., as given in our proposal."

There was other evidence which tended to show that Van Cortlandt Park was, in September 1913, when the notice was given, the principal office of defendant within the state. One fact alone will be referred to. A process server testified that in September, 1912, he went to serve certain papers on defendant at the office at Van Cortlandt Park and asked the defendant's president "where his principal office was in New York state, so that I could serve papers." "Did you tell him that?" the court inquired. To which the witness replied, "Yes, sir. That was exactly what I told him beforehand, so that I could serve papers in connection with cases I may have against him, and he told me right here, meaning Van Cortlandt Park, where we were standing." The witness went on to explain more specifically that what he asked was where the principal office of the corporation was. There was evidence to the effect that no such conversation took place, but

the jury had a right to disregard it. The jury has found specifically that the company's principal office was at the time of service at Van Cortlandt Park, and this court is satisfied that the evidence supports the finding.

The defendant contends that the evidence shows that the accident happened without any negligence whatever on its part and that it was a case of pure accident. We have looked into the evidence with care and are satisfied that it was sufficient to justify the submission of the charge of negligence to the jury.

The defendant also contends that plaintiff was guilty of contributory negligence as matter of law. We do not think so. Contributory negligence under the New York act is a defense to be pleaded and proved by defendant. Consolidated Laws N. Y. c. 31, as amended by chapter 352, Laws 1910. Defendant has pleaded it, but the question whether it has proved it was upon the evidence a question for the jury. The evidence upon the first appeal upon the question of plaintiff's contributory negligence is practically identical with the evidence on the present appeal. We then declared that "the only error we discover in the bill of exceptions is connected with the service of the notice." It seemed to us then, as it seems to us now, that there was no error in submitting the question of plaintiff's contributory negligence to the jury.

Judgment affirmed.

THE WILLIE.

THE THOMAS CONNELL.

(Circuit Court of Appeals, Second Circuit. February 15, 1916. On Petition for Rehearing, February 25, 1916.)

No. 90.

1. SHIPPING ⟸41—CHARTERS—DEMISE OF SCOW.

Charters of scows in New York Harbor, without motive power of their own and subject to the orders and control of the charterers, are treated as demises, even though the owner keeps a man aboard, called captain by courtesy.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 149–155; Dec. Dig. ⟸41.]

2. COLLISION ⟸115—SCOWS DEMISED TO CHARTERER—LIABILITY.

Identical charters of scows to the same charterer, which were demises, provided that the charterer should be responsible for any damage caused by the negligence of its employés in loading or unloading. One of such scows was injured by another belonging to another owner through negligence of the charterer's foreman in loading. *Held*, that the charterer was liable under the charter, and that, although the owner of the offending scow was not liable, because the charter was a demise, such fact did not prevent the scow from being held liable in rem by the owner of the injured vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 244–247; Dec. Dig. ⟸115.]

On Petition for Rehearing.

3. ADMIRALTY ⊜118—APPEAL—ISSUES.

An appeal in admiralty is a new trial, and vacates the decree below; and although one respondent alone appeals, it may assign error in the failure to hold a co-respondent liable, and may avail itself of charges of fault against such co-respondent contained in the libel.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758–775, 794; Dec. Dig. ⊜118.]

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

Suit in admiralty by the Ætna Insurance Company and Tony Ross against the Borough Development Company, impleaded with the steam tug Willie and the scow Thomas Connell. Decree against the Borough Development Company alone, and it appeals. Modified and affirmed.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for appellant.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellees Ætna Ins. Co. and Ross.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for the Thomas Connell.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The Borough Development Company is a corporation engaged in the business of transporting ashes and other refuse for the city of New York, and has a dump at the foot of Fulton street, Brooklyn, where it loads scows for that purpose. May 15, 1913, the scow Thomas Connell was lying loaded under the dumpboard with the light scow Ward A outside of her. One Curran, the Borough Development Company's foreman, ordered the tug Willie to wind the scows around so as to put the Ward A under the dumpboard with the scow Connell outside of her. As this was being done the load on the Connell shifted against the starboard rail, broke it, and opened up a seam on the deck through which she took on water. This gave her an outboard list, which gradually increased, with the effect that the Connell's bilge was brought with an ever-increasing pressure against the bottom of the light scow Ward A and a constantly increasing strain was put upon the lines. An effort was made to correct the list by trimming the cargo of the Connell, but without success, and she tore off several planks from the bottom of the Ward A, causing her to sink, and shortly after sinking herself. It is said by some of the witnesses that all this could have been prevented if the captain of the Ward A had let the Connell's lines go. The circumstances, however, show that it would have been impossible to do this because of the strain on them, and that the only remedy would have been to cut the lines. The District Judge found that when the captain was about to do this he was stopped by Curran, who told him that he would be arrested if he did so.

The libelant insurance company, having paid the damages sustained by the Ward A, filed a libel against the Borough Development Company, the tug Willie, and the scow Connell, charging each with fault. The District Judge, finding no fault with the tug, dismissed the libel as to her, and also as to the Connell, on the ground that her fault, if any, was not the proximate cause of the injury, but that the Borough Development Company was solely at fault, because its foreman, who was in charge of both scows, by his order to the captain of the scow Ward A, prevented the last chance of saving her. We agree with the court as to the fault of the tug and the fault of the Borough Development Company, but we think that the scow Connell should not have been exonerated.

[1] Charters of scows in this harbor, without motive power of their own and subject to the orders and control of the charterers, are treated as demises, even though the owner keeps a man aboard, called captain by courtesy. Monk v. Cornell Steamboat Co., 198 Fed. 472, 117 C. C. A. 232.

[2] The charter parties of the Ward A and Connell contained the following clauses:

"Second. We will furnish a captain for each scow at our own expense, who will be under your control and orders, but you are not to be responsible for the acts of the captains in the care, navigation, or movement of said scows, and we will save you harmless and defend you from any claims, actions or suits arising therefrom.

* * * * * * * *

"Fourth. You are responsible for all repair of damage done to said scows in loading or unloading, where such damage is caused by the negligence of your employés or the imperfection of your machinery or appliances. In case of damage to scows in tow, or by another vessel, the towboat or vessel at fault and its owners shall alone be held responsible. You are not to be held responsible for damage done by ice, storm, fire, the elements, the act of God, or causes beyond your control, or for repairs that are due to the ordinary wear and tear of the scows, and we will at all times keep the scows in repair and fit for service in which they are engaged, excepting in so far as concerns the repair of damage for which you are responsible."

We see nothing in these provisions to prevent the owners of the Ward A from holding the Borough Development Company and the scow Connell liable for their own defaults, respectively. They must be construed so as to give effect to each, if possible. The damage to the Ward A in this case was caused by the negligence of the Borough Development Company's foreman, who was in charge of both scows, in loading, for which the first clause in the fourth article makes it liable. It was also caused by another vessel, for which, literally construed, the owners of such vessel, the scow Connell, were alone to be held responsible. But the charter being a demise, the owners of that scow would not be responsible at all, so that this second clause should not apply. The scow was in the sole charge of the charterer, and was put into and kept in the dangerous position by its foreman, and it would be a very unfair construction to apply the clause so as to relieve the charterer from the consequences of its own negligence.

So far as the libelant's claim against the scow Connell is concerned, it seems to us it makes no difference whether the Connell injured the Ward A as the result of the negligence of the Borough Development

Company in giving her an unsafe berth where she grounded, or as the result of being improperly laden, either by the Borough Development Company or by her own captain, or as the result of her unseaworthiness because of the negligence of her owners. In any case she did the damage, and was proceeded against in rem as the guilty thing. Her liability is fully raised in this court by the appellant's assignments of error, and we think that the District Judge erred in discharging her.

Accordingly the court below is directed to enter the usual decree in favor of the libelant for damages, with costs against the Borough Development Company and the scow Connell, costs of this court to the libelant against the Borough Development Company and to the Borough Development Company against the Connell, and the decree, so modified, is affirmed.

On Petition for Rehearing.

PER CURIAM. Where a boat lying motionless at a pier has her bottom torn out of her by a boat alongside, the latter is liable for the injury in rem, unless her claimant shows that it was an inevitable accident. In this case the presumption of negligence arose against the scow Connell exactly as if she had navigated straight into the Ward A, under which circumstances it would be no defense that she was being navigated by a charterer. As the charter was a demise, the charterer might, as between it and the owner of the Connell, be primarily responsible; but the claimant of the Connell did not establish that the charterer was primarily responsible. Therefore the decree should be absolute against the scow.

[3] An appeal in admiralty is a new trial; the decree of the court below is vacated. If the scow Connell was erroneously discharged, this court ought to order her to be held, if it is possible to do so. The libelant did not appeal, but the respondent, the Borough Development Company, did. This obliged it to file assignments of error. Its assignments, as well as its brief, covered charges of negligence against the Connell, and it may avail of the charges of negligence contained in the libel. The libelant becomes entitled to a decree against both of the defendants, although it did not appeal. This is necessary to protect the rights of the appellant. Munson Line v. Miramar S. S. Co., 167 Fed. 960, 93 C. C. A. 360; The Galileo (C. C.) 29 Fed. 538. The appellant, which has succeeded in holding the Connell liable, is entitled to the costs of this court as against her.

The petition for a rehearing is denied.

HOGGSON BROS. v. FIRST NAT. BANK OF ROSWELL.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1916. Rehearing Denied May 4, 1916.)

No. 4433.

CONTRACTS ⊂=261(6)—RESCISSION—REFUSAL TO PERFORM.

Where architects, who had contracted to build a bank building for a fixed sum, wrote to the bank, suggesting that the work desired would cost more than the amount limited, and stated that, if the bank insisted on keeping within that limit, the architects would prefer not to do the work, to which the bank replied that they considered the matter off and would begin negotiations elsewhere, whereupon the architects telegraphed that they were ready and anxious to begin the work, the statement that they would prefer not to do the work was not an absolute refusal to do it, which alone is sufficient to authorize rescission by the other party, and they can recover under the contract for their services and disbursements theretofore rendered.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1174; Dec. Dig. ⊂=261(6).]

In Error to the District Court of the United States for the District of New Mexico; William H. Pope, Judge.

Action by Hoggson Bros. against the First National Bank of Roswell. Judgment for defendant, and plaintiffs bring error. Reversed and remanded, with directions to enter judgment for plaintiffs.

Selden Bacon, of New York City, for plaintiffs in error.

James M. Hervey, of Roswell, N. M. (William C. Reid, of Roswell, N. M., on the brief), for defendant in error.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. Hoggson Bros., hereinafter called plaintiff, sued the First National Bank of Roswell, New Mexico, hereinafter called the Bank, to recover for services rendered and expenses disbursed in connection with four alleged contracts, dated April 21, 1906, June 22, 1907, August 24, 1907, and December 8, 1908. A jury was waived and the action tried by the court. Special findings of fact were made, upon which judgment was rendered in favor of the Bank. Plaintiff brings the case here, assigning as error that on the facts found the judgment should have been in its favor.

The trial court found, and in which finding we concur, that the three first contracts were all merged into the contract of December 8, 1908, and that plaintiff must recover on that contract, if at all. It also ruled that there was no breach of said contract on the part of the Bank, for the reason that the plaintiff was the first to breach the contract, thereby justifying the Bank in refusing to perform the same. In the contract of December 8th, the plaintiff agreed to construct for the Bank a new bank and store building at Roswell, N. M., and to furnish all architectural services, including sketches, plans, drawings, specifications, labor, and material for $70,000. The contract also contained the following stipulation:

"We agree to allow you the privilege of canceling the order at any time before the work is begun, and, in the event of our not going on with the work, to accept as our remuneration a sum based on the schedule of charges endorsed by the American Institute of Architects."

The twenty-fourth finding of the trial court is as follows:

"Up to its writing the said letter of January 25, 1909, the plaintiff fully and in all respects kept and performed all terms, conditions, and provisions of each and all its said agreements with the defendant; and at no time prior to the receipt of the defendant's letter of the 16th day of February, 1909, failed in any way to perform any of said terms, conditions, and provisions of any of said agreements, save and except by sending the said letter of the 25th day of January, 1909."

The correspondence between plaintiff and the Bank, which the trial court found as a conclusion of law constituted a refusal by the plaintiff to perform the contract, is as follows:

"New York, Jan. 25/09.

"E. A. Cahoon, Cashier First National Bank, Roswell, New Mexico—Dear Sir: We acknowledge receipt of yours of the 18th, and the writer believes he understands what your requirements are. Our difficult problem is to include in our plans, sketches, specifications, details, and samples everything that we know you would like for the limited amount of our order. When writer was in Roswell, you will recall that he brought with him the details complete for the order for $50,000 you had previously signed, and you were of course aware that, until those details were worked out, figured, submitted to, and accepted by you, nothing was settled but the limit of expenditure. You will also recall that, when you broached the subject of a new building, I told you it would cost $70,000 to $75,000, and supposed, of course, you would understand that by a guess of mine—varying $5,000—it was very clear that I could not tell whether or not the amount would include everything required.

"There is no question but that $70,000 will give you a bank building, boiler house, and store; but we have worked out this proposition faithfully, and the bids we have received confirm our own figures, and if you desire the interior of your banking room furnished and equipped as per the details submitted, to build the construction work so that it would be in keeping will require an expenditure as specified in our estimates, and if you insist on building it to keep the cost within $70,000 *we would prefer not to do the work.* The profit in it is very small; there is no way for us to increase it. If the cost by any means is decreased, the bank makes the saving; we don't, and we would not care to start a job that we were not sure would be a satisfactory one to all concerned.

"We cannot feel that we have misled you in any way, or led you into anything not plainly stated beforehand. You will find that, on the signing of each order, details were referred to each time that were to be submitted and approved, and nothing was settled until they were approved. We are not responsible if you change your requirements. We do not become responsible until we have the designs and drawings made, duly estimated, and have submitted all the details which we can include for the amount of the order. If these details are satisfactory, we are ready to proceed, and your acceptance of them makes the contract complete; if they are not, they have to be adjusted until they are, if possible. If not possible to include all the items wanted by the owner in the appropriation, in a quality of material and workmanship that we will be responsible for, the owner has the privilege of cancellation as provided in the contract.

"You have the details in full—everything I believe that can be submitted to produce your work. We have carefully estimated every item, and the figures given you we know are lower than any one else can give you the same thing for. There is no question of further expense. You know beforehand

every time just what the limit is. You must not think, however, that we can work into an appropriation work that costs to execute much in excess of same. We cannot do the impossible.

"Where your misunderstanding occurred was in your taking it for granted that the amount of our order would do anything required. We had twice gone through the same thing before, and again started on exactly the same proposition, which was to see if the appropriation of $70,000 (the amount of our order) would do what you wanted done, and it is in keeping with the principle of this house that, believing a mistake would be made if an operation were attempted with an insufficient appropriation, to tell you so frankly and take a cancellation, rather than deliver a disappointment to one of our customers. Perhaps you do not realize that we have an allowance to move you into the new store, fit you up, furnish you with a temporary banker's safe—fireproof—and that, did we not feel that it was absolutely necessary, we would not ask for a cent over $70,000.

"I am convinced that, if the bank tries to put up the three buildings and furnish the bank up to the value we have been figuring on, or $70,000, the result will be a disappointment, and we prefer to take the cancellation rather than a job with not enough appropriation to do it well. You have all the details of what we propose; it is simply up to you to accept it, or any part of it, or reject it. The sketches submitted would give you a notable building, and a bank that you would be proud of. Perhaps I received a wrong impression from Mr. Godair of how the store building would be fitted up. We are willing to deduct our allowance of $7,000 for the store building, and go ahead with the bank; we are willing to do anything that is reasonable, will meet you in any way that is fair; but we always feel that responsibility for a result, and we cannot undertake to spread $70,000 over a surface so large that the frame underneath will 'show through' and run the chance of having you come back at us.

"The one great regret I have is that you have not seen some of our work—have not talked with people for whom we have worked—for I always feel that letters without the personal contact do not fully satisfy, and I want, as a closing word, to say that we sometimes have difficulty before starting work in satisfying clients with the amount of work we could give for the amount of the order; we do not, however, nor have not left a customer dissatisfied, after we have completed a contract.

"Awaiting your decision, I am,

"WJH—HP Sincerely yours, W. J. Hoggson.

"As soon as we hear from you we are ready, if desired, to send a man down to Roswell, who will have the drawings for store finished, let the contracts for same, and then, as soon as the drawings and specifications for bank are completed and accepted, we will have one of our superintendents go and take charge of your temporary quarters, and the erection and completion of the building."

"Roswell, New Mexico, February 16, 1909.

"Mr. W. J. Hoggson, New York City—My Dear Sir: I find awaiting me, upon my return from a month's trip to Panama, your letter of January 25th. This letter I have given very careful consideration and the subject-matter I have discussed at length with my board of directors. The board and Mr. Godair, with whom I have been in active correspondence all the time, insist that we do not exceed our limit of $70,000, agreed upon between us when you were in Roswell. As I understand your letter, you advise me that you cannot give us, for that price, what we desire. I therefore take it, from the paragraph in your letter which reads, 'And if you insist on building it to keep the cost within $70,000, we would prefer not to do the work,' that you do not wish to continue negotiations further. Basing my decision, therefore, on this statement of yours, we will call the matter off and will open negotiations elsewhere.

"Our negotiations with you during the present year have consumed so much time that it will be necessary for us to continue for another year in our present quarters, as it will not be convenient for us to be in temporary

quarters during the winter months, and our desire was to begin operations promptly by March 1st, and have our new building completed by the following winter. This necessitates our going over until another year, and it would doubtless not suit either of us to drag out our negotiations further.

"Awaiting your reply, I am,

"Yours very truly, E. A. Cahoon, Cashier."

Telegram.

"Feb. 23, 1909.

"E. A. Cahoon, Cashier First National Bank, Roswell, New Mexico: Ready and anxious to begin your work if you will be reasonable, but will have to give and take to bring appropriation and requirements together; can complete building when desired; superintendent could leave at once and start store building while waiting for balance of plans. Corpus Christi building finished in seven months. Hoggson Brothers."

And that in reply thereto the defendant sent the plaintiff the following letter on February 24, 1909:

"Roswell, New Mexico, February 24, 1909.

"Messrs. Hoggson Bros., New York City—Gentlemen: We are in receipt of your telegram of the 23d inst. After giving due consideration to the matter, we adhere to our statement in our last letter, made in accordance with your expression that you did not desire to do the work provided we could not see fit to exceed our limit of $70,000. We therefore beg to advise you that negotiations toward the construction of a building for us by you are now discontinued. Yours very truly, E. A. Cahoon, Cashier."

The trial court also found:

"There were no other communications between the parties on the subject of refusal to go on with the contract, and no other evidence of any refusal on the part of the plaintiff to perform the $70,000 contract, or any of the contracts or contradicting the correspondence found in this finding."

We do not think the Bank was justified in assuming that the plaintiff by its letter of January 25, 1909, absolutely refused to perform the contract when it said that it "would prefer not to do the work" if the cost was to be kept within $70,000. The expression of a preference not to do the work, and an absolute refusal to do it, are two very different things. Viewing the letter as a whole, it would seem to have been an effort on the part of the plaintiff to induce the Bank to increase the limit of cost of the new bank building, so that a better building might be built. The telegram which the plaintiff immediately sent to the bank in answer to the letter of February 16, 1909, discloses the true feeling on the part of the plaintiff, and we do not think the telegram indicates that the plaintiff intended to absolutely refuse to perform the contract.

The law seems to be settled that a refusal to fulfill a contract must be absolute to be equivalent to an assent to its dissolution, and to authorize the other party to rescind it; such refusal must be in no way qualified, and should substantially amount to an avowed determination of the party not to abide by the contract. Fay v. Oliver, 20 Vt. 118, 49 Am. Dec. 764; Benjamin on Sales (7th Ed.) § 568; Dingley v. Oler, 117 U. S. 490, 502, 6 Sup. Ct. 850, 29 L. Ed. 984; McBath v. Jones Cotton Co., 149 Fed. 383, 386, 79 C. C. A. 203; Smoot v. United States, 15 Wall. 36, 49, 21 L. Ed. 107; Swiger v. Hayman, 56 W. Va. 123, 127, 48 S. E. 839, 107 Am. St. Rep. 899, 3 Ann.

Cas. 1030; Armstrong v. Ross, 61 W. Va. 38, 48, 55 S. E. 895; Bannister v. Victoria Co., 63 W. Va. 502, 61 S. E. 338; Poling v. Boom Co., 55 W. Va. 529, 543, 47 S. E. 279; Kilgore v. Baptist Ass'n, 90 Tex. 139, 142–143, 37 S. W. 598; Provident v. Ellinger (Tex. Civ. App.) 164 S. W. 1024, 1026; Roehm v. Horst, 178 U. S. 1, 12, 20 Sup. Ct. 780, 44 L. Ed. 953; Wells v. Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599.

We think under the facts found that the plaintiff was entitled to judgment on the contract of December 8, 1908. It is stipulated in the record that if this court finds that compensation is recoverable under the fourth cause of action only, which is the contract above mentioned, that the sum due the plaintiff would be $1,200. It is also stipulated that plaintiff, during the period after the third contract and antecedent to the making of the last contract, necessarily incurred disbursements in and about the work amounting to $408.85. We are of the opinion that under the facts found plaintiff is entitled to recover these disbursements. We therefore are of the opinion that upon the findings of fact made by the trial court the plaintiff is entitled to judgment in the sum of $1,608.85.

The judgment below, therefore, will be reversed, and the case remanded, with directions to enter judgment in favor of the plaintiff and against the Bank for the sum so found due, together with interest at the legal rate from March 3, 1909, the date plaintiff presented its bill for services and expenses to the Bank.

And it is so ordered.

INTERNATIONAL LUMBER CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1916. Rehearing Denied May 12, 1916.)

No. 4332.

1. APPEAL AND ERROR ⟸248—QUESTIONS REVIEWABLE—NECESSITY OF EXCEPTIONS.

   An appellate court on a writ of error can only consider errors which have been properly excepted to at the trial.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1432, 1435–1439, 1443, 1447–1452, 1454–1459, 1462, 1464–1468; Dec. Dig. ⟸ 248.]

2. TRIAL ⟸420—MOTION FOR DIRECTED VERDICT—WAIVER.

   The introduction of evidence by defendant after the court overruled its motion for a directed verdict at the close of plaintiff's testimony waives any error in the ruling on the motion.

   [Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. ⟸ 420.]

3. PUBLIC LANDS ⟸13—GOVERNMENT OWNERSHIP—CUTTING TIMBER—EVIDENCE—WILLFUL TRESPASS.

   Where the evidence was undisputed that a homestead entryman arranged for the disposition of the timber on government land, and thereafter filed a homestead entry for such land, which, he was notified, was suspended because of a conflict with the claim of the state under the Swamp Land Act, but nevertheless he cut all the merchantable timber

therefrom, without making any attempt to cultivate the land, his trespass was willful, and the United States can recover the value of the timber from a purchaser.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16-18; Dec. Dig. ⊂⊃13.]

4. TRIAL ⊂⊃260(3)—REQUESTED INSTRUCTIONS—REPETITION OF GIVEN CHARGE. Where the court had charged the jury that, unless plaintiff established by a fair preponderance of the evidence that the defendant, and not another corporation, as claimed, bought the timber cut by a willful trespasser, their verdict should be for defendant, it was not error to refuse a charge requested by defendant, to the same effect, but in different words, which included in addition the statement that it was not evidence to hold the defendant that its officers were also the officers of the other corporation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 653; Dec. Dig. ⊂⊃ 260(3).]

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

Action by the United States against the International Lumber Company. Judgment for the United States, and defendant brings error. Affirmed.

This was an action by the United States, the defendant in error, hereinafter called the plaintiff, against the plaintiff in error, referred to herein as the defendant, to recover the value of timber purchased by the plaintiff in error from one Arthur M. White, which it was charged had been wrongfully, unlawfully, and willfully cut and removed by White from the public lands of the United States, and by the defendant converted to its own use. The defendant in its answer pleaded a general denial, and as a special defense that the said White had entered upon and occupied the lands from which it was alleged the timber was cut for the purpose of acquiring them as a homestead, in conformity with the laws of the United States; that White went upon the premises, built a dwelling house thereon, clearing the land and cultivating the same; also that the logs described in the complaint as having been cut by him were sold to the Keewatin Lumber Company, and not the defendant, who purchased them in good faith, believing that said White had a good and lawful right to cut and remove the said timber, and that he did so for the lawful purpose of clearing and cultivating the land as required by the homestead laws of the United States; that all the acts of White, as well as those of the purchaser of the logs, were done and performed in good faith, believing that the said White had a lawful right and authority to cut and remove the logs, and that the purchaser had the right and authority to purchase the same. To this answer a reply was filed, denying the allegations in the answer. A trial to a jury was had, and upon a verdict in favor of the plaintiff, judgment was entered against the defendant, who now prosecutes this writ of error.

Harris Richardson, of St. Paul, Minn. (Walter Richardson, of St. Paul, Minn., on the brief), for plaintiff in error.

Alfred Jaques, U. S. Atty., of Duluth, Minn.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). While there are a number of assignments of error, the record shows that there were only three exceptions taken by the defendant, during the progress of the trial: (1) At the close of the testimony on behalf of the plaintiff, the defendant moved for a directed verdict in its favor,

which being refused by the court, an exception was saved. (2) Upon the close of all the testimony in the case the defendant again moved the court for a directed verdict in its favor, which was refused by the court, and an exception saved. (3) To that part of the charge which instructed the jury that the cutting of the timber by White was a willful trespass.

[1, 2] The rule is well settled that an appellate court, on a writ of error, can only consider such alleged errors as have been properly excepted to at the trial. Chicago, Burlington & Quincy Ry. Co. v. Frye-Bruhn Co., 184 Fed. 15, 106 C. C. A. 217; Mexico International Land Co. v. Larkin, 195 Fed. 495, 115 C. C. A. 405; Griggs v. Nadeau, 221 Fed. 381, 137 C. C. A. 189. As the defendant introduced evidence after the court had overruled its motion for a directed verdict at the close of the plaintiff's testimony, this exception was waived, and cannot be considered by this court. Bell v. Union Pacific Ry. Co., 194 Fed. 366, 114 C. C. A. 326.

[3] The other two exceptions may be considered together, as the counsel for the government announced in open court that, unless the trespass by White was willful, the plaintiff was not entitled to recover. It is only necessary, therefore, to determine whether the evidence was of such a nature as to justify the court in peremptorily charging the jury that the trespass by White was willful. While the evidence is quite voluminous, the facts are undisputed, showing that the trespass was willful.

From the evidence it appears that on December 17, 1908, Arthur M. White made an application at the United States land office at Cass Lake to enter the lands described in the complaint and some other lands as a homestead. The application for all the lands was suspended because of a conflict with the claim of the state of Minnesota, under the swamp land law, and remained suspended ever since. Notice of the suspension was sent to White by mail. But White, regardless of that fact, entered upon the lands described in the complaint, and which belonged to the United States, and began to cut and remove all the timber that was suitable for the purposes of lumber, without any attempt to cultivate the land, or any part of it, as required by the homestead laws. Before entering upon the land, and cutting this timber, White had made an arrangement for the disposition of the timber to one R. S. McDonald, who was the superintendent of the logging operations of the defendant company. This clearly established a willful trespass on the part of White.

[4] Counsel for the defendant insist that the evidence fails to establish that it was the defendant who purchased and converted these logs to its own use, but another corporation, the Keewatin Lumber Company, whose officers were the same as those of the defendant. The evidence on that question was conflicting, and the court in its charge left it to the jury to determine whether the defendant was the party who purchased and converted the logs to its own use. The court charged the jury that, if they find from a fair preponderance of the testimony that the defendant bought these logs, the verdict should be for the plaintiff.

As the logs were cut by White, the registered log mark and the registered bark mark of the defendant company were both stamped upon the logs by him, and in course of time they were received by the defendant and converted to its own use. The agreement to purchase the logs, when cut, was made with the defendant's superintendent, and the price paid by drafts on the defendant. The court in its charge to the jury called their special attention to this question of defendant's liability. It charged:

"Who bought these logs, the International Lumber Company or the Keewatin Lumber Company? Unless you believe from this testimony that the International Lumber Company bought these logs, you should find for the defendant. * * * If you believe from the evidence that it [the plaintiff] has * * * established by a fair preponderance of the testimony that the International Lumber Company bought these logs, then you should give your verdict for the plaintiff in this action, and the amount is simply a matter of calculation. * * * Gentlemen, if they were * * * sold to the International Lumber Company, then this International Lumber Company that is being sued here is liable for the value at that place at that time. But if they were sold to the Keewatin Lumber Company, then this International Lumber Company is not liable at all."

And later on the court again charged:

"Now, gentlemen of the jury, I charge you—I have already charged you—that if you believe from the evidence that the Keewatin Lumber Company bought the logs in question from White, through Weeks & McDonald, or either of them, then your verdict must be for the defendant."

The defendant had asked the court to charge the jury to the same effect, and in addition to that:

"It is not evidence to hold the defendant, that its officers were also the officers of the Keewatin Lumber Company."

The court had covered in its charge all that was requested by the defendant, although the language was not that used in the defendant's request. This is not necessary. Texas & Pacific Ry. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057; Kansas City Southern Ry. Co. v. Clinton, 224 Fed. 896, 140 C. C. A. 340. Besides, no exception was taken to the refusal of the court to give this special instruction; so, even if there had been error in the refusal of the court to give these instructions, it would not be subject to review by this court.

We find no error in the record, and the judgment is affirmed.

MANCHESTER MILL & ELEVATOR CO. v. STRONG et al.

(Circuit Court of Appeals, Eighth Circuit. April 5, 1916.)

No. 4524.

1. CORPORATIONS ⊂⊃374—POWERS—NAME.

Under Gen. St. Kan. 1909, § 1699, which provides, among other things, that the purposes for which private corporations may be formed are the conversion and disposal of agricultural products by means of mills and elevators, or otherwise, and section 1701, providing that the corporate

name of every such corporation shall indicate the character of the business to be carried on by it, the adoption as a corporate name of "M. Mill & Elevator Co." by a corporation whose charter stated that its purpose was, among other things, to buy, sell, and handle all kinds of grain, does not limit its business to the operation of a mill and elevator, so as to render unauthorized contracts for the sale of wheat.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1517, 1518; Dec. Dig. ⟸374.]

2. CORPORATIONS ⟸425(4)—POWERS OF AGENTS—GENERAL MANAGER—ESTOPPEL.

Where the chief executive officer of a milling and elevator company alone transacted its business, the other officers and directors being farmers or bankers, and made contracts in its behalf with the acquiescence of the other directors, he was held out to third parties as general manager of the company and as authorized to make contracts, though he was never formally appointed as such, and the corporation is estopped to deny his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1700, 1701; Dec. Dig. ⟸425(4).]

3. TRIAL ⟸253(6)—REQUESTED INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

A requested instruction directing a verdict for defendant, which was predicated on unproven facts and ignored facts bearing on the vital issue of the case, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 618; Dec. Dig. ⟸253(6).]

4. TRIAL ⟸260(1)—REQUESTED INSTRUCTIONS—REPETITION OF GIVEN INSTRUCTION.

A requested instruction, which so far as it contained correct and applicable principles of law had been given in the main charge, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⟸260(1).]

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

Involuntary petition in bankruptcy by B. Strong and others against the Manchester Mill & Elevator Company. From a judgment adjudicating the defendant a bankrupt, it brings error. Affirmed.

Charles Blood Smith, of Topeka, Kan. (Samuel Barnum, of Topeka, Kan., on the brief), for plaintiff in error.

E. R. Morrison, of Kansas City, Mo. (Hurd & Hurd, of Abilene, Kan., and Morrison, Nugent & Wylder, of Kansas City, Mo., on the brief), for defendants in error.

Before ADAMS, Circuit Judge, and REED and ELLIOTT, District Judges.

ADAMS, Circuit Judge. The B. Strong Grain & Coal Company, Goffe & Carkener, and Norris & Co. filed an involuntary petition in bankruptcy against the Manchester Mill & Elevator Company, plaintiff in error in this case. The petition alleged, in substance and effect, that the several petitioning creditors had claims against the Elevator Company arising out of contracts for the purchase by them from the Elevator Company of certain quantities of wheat for future delivery,

and that the Elevator Company failed and refused to make deliveries according to the terms of their several contracts, to their damage in the aggregate sum of $5,000. The petition further alleged that the Elevator Company was insolvent and within four months prior to the institution of the proceeding had committed an act of bankruptcy by executing a mortgage conveying its property to one O. C. Barner, to secure the payment of a pre-existing indebtedness in the sum of $8,500.

The Elevator Company answered the petition, alleging that the contracts made with the several petitioning creditors were made without the authority of the corporation and in conflict with the provisions of its by-laws, and that the claims of the petitioning creditors arose out of gambling transactions, and were illegal and void, under the provisions of sections 5167 and 5176 of the General Statutes of Kansas of 1909.

In due course the issues so joined came on for a hearing before a jury in the District Court, and at the conclusion of the evidence the cause was submitted to the jury on a full charge by the court, with instructions to answer the following questions:

(1) "Was the Manchester Mill & Elevator Company insolvent at the date the petition was filed in this case, which date was the 4th day of December, 1914?" To which the jury answered, "Yes."

(2) "On that date do you find the bankrupt, the Manchester Mill & Elevator Company, was indebted to the B. Strong Grain & Coal Company, petitioning creditor herein? If so, in what amount?" To which the jury answered, "$1,552.50."

(3) "Do you find the Manchester Mill & Elevator Company was indebted to Norris Grain Company, petitioning creditor herein, on December 4, 1914? If so, in what amount?" To which the jury answered, "$8,271.02."

(4) "Do you find the Manchester Mill & Elevator Co. was indebted to Goffe & Carkener, petitioning creditor herein, on December 4, 1914? If so, in what amount?" To which the jury answered, "$2,800."

(5) "Do you find the Manchester Mill & Elevator Company, being insolvent, made a mortgage on its property to O. C. Barner to secure a past-due indebtedness of $8,500, as charged in the petition?" To which the jury answered, "Yes."

(6) "Were the contracts made by McAndrews in the name of the Mill Company with the petitioning creditors, or any of them, wagering or gambling contracts?" To which the jury answered, "No."

Thereupon the Elevator Company was duly adjudicated a bankrupt, and now prosecutes its writ of error to reverse that judgment.

There were many formal assignments of error, but counsel for the bankrupt, in a manifest effort to conform in their brief to our rule 24, specified the ones relied on for reversal of the judgment in the following way:

"While it was asserted in the answer that all these contracts were void and illegal as gambling transactions, the respondent submitted no proof to sustain such defense. It, however, urged upon the trial court the lack of power in the corporation itself to enter into these speculative contracts in the first instance, and also denied that McAndrews, the president of the corporation, had any authority, as president, to bind the corporation by executing these contracts. These are the two principal questions involved in this hearing. * * *"

[1] The first contention is that the Elevator Company was without power to enter into the contracts upon which the petitioning creditors

predicated their claims; that the contracts were not made for any legitimate purpose for which the Elevator Company was organized. The company was organized under the general law of the state of Kansas concerning private corporations (General Statutes of Kansas 1909, § 1699), which provides, among other things, that the purposes for which private corporations may be formed are:

"(39) The conversion and disposal of agricultural products by means of mills, elevators, markets and stores, or otherwise."

Section 1701 of that law provides that the corporate name of every such corporation "* * * shall indicate by its corporate name the character of the business to be carried on by the corporation."

It is argued that the adoption by the corporation of the corporate name "the Manchester Mill & Elevator Company" imposed a limitation upon the scope of its business, confining it to the operation of a mill and elevator, thereby excluding the purchase and sale of wheat as any part or portion of its legitimate business. It is noticeable that clause 39 of section 1699 provides for the creation of corporations for "the conversion and disposal of agricultural products by means of *mills, elevators,* markets and stores, or otherwise." This, in our opinion, necessarily implies that the operation of mills and elevators is an appropriate and lawful method to be resorted to for "converting and disposing of agricultural products." If so, the corporate name of the plaintiff in error "Mill & Elevator Company" indicates that a part of its business is the purchase and sale of wheat.

In harmony with this view, the charter of the defendant corporation, as granted to and accepted by it, specified that the purpose for which it was created was "to conduct a general grain and milling business, to buy, sell, and ship and handle any and all kinds of grain, manufacture flour, feed and feed meal, alfalfa meal and alfalfa product, any and all other products of grain, * * * and to do and perform all other acts necessary for the carrying on of the management of the above-named business."

The case of Ginrich v. Mill Company, 21 Kan. 61, is cited in support of their contention. All that case decides, in any way affecting this, is that under the provision of the corporation law of Kansas, providing for the creation of private corporations for "the conversion and disposal of agricultural products by means of mills," etc., a corporation may be created to "build and create a flouring mill." This, instead of supporting the contention of plaintiff in error, in our opinion, necessarily implies that the maintenance of a flouring mill and elevator is germane to the general business of converting and disposing of agricultural products and that such a mill or elevator is among the lawful means for accomplishing the purpose of converting and disposing of such products. We, therefore, are unable to give our assent to the proposition that the business of buying and selling wheat is so foreign to the permissible business suggested by the corporate name of plaintiff in error as to render any contracts for purchasing wheat void.

[2] The next contention of the plaintiff in error is that McAndrews, as president of the defendant corporation, had no authority to execute the contracts, for the breach of which the petitioning creditors as-

serted claims for damages. The evidence on this point disclosed, without substantial contradiction (employing now the language found in the bill of exceptions):

"That W. E. McAndrews owned a large majority of the stock of the Manchester Mill & Elevator Company; that the actual management of its business was practically solely done by said W. E. McAndrews; * * * that its mill and elevator were in charge of W. E. McAndrews; that all business of the company was done solely by the said McAndrews; that none of the other officers or directors of the company took any part in the management of the business, or operation of the elevator or mill, and that none of them, except the said McAndrews, had any experience of running concerns of this character, all of them being farmers, except one, who was cashier of a bank; that all of them knew that the said McAndrews was running said business and said plant; that in all the purchase contracts made with him by the petitioning creditors, the said creditors, and each and all of them, expected to receive the wheat under said contracts and that the dealings with McAndrews were in no wise, so far as they were concerned or had any knowledge of, deals amounting to wagers on the price of wheat; that as far as they knew McAndrews, acting on behalf of the respondent, intended and expected to carry out his contracts by the delivery of wheat thereunder."

McAndrews had never been formally elected general manager of the corporation, and his acts in executing the contracts in question were never formally approved or ratified at any meeting of the board of directors of the corporation. Evidence was also offered that several days before the charter of the corporation was applied for or granted the following by-law appears to have been adopted (and was offered in evidence by the defendant corporation), as follows:

"No debts or obligation shall be contracted by this company except upon the authority of the board of directors, and when such indebtedness shall be authorized, shall be evidenced by notes or contracts which shall be signed by the president and secretary of the company and duly approved by the executive committee before being issued."

At the time this evidence was offered no proof had been offered tending to show that any of the petitioning creditors had any knowledge of this by-law or its contents, and counsel for the corporation then admitted that they had no evidence and no such evidence would be offered. Whereupon an objection to the introduction of the by-law was sustained by the court.

On the foregoing evidence the court submitted the case to the jury in a charge ably covering all the legal questions in the case, and directed the jury to answer the several questions specified above. Before the jury left the box the defendant's counsel requested the court to give this instruction to the jury:

"You are instructed that the directors of a corporation are the body which, under the law, is authorized to make contracts for it. It may delegate authority to a general manager to conduct the ordinary business of the corporation and this is the usual authority existing in a general manager. If, therefore, you find from the evidence that the ordinary business of the Manchester Mill & Elevator Company was and is that of operating a flour mill and elevator, and that speculation on the price of grain was not the business in which said company was engaged, but that McAndrews without any specific authority from the directors, engaged in such speculation in the name of the company, and that no knowledge or notice thereof was possessed by the officers of the company, with the exception of said McAndrews, then and in that event you

are instructed that the contracts by the said McAndrews in the name of the Manchester Mill & Elevator Company were not binding upon said company and you must return a verdict for the respondent, the Manchester Mill & Elevator Company."

The court refused to give this instruction and defendant assigns this refusal as error. Before considering this specific assignment, we pass to the contention made and argued by counsel that on the facts shown McAndrews had no authority to execute the contracts for the purchase of wheat from the petitioning creditors. While the proof shows that McAndrews was never formally appointed general manager by the board of directors of the company, he was its chief executive officer and acted as general manager, even to the extent of transacting, alone, all the business of the company. The other officers and directors, being farmers, had no experience in such business and took no part in the management of it. They all knew that McAndrews was running the business, and the record shows they acquiesced in his doing so, or at least never objected to it. In this way McAndrews, the president and chief executive officer, was left in sole charge of the business of the company and as such made contracts for and on behalf of the company. The mere fact that he had never been formally appointed or elected general manager, pressed upon our attention by attorneys for plaintiff in error, is of no consequence. He acted as such with the full knowledge of the other officers and directors, and so far as third parties, dealing with the company through him acting within the general scope of his apparent power, are concerned, he must be held to have been acting for the company as its duly authorized agent, and to have bound his company in so doing. In such circumstances, the corporation (on all principles of justice) must be held estopped from denying its liability for his action. Martin v. Webb, 110 U. S. 7, 14, 3 Sup. Ct. 428, 28 L. Ed. 49; Jenson v. Toltec Ranch Co., 98 C. C. A. 60, 174 Fed. 86; Ford et al. v. Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902; McKiernan v. Lenzen, 56 Cal. 61, 63; Stokes v. Pottery Co., 46 N. J. Law, 237.

[3, 4] For reasons already stated in discussing the authority of McAndrews to execute the contracts in question, it appears that the facts disclosed by the proof did not warrant the giving of the instruction requested by plaintiff in error and refused by the court. This instruction was predicated upon unproven facts and ignored facts bearing upon the vital issue of the case—whether or not McAndrews was held out as a managing agent in sole charge of the business of the company. Moreover, so far as it contained correct and applicable principles of law, it had been given in the main charge. No error was committed in refusing to give it.

Some other assignments of error, not included in the specification of errors relied upon in their brief, were argued by counsel. To these we have given due consideration, and, finding no reversible error in any of them, the judgment of the District Court must be affirmed.

FRIEDERICHSEN v. RENARD et al. *

(Circuit Court of Appeals, Eighth Circuit. March 25, 1916.)

No. 4476.

1. APPEAL AND ERROR ⟸836—REVIEW—CONFLICTING RULINGS BY DIFFERENT JUDGES.

While the ruling by one District Judge on a question ought as a matter of comity and orderly judicial procedure to be followed by another District Judge sitting in the same case, the failure of the second judge to follow the prior ruling does not affect the power of the Circuit Court of Appeals to review the final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3247–3261; Dec. Dig. ⟸836.]

2. LIMITATION OF ACTIONS ⟸127(12)—COMMENCEMENT OF ACTION—AMENDED PETITION—NEW CAUSE OF ACTION.

Where a bill to rescind a sale of land for fraud and to recover incidental damages was transferred to the law side of the court under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), because the plaintiff had put it out of his power to restore the vendor to his former position, an amended petition claiming damages for the fraud, if allowable, set up a new cause of action, and did not relate back to the filing of the original bill, so that it was barred by Rev. St. Neb. 1913, § 7569, where four years had elapsed after the discovery of the fraud before the filing of the amendment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 545; Dec. Dig. ⟸127(12); Pleading, Cent. Dig. § 688.]

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

Action by John H. Friederichsen against G. H. Renard, as executor of the estate of Edward Renard, deceased, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

William V. Allen, of Madison, Neb. (William L. Dowling, of Norfolk, Neb., on the brief), for plaintiff in error.

R. E. Evans, of Dakota City, Neb. (W. D. Funk, of Bloomfield, Neb., on the brief), for defendants in error.

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

CARLAND, Circuit Judge. Friederichsen, hereafter called plaintiff, on September 22, 1908, filed a bill in the United States Circuit Court for the District of Nebraska against Edward Renard, in his own right and as agent of Mary C. Gilmore, Mary C. Gilmore, and W. J. Gilmore, hereafter called defendants, for the purpose of having a contract between the plaintiff and Renard, dated March 12, 1908, and a deed executed in pursuance thereof by plaintiff to Renard on March 19, 1908, conveying 240 acres of land in Knox county, Neb., declared null and void, and for damages, for the reason that the plaintiff had been induced by false and fraudulent representations on the part of Renard to enter into the contract and to execute the deed. Renard and Mary C. Gilmore answered the bill. A special master was appointed to take

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

* Rehearing denied June 16, 1916.

the evidence, find the facts, and report the same to the court, with conclusions of law. The master heard the evidence and made his report. It appeared from the report that a part of the consideration for the Knox county land conveyed by the plaintiff to Renard was land in Louisa county, Va., that the plaintiff went into the possession of this land and cut down a large amount of timber, and that the sum of $3,050 paid by Renard to plaintiff in connection with the exchange of lands had not been refunded or offered to be returned to Renard by the plaintiff. As a conclusion of law from these facts the master found that there could be no rescission of the contract or a cancellation of the deed. The master, however, found that the plaintiff was entitled to damages in the sum of $5,880. The defendants excepted to the report of the special master and made a motion to set the same aside.

On September 23, 1913, the court (Hon. W. H. Munger, Judge) set the report aside, and claiming to act under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) ordered the case transferred to the law side of the court, agreeing with the master that there could be no rescission of the contract or cancellation of the deed, but that the case for damages should be conducted as an action at law. The plaintiff did not object in any way to the order of transfer, and on September 25, 1913, filed what is termed in the record an "amended petition at law," wherein the same facts were alleged as constituting fraud as were alleged in the bill, and a judgment for damages was asked. The defendants moved to strike the amended petition from the files for several reasons, among which was the following:

(9) "Because the cause of action set out in the amended petition is barred by the statute of limitations."

On July 15, 1914, the court (Hon. Smith McPherson, Judge) denied the motions. The defendants then answered the so-called amended petition. Plaintiff then made a motion to strike from the answers certain alleged irrelevant and redundant matter, included in which was an allegation that the action was barred by the statute of limitations. On September 16, 1914, the court (Hon. Smith McPherson, Judge) granted the motion to strike. September 21, 1914, counsel for defendants in open court asked permission to withdraw their answers and file pleas in abatement instanter setting up those things that had been stricken from the answers. The court (Hon. Page Morris, Judge) denied the request. November 4, 1914, the case was moved for trial before Hon. T. C. Munger, Judge, and a jury. The defendants moved that no evidence be allowed to be introduced for the reason among others:

(8) "Because more than four years have elapsed since discovery of the alleged fraud and prior to the filing of the amended petition in this case."

On November 5, 1914, while the case was on trial, it was stipulated that the plaintiff had shown himself entitled to recovery against the defendants if the action had not been barred by the statute of limitations of Nebraska. Thereupon the court took the question as to whether the case was barred under advisement, and March 24, 1915, re-

called the jury and directed a verdict in favor of defendants, on the ground that the action set forth in the so-called amended petition was barred. Plaintiffs excepted to the ruling of the court, and sued out this writ of error to review the judgment entered. It is first urged as error that the court below, in rendering final judgment, did not follow the rulings of the other judges, who had ruled, as claimed by counsel for plaintiff, that the action was not barred by the statute of limitations.

[1] It may be stated, as a matter of comity and orderly judicial procedure, that where a question has been ruled by one District Judge, the ruling ought to be followed by another District Judge sitting in the same case; otherwise, great confusion might arise if each judge called to sit in a case should set up his own independent opinion upon a question which had been already ruled in the same case. The ruling, however, which transferred the cause to the law side of the court, did not decide any question regarding the statute of limitations, and we are not informed by the record for what reasons the other judges made the rulings they did. But whatever may have been the reasons, or whatever may be the correct procedure, the rulings made in no way affect the power of this court to review the final judgment.

[2] We therefore pass to the only remaining question in the case, and that is: Was the cause of action stated in what is called the amended petition a new cause of action, or was it an amendment of an old cause of action, so as to relate back to September 22, 1908, when the bill was filed? It seems to be conceded that the cause of action stated in the so-called amended petition is a cause of action mentioned in section 7569 of the Revised Statutes of Nebraska (Ed. 1913). This section provides a limitation of four years for actions for relief on the ground of fraud, and also provides that the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. It is also conceded, or at least must be conceded, that if the so-called amended petition set up a new cause of action that it was barred by the statute. Plaintiff claims, however, that the case stated in the so-called amended petition was simply an amendment of the case stated in the original bill, and therefore the statute of limitations did not run after the bill was filed. We think the contention of counsel for plaintiff is unsound, and that this clearly appears by an examination of the record.

The original bill was brought for the purpose of rescinding the contract between the parties and for such damages as might be recovered in an equitable action with such relief in view. The bill was answered and the action proceeded to a determination, which would have resulted in the dismissal of the bill, had not the court decided that the course marked out by equity rule 22 ought to be followed. It appears from the report of the master and from the memorandum of the court that the cause in equity failed because Friederichsen had not refunded nor offered to refund the money paid to him by Renard on the exchange of lands, and also that Renard, with knowledge of the character of the Virginia lands, had cut val-

uable timber therefrom. In other words, Friederichsen by his own voluntary acts had rendered it impossible for him to place Renard in the same position as he was before the contract and deed were made. Now to say that an action at law, wherein the plaintiff did not seek to rescind the contract, but sought to affirm it and recover his damages for the fraud, is an amendment to the cause of action stated in the bill, seems to be clearly erroneous. The cause of action stated in the so-called amended petition was a new cause of action. There never had been stated in court such a cause of action as was stated in the so-called amended petition, and therefore it could not be said to be an amendment to any such cause of action. It was simply a new action at law, directly opposed to the theory stated in the bill. We think the case is clearly ruled by Whalen v. Gordon, 95 Fed. 305, 37 C. C. A. 70, a decision by this court, and also by the following cases: Union Pac. R. R. Co. v. Wyler, 158 U. S. 285–291, 15 Sup. Ct. 877, 39 L. Ed. 983; Robb v. Vos, 155 U. S. 13, 41–43, 15 Sup. Ct. 4, 39 L. Ed. 52; Stewart v. Hayden, 72 Fed. 403–411–412, 18 C. C. A. 618; First Nat. Bk. of Chadron v. McKinney, 47 Neb. 149, 151, 152, 66 N. W. 280; American Bldg. & Loan Ass'n v. Rainbolt, 48 Neb. 434, 440, 67 N. W. 493; Pollock v. Smith, 49 Neb. 864–868, 69 N. W. 312; First Nat. Bk. of Chadron v. Tootle, 59 Neb. 44, 46–48, 80 N. W. 264; Boggs v. Young, 81 Neb. 621, 624, 625, 116 N. W. 501.

We do not think this court intended in Schurmier et al. v. Conn. Mut. Life Ins. Co., 171 Fed. 1, 96 C. C. A. 107, to overrule Whalen v. Gordon. In the Schurmier Case it appeared that under a statute of Minnesota and by order of court creditors of a decedent estate were allowed 6 months within which to present their claims. Under the statute, if good cause was shown for the delay, the court might receive a claim and allow it not later than 18 months after the order. The insurance company, being a foreign creditor, began suit in the federal court upon its claim within 18 months, but set up no reason for the delay. After the 18 months had elapsed, and after demurrer sustained to plaintiff's pleading, on application the suit was transferred to the equity side of the court, and a bill filed setting up facts which were held sufficient cause for the delay, and the plaintiff was allowed to recover. But in this case there was no change of the cause of action, and the real question decided was whether the amendment, alleging facts which excused the delay, would relate back to the time of filing the original bill. In Union Pacific Ry. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, it was held that, where the amendment alleges a new cause of action, the statute of limitations runs until the amendment is filed, and this though the amendment is made by consent.

We are clearly of the opinion that, if the cause of action stated in the petition at law can be called an amendment of the cause of action stated in the bill, which we very much doubt, still it was a new cause of action, and as such barred by the statute of limitations of Nebraska.

Judgment affirmed.

MORGAN, Warden, v. SYLVESTER et al.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1916.)

No. 4534.

1. CRIMINAL LAW ⊜200(3)—FORMER "JEOPARDY"—IDENTITY OF OFFENSES.
It is not double "jeopardy" to convict and punish one, who broke into a post office and stole stamps therefrom, for larceny, under Penal Code (Act March 4, 1909, c. 321) § 47, 35 Stat. 1097 (Comp. St. 1913, § 10214), as well as for the breaking and entering, under section 192 (section 10362), though the larceny was in a sense a continuation of the breaking and entering.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 396; Dec. Dig. ⊜200(3).

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

2. HABEAS CORPUS ⊜30(1)—GROUNDS FOR RELIEF—ERROR.
Error, if any, in convicting one who stole stamps from a post office, under Penal Code, § 47, which provides for the punishment of larceny of property belonging to the government, rather than under section 190, which provides for the punishment of stealing any mail bag or other property in use by or belonging to the Post Office Department, was available to defendant on his trial, and on writ of error to the conviction, but it cannot be questioned by habeas corpus proceedings to procure discharge from the sentence of imprisonment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ⊜30(1).]

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

Habeas corpus by Sam Sylvester and another against Thomas W. Morgan, as Warden. From a judgment discharging the petitioners, respondent appeals. Reversed and remanded, with instructions to set aside the order discharging the prisoners and remand them to custody.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., of Kansas City, Kan., on the brief), for appellant.

P. Louis Zickgraf, of Pittsburg, Kan. (John L. Kirkpatrick, of Pittsburg, Kan., on the brief), for appellees.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

ADAMS, Circuit Judge. The appellees, Sylvester and Wulle, were jointly indicted in the District Court of the United States for the Northern District of Ohio, in one count for burglarizing a post office at Mt. Blanchard, Ohio, in violation of the provisions of section 192 of the federal Penal Code, and in another count for stealing certain property of the United States from and out of that post office, in violation of the provisions of section 47 of the Penal Code. In due course of procedure they were tried, found guilty as charged, and sentenced by the court to be imprisoned in the United States penitentiary at Leavenworth, Kan., for different periods of time on each count. The

term of imprisonment on the second count was to begin at the expiration of the term imposed on the first count. Pursuant to their convictions and sentences they were in due time delivered into the custody of the appellant, who was warden of the penitentiary, and entered upon the service of their sentences.

Prior to the expiration of their terms of service on the first count they joined in a petition to the District Court of the United States for the District of Kansas for a writ of habeas corpus to secure their release from imprisonment at the expiration of the sentence imposed on the first count, and to be discharged from any imprisonment imposed on the second count. The warden filed his response, setting forth the facts already disclosed, with exhibits properly authenticating the same. Afterwards, on final hearing, the District Court ordered and adjudged that the petitioners be discharged at the expiration of their terms of imprisonment imposed on the first count of their indictment. From this order the warden appeals.

These are the assignment of errors:

"The court erred in holding that the sentences pronounced by the trial court upon the petitioners, and each of them, on the second count of the indictment, was and is illegal and void.

"The court erred in holding that said sentences so pronounced upon the petitioners, and each of them, placed the said petitioners, and each of them, twice in jeopardy for the same offense as that charged in the first count of the indictment.

"The court erred in granting the application for the writ of habeas corpus, and directing that the petitioners, and each of them, be released from imprisonment at the expiration of the term of imprisonment imposed upon the first count of the indictment."

Conceding, for the purpose of this case (as counsel for appellant apparently does), but not deciding it, that the petitions for writ of habeas corpus were not improperly applied for before the expiration of the term of imprisonment imposed on the first count conceded to be lawful, we proceed to a consideration of the question raised by the assignment of errors: Did the sentence for the crime of larceny, as charged in the second count of the indictment, amount to double jeopardy and was it for that reason illegal?

Section 192 reads as follows:

"Whoever shall forcibly break into or attempt to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building, or part thereof, so used, any larceny or other depredation, shall be fined not more than one thousand dollars and imprisoned not more than five years."

Section 47 reads as follows:

"Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

[1] Counsel for appellees contend that the offense of larceny charged in the second count, based on section 47, was only a continuation of the offense of burglary charged in the first count based on section 192;

that the two were one continuing offense, and constituted only one crime, for which they could lawfully be punished. In support of their contention they rely upon the following cases: Halligan v. Wayne, 102 C. C. A. 410, 179 Fed. 112; Munson v. McClaughry, 117 C. C. A. 180, 198 Fed. 72, 42 L. R. A. (N. S.) 302; Stevens v. McClaughry, 125 C. C. A. 102, 207 Fed. 18, 51 L. R. A. (N. S.) 390; and O'Brien v. McClaughry, 126 C. C. A. 540, 209 Fed. 816. These cases give countenance to their contention, and upon their authority the learned trial judge made the order appealed from in this case.

After those cases were decided, and before the judgment appealed from was rendered in the District Court, the Supreme Court of the United States handed down its opinion in the case of Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1150, in which it disapproved of the doctrine announced in the cases supra, saying (Mr. Justice Day delivering the opinion of that court) as follows:

"We think that it is manifest that Congress in the enactment of these sections [190–192—section 190 being practically the same as section 47 involved in the present case] intended to describe separate and distinct offenses, for in section 190 [47] it is made an offense to steal any mail bag or other property belonging to the Post Office Department, irrespective of whether it was necessary, in order to reach the property, to forcibly break and enter into a post office building. The offense denounced by that section is complete when the property is stolen, if it belonged to the Post Office Department, however the larceny be attempted. Section 192 makes it an offense to forcibly break into or attempt to break into a post office, with intent to commit in such post office a larceny or other depredation. This offense is complete when the post office is forcibly broken into, with intent to steal or commit other depredation. It describes an offense distinct and apart from the larceny or embezzlement which is defined and made punishable under section 190 [47]. If the forcible entry into the post office has been accomplished with the intent to commit the offenses as described, or any one of them, the crime is complete, although the intent to steal or commit depredation in the post office building may have been frustrated or abandoned without accomplishment. And so, under section 190 [47], if the property is in fact stolen, it is immaterial how the post office was entered, whether by force or as a matter of right, or whether the building was entered into at all. It being within the competency of Congress to say what shall be offenses against the law, we think the purpose was manifest in these sections to create two offenses. Notwithstanding there is a difference in the adjudicated cases upon this subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself."

To the same effect is the case of Ebeling v. Morgan, 237 U. S. 625, 35 Sup. Ct. 710, 59 L. Ed. 1151.

On the authority of these cases, the contention of the appellees cannot be sustained. There was no double jeopardy in the sentence imposed on the second count. The two counts charged two separate offenses, and they were punishable separately according to the provisions of the sections of the statute quoted.

[2] The point was made by appellees' counsel in their brief that the conviction for the crime of larceny on the second count, based on section 47, was illegal and void, because the articles charged to have been stolen were postage stamps, for the stealing of which more apt provision is alleged to have been made in section 190.

It is argued that section 47 is broad and comprehensive in its character, making provision generally for the punishment of stealing "any money, property, record, voucher or valuable thing whatever of the moneys, goods, chattels, records or property of the United States," while section 190 makes specific provision for the punishment of stealing "any mail bag or other property in use by or belonging to the Post Office Department." It is argued that postage stamps, which were the subject of the larceny in the second count of the indictment, fall under the description of "property" referred to in section 190, and do not fall so accurately under the description of property made the subject of larceny by section 47, and that as a result the indictment should have been based on section 190, instead of section 47.

If there is any merit in this contention, as to which we express no opinion, it was available to the appellees in the trial court as a defense to the indictment, and afterwards, if necessary, by writ of error, from the United States Circuit Court of Appeals for the Sixth Circuit. No such defense having been there made, and the point now raised not having been presented to or ruled upon by the trial court, it cannot now be availed of. A habeas corpus case cannot be made to serve the purposes of a writ of error. To this well-known proposition of law no citation of authority is necessary.

The judgment must therefore be reversed, and the cause remanded to the District Court, with instructions to set aside the order discharging the prisoners, and remand them to the custody of the warden of the penitentiary, there to remain until the terms of their sentences, as pronounced, shall expire.

McELWAIN-BARTON SHOE CO. v. BASSETT.

In re ADKINS.

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

No. 4547.

1. BANKRUPTCY ⟸140(1)—TITLE OF TRUSTEE—CONSIGNMENT TO FACTOR—CONTRACT.

A contract by which a corporation agreed to consign shoes to the bankrupt for sale by him, the bankrupt to pay the freight and storage charges, and to keep the shoes insured for the benefit of the consignor, and to account to the consignor for the net price fixed in invoices, which were to be attached to the contract, and permitting the bankrupt to sell the shoes at such price as would enable him to pay his commission and all expenses, but reserving title in the consignor, is a contract of factorage, not of sale, which is valid, and not required by the laws of Kansas to be recorded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⟸140(1).]

2. BANKRUPTCY ⟸140(1)—TITLE OF TRUSTEE—CONSIGNMENT—IRREGULARITIES.

That the parties to such contract conducted the business in relation

thereto in an irregular manner did not avoid the contract, so long as no creditor of the bankrupt was thereby misled to his injury.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⟸140(1).]

3. BANKRUPTCY ⟸140(1)—TITLE OF TRUSTEE—CONSIGNMENT—BILLING OF GOODS.

The billing of the shoes by the consignor upon its ordinary blank forms, without reference to the contract, does not overcome the contract itself, and undisputed testimony that the shoes claimed were shipped under its terms, so as to establish a sale of the shoes to the bankrupt.

[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 District of Kansas; John C. Pollock, Judge.

In the matter of W. C. Adkins, bankrupt. From an order of the District Court, denying the claim of McElwain-Barton Shoe Company to certain shoes in the possession of George R. Bassett as trustee, the claimant appeals. Reversed and remanded, with directions.

H. T. Dedrick and W. M. Dedrick, both of Wichita, Kan., and Edgar C. Ellis, Hale H. Cook, and Raymond G. Barnett, all of Kansas City, Mo., for appellant.

C. V. Ferguson and E. J. Dierks, both of Wichita, Kan., for appellee.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. Appeal from an order of the District Court for the District of Kansas, which denied the appellant the right to recover certain shoes in the possession of appellee, as trustee of the estate of W. C. Adkins, a bankrupt. The facts of the case which condition the correctness of the decision below are substantially as follows:

By contract made May 25, 1914, the appellant appointed Adkins its authorized agent at Wichita, Kan., for the sale on commission of shoes thereafter to be shipped by appellant to Adkins under said contract. The invoices of said shoes were to be attached to the contract, which was executed in duplicate, as the shoes were shipped. The appellant in and by said contract agreed to consign to Adkins upon his request shoes during the continuance of the contract. Adkins agreed to receive the shoes from the transportation companies and pay all transportation charges, to furnish proper warehouse room for all shoes consigned, to pay all taxes, license, rent, and all other expenses incidental to the safe-keeping and sale of the shoes, and to waive all claims against appellant for such expense, to keep such shoes insured for their full value, at the expense of Adkins, in the name and for the benefit of appellant, in companies approved by it, to turn over the policies to it, and, in case of neglect or failure to insure, to become personally responsible for any loss or damage that might occur to the shoes while in the custody of Adkins, to keep samples of said shoes

set up in salesrooms suitable for the purpose, to make all reasonable efforts to sell the same, and not to sell any other make of shoes to the exclusion of those consigned under the terms of the contract, and to sell the shoes consigned for enough more than the net amounts to be received therefor by appellant, and set opposite said shoes in the invoices and schedules to be attached to the contract, to pay all freights, taxes, expenses, charges, compensation, and commissions for the handling and selling of said shoes, and the doing of all things provided to be done by Adkins; it being mutually understood that the net amounts set opposite said shoes in the schedules or invoices should be the net prices at which said shoes were to be consigned for sale, and were the net amounts which Adkins agreed to account for and deliver to appellant for said shoes when sold as per terms of the contract—the full charges, compensation, commission, and expenses of Adkins for the handling and selling of the shoes, and the doing of all things stated in the contract to be performed by Adkins, to be the difference between the net amounts and the gross amounts received from the sale of the shoes. Adkins also agreed not to part possession with any of the shoes until full and satisfactory settlement should have been made for the same by the purchaser thereof, and that he would not allow under any circumstances any such shoes to be taken away on approval before such settlement was made, and that all proceeds of such sales, whether cash or notes, should be kept separate and distinct from the other business of said Adkins. Adkins further agreed to make out and render to appellant on the 1st day of every alternate month, and oftener if so requested, a full and complete report of all sales made the two months previous, or since the last report made, and to accompany said report with a full settlement in accordance with the contract for all shoes reported sold. It was further agreed between the parties to the contract that the shoes to be supplied thereunder were to be consigned simply, and that the title to and ownership of all shoes consigned to Adkins under the contract, and all proceeds of the sale of same, should remain vested in appellant, and be its sole property and subject to its order, until the full amount to be received for said goods should have been received by appellant. The contract was to remain in force until January 1, 1915, unless canceled and annulled by appellant. At the termination of the contract Adkins agreed to return all shoes remaining on hand and unsold to appellant at their warehouse in Kansas City in good order and free from all freight charges.

It appears in the record that in the actual transaction of the business of the contract the request for shoes made by Adkins, and the bills or invoices made out by appellant when the shoes would be shipped to Adkins, were not actually attached to the contract, the original of which was in the possession of appellant and the duplicate in possession of Adkins. The invoices also were made out on the blank forms commonly used by appellant in the ordinary business of selling shoes. It does not appear that Adkins insured the shoes as provided in the contract. At the time Adkins filed his voluntary petition in bankruptcy on January 28, 1915, there was in his possession shoes shipped by appellant to him under the terms of the contract which had not been

paid for. The subsequent disposition of the same appears from the following stipulation:

"That the said McElwain-Barton Shoe Company have heretofore filed and have now pending a petition in reclamation for certain shoes in the possession of the said Geo. R. Bassett, as trustee of the said bankrupt estate; that said shoes have this day been, with other assets of said estate, exposed to sale, and the said McElwain-Barton Shoe Company have purchased for $600 said shoes claimed in said reclamation petition, now on hand, and they shall take said shoes, and if said petition in reclamation is determined in their favor no payment shall be made on said purchase, and if their petition be not sustained, and the property is determined to be that of the trustee, then the McElwain-Barton Shoe Company will pay into the hands of Geo. R. Bassett, trustee, the said sum of $600."

The trial court held that, as the invoices of the shoes were not formally attached to the contract as provided for therein and the shoes were not insured, the parties to the contract had departed therefrom to such an extent that the shoes which appellant seeks to recover were sold in the regular course of trade, and the title thereto passed to Adkins, so as to defeat the right of appellant to recover the goods under the terms of the contract. Mr. E. E. Pearson, the credit man of appellant, positively testifies that the shoes were shipped under and by virtue of the terms of the contract, and there is no evidence to the contrary, except the mere fact that the billing of the shoes by appellant was made on the ordinary blank forms used by it in the ordinary course of its business, and did not refer to the contract, nor were the invoices attached to the same.

[1] There is no evidence in the record that any creditor of Adkins was misled in any way by the course of dealings between appellant and Adkins. The referee, whose order disallowing the claim of appellant was confirmed by the District Court, decided that the contract itself was a fraud upon the public, and, as it had not been recorded, was void. We are of the opinion that the contract on its face was not an absolute sale, nor a conditional sale, but was a contract of factorage. Contracts of this kind have uniformly been held valid. Ellet-Kendall Shoe Co. v. Martin, 222 Fed. 851, 138 C. C. A. 277 (8th Circuit); Ludvigh, Trustee, v. American Woolens Co., 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345; Id., 188 Fed. 30, 110 C. C. A. 180; National Bank of Augusta v. Goodyear, 90 Ga. 711, 16 S. E. 962; Cortland Wagon Co. v. Sharvy, 52 Minn. 216, 53 N. W. 1147; Thornton v. Cook, 97 Ala. 630, 12 South. 403; Conable v. Lynch, 45 Iowa, 84; Heim Brewing Co. v. Linck, 51 Mo. App. 479; Bank v. Benedict Co., 74 Fed. 182, 20 C. C. A. 377; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Renoe v. Milling Co., 53 Kan. 255, 36 Pac. 329; Big Four Implement Co. v. Wright, 207 Fed. 535, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223 (8th Circuit); Powell v. Wallace, 44 Kan. 656, 25 Pac. 42. As a contract of factorage, no public record of the same was required by the laws of Kansas in order to make it valid, as against creditors. Ellet-Kendall Shoe Co. v. Martin (supra), 222 Fed. 851, 857, 138 C. C. A. 277; Powell v. Wallace, 44 Kan. 656, 25 Pac. 42; Van Arsdale v. Peacock, 90 Kan. 347, 349, 133 Pac. 703; Jones v. Coates, 196 Fed. 860, 116 C. C. A. 422.

[2] The fact that the parties to the contract conducted the business in relation thereto in an irregular manner, so long as no creditor of Adkins was misled to his injury thereby, did not avoid the contract. Bank v. Goodyear, supra, 90 Ga. 711, 16 S. E. 962; Thompson & Co. v. Barnum & Co., supra, 49 Iowa, 392; Sturm v. Boker, supra, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Schenck v. Saunders, 13 Gray (Mass.) 37, 40.

[3] The billing of the shoes by appellant upon the ordinary blank forms, without reference to the contract, cannot be allowed to overcome the contract itself, and the other undisputed testimony that the shoes were shipped under the terms of the contract. The witness Pearson also testified that the contract continued from May until the last shipment in December, 1914, and that the same was never modified or superseded by any other arrangement between the parties. We have no doubt but that upon the facts and the law appellant is entitled to recover.

The judgment below is therefore reversed, and the case remanded for judgment in accordance with the stipulation hereinbefore quoted.

W. S. PECK & CO. v. WHITMER. CITIZENS' BANK OF FRANKFORT, KAN., v. SAME. In re HELEKER BROS. MERCANTILE CO.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1916.)

Nos. 4486, 4487.

1. BANKRUPTCY ⟸303(1)—CLAIMS—PREFERENCES—BURDEN OF PROOF.

In order to defeat, under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 (Comp. St. 1913, § 9641), the claims of creditors who have received voidable preferences and have not surrendered them, the trustee in bankruptcy must prove, under sections 60a and 60b (section 9644), by a fair preponderance of the evidence, that the bankrupt was insolvent at the time the payments were made, that they enabled the creditors to receive a larger percentage of their respective debts than any other creditor of the same class, and that at the time each particular payment was made the creditors had reasonable grounds to believe that the enforcement of the payment would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458, 459; Dec. Dig. ⟸303(1).]

2. BANKRUPTCY ⟸303(3)—CLAIMS—PREFERENCES—PART PAYMENTS.

Evidence *held* not to show that creditors, who received from their debtor, knowing him to be insolvent and during the four months preceding the filing of the petition in bankruptcy against him, payments, none of which exceeded 2½ per cent. of the amount of their claims, and which totalled only 18 per cent. of their claims, while during the same period other creditors whose claims amounted to 30 per cent. of the insolvent's indebtedness were paid in full, and there was sufficient in the hands of the trustee to pay 30 per cent. on the remaining debts, had reason to believe that they would result in a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⟸303(3).]

3. BANKRUPTCY ⟸166(1)—"PREFERENCE"—STATUTES.

Under Bankr. Act, § 60a, providing that a person shall be deemed to have given a preference if, being insolvent, he has within four months

before the filing of the petition made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class, the phrase "will be" does not control the provision of section 60b that if a bankrupt shall have made a transfer of any of his property, and if at the time of the transfer he be insolvent and the transfer then operate as a preference, and the person receiving it or to be benefited thereby shall then have reasonable cause to believe that it would effect a preference, it shall be voidable, so as to make the time for determining whether the creditor had cause to believe that the payment operates as a preference the time of distribution, instead of the time of payment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251; Dec. Dig. ⊂⊃166(1).

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

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

In the matter of the Heleker Bros. Mercantile Company, bankrupt. From orders disallowing the claims of W. S. Peck & Co. and the Citizens' Bank of Frankfort, Kan., against the estate of the bankrupt, the claimants separately appeal. Orders reversed, and cases remanded, with direction to allow the claims.

William J. Gregg and J. D. Gregg, both of Frankfort, Kan., and Ernest S. Ellis and Frank W. Yale, both of Kansas City., Mo., for appellants.

A. L. Quant, of Topeka, Kan. (W. S. McClintock, of Topeka, Kan., and Edwin A. Krauthoff, of Kansas City, Mo., on the brief), for appellee.

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

CARLAND, Circuit Judge. These appeals are from orders disallowing the claims of appellants against the estate of Heleker Bros. Mercantile Company, a bankrupt, on the ground that within four months prior to the filing of the petition in bankruptcy, to wit, September 23, 1914, they had received voidable preferences. The facts with reference to the alleged preferences are as follows:

W. S. Peck & Co., doing business in New York City, within four months prior to the date last mentioned, received in the form of partial payments, made a week or more apart, from the bankrupt, which did business at Frankfort, Kan., the sum of $525. This sum was about 18 per cent. of the total indebtedness owing by the bankrupt to Peck & Co., and each payment was from 1¼ per cent. to 2½ per cent. thereof. The Citizens' Bank, doing business at Frankfort, Kan., during the period of four months prior to the filing of the petition as before stated, received in partial payments from the bankrupt the sum of $621.68, which was about 18 per cent. of the total debt owing by the bankrupt to the bank, and no payment exceeded 2½ per cent. of said debt. The payments were made through Gregg & Gregg, attorneys at law, residing at Frankfort, Kan. One of the Greggs was also

a director of the bank. Between January 24, 1913, and September 15, 1913, Gregg & Gregg collected the claims of 21 creditors of the bankrupt in full. Between May 19, 1914, and September 19, 1914, the bankrupt made payments to its creditors as follows:

Richardson Dry Goods Company	$1,238 80
Morris Levy & Company	22 50
Perfection Manufacturing Company	153 50
Cutter & Crossette	25 00
S. Galewski	20 00
Omaha Rubber Company	25 00
A. Ratkowski	45 00
Topeka Woolen Mfg. Company	25 00
Topeka Woolen Mfg. Company, Mdse	84 00
Geo. P. Ide & Co	165 28
W. S. Peck & Co., as follows: 5/24 $70, 6/7 $35, 6/14 $35, 6/21 $35, 6/28 $70, 7/7 $70, 7/18 $70, 7/31 $35, 8/7 $35, 8/14 $35, 8/23 $35—total	525 00
W. S. Peck & Co., Merchandise	81 00
Royal Worcester Corset Company	15 00
McCord Donavan Shoe Company	160 00
Jas. F. Coyle & Co	60 00
Cooper Wells & Co	80 00
Whittinghill-Harlow Shoe Company	60 00
Shoninger Heinsheimer Company	10 00
Richardson Shoe Company	103 85
McCaskey Register Company	16 25
P. W. Minor & Son	119 90
Boye Needle Company	16 96
Hamilton Brown Shoe Company	80 00
Interstate Rubber Company	119 82
Northwestern Knitting Company	129 00
Beloit Glove & Mitten Company	165 00
Jacob David Sons Co	250 00
Morris Mann & Reilly	74 23
American Handsewed Shoe Company	46 07
Schmelzer Arms Company	12 50
The Bracken Company	64 50
Thos. D. Barry Company	40 60
Fred S. Todd Shoe Company	25 00
Outcault Adv. Company	15 00
H. H. Lobdell Company	35 00
F. Siegel & Bros	50 00
Tootle-Campbell Company	10 00
Home Manufacturing Company	30 00
Wayne Muslin Uwear Company	15 17
Central Topeka Paper Company	6 10
Bush Hat Company	100 00
Bush Hat Company, merchandise	97 88
H. Burstein Company	10 00
K. C. Paper House	7 30
Shukert Furniture Company	2 50
Citizens' Bank	621 68
	$5,059 39

The aggregate of all the bankrupt's debts at the beginning of the four months period was $17,509.34. It would thus appear that the bankrupt paid about 30 per cent. of its indebtedness during the four months period. The appellants did not receive their proportion of the payments made when the amount of their indebtedness is considered.

These facts are stated as bearing on the question as to whether the payments were preferences and also as bearing upon the question as to whether appellants at the time they received the same had reasonable cause to believe that the enforcement of the payments would effect a preference.

[1] The following sections of the bankruptcy law are material in the consideration of the question as to whether the payments made were voidable preferences:

Sec. 57g: "The claims of creditors who have received preferences, voidable under section 60, subdivision b, * * * shall not be allowed unless such creditors shall surrender such preferences. * * *"

Sec. 60a: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 60b: "If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

It thus appears that it is not sufficient to defeat the allowance of the claims of appellants that they received preferences as defined by law, but it also must appear that at the time the payments were made appellants had reasonable cause to believe that the enforcement of the payment or transfer would effect a preference. Therefore the burden of proof was upon the trustee to show by a fair preponderance of the evidence (1) that the bankrupt was insolvent at the time the several payments were made; (2) that the payments so made enabled appellants to receive a larger percentage of their respective debts than any other creditor of the same class; (3) that at the time each particular payment was made appellants had reasonable cause to believe that the enforcement of the payment or transfer would effect a preference.

[2] Where in any particular case it is shown that a creditor at the time he receives full payment of his debt knows that his debtor is insolvent or has knowledge of such facts, which investigated would show insolvency, it necessarily results that the creditor had reasonable cause to believe that the enforcement of the transfer would effect a preference. But in a case where the transfer or payment amounts to but a small percentage of the total debt, knowledge of the insolvency of the debtor or of facts which if investigated would lead to such knowledge is not conclusive upon the question as to whether the creditor had reasonable cause to believe that the enforcement of the transfer or payment would effect a preference. It will be observed that the language of section 60b provides:

"That if at the time of the transfer the bankrupt be insolvent and the transfer then operate as a preference, and the person receiving it shall then have reasonable knowledge to believe that the enforcement of the transfer would effect a preference, the same shall be voidable by the trustee."

It thus appears that the insolvency must exist at the time of the transfer, and the transfer must then operate as a preference and the creditor must then have reasonable cause to believe that the enforcement of the transfer would effect a preference. Let us assume that the record shows that the bankrupt was insolvent at the time the several payments were made, and that appellants had knowledge of such facts, which if investigated would have led to a knowledge of the insolvency, there would still remain to be established two important and material facts, viz. that the payments at the time they were made to appellants enabled them to receive a larger percentage of their respective debts than any other creditor of the same class, and that at the time each particular payment was made appellants had reasonable cause to believe that the payments would have this effect. The enforcement of the transfer when such transfer is in the form of the payment of money simply means if the payment shall stand as a legal payment.

We fail to find any evidence in the record that the appellants at the time they received the several payments had reasonable cause to believe that the enforcement thereof would effect a preference. On the contrary, the percentage of the total indebtedness of the bankrupt paid during the four months period amounted to about 30 per cent., which was about 27 per cent. in excess of the percentage received by the appellants if each individual payment is considered alone, and about 12 per cent. in excess if the total payments made to appellants be considered. It also appears from the record that the estate of the bankrupt has been reduced to cash and that the same will pay about 30 per cent. more of the total indebtedness of the bankrupt. In view of these undisputed facts, how can it be said that the appellants at the time they received the payments had then reasonable cause to believe that the enforcement of the transfer would effect a preference; that is, that it would result then and there if the estate of the bankrupt was distributed, in the appellants receiving a larger percentage of their debt than other creditors of the same class? We find no evidence upon which to base such a finding.

[3] Counsel for the trustee, however, seek to avoid the force of this contention by calling attention to the language of section 60a, defining a preference. The following clause is specifically referred to:

"And the effect of the enforcement of such judgment or transfer *will be* to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

It is argued that the words "will be" refer to some future period, presumably to the time when, after the payment of all expenses, a bankrupt's estate is ready for distribution by a court of bankruptcy. We are of the opinion, however, that by the very language of section 60b the payment must operate as a preference at the time it is made, or not at all, and the belief of the creditor as to whether it will constitute a preference or not, must be of the time the payment is made.

Taking the record as it stands, how could the appellants be held to have believed that if the estate of the bankrupt had been distributed at the time of these payments it would not have given every cred-

itor a greater percentage of their debts than they were receiving. The estate of the bankrupt at the time the payments were made, would have paid about 60 per cent. on the dollar. The creditor who receives a partial payment on his debt, so far as the question of his having reasonable cause to believe that the enforcement of the payment would effect a preference is concerned, has the right to look at the bankrupt's estate at the time the payment is made, bankruptcy may never occur; but if it does, the creditor may not be charged with a knowledge of what an estate will pay out after it has undergone the shrinking process of the courts.

We are therefore of the opinion that the trustee did not sustain the burden of proof in establishing that at the time the payments were made they operated as preferences, and that at the time they were made the appellants had reasonable cause to believe that the enforcement of the payment would effect a preference.

The decrees in each case are reversed, and the cases remanded, with directions to allow the claims of appellants.

TRIEBER, District Judge, concurs in the result.

WEYMAN-BRUTON CO. v. LADD.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1916.)

No. 4511.

1. APPEAL AND ERROR ⟸185(1)—RESERVATION OF GROUNDS OF REVIEW—WANT OF JURISDICTION OF LOWER COURT.

Under Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. 1913, § 1019), providing that if, in any suit in the District Court, it shall appear at any time that the suit does not really and substantially involve a controversy properly within the jurisdiction of the District Court, it shall proceed no further therein, but shall dismiss the suit, or remand it to the state court, the Circuit Court of Appeals should dismiss for want of jurisdiction a suit over which the District Court had no jurisdiction, but which it dismissed on the merits, even if the question of jurisdiction was not raised by the defendant in the court below or on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166–1168, 1170–1176; Dec. Dig. ⟸185(1).]

2. COURTS ⟸303(2)—SUITS AGAINST STATES—UNAUTHORIZED ACTS OF OFFICER—JURISDICTION.

If the acts of a state officer are beyond the authority vested in him, an action in trespass or suit for injunction against him is not an action or suit against the state, but may be entertained by the federal courts, if requisite jurisdictional facts appear.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 844½; Dec. Dig. ⟸303(2).]

3. INJUNCTION ⟸105(1)—JURISDICTION—CRIMINAL PROSECUTIONS.

The fact that a state statute can be enforced only by criminal prosecutions does not defeat the jurisdiction of equity to enjoin unlawful interference with property rights by unauthorized criminal proceedings under the statute.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 178; Dec. Dig. ⟸105(1).]

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4. CONSTITUTIONAL LAW ⊂⊃46(1)—DETERMINATION OF CONSTITUTIONAL QUESTION—NECESSITY.

Courts will never pass on the constitutionality of a statute, unless it is absolutely necessary.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43, 45; Dec. Dig. ⊂⊃46(1).]

5. INJUNCTION ⊂⊃128—HEALTH—REGULATIONS—EVIDENCE—"SNUFF"—"FINE CUT CHEWING TOBACCO."

In a suit to restrain a state food commissioner from interfering with the sale of plaintiff's tobacco under the authority of Laws N. D. 1913, c. 271, prohibiting the sale of snuff, evidence *held* to show that the tobacco was not a "snuff," which is ordinarily understood as tobacco which has been fermented and powdered and is primarily intended to be taken by the nose, but may also be taken in the mouth for absorption by the gums without mastication, but was a "fine cut chewing tobacco," which is generally recognized, in accordance with the regulations of the Internal Revenue Department, as tobacco which has been cut or prepared from manufactured plug or twist tobacco, or from tobacco scraps, cuts, or clippings, and which is practically intended to be used exclusively as a chewing tobacco.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec Dig. ⊂⊃128.]

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Suit by the Weyman-Bruton Company against E. F. Ladd. From a decree denying the relief asked, and dismissing the bill, plaintiff appeals. Reversed and remanded, with directions to grant the injunction prayed for.

This is an action by the appellant, who is engaged in the manufacture of tobacco, manufacturing, among others, a fine cut chewing tobacco known to the trade and branded as "W-B Fine Cut Chewing Tobacco," to enjoin the appellee, who is the state chemist and food commissioner of the state of North Dakota, from preventing the appellant and tobacco dealers in that state from selling this tobacco in the state, which he declared to be a snuff within the prohibition of the laws of that state. We shall refer to the parties as plaintiff and defendant respectively, that being their relation in the District Court.

The bill charges that the defendant, in his official capacity, has sent circulars to dealers in tobacco throughout the state, advising them that this tobacco is a snuff, and warning them that any further sales of this tobacco would result in prosecutions under the law; that the plaintiff has expended large sums of money in advertising this tobacco in that state, which it is claimed is not a snuff, but a fine cut chewing tobacco; that unless the defendant is prevented from doing so, the plaintiff, who has a very large trade of that tobacco in the state, would suffer damages in excess of $100,000; that by reason of these circulars and threats of prosecutions, the penalty being a fine of not less than $500 and not more than $1,000 upon a conviction for the first offense, and for each subsequent conviction confinement in a jail for not less than 6 months, the plaintiff's business is practically destroyed, and great loss sustained by it. The prayer is for an injunction, to prevent the defendant from carrying into effect the threats of prosecutions.

The answer seeks to justify the acts of the defendant, which are admitted, by claiming that this tobacco is in fact snuff within the meaning of the act of the Legislature of the state of North Dakota, entitled "An act to prohibit the importation or sale of snuff or any substitute therefor, and providing a penalty therefor, and to repeal chapter 277 of the Session Laws of North Dakota of 1911," approved March 7, 1913 (Laws N. D. 1913, c. 271), and which act is as follows:

"Prohibiting Manufacture and Sale of Snuff.

"Be it enacted by the Legislative Assembly of the state of North Dakota:

"Section 1. *(Sale of Snuff Prohibited.)* It shall be unlawful for any person, firm or corporation to import, manufacture, distribute, transport, sell, offer for sale, or to have in possession for sale, or to give away any snuff or any substitute therefor, under whatever name called, and as defined in this act.

"Sec. 2. *(Snuff Defined.)* For the purpose of this act, snuff is defined as any tobacco that has been fermented, or dried, or flavored, or pulverized, or cut, or scented, or otherwise treated, or any substitute therefor or imitation thereof, intended to be taken by the mouth, or nose: Provided, however, that ordinary plug, fine cut, or long cut chewing tobacco as now commonly known to the trade of this state shall not be included in such definition.

"Sec. 3. *(Officers to Enforce.)* It shall be the duty of the state's attorneys, sheriffs, police officers, health officers, and the food commissioners to enforce the provisions of this statute, and for the purpose thereof they shall have ingress and egress to all places of business where it is believed that snuff, as hereinbefore defined, is kept in violation of this act. Grand juries and state's attorneys shall have full inquisitorial powers over offenses committed under this act, and state's attorneys shall make investigation and conduct prosecutions when proper evidence is furnished to them.

"Sec. 4. *(Repeal.)* Chapter 277 of the Session Laws of North Dakota of 1911 is hereby expressly repealed.

"Sec. 5. *(Penalty.)* Any person or persons violating the provisions of this statute or who aids another to violate the same shall be guilty of a misdemeanor and on conviction shall be fined not less than $500.00 nor more than $1,000.00 for the first offense, and for each subsequent conviction shall be confined in jail for not less than six months.

"Approved March 7, 1913."

The answer states that this tobacco is a snuff, because: (1) A chemical analysis shows that it is similar in amount of moisture and in nicotine content to "Right Cut" and "Copenhagen" tobaccos, two other products manufactured and sold by the plaintiff, and held to be snuff. (2) That the method of using "W-B Cut," as evidenced by plaintiff's advertisement of the product, is similar to the method of using "Copenhagen Snuff" and "Right Cut Chewing Tobacco," the latter having been held by the Supreme Court of North Dakota, in State v. Olson, 26 N. D. 304, 144 N. W. 661, to be snuff within the meaning of the above statute.

Upon the final hearing a final decree was rendered, denying the relief asked by plaintiff, and dismissing the bill, with costs in favor of the defendant, from which decree this appeal is prosecuted.

Engerud, Holt & Frame, of Fargo, N. D., and A. H. Burroughs and H. Lewis Brown, both of New York City, for appellant.

Henry J. Linde, Atty. Gen., and Francis J. Murphy and H. R. Bitzing, Asst. Attys. Gen., for appellee.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). [1] The defendant questions the jurisdiction of the District Court to entertain the bill, upon the ground that the action is in effect against the state, the defendant merely acting as an officer of the state in enforcing its laws, and upon the further ground that as the state can, under the statute, only proceed by criminal prosecutions, a court of equity cannot, by injunction, prevent the enforcement of the criminal laws of the state.

The jurisdiction of the District Court, or as a court of equity, was not questioned by a motion to dismiss, nor did the court below dismiss

the bill upon either of these grounds. That it was not dismissed for want of jurisdiction as a national court is conclusively shown by the fact that the court awarded to the defendant costs, which could not have been done if the dismissal had been for such want of jurisdiction. Still, if the court was without jurisdiction, it would be our duty to direct a dismissal upon that ground, and not on the merits, even if the defendant had not raised the question, in either court. Section 37, Judicial Code. Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682.

[2] Whatever might have been the rule at an earlier date, it is now beyond question that, if the acts of an officer are beyond the authority vested in him by law, an action against him for trespass, in an action at law, or to enjoin him in equity, is within the jurisdiction of the national courts, if there is the proper diversity of citizenship, and the amount involved exceeds $3,000, both of which appear from the face of the complaint in the instant case. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Western Union Tel. Co. v. Andrews, 216 U. S 165, 30 Sup. Ct. 286, 54 L. Ed. 430; Harrison v. St. Louis & San Francisco R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187.

[3] Nor does the fact that the statute can only be enforced by criminal proceedings affect the jurisdiction of the court, sitting in equity, if property rights will be destroyed by the unlawful interference by criminal proceedings. Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; Missouri Pacific Ry. Co. v. Omaha, 235 U. S. 121, 130, 35 Sup. Ct. 82, 59 L. Ed. 157. The court had jurisdiction as a national court, as well as an equity court.

[4] Counsel have very elaborately argued the constitutionality of the statute, but courts will never pass upon the constitutionality of a statute, unless it is absolutely necessary, which we do not find to be the case in this proceeding.

[5] State v. Olson, supra, is relied on by the defendant as conclusive that the decree of the court below, dismissing the complaint, should be affirmed. But the facts in that case differ so materially from those in the case at bar that, in our opinion, it has not the effect claimed for it. The tobacco there involved was "Right Cut Chewing Tobacco." The court there found from the evidence that "Right Cut" is a snuff, and was intended to be and was actually used as a snuff. The court found that it was actually used as a snuff, that it was to be used—

"upon the gums, and between the lip and the gums, and that such use is not the ordinary, and we might say the necessary, use of even the finest of the other tobaccos (chewing) mentioned. * * * We hold, in short, that fine cut chewing tobacco is generally excluded (by the statute), but that fine cut snuff is not. * * * We are quite satisfied that the evidence in the case at bar justifies the conclusion at which we have arrived."

The learned trial judge found the issues in favor of the defendant, and while the findings of facts by a chancellor are entitled to the highest consideration, and are presumptively treated as correct, they do not

have the conclusive effect of a verdict by a jury, and if clearly against the weight of the evidence will be set aside, especially when, as in this case, a great deal of the evidence was by depositions and ex parte affidavits. What are the facts, as shown by the overwhelming weight of the evidence? As to the chemical testimony, counsel for the defendant in their brief say:

"The evidence produced by the chemists contributes but little to a solution of the problem. With respect to chemical content there is no material dispute. It is only when the experts proceed to draw conclusions from known chemical and physical facts that a divergence appears."

We may therefore lay aside that testimony. Snuff, as ordinarily understood, as shown by the undisputed evidence, is tobacco that (1) has been fermented, (2) powdered, or pulverized, and (3) is primarily intended to be taken by the nose, but may also be taken in the mouth. On the other hand, fine cut chewing tobacco is generally recognized by the trade in accordance with the regulations of the United States Internal Revenue Department, which are as follows:

"Fine cut chewing tobacco will be regarded as that class of tobacco, which has been prepared or cut from manufactured plug, or twist tobacco, or from tobacco scraps, cuts, or clippings, which is practically intended to be used exclusively as a chewing tobacco, and known and accepted by the trade, as fine cut chewing tobacco." Regulations of the Internal Revenue Department, Revised July 1, 1910, page 43.

The uncontradicted evidence of a number of the officers, managers, and superintendents of the plaintiff shows that this tobacco is intended, in good faith, as a fine cut chewing tobacco, and not as a snuff; that for years experiments had been made to produce it as a good tasting chewing tobacco, which would be different and distinctive from other chewing tobaccos, and become more popular. It is also shown that it comes strictly within the requirements of the regulations of the Internal Revenue Department, and differs entirely from snuff, and that it is not fermented.

In addition to these witnesses is the testimony of a number of other manufacturers of tobacco, as well as snuff, all of whom testified that the tobacco in controversy is not a snuff, but a chewing tobacco. The president of the Geo. W. Helme Company, which manufactures snuff exclusively, testified that this tobacco is not a snuff, but a chewing tobacco, nor does it resemble snuff, which he describes as being—

"either ground and powdered, or else is cut into very minute particles; furthermore, snuff is designed for use in the nose, with the exception of a very few brands that are used more in the mouth than in the nose."

He testified that he is familiar with snuffs, and can see no resemblance in "W-B Fine Cut" to snuff; that this tobacco consists of long fibers, which is never used in snuff.

A large number of other tobacconists, of great experience in the manufacture and sale of chewing tobacco, testified to the same effect, among them the presidents of the Lorrillard Tobacco Company, the American Tobacco Company, and the Liggett & Myers Tobacco Company.

Over 100 citizens of the state of North Dakota, some of them wholesale, and others retail, dealers in tobacco, many others users of chew-

ing tobacco, testified that this is not a snuff, neither adapted, nor capable of being used, as snuff, but that it is a fine cut chewing tobacco, and adapted only for such use as any other fine cut chewing tobacco, consisting of the shredded leaf; that the cut is about the same as usual with the fine cut chewing tobacco used in the state of North Dakota.

On behalf of the defendant only three witnesses testified. Only one testified that he has used this tobacco as a snuff, and in his opinion it could only be intended for that purpose. The second witness was the chemist of the defendant's department, who testified as to the chemical analysis, which, as stated hereinbefore, counsel for the defendant treat as immaterial. The third witness was the defendant himself. His testimony is in the form of an ex parte affidavit. He merely gives his opinion and his belief that this tobacco is similar to that of "Copenhagen," and "Right Cut," declared in State v. Olson to be a snuff within the meaning of the statute. He bases that belief upon the analysis made by the chemist, and, comparing it with the analysis made of "Right Cut," he expresses his belief that this tobacco was intended by the plaintiff to take the place of "Copenhagen," and "Right Cut," to be used as a snuff. The test laid down in State v. Olson is:

"We hold, not that all other fine cuts shall be excluded (from the provisions of the act), but only those fine cuts which are cut so fine or otherwise manufactured so that their natural use is upon the gums, as between the lips and the gums, which use involves no mastication," the court declares within the prohibitions of the statute.

However, for the purposes of this case, the proof establishes beyond a doubt that this tobacco is intended to be used by mastication, and not to be used through either the nose or by placing it in the mouth for absorption. The fact that one witness was found who used it as a snuff cannot overcome the overwhelming testimony introduced by the plaintiff on that point.

We are convinced that the court below erred in dismissing the bill, and the case is reversed and remanded, with directions to grant the injunction as prayed in the bill.

It is so ordered.

FRANKFURT v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 15, 1916. Rehearing Denied May 20, 1916.)

No. 2762.

1. CONSPIRACY ⊂⇒43(6)—TO CONCEAL PROPERTY—INDICTMENT.
An indictment charging a conspiracy to conceal, contrary to Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201) § 37, property belonging to a copartnership which subsequently filed a voluntary petition in bankruptcy, *held* sufficient.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 91; Dec. Dig. ⊂⇒43(6).]

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

2. CRIMINAL LAW ⟸1167(2)—HARMLESS ERROR—RULINGS ON INDICTMENT—SEPARATE COUNTS.

Where accused was convicted on two counts, and sentence was passed on both counts, but ordered to run concurrently, and one of the counts was sufficient, error in sustaining the other count was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3101; Dec. Dig. ⟸1167(2).]

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

Ben Frankfurt was convicted of conspiracy to conceal the property of a bankrupt, and of concealing the property, and he brings error. Affirmed.

The second count of the indictment was as follows:

"Second Count: And the grand jurors aforesaid upon their said oaths do further present in and to said court that on, to wit, the 9th day of December, 1914, the said John W. Easterwood, Rufus Easterwood, Ben Frankfurt, and S. W. Skinner did then and there unlawfully, corruptly, fraudulently, willfully and feloniously conspire, combine, confederate, and agree together within the Tyler division of the Eastern district of Texas, to wit, in Henderson county, the state of Texas, and within the jurisdiction of this court to commit an offense against the United States of America as follows, to wit, That is to say: The said Easterwood Dry Goods Company was then and there a mercantile firm consisting of John W. Easterwood, Rufus Easterwood, and S. W. Skinner, engaged in selling goods, wares, and merchandise in the town of Athens, in the county of Henderson and state aforesaid, and he, the said John W. Easterwood, and he, the said Rufus Easterwood, and he, the said Ben Frankfurt, and he, the said S. W. Skinner, on the date aforesaid, at the place aforesaid, conspired, agreed, combined, and confederated to effect and in substance that the said Easterwood Dry Goods Company should thereafter file its voluntary petition in bankruptcy under and as provided for in and by the acts of the United States Congress in the act commonly called and known the 'Law of Bankruptcy,' and that in anticipation of said voluntary bankruptcy on the part of the said Easterwood Dry Goods Company that the said Ben Frankfurt, Rufus Easterwood, and S. W. Skinner should hide, secrete, and conceal a large part of the stock of merchandise in the store of the said Easterwood Dry Goods Company at Athens, Henderson county, Texas, where said Easterwood Dry Goods Company was doing business, and that the said John W. Easterwood, Rufus Easterwood, and S. W. Skinner should, at the time that the Easterwood Dry Goods Company filed its petition in bankruptcy, unlawfully, knowingly, and fraudulently hide, secrete, conceal, and keep that part of said stock of goods, wares, and merchandise, so before that time secreted, hid, and concealed by them, the said Ben Frankfurt, Rufus Easterwood, and S. W. Skinner, out of and from the schedules so filed in said bankruptcy proceeding, and that the said John W. Easterwood, Rufus Easterwood, and S. W. Skinner, composing the firm of Easterwood Dry Goods Company aforesaid, as and while such bankrupt should unlawfully, knowingly, fraudulently, and willfully conceal from the trustee in bankruptcy thereafter to be appointed in the said bankruptcy proceedings that part of the said stock of goods, wares, and merchandise so hid, secreted, and concealed, as aforesaid, which said part of said stock of goods, wares, and merchandise belong to said business, and was a part of the assets of said Easterwood Dry Goods Company, and was subject to the said Bankruptcy Act, and which should be properly scheduled as a part of its said estate in bankruptcy and turned over to said trustee in bankruptcy; that the said Ben Frankfurt, Rufus Easterwood, and S. W. Skinner were to conceal said assets and property as aforesaid, and on the 9th day of December, A. D. 1914, in pursuance of their said agreement and in aid thereof, and in furtherance and for the purpose of effecting the object of said unlawful and malicious combination and con-

spiracy, formed and entered into as aforesaid, for the purpose and object aforesaid, the said Ben Frankfurt, Rufus Easterwood, and S. W. Skinner did unlawfully, fraudulently, and willfully secrete, hide, and conceal a large amount of the goods, wares, and merchandise belonging to the stock of the said Easterwood Dry Goods Company at Athens, Henderson county, Texas, in anticipation of the filing of the petition in bankruptcy by the said Easterwood Dry Goods Company, as hereinbefore set out, and on the 9th day of December, A. D. 1914, the said Easterwood Dry Goods Company filed in the United States District Court, for the Eastern District of Texas, at the Tyler division of said court, its certain voluntary petition in bankruptcy, and was thereupon and thereunder, to wit, on said date, adjudged a bankrupt under the provision of the act of Congress relating to such matters, by Hon. Hampson Gary, who was then and there properly appointed and acting referee in bankruptcy for the Tyler division of the Eastern district of Texas; that thereafter, and in the regular and legal course of bankruptcy proceeding, to wit, on the 21st day of December, A. D. 1914, one T. D. Bonner was duly and legally appointed and elected trustee in the said bankruptcy proceeding, and thereafter, in the said month of the said year, he (the said T. D. Bonner) duly qualified as such trustee, and continued to act as such trustee from that date up to the time of the presentation of this bill of indictment in this honorable court.

"And the grand jurors aforesaid, on their oaths aforesaid, do say and present that before and while the said Easterwood Dry Goods Company was a voluntary bankrupt as aforesaid, and before and while the said T. D. Bonner was the duly appointed, qualified, elected, and acting trustee in the bankruptcy proceeding as aforesaid, he, the said John W. Easterwood, he, the said Ben Frankfurt, he, the said Rufus Easterwood, and he, the said S. W. Skinner, within the Tyler division of the Eastern district of Texas, and on the date aforesaid, to wit, on the 9th day of December, A. D. 1914, did, as aforesaid, unlawfully, willfully, and fraudulently combine, conspire, confederate, and agree that when the said Easterwood Dry Goods Company should become such bankrupt, and while such bankrupt, the said Easterwood Dry Goods Company, and the individual members thereof, to wit, John W. Easterwood, Rufus Easterwood, and S. W. Skinner, should unlawfully, knowingly, willfully, and fraudulently conceal a certain portion of said stock of goods, wares, and merchandise, which said portion and part of said stock of goods, wares, and merchandise was then and there a portion and part of the goods which should be and ought to have been turned over to the possession and custody of said T. D. Bonner, as trustee, as aforesaid, which said property was hid, secreted, and concealed by the said Ben Frankfurt, Rufus Easterwood, and S. W. Skinner before the filing of the said voluntary petition of Easterwood Dry Goods Company in bankruptcy and unlawfully, willfully, and fraudulently concealed by the said Easterwood Dry Goods Company, and the individual members thereof, to wit, John W. Easterwood, Rufus Easterwood, and S. W. Skinner, from said trustee in bankruptcy while said firm was a bankrupt, as hereinafter set out, and which property consisted of a large amount of clothing, shoes, shirts, underwear, dress goods, and general merchandise, of the value of $6,500 of the current legal money of the said United States of America, a more perfect description of which said goods, wares, and merchandise it is impossible for the grand jurors to give, and in pursuance and in aid of such agreement and confederation so unlawfully and fraudulently made as aforesaid, and for the purpose aforesaid, and to effect the object thereof, he, the said John W. Easterwood, and he, the said Rufus Easterwood, and he, the said S. W. Skinner, did unlawfully, knowingly, willfully, and fraudulently conceal from the said T. D. Bonner, trustee of said bankrupt estate, the said property then and there belonging to the said bankrupt estate of Easterwood Dry Goods Company, which property, as hereinbefore set out and described, he, the said Ben Frankfurt, and he, the said Rufus Easterwood, and he, the said S. W. Skinner, had secreted, hid, and concealed from said stock of goods at the storehouse in the town of Athens and county of Henderson, as hereinbefore set out, in anticipation of the filing of said petition in bankruptcy on the date hereinbefore set out, while such bankrupt as aforesaid, and the said

property then and there belonged to the said Easterwood Dry Goods Company estate in bankruptcy, and the said T. D. Bonner, as trustee, was entitled to the possession thereof, and he, the said John W. Easterwood, and he, the said Rufus Easterwood, and he, the said S. W. Skinner then and there well knew that the said property then and there belonged to the said estate in bankruptcy, and should have been scheduled and turned over as aforesaid to the trustee of said estate in bankruptcy, and the said John W. Easterwood, Rufus Easterwood, and S. W. Skinner unlawfully, willfully, knowingly, and fraudulently continued the concealment of said goods, wares, and merchandise, and wholly failed to turn the same over to the said T. D. Bonner as trustee of said estate in bankruptcy in the manner and form as aforesaid, and in pursuance of the conspiracy of him, the said John W. Easterwood, of him, the said Rufus Easterwood, of him, the said S. W. Skinner, and of him, the said Ben Frankfurt—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

James M. Edwards, of Tyler, Tex. (N. F. Faulk and W. L. Faulk, both of Athens, Tex., on the brief), for plaintiff in error.

Clarence Merritt, U. S. Atty., of McKinney, Tex., and James B. Dailey, Asst. U. S. Atty., of Paris, Tex.

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

PER CURIAM. On a verdict finding the plaintiff in error guilty on the first and second counts of the indictment he was sentenced to imprisonment for a term of two years on each of the counts; the judgment, however, containing the provision that "the sentences on the first and second count to run concurrently."

[1] The second count sufficiently charged that four named persons, one of them being the plaintiff in error, conspired to commit the offense denounced by Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Comp. St. 1913, § 9613), against one who knowingly and fraudulently conceals while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy, and that one or more of such parties did a specified act to effect the object of the conspiracy. Criminal Code, § 37. That count is very similar to the indictment which was passed on in the case of Cohen v. United States, 157 Fed. 651, 85 C. C. A. 113; Id., 207 U. S. 596, 28 Sup. Ct. 261, 52 L. Ed. 357, with the exception that in the instant case the alleged bankrupt was a firm or partnership, while in the Cohen Case the bankrupt was a corporation. All objections urged against the sufficiency of that count may be disposed of by a reference to rulings made in similar cases in which those objections have been passed on and held, and we think correctly, not to be tenable. Cohen v. United States, supra; Roukous v. United States, 195 Fed. 353, 115 C. C. A. 255; Id., 225 U. S. 710, 32 Sup. Ct. 840, 56 L. Ed. 1267; Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149; Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; Heike v. United States, 227 U. S. 131, 33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128; United States v. Rabinowich, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211.

[2] We do not find it necessary to pass on the sufficiency of the first count of the indictment, as when a separate sentence for the same term

of imprisonment is imposed on a verdict of guilty on each of two counts, one of which is bad, but the terms of imprisonment are to be concurrent and not cumulative, the result is practically the same as it would have been if there had been no conviction on the bad count, and the defendant has nothing to complain of in such a judgment. Bartholomew v. United States, 177 Fed. 902, 101 C. C. A. 182; Id., 217 U. S. 608, 30 Sup. Ct. 697, 54 L. Ed. 901; Billingsley v. United States, 178 Fed. 653, 101 C. C. A. 465; Powers v. United States, 223 U. S. 303, 32 Sup. Ct. 281, 56 L. Ed. 448; Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390. The second count being sufficient to sustain the sentence, any insufficiency there may be in the first count would not warrant a reversal of the judgment which was rendered. An examination of the record has led us to the conclusion that it does not show the commission of any reversible error.

The judgment is affirmed.

ALLER-WILMES JEWELRY CO. v. OSBORN.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1916.)

No. 4572.

1. BANKRUPTCY ⊂⊃407(5)—DISCHARGE—GROUNDS FOR REFUSAL—"MATERIALLY FALSE STATEMENT."

A statement, to be materially false, so as to justify the refusal of a discharge to a bankrupt, under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (Comp. St. 1913, § 9598), must be not only false in fact in a material matter, but must have been with the intention to deceive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761; Dec. Dig. ⊂⊃407(5).

For other definitions, see Words and Phrases, Second Series, Materially False Statement.]

2. BANKRUPTCY ⊂⊃467—REVIEW—FINDINGS.

The finding of the lower court that a false statement made by the bankrupt as to his debts was not made with intention to deceive is presumptively correct, and must be sustained on appeal, unless an obvious error of law or serious mistake of fact appear, especially where both the master and trial judge reached the same conclusion.

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

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

In the matter of Alexander H. Osborn, bankrupt. From an order of the District Court, discharging the bankrupt, the Aller-Wilmes Jewelry Company, an objecting creditor, appeals. Affirmed.

G. M. Sebree, of Springfield, Mo. (W. J. Orr, of Springfield, Mo., on the brief), for appellant.

J. T. White, of Springfield, Mo. (W. H. Horine, of Springfield, Mo., on the brief), for appellee.

Before HOOK and ADAMS, Circuit Judges, and ELLIOTT, District Judge.

ADAMS, Circuit Judge. This is an appeal from an order of the District Court of the United States for the Western District of Missouri, discharging Osborn, the bankrupt, from the payment of his debts. When the bankrupt filed his application for a discharge, the jewelry company, one of his creditors, entered its appearance in opposition to it, and in due time specified its grounds therefor as follows:

"That the said Alexander H. Osborn did obtain property on credit from the objector upon a materially false statement in writing, made to the objector for the purpose of obtaining such property on credit, in this: That on the 13th day of August, 1912, the said Alexander H. Osborn did write to the objector as follows: 'I am frank with everybody, as there are no secrets in my business. I have never misrepresented my affairs to any one, as it would be sure road to failure. Your account and C. B. Norton is the extent of my indebtedness, except a few scattering hundred dollars.' That relying upon said written statement the objector thereafter at various times between the dates of September 6, 1912, and May 9, 1913, sold and delivered to the said bankrupt goods, wares, and merchandise on credit to the amount and value of $2,064.09, which account is long past due and unpaid. That said statement was materially false, in this: That when it was made, to wit, on the 13th day of August, 1912, the said bankrupt was indebted to A. H. Osborn, Sr., in the amount of $12,700, and was also indebted to Mrs. Elsie Osborn in the sum of $5,000. That at said time the said A. H. Osborn, Sr., and Mrs. Elsie Osborn held bankrupt's notes for money loaned him aggregating the amounts due each as above stated. That said notes were valid and subsisting claims against him, and were all proved up and allowed in the bankruptcy court, and participated in dividends distributed by bankrupt's trustee."

The issue so created was referred to a special master to hear the proof and report it, with his findings, to the court for its information. The proof was made, and the special master reported it to the court, with his finding adverse to the contention of the objector. Exceptions having been duly filed, the judge, after a full hearing and consideration thereof, overruled them, confirmed the report, and entered an order discharging the bankrupt; hence this appeal.

[1] Section 14(b) of the Bankruptcy Act, as amended on February 5, 1903, enacts that:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by * * * parties in interest, at such time as will give * * * parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has * * * (3) obtained property on credit from any person upon a materially false statement in writing, made to such person for the purpose of obtaining such property on credit. * * *"

From this it appears that the written statement must have been (1) materially false, and (2) made for the purpose of obtaining property on credit. A statement, to be "materially false" within the meaning of this statute, must be not only false in fact in a material matter, but must have been made with the intention to deceive. Gilpin v. Merchants' National Bank, 91 C. C. A. 445, 165 Fed. 607, 20 L. R. A. (N. S.) 1023; Firestone v. Harvey, 98 C. C. A. 420, 174 Fed. 574; Peck Co. v. Lowenbein, 101 C. C. A. 498, 178 Fed. 178. And such statement must have been made for a certain specified purpose, namely, "to secure property from another on credit."

[2] The writing of the letter, set out in the specification of objec-

tions by the objector, is admitted. It is also admitted that at the time of writing the letter the bankrupt owed his father and his mother a large amount of money, not disclosed in the statement, practically as specified by the objector, and that the bankrupt, after writing the letter, purchased goods of the appellant on credit. Based on these admissions and some other evidence, the appellant, invoking the doctrine that one must be held to intend the natural consequences of his acts, insists that the discharge should have been refused to the bankrupt. He, on the other hand, contends that the proof, taken as a whole, fails to establish that the statement was made with the intent to deceive, or that it was made for the purpose of obtaining property on credit. On this issue the special master made these special findings:

(1) "That Beard [traveling salesman of the appellant] knew when he took the orders in September, 1912, that Osborn was indebted to his parents. Osborn explained that to Beard in connection with his asking for credit, and Beard by letter to and in conversation with Aller reported same to him. Beard knew that Osborn was the only child of his father, who was wealthy, quite old, in poor health, and that Osborn would likely inherit his fortune. Beard relied largely on that in recommending Osborn for credit, that he would come into possession sooner or later of a large estate, and communicated these facts to Mr. Aller, the president and principal credit man of the company. Beard came to Springfield, and called on Osborn four or five times a year."

And—

(2) "There was no intent on the part of Osborn to deceive or mislead the company, nor to conceal from it the indebtedness to his parents, nor was he seeking to establish a basis of credit, nor was the statement made for the purpose of obtaining property or money on credit. Nor was the statement actuated by any fraudulent purpose on the part of Osborn."

The learned trial judge of the court below, upon exceptions taken to the master's report, made the following statement:

"After hearing the extended arguments of counsel, and a careful reading of all the testimony and exhibits in the case, together with the briefs and memoranda of counsel, I am of the opinion that the findings and conclusions of the special master are correct, and that his report should be confirmed. Not only have the objecting creditors failed to carry the burden that these findings involve gross mistake of facts or error of law, but, on the contrary, the court feels impelled to the same conclusion upon independent examination."

After analyzing and discussing the facts reported to him by the master, the court concludes:

"As I have said, I think the whole record sustains the finding of the special master that this statement was not made with the intent and purpose to deceive and thereby to obtain from the person to whom it was made property upon credit. The discharge should be granted accordingly."

In view of the manifestly critical analysis of the testimony by the master, as well as by the trial judge, and because it appears to us, after a careful consideration of the case, that there is abundant evidence tending to sustain the conclusions so reached, we are disposed to apply the rule repeatedly laid down by this court that when the chancellor has considered conflicting evidence and made his findings and decrees thereon, they are presumptively correct, and, unless

an obvious error of law or some serious mistake of fact appears, the findings and conclusions so reached must be sustained. This is especially true when both the master and the trial court agree. Nichols v. Elken et al., 140 C. C. A. 563, 225 Fed. 689, and cases cited.

Judgment is affirmed.

FISHER MACH. WORKS CO. v. DOUGHERTY.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1916. Rehearing Denied May 1, 1916.)

No. 4449.

1. TRIAL ⟸418—DEMURRER TO EVIDENCE—WAIVER.
   A demurrer to plaintiff's evidence was waived by the introduction of evidence on the part of defendant.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. § 981; Dec. Dig. ⟸418.]

2. DAMAGES ⟸158(1)—EVIDENCE—PERSONAL INJURIES—APPLICABILITY TO PLEADINGS.
   A petition alleging that plaintiff's legs and the lower part of his body were mashed or crushed, and that he was injured internally, the exact nature and extent of which he could not more definitely state at that time, was sufficient, in the absence of a motion to make more specific, to authorize evidence that plaintiff was ruptured.
   [Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441, 443, 444; Dec. Dig. ⟸158(1).]

3. APPEAL AND ERROR ⟸263(1), 730(2)—QUESTIONS REVIEWABLE—EXCEPTIONS—ASSIGNMENT OF ERROR—INSTRUCTIONS.
   Where the portion of the charge alleged to have been erroneous was not set out totidem verbis, as required by rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), and no exception was taken to the charge as given, the judgment will not be reversed on an assignment of error to the charge.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516, 1520, 1522, 1523, 1525, 1529–1532, 3014, 3015; Dec. Dig. ⟸263(1), 730(2).]

4. TRIAL ⟸252(11)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.
   Where there was evidence that defendant promised to warn his servant whenever other servants were about to perform the work in connection with which plaintiff received his injuries, a requested charge that the plaintiff assumed all of the open, ordinary, and obvious risks of his employment was properly refused.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. ⟸252(11).]

5. MASTER AND SERVANT ⟸294(5)—INJURIES TO SERVANT—DUTY OF MASTER—DELEGATION.
   In an action by a servant for injuries caused by his master's failure to use ordinary care to furnish a reasonably safe place for work, a requested charge on the negligence of fellow servants was properly refused, since that duty could not be delegated by the master.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1164; Dec. Dig. ⟸294(5).]

6. APPEAL AND ERROR ⟸974(1)—TRIAL ⟸349(2)—REVIEW—DISCRETION OF LOWER COURT—SPECIAL QUESTIONS TO JURY.
   The submission of special questions or findings of fact to the jury in a personal injury action is discretionary on the part of the trial court, and error cannot be assigned thereon.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3858; Dec. Dig. ⟸974(1); Trial, Cent. Dig. § 824; Dec. Dig. ⟸349(2).]

7. APPEAL AND ERROR ⟸733—QUESTIONS REVIEWABLE—ASSIGNMENT OF ERROR.
In an action for personal injuries, where the verdict was for plaintiff, an assignment that the court erred in refusing to render judgment for defendant, instead of plaintiff, presents nothing for review.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025–3027; Dec. Dig. ⟸733.]

8. APPEAL AND ERROR ⟸688(1)—QUESTIONS PRESENTED—MOTION FOR NEW TRIAL.
An assignment of error relating to remarks of the trial court, which remarks do not appear in the bill of exceptions, but only in the motion for new trial, cannot be considered.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2894, 2895; Dec. Dig. ⟸688(1).]

9. APPEAL AND ERROR ⟸977(1)—QUESTIONS REVIEWABLE—MOTION FOR NEW TRIAL.
The ruling of the trial court on a motion for a new trial is not reviewable in the Circuit Court of Appeals.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3860; Dec. Dig. ⟸977(1).]

In Error to the District Court of the United States for the District of Kansas.

Action for personal injuries by Charles P. Dougherty against the Fisher Machine Works Company, a corporation. Judgment for the plaintiff, and defendant brings error. Affirmed.

Ewing C. Bland, of Kansas City, Mo., and Arthur M. Jackson, of Leavenworth, Kan. (Glenn R. Donaldson, of Kansas City, Mo., on the brief), for plaintiff in error.

John H. Atwood, of Kansas City, Mo. (O. S. Hill, of Kansas City, Mo., on the brief), for defendant in error.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. Dougherty, hereinafter called plaintiff, sued the machine company, hereinafter called defendant, to recover damages for personal injuries received by him and which he alleged were caused by the negligence of the company. At the trial a verdict was returned, upon which judgment was rendered in favor of the plaintiff. The defendant brings the case here, assigning eight errors on which it prays a reversal of the judgment below.

[1] First. It is assigned as error that the court erred in overruling the defendant's demurrer to plaintiff's evidence. The demurrer was waived by the introduction of evidence on the part of defendant, and no demurrer was interposed at the close of all the evidence.

[2] Second. It is assigned as error that the court erred in overruling the objections made by defendant to the evidence introduced by plaintiff. The evidence admitted, or the full substance thereof, is not quoted in connection with this assignment of error. Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii). In the brief there is a statement under this head of two rulings of the court—one, a refusal to strike out a portion of an answer to a question propounded by defendant's coun-

sel to plaintiff; the other, an admission of evidence from the same witness that he had no rupture prior to the accident. The motion to strike related to a reference to this rupture by the plaintiff when defendant's counsel was asking him concerning his injuries. Both objections were made for the reason that plaintiff did not plead anything about a rupture. The plaintiff alleged in his petition that "his legs and the lower parts of his body were mashed or crushed"; that "he was injured internally, the exact nature and extent of which plaintiff cannot at this time more definitely state." If the defendant thought the petition was indefinite as to the injuries received by the plaintiff, it could have by motion had it made more specific. No such motion having been made, we think the testimony in regard to the rupture was admissible.

[3] Third. That the court erred in its instructions to the jury. The portion of the charge alleged to have been erroneous is not set out totidem verbis. Rule 11. Moreover, the record shows that there was no exception taken to the charge of the court as given.

[4, 5] Fourth. That the court erred in refusing to give certain instructions requested by defendant. The instruction refused is not set out, as required by rule 11. We have, however, in the interest of justice, examined the record, and find that counsel did request two instructions, which were refused, and an exception allowed. They are as follows: (a) The defendant requests the court to instruct the jury that the plaintiff in this case assumed all of the open, ordinary, and obvious risks of his employment. This request was inapplicable to the case on trial, for the reason that there was evidence that the defendant promised to warn the plaintiff whenever the servants of defendant were about to perform the work in connection with which plaintiff received his injuries. (b) "Defendant also requests the court to define to the jury what is meant by the term 'fellow servant,' and to instruct the jury that, if it believes from the evidence that the plaintiff was injured by reason of the negligence of his fellow servants, the plaintiff cannot recover." This request was properly refused because the duty for the violation of which plaintiff sued defendant could not be delegated. It was the absolute duty of the defendant to use ordinary care to furnish the plaintiff with a reasonably safe place to perform his work, and this duty could not be delegated so as to relieve the defendant from liability.

[6] Fifth. That the court erred in refusing to submit ten special questions or findings of fact to the jury. This was discretionary on the part of the trial court, and there is no merit in the assignment.

[7] Sixth. That the court erred in refusing to render judgment for defendant, instead of plaintiff. This assignment presents nothing for review.

[8, 9] Seventh. This assignment of error relates to certain remarks which it is claimed the trial court made to the jury on an occasion when the jury had reported that they were unable to agree. Nothing in reference to this appears in the bill of exceptions. It appears in the record in this way: Counsel for defendant moved for a new trial in the court below, and one of the grounds urged for a new trial were

the remarks claimed to have been made by the court to the jury as above stated. These remarks were made to appear on the motion for a new trial by an affidavit of counsel for defendant, and the proceedings on motion for a new trial are incorporated in the record filed in this court; but they are not properly a part of the record, as we have no power to review the action of the trial court in granting or refusing a new trial. In order that we may review on writ of error alleged errors in the rulings of the trial court, such rulings must be excepted to, and the rulings incorporated in a bill of exceptions, certified and allowed by the trial judge.

Eighth. That the court erred in overruling the motion for a new trial of this cause. As we have before said, the ruling of the trial court on the motion for a new trial is not reviewable in this court.

No assignment of error having any merit, the judgment below is affirmed.

HART-PARR CO. v. BARKLEY et al.

In re TUXHORN.

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

No. 158.

1. BANKRUPTCY ⊜440—PETITION TO REVISE—ORDER TO VACATE ADJUDICATION.

Since an order denying the application of a creditor to vacate an adjudication in bankruptcy is not appealable, questions of law raised by it may be reviewed by petition to revise.

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

2. BANKRUPTCY ⊜68—INVOLUNTARY PROCEEDINGS—PERSONS EXEMPT—"FARMING"—"TILLAGE OF THE SOIL."

In Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (Comp. St. 1913, § 9588), exempting from being adjudicated an involuntary bankrupt those engaged chiefly in farming or the tillage of the soil, the word "farming" and the words "tillage of the soil" mean the same thing; and while the threshing by a farmer of his own grain belongs to the industry of farming, one who is chiefly engaged in threshing for hire grain raised by others is not within the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. ⊜68.

For other definitions, see Words and Phrases, First Series, Farming; Tillage.]

Petition to Revise Order of the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

In the matter of Julius Tuxhorn, bankrupt. Petition of the Hart-Parr Company, a corporation, against Adam Barkley and another, to revise an order of the District Court denying petitioner's application to vacate the adjudication. Petition to revise denied.

Chester I. Long, of Wichita, Kan. (A. G. C. Bierer, of Guthrie, Okl., and A. M. Cowan, of Wichita, Kan., on the brief), for petitioner.

Jesse D. Wall and E. L. Foulke, both of Wichita, Kan. (C. A. Matson, of Wichita, Kan., on the brief), for respondents.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. [1] This is a petition to revise an order of the District Court of the Western District of Oklahoma, denying the application of the Hart-Parr Company, a creditor, to have the judgment of said court, which adjudicated Julius Tuxhorn an involuntary bankrupt, vacated and set aside. As such an order is not appealable, it would seem that as to matters of law it may be reviewed by a petition to revise. B-R Electric & Telephone Manufacturing Co. v. Ætna Life Insurance Co., 206 Fed. 885, 124 C. C. A. 545.

[2] The application to vacate the adjudication of bankruptcy alleged as the ground thereof that the alleged bankrupt, Tuxhorn, at the time the involuntary petition was filed, to wit, January 30, 1915, was a person chiefly engaged in farming or the tillage of the soil, and therefore could not be adjudicated an involuntary bankrupt. The court took the evidence upon this question and found the facts as follows:

"The bankrupt, prior to 1912, leased for three years the Nelson farm and the Adam Barkley farm, each being a quarter section, and was the owner of another quarter section in the same locality, which he acquired on May 5, 1911, where he had his residence and home until he left the state of Oklahoma in November, 1914. He farmed said tracts in 1912, and planted crops thereon in 1913, but did not raise much crop; the season being dry. In the spring of 1914, he plowed 60 to 70 acres on his own land, and planted about 25 acres in kaffir and maize thereon, and 8 to 10 acres in kaffir on the Nelson farm, but did not cultivate said crops, and the same were sold under attachment for about $36. He also raised about 115 bushels of wheat on his own land in the year 1914, and sold the same for $103.50; also raised there a small amount of barley. He owned and kept on his farm 6 to 8 head of horses and a few chickens, and used one or two of these teams in his threshing business. He did not raise sufficient feed on his farm for his horses, and bought feed for them in the spring of 1914. He did not cultivate or plant upon the Barkley farm in the season of 1914.

"The bankrupt was a single man. He kept his clothes, trunk, and papers in the house on his land, and on September 19, 1914, asked a Mr. Andrews and his wife, who resided there since that date and were employed with his threshing crew from about August 3, 1914, to September 19, 1914, to stay there until spring and harvest the kaffir and maize planted thereon. The total value of all crops raised in 1914 upon his land and the leased land was not over $250. From April 1, 1914, until August 1, 1914, he was on his land less than half the time, and after the threshing season began he was there on Sundays and when it rained. No plowing was done thereon after September 19, 1914. It was his custom to leave his farm for several days or weeks at a time, and turn on a windmill to furnish water for his horses and leave them in the pasture. When he was last at the farm his personal property there consisted of two two-row listers belonging to the engine, another lister, two wheat drills, three discs, three wagons, and some other small machinery. The bankrupt stated to one party in August, 1914, that he had to make a stake at threshing or 'go broke,' and that he had made nothing at farming, and in the winter of 1913–14 he advised another party to buy a threshing outfit, that he could make money thereby, and that he had just as

well 'cut out' this farming business first as last, and that he, the bankrupt, had tried it, but there was nothing in it, and that he had quit farming.

"The bankrupt purchased, in the season of 1910, or 1911, a J. I. Case threshing outfit, consisting of a steam tractor, separator, and attachments and equipments, securing the cost by mortgages thereon and on 100 acres of wheat and on his farm. He also purchased an eight-bottom gang plow, which was used in connection with the tractor engine, for plowing for others for hire, and a two-row lister, also used with the tractor engine, and prior to July, 1914, he used all of the above in plowing and listing for others and on his own land. About July 1, 1914, he leased the J. I. Case outfit, complete, to other parties to be run on equal shares. In July, 1914, he bought of the Hart-Parr Company another complete threshing outfit, heretofore referred to, the engine of which was a gas tractor, suitable for running a threshing machine and for plowing and hauling. He operated this latter outfit, employing eight to ten hands, the daily expense being about $35 to $40, from about August 1, 1914, until he left Beaver county, Okl., for parts unknown, on November 25, 1914, and when it was too wet to thresh he used the said gas tractor in plowing for others for hire. He was observed to compute the amount of his wheat threshing at 35,000 to 40,000 bushels.

"It is shown by a bank account that he received, for threshing, the season of 1914, $2,625, and had an overdraft of $167; but it does not appear what, if any, his other receipts were therefrom, nor what he received from the 'Case' outfit. The average daily run of the Hart-Parr machine was 700 to 900 bushels, and the charge 6 to 7 cents a bushel for threshing wheat. The petitioning creditor did not attempt to show the entire indebtedness of the bankrupt. It does appear that he is indebted to the J. I. Case Company about $1,817, owes $500 as a farm loan on his land, paid on the cost of the 'Case' outfit, $300 for repairs thereon, $249 to the Kan-O-Tex Oil Company for gasoline and oil furnished to him in the fall of 1914, the said debt to the Hart-Parr Company, and a number of merchandise accounts, ranging from $30 to $150, all being contracted for threshing outfits and in the operation of the same.

"The threshing season for wheat in Beaver county, Okl., extends from about July 1st until late fall. He was still threshing when he left the state in November, 1914. After the wheat threshing season there is a threshing season for kaffir corn and maize, which continues until early spring. In March, 1915, such threshing was going on in said Beaver county. The threshing season of 1912 began in July or August, and continued into the following March. In 1913 the season was shorter, owing to the scarcity of crops."

The court concluded as matter of law from these facts that Tuxhorn was chiefly engaged in threshing for others for hire, and therefore was not chiefly engaged in farming or the tillage of the soil.

The words "farming or the tillage of the soil," as used in subdivision "b" of section 4, Act of July 1, 1898, express the same thought; that is, the word "farming" and the words "tillage of the soil" mean the same thing. Counsel for the petitioner contend that the trial court erred in confusing the meaning of the word "farming," which relates to an industry, with the meaning of the word "farmer," which relates to an occupation; that while the facts proven might sustain the conclusion of the court that Tuxhorn was not a farmer, they do not sustain the conclusion that Tuxhorn was not engaged in farming, because, as counsel insist, the threshing of grain is farming, although Tuxhorn might not have been a farmer.

We think, speaking generally, without reference to the facts in this case, that the threshing of his own grain by a farmer belongs to the industry of farming; but the statute provides that a person, in order to be exempted from being adjudicated an involuntary bankrupt, must be engaged chiefly in farming or the tillage of the soil, and the

determination of whether Tuxhorn is within the exemption must be determined from the facts in this case, and we entirely agree with the trial court that Tuxhorn was not chiefly engaged in farming or the tillage of the soil, but that he was chiefly engaged in the business of threshing grain for others for hire, which in our opinion is not farming. The purchase within about four years of two complete threshing outfits, when considered with reference to the amount of grain raised by Tuxhorn and the amount of revenue received from threshing for others for hire, shows what he was chiefly engaged in.

Counsel cite the standard dictionaries, and the use of the word by the Census Bureau; but we must confine ourselves to the statute and to the facts shown in this particular case; and within those limits we have no question but that the conclusion of the court below from the facts found was right, and therefore the petition to revise must be denied.

And it is so ordered.

SULLIVAN v. DAMON et al.

(Circuit Court of Appeals, Eighth Circuit. March 20, 1916. Rehearing Denied May 25, 1916.)

No. 4505.

LIMITATION OF ACTIONS ⊂=105(1)—COMPUTATION OF PERIOD—PENDENCY OF OTHER ACTION.

The Iowa 10-year statute of limitations (Code Iowa 1897, § 3447), which has been construed by the Supreme Court of that state to run only in favor of one in possession under some claim of right or color of title, which he in good faith supposes gives him his right to the property, does not run against the one holder of the legal title during the pendency of a suit by the one in possession to have the title holder declared trustee for him in which suit the final decree was against the claimant in possession.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 514; Dec. Dig. ⊂=105(1).]

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Ejectment by Albert N. Damon and others against John Sullivan. Judgment for plaintiffs (218 Fed. 526), and defendant brings error. Affirmed.

Alfred Pizey, of Sioux City, Iowa (D. H. Sullivan, of Sioux City, Iowa, on the brief), for plaintiff in error.

John E. Stryker, of St. Paul, Minn., for defendants in error.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

ADAMS, Circuit Judge. This was a suit in ejectment, brought by defendants in error, who were the sole heirs of Myron H. Damon, deceased, to recover possession of a tract of land situated in O'Brien county, Iowa, patented to their ancestor in 1901. After the issuance

of the patent to him, some time in 1903 Sullivan (the plaintiff in error) commenced a suit in equity in the court below against the patentee, asserting that he, by his settlement upon the land in question under the homestead laws of the United States prior to the issuance of the patent to Damon, had acquired title to it, and that through error of law the patent had been issued to Damon, when it should have been issued to him, and his prayer was that Damon (the defendant in that suit) should be decreed to hold the legal title in trust for him (Sullivan). During the pendency of that suit Myron H. Damon died, and some time in 1912 the suit was revived against the defendants in error as his heirs at law. In 1913, after a full hearing, a final decree was entered dismissing the bill on the merits, and awarding the land to the defendants in error as the surviving heirs of the patentee. Sullivan v. Damon (D. C.) 202 Fed. 285.

The defendant Sullivan was in possession of the land during the pendency of the equity suit, and upon his refusal to surrender its possession plaintiffs brought this suit to recover it from him. In their petition plaintiffs set forth, among other things, the claim which Sullivan had asserted to the land, and the facts relating to the bringing of the equity suit by him, and the entry of the final decree therein. Defendant, Sullivan, in his substituted and amended answer, admitted that he brought the equity suit, contesting the validity of the Damon patent as against his homestead claim, and that final decree was entered therein against him; but he alleged that no issue relating to his claim of title by adverse possession was there tried, and that the only issue there involved was whether the land department of the United States had erred as a matter of law in issuing the patent to Damon instead of to him. He further alleged that his equity suit was commenced on February 20, 1901, and that he had been for years prior thereto in the actual, open, hostile, notorious occupancy and possession of the land adverse to and exclusive of any and every other right or claim; that his possession continued for more than 10 years after the commencement of that suit, during which period of time neither Myron H. Damon nor his heirs (plaintiffs herein) brought any action for the recovery of the real estate, or the possession thereof, nor took any steps to bring the equity suit to trial; that by such acquiescence and laches any right, title, or interest which plaintiffs may have had in the land has been abandoned and lost, and barred of remedy by the statute of limitations of 10 years. A demurrer filed to this answer was sustained by the trial court, and, defendant declining to plead further, judgment was rendered against him, for the reversal of which this writ of error is prosecuted.

The defendant makes these assignments of error:

"(1) That the court erred in sustaining the demurrer to the amended and substituted answer filed in this cause, for the reason that the statements and allegations contained in said answer pleading title in this defendant and plaintiff in error to the real estate in controversy by adverse possession and the statute of limitations, state a good and valid defense to the petition of the plaintiffs."

"(2) That the court erred in entering final judgment in this cause against this defendant and plaintiff in error and in favor of the plaintiffs for the same reason."

This case is thus simplified and reduced to the question whether the Iowa statute of limitations (section 3447, Code Iowa 1897), which requires the bringing of an action for the recovery of real estate within 10 years after the cause of action accrues, was tolled in favor of the plaintiffs in this case during the pendency of the equity suit. If so, inasmuch as that was for a period in excess of 10 years before this action was brought, the defendant's title based on adverse possession cannot prevail.

The Supreme Court of Iowa, in decisions relating to its local statutes, which are binding upon federal courts, has held that, in order to enable a party to rely on the statute of limitations, he must be in the actual adverse possession under a claim of right or under a color of title. Larum v. Wilmer, 35 Iowa, 244; Hintrager v. Smith, 89 Iowa, 270, 56 N. W. 456; Litchfield v. Sewell, 97 Iowa, 247, 66 N. W. 104; Goulding v. Shonquist, 159 Iowa, 647, 141 N. W. 24. See also to the same effect St. Paul M. & M. Ry. Co. v. Olson, 87 Minn. 117, 91 N. W. 294, 94 Am. St. Rep. 693.

In Goulding v. Shonquist, supra, the Supreme Court said:

"These words 'claim of right' or 'claim of title' are often used in the same sense. It is difficult to give an exact definition that would be applicable in all cases, but there must be some claim of right or title or interest in or to the property by which the possessor, in good faith, supposes he has a right to the property, and under which he continues in possession, and which, when held openly for the requisite length of time, with the intention of holding against the true owner and all others and adversely, will ripen into a title."

In view of these authorities, and others of like character, the trial court held that the equity suit instituted by Sullivan in 1903, and prosecuted to a final decree against him in 1913, presented a fatal obstacle to his title by adverse possession. To this contention, after examining and considering the foregoing cases and many others to which our attention has been called by counsel in the case, we feel constrained to agree.

It is inconceivable that Sullivan, at the time this suit was instituted in September, 1914, or for some time prior thereto, when, as he claims, the statute was running against plaintiffs' cause of action, could have believed, in good faith, that he had a claim or color of title to the land. The decree in the equity suit had, in a most solemn way, advised him that he had no such claim or color of title, and the pendency of that suit from 1903 to 1913, during which time the present plaintiffs were contesting his pretensions in the only permissible way, affords very conclusive assurance that these plaintiffs were not acquiescent in Sullivan's claim. In Litchfield v. Sewell, supra, 97 Iowa, loc. cit. 251, 66 N. W. 104, the Supreme Court of Iowa said (citing in support Washburn's Real Property):

"The whole doctrine of adverse possession rests upon the presumed acquiescence of the party against whom it is held."

During this period of 10 years the plaintiffs in this case were defending their claim of ownership of the property against Sullivan whenever the progress of the equity suit permitted them to do so. To now hold that the statute of limitations was running against plaintiffs

during the pendency of that suit would, in effect, permit Sullivan to make use of its protraction, presumably within his own control, to accomplish for him what the suit itself failed to do. Such a holding would offer a premium to protracted litigation, and convert merited defeat into unmerited victory.

The judgment of the District Court was right, and must be affirmed.

BARTON LUMBER & BRICK CO. v. PREWITT.

In re YOUNG COMMISSION CO.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1916.)

No. 4508.

BANKRUPTCY ⊂=461—APPEALS—"PROCEEDING IN BANKRUPTCY"—"CONTROVERSY IN BANKRUPTCY."

A petition by an intervener in bankruptcy proceedings, claiming an equitable right to a portion of the money, received by the trustee for a contract completed by a state receiver before the petition in bankruptcy was filed, equal to the amount of the material furnished by the intervener for the completion of the building, recognized the title of the trustee to the fund, and is a "proceeding in bankruptcy," within Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (Comp. St. 1913, § 9609), providing that appeals may be taken in bankruptcy proceedings from a judgment allowing or rejecting a debt or claim of $500 or over, provided it be taken within 10 days after the judgment appealed from has been rendered, and not a "controversy in bankruptcy," within section 24a, giving appellate jurisdiction over such controversies under which an appeal may be taken within 6 months.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–923; Dec. Dig. ⊂=461.

For other definitions, see Words and Phrases, First and Second Series, Bankruptcy Proceeding; Controversy Arising in Bankruptcy Proceedings.]

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

In the matter of the Young Commission Company, bankrupt. From an order denying a petition by the Barton Lumber & Brick Company against W. W. Prewitt, as trustee in bankruptcy, to recover the value of materials furnished the bankrupt, the petitioner appeals. Appeal dismissed.

Baker & Sloan, of Jonesboro, Ark., for appellant.

J. R. Turney, of Jonesboro, Ark., for appellee.

Before ADAMS and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. Prior to the institution of proceedings in bankruptcy against it, the Young Commission Company brought a suit in the chancery court of Mississippi county, Ark., to protect itself against certain threatened suits by its creditors, in which Hugh Wells was appointed receiver, and directed by the order of appointment—

"to take charge of all assets of said company, to collect outstanding accounts, defend any suit now pending against said company, make an inventory of all the assets of said company, and in general to protect and preserve the assets of said company, subject to the orders of the chancellor from time to time, with a view to the best interests of all parties concerned therein."

Afterwards, on March 23, 1914, Wells, the receiver so appointed, ordered from the Barton Lumber & Brick Company, appellant herein, certain lumber, amounting in value to $363.49, for the purpose of completing a certain contract for the construction of a building in Osceola, Ark., for one Patterson, which the Young Commission Company had, before its bankruptcy, contracted to build.

On April 18, 1914, an involuntary petition in bankruptcy was filed against the Young Commission Company, upon which it was duly adjudicated a bankrupt, and the appellee, Prewitt, chosen as its trustee. The trustee collected from Patterson the full amount of the contract price for the construction of the building by the bankrupt, which amounted to $716, and this amount was deposited by him in the bank with other funds belonging to the bankrupt estate, and was checked against by the trustee from time to time in payment of costs and claims adjudged to be entitled to priority, and for other purposes. By payments made in this way the fund was reduced to $100. Subsequently the trustee collected other moneys and has sufficient on hand in this commingled account to pay the appellee's claim, if ordered to do so.

The appellant, having never been paid the amount due it for the lumber sold to Wells, the state receiver, filed a petition in intervention in the bankruptcy case as an adverse claimant, setting up the facts already detailed, and claimed that the collection by the trustee of the amount of the contract price for constructing Patterson's building, including the value of the lumber, furnished to receiver Wells by the Barton Lumber & Brick Company, conferred upon it a superior right to so much of the money in the hands of the trustee as was necessary to pay its claim for the lumber furnished to Receiver Wells. It thereby recognized the title to and possession of the fund by the trustee, and asserted its rights to have it so administered or distributed as to recognize its equitable right thereto, to the extent of its claim of $363.49.

On April 17, 1915, the District Court made an order allowing to the intervener the sum of $100, the lowest balance left in the bank in the commingled fund, as a preferred claim, but disallowed the balance. On April 17, 1915, appellant filed its assignment of error, and on June 18, 1915, it perfected its appeal by giving the required bond and securing an order granting the appeal.

From these dates it appears that the appeal was not taken within 10 days after the judgment rejecting the claim, as made, was rendered. Neither did the amount involved aggregate the sum of $500, or over, as required by section 25 (a), to confer the right of appeal thereby conferred. But appellant contends that section 25 (a) concerning *proceedings* in bankruptcy is not applicable to this case, but that the appeal was taken under and in accordance with the provisions of section 24 (a), which permits appeals in "*controversies arising in*

bankruptcy proceedings" at any time within 6 months from the order appealed from regardless of the amount involved.

The question thus arises whether the intervening petition of appellant was a *proceeding in bankruptcy,* or a *controversy arising in bankruptcy proceedings,* within the meaning of those sections. An examination of the intervening petition discloses, as already indicated, that the appellant recognized the title to and possession of the fund in the trustee for administration under the orders of the bankruptcy court, and asserted its right to have it so administered or distributed as to recognize its equitable title to the fund, at least to the extent of its claim of $363.49. This, on the authority of Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, constituted a *proceeding in bankruptcy,* as distinguished from a *controversy arising in bankruptcy proceedings,* within the meaning of sections 25 (a) and 24 (a), respectively, and as such *proceeding* it was subject to the provisions of section 25 (a), and should have been appealed if at all, in accordance with its provisions.

Because the amount involved was not $500, or over, and because the appeal was not taken within 10 days after the judgment appealed from was rendered, the appeal was improvidently allowed, and, on the authority of Coder v. Arts, must be dismissed.

It is so ordered.

WILSON v. SANDS et al.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1916.)

No. 4418.

1. COMPROMISE AND SETTLEMENT ⟸23(3)—CANCELLATION—EVIDENCE—FRAUD —MISTAKE.

In a suit to cancel a contract for the settlement of personal injuries to a passenger, evidence *held* not clear, unequivocal, and certain that the contract was procured by fraud or mistake, and therefore not to justify setting it aside.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 94; Dec. Dig. ⟸23(3).]

2. APPEAL AND ERROR ⟸1009(1)—REVIEW—FINDINGS OF FACT—EQUITABLE SUIT.

The conclusion of the lower court in a suit to cancel a contract of settlement for fraud or mistake, based on oral testimony and depositions, is presumptively correct, and should be followed on appeal, unless an obvious error is found in the application of the law, or a serious and important mistake in the consideration of the proofs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970, 3978; Dec. Dig. ⟸1009(1).]

Appeal from the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Suit by Miss Artie Wilson against George L. Sands and others to

cancel a contract of compromise and settlement. Decree for the defendants, and complainant appeals. Affirmed.

I. W. Crabtree, of Memphis, Tenn. (J. M. Shinn, of Jasper, Ark., and Anderson & Crabtree, of Memphis, Tenn., on the brief), for appellant.

W. B. Smith and J. Merrick Moore, both of Little Rock, Ark., for appellees.

Before ADAMS and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. Artie Wilson, the appellant, sustained an injury when a passenger on the Missouri & North Arkansas Railroad, operated by the appellees, Sands, McDonald, and Holt, as receivers, and presented claim for damages against them. Negotiations followed, which resulted in a compromise and settlement whereby the receivers paid her $235, besides paying her doctor bills, amounting to some $300 more. Pursuant to the terms of the settlement the appellant executed and delivered to the receivers a release of any and all claims or demands existing against them for and on account of the injury so received by her.

This was a bill in equity to rescind the contract of settlement so made and cancel the release executed by appellant. It is alleged in the bill that the settlement was brought about and her release secured by fraud and deception practiced by the agents of the receivers upon her, and that it was the result of a mutual mistake of facts. The defendants in their answer deny specifically these allegations.

[1] The case came on for hearing before the court below where oral evidence and testimony taken by depositions were heard. The evidence on the part of the plaintiff tended to show that she received an injury occasioned by the derailment of the car in which she was seated; that she was prevented from working to her full capacity for some time; that it was four months, or more, before she was able to go back to her work, she being a masseuse; that during this time she suffered much pain. Her testimony also tended to show that the physician, acting for the defendant railroad company, and a claim agent for that company, soon after the injury was sustained, made representations to her to the general effect that her injury was not permanent, that she would be well in three or four weeks, and that it would be best for her to compromise and settle her case, if she could get a fair and reasonable amount, and that representations of this kind resulted in her making an agreement to settle on the terms already indicated.

Testimony of the defendants, including that of the physician and the claim agent, is to the effect that her chief injury was to her finger; that the doctor told her, in his opinion, the finger would soon recover, and that her injury would not be permanent; that he did not think it advisable to settle the matter right then; that the wound had not progressed sufficiently for him to be positive as to its extent or as to the duration of her inability to work. He swears positively that he did not assure her that her finger would get well, that he only gave it

to her as his opinion that the probability was that the finger would get well, and that such was his honest opinion.

The claim agent testified, in effect, that the question of settlement was first mentioned eight days after the injury, and that Miss Wilson broached the matter to him first. He says that he and she talked about her hand and finger, and talked the matter over fully the morning of the day the settlement was made. He said he told her the information he had received from the doctors who had seen her hand was to the effect that they believed her finger would get all right in three or four weeks, and he says that on that basis he advised her that it would be all right, and they talked the matter over and finally arranged the settlement on the terms stated.

The evidence in this case, so far as it concerns the fraud and mistake upon which is based the right to set aside the release in question, consists mainly of the testimony of the plaintiff in her own behalf and the doctor and claim agent of the defendants on their behalf. To this evidence just epitomized we have given careful consideration, bearing in mind the interest of both parties involved in this case, and the disadvantage under which a claimant generally acts in the matter of making settlements of this kind under like circumstances. As a result, we are not persuaded that plaintiff, upon whom the burden rested, made out a case within the spirit and meaning of the well-established rule of this and the Supreme Court which requires that the evidence adduced to set aside a written contract must be clear, unequivocal, and certain. Mastin v. Noble, 85 C. C. A. 98, 157 Fed. 506, and cases cited. And see C. & N. W. Ry. Co. v. Wilcox, 54 C. C. A. 147, 116 Fed. 913, for an instructive opinion on a case similar to this; on the contrary, we think the proof well warranted the conclusion reached below.

[2] Moreover, this conclusion is presumptively correct, and according to well-recognized practice should be followed, unless an obvious error is found to have occurred in the application of the law or a serious and important mistake made in the consideration of the proof. Mastin v. Noble, supra; Babcock v. DeMott, 88 C. C. A. 64, 160 Fed. 882, 885.

Finding neither of these in the proceedings before the trial court, its decree should not be disturbed.

It is accordingly affirmed.

McSHANN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1916.)

No. 4368.

1. POST OFFICE ⇐42—OFFENSES—TAMPERING WITH MAIL—"LETTER INTENDED TO BE CONVEYED BY MAIL."

Decoy letters addressed to fictitious persons, which were placed in the mails by post office inspectors, so as to be carried over the route of a suspected railway mail clerk, and intended to be removed from the mails at the end of his route without being carried to the place of address, are let-

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

ters intended to be conveyed by mail, within Penal Code (Act March 4, 1909, c. 321) § 195, 35 Stat. 1125 (Comp. St. 1913, § 10365), making it punishable for an employé in the postal service to detain, delay, or open any "letter intended to be conveyed by mail."

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 61; Dec. Dig. ⊂⊃42.]

2. INDICTMENT AND INFORMATION ⊂⊃110(3)—TAMPERING WITH MAIL.

An indictment against a railway mail clerk, which charged in separate counts the offenses of detaining and delaying, secreting, embezzling, and destroying, and selling, abstracting, and removing the contents of letters placed in the mails, in the language of the statute, and specifically describing the letters, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291–294; Dec. Dig. ⊂⊃110(3).]

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

Lewis H. McShann was convicted of tampering with mail intrusted to his custody, and he brings error. Affirmed.

B. B. Blakeney and James H. Maxey, both of Muskogee, Okl., for plaintiff in error.

John A. Fain, U. S. Atty., of Lawton, Okl., and W. Boothe Merrill, Asst. U. S. Atty., of Oklahoma City.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

ADAMS, Circuit Judge. This was an indictment against plaintiff in error, McShann, for violating provisions of section 195 of the federal Penal Code of 1910, as follows:

"Whoever, being a postmaster or other person employed in any department of the postal service, shall unlawfully detain, delay, or open any letter * * * intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the postal service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General; or shall secrete, embezzle, or destroy any such letter; * * * or shall steal, abstract, or remove from any such letter * * * any article or thing contained therein, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both."

The indictment charges McShann in nine separate counts with (1) detaining, delaying, and opening a certain letter addressed to one Eliza White, Columbia, S. C., and specifically otherwise described in the indictment; (2) secreting, embezzling and destroying that letter; (3) stealing, abstracting, and removing the contents of that letter; (4) detaining, delaying, and opening a certain letter addressed to Miss Mary Richards, North McAlester, Okl., and otherwise sufficiently described; (5) secreting, embezzling, and destroying that letter; (6) stealing, abstracting, and removing the contents from that letter; (7) detaining, delaying, and opening another letter addressed to Miss Celestia Thompson, Haileyville, Okl.; (8) secreting, embezzling, and destroying that letter; and (9) stealing, abstracting, and removing the contents of that

letter. It charges that each of these letters came into the possession of and were intrusted to the defendant while acting as a substitute railway postal clerk in the McAlester-Sayre railway post office, and were intended to be carried by the United States mail.

The defendant entered a plea of not guilty, and the case was brought on for trial, resulting in a verdict of guilty on the first six counts and of not guilty on the last three counts, and he was sentenced on each of the counts on which he was convicted to imprisonment in the penitentiary for a period of 2 years and 6 months on each count; the time of imprisonment on the several counts running concurrently. From this judgment and sentence the defendant prosecutes error.

[1] He assigns for error the following:

"First. The court erred in failing and refusing to charge the jury, as requested by the defendant, that no conviction could be had, for the reason that neither of the packages charged in the indictment to have been taken, broken, mutilated, or the contents of which is charged to have been embezzled, was deposited in said post office, or in any post office in the United States, with the intention that the same should be transported as mail, and that the same did not come into the hands, custody, or charge of the defendant as mail for transportation, and that the same was not mail, and the United States was not obligated and had not undertaken to transport the same, but that the same was left and placed therein, to be removed therefrom, and not transported as mail, and the taking of the same would not be a violation of the postal laws of the United States, and would not sustain a conviction under the indictment on which the defendant was being tried, and would not sustain a conviction on any count thereof.

"Second. That the court erred in stating to the jury in his instructions that the law authorizes these officials of the department, these inspectors, to adopt a plan of that character to detect and discover crime, and in charging that the tampering, taking, delaying, molesting, abstraction, secretion, appropriation, or embezzlement of the same an offense was committed.

"Third. The court erred in entering judgment upon the verdict returned herein, for the reason that the evidence did not establish a public offense, in this: That the package placed in the post office by the witnesses, George H. Lewis and O. C. Pierce, as to which the defendant is charged with secreting, abstracting, appropriating, and destroying the same, and embezzling the contents thereof, were not parcels or letters placed in said post office in good faith for transportation, and was not such mail for which a conviction could be had for such interference, abstraction, molesting, secretion, appropriation, and embezzlement."

The meaning of these assignments, as argued by defendant's counsel, is that, inasmuch as the proof showed that the letters were prepared by post office inspectors and caused to be placed within the mail bag on defendant's route, addressed to fictitious persons, intended to be intercepted and removed from the bag on or before the arrival of the train at the end of defendant's route, in the event they were not tampered with by him, without being carried forward to their destination as shown on the addressed envelopes, they, and each of them, were not "intended to be conveyed by mail," within the meaning of the statute. In other words, the contention is that the use of decoy letters by inspectors of the United States to detect crime perpetrated against the postal establishment was unwarranted, and that such letters were not "intended to be conveyed by mail" within the meaning of the statute. This presents a question which was long ago decided by the Supreme Court of the United States adversely to the

defendant's contention. Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode v. United States, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297; Montgomery v. United States, 162 U. S. 410, 16 Sup. Ct. 797, 40 L. Ed. 1020; Hall v. United States, 168 U. S. 632, 18 Sup. Ct. 237, 42 L. Ed. 607; Scott v. United States, 172 U. S. 343, 19 Sup. Ct. 209, 43 L. Ed. 471. These assignments are therefore without merit.

[2] It is argued that the indictment is insufficient, in that it fails to charge a public offense. This argument is also without merit. It charges the separate offenses in the language of the statute, and with every requisite detail.

The judgment is affirmed.

WHITTED v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1916.)

No. 4504.

1. MASTER AND SERVANT ⟸300—TORTS OF SERVANT—LIABILITY OF MASTER.
A master is liable for the torts of his servant, committed in the course of his employment and within its scope.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1209; Dec. Dig. ⟸300.]

2. MASTER AND SERVANT ⟸332(2)—MASTER'S LIABILITY TO THIRD PERSONS—EVIDENCE—SCOPE OF EMPLOYMENT—ASSAULT AND BATTERY.
In an action for assault and battery, committed by defendant's general manager after he had rightfully ejected plaintiff from defendant's telephone booth, using no more force than necessary, evidence *held* sufficient to take to the jury the question whether the subsequent assault, following almost immediately thereafter, was a continuance of the first assault, so as to render the defendant liable, or was a mere personal quarrel, having no relation to the duties of the general manager.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1275; Dec. Dig. ⟸332(2).]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action by Burt Whitted against the Southwestern Telegraph & Telephone Company. Judgment for defendant on a directed verdict (217 Fed. 835), and plaintiff brings error. Reversed and remanded, with directions to grant a new trial.

R. E. Wiley, of Little Rock, Ark., and Joe Hardage and T. N. Wilson, both of Arkadelphia, Ark., for plaintiff in error.

A. P. Wozencraft, of Dallas, Tex., and Walter J. Terry and Edward B. Downie, both of Little Rock, Ark., for defendant in error.

Before ADAMS and CARLAND, Circuit Judges.

ADAMS, Circuit Judge. Whitted, the plaintiff below, brought this suit against the telephone company to recover damages sustained by him by reason of an assault and battery committed by one John Grogan,

alleged to have then been acting as agent of the company and within the scope of his employment. At the close of all the evidence the court instructed the jury to find a verdict for the defendant. This was done, and judgment was rendered for the defendant. Plaintiff prosecutes error.

The evidence tended to show that the defendant telephone company maintains a public office in the depot of the St. Louis, Iron Mountain & Southern Railway Company, at Arkadelphia, Ark., for sending and receiving telephonic messages, the use of which was offered to the public for a consideration to be paid therefor; that the plaintiff, Whitted, having occasion to converse with a patron, entered one of the booths provided for that purpose, and called the operator at central station to secure the necessary connection. Some delay ensued, and plaintiff being then intoxicated, began abusing and cursing the operator, kicking the sides of the booth, beating the receiver against the telephone box, and otherwise creating disturbance. At this juncture John Grogan, the general manager of the defendant company, appeared upon the scene and ordered the plaintiff to cease his disturbance and to behave properly if he desired to use the booth. This not having the desired effect, but promoting more profanity and disturbance, Grogan forcibly ejected plaintiff from the booth, telling him he wanted no trouble with him; that all he wanted was that he should behave himself properly when transacting business there. He told plaintiff, if he would go away awhile and come back again, he would probably be able to get his party. This conversation occupied but little time, one witness putting it at 20 or 30 seconds. Hot words passed, and threatening attitude was taken by Whitted, and Grogan fearing for his personal safety, drew back and hit plaintiff a hard blow in the face with his fist.

[1] It is not contended that Grogan used more force in ejecting plaintiff from the booth than was reasonably necessary to get rid of him, and protect defendant's property from injury, and secure efficiency in the public service; and it is not contended that defendant would be liable to plaintiff for anything connected with that first assault. It is contended, however, that the second assault, when Grogan struck plaintiff in the face, was unwarranted and actionable. It is well settled that the master is liable for the torts of his servant when they are done in the course of his employment and within its scope. New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Texas & Pacific Ry. Co. v. Scoville, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179; Goodwin v. Cincinnati Traction Co., 175 Fed. 61, 99 C. C. A. 661.

[2] The contention of the defendant in this case is that, although the first assault made by Grogan upon the plaintiff, ejecting him from the booth, was within the scope of his employment, it was justified by the obligation resting on Grogan to protect the property of the defendant and conserve the efficiency of its service; but that the second assault was so disconnected from the first as not to have been a part of it, and was not an act done in the interest of the defendant or the conduct of its business, and therefore was not within the scope of Grogan's employment in such way as to render the defendant liable

for it. On the contrary, the contention is that it was a distinct and personal controversy between Grogan and the plaintiff, culminating in a personal quarrel between the two.

A careful and attentive reading of all the proof satisfies us that there was substantial evidence arising, not only from the facts proven, but from the reasonable inferences deducible from them, to the effect that the second assault was a mere continuation of the first, and committed by Grogan for the purpose of preventing a continuance of the disturbance by plaintiff—enough, at least, to justify a submission of the issue to the jury whether or not the assault was committed in the interest of the defendant and within the scope of Grogan's employment, or whether it was a mere personal quarrel having no relation to the duty of Grogan to his master. A case involving facts quite similar to those in the present case (Pennsylvania Mining Co. v. Jarnigan, 222 Fed. 889, 138 C. C. A. 369) was recently before us. In it we held that the question whether the assault was personal, or representative of the master, was for the jury; so in this case we think the District Court should have submitted the issue presented to the jury under appropriate instructions.

The judgment must therefore be reversed, and cause remanded, with directions to grant a new trial.

UNITED STATES v. SALOMON.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1916. Rehearing denied May 20, 1916.)

No. 2900.

ALIENS ⟸71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE—AFFIDAVIT.

Under Comp. Stat. 1913, § 4374, making it the duty of the United States attorneys, on affidavit showing good cause, to institute proceedings to set aside and cancel a certificate of citizenship on the ground of fraud, or that it was illegally procured, an affidavit which shows that the certificate was granted on the same day the petition was filed, contrary to section 4354, but which does not show that there was any ground for refusing the certificate, does not show good cause, even though the requirement of the latter section that action should not be taken on the petition until 90 days after it was filed was mandatory, since the remedy for violation thereof was by objection in the proceedings, and the remedy by cancellation was only intended for cases in which injury resulted.

Maxey, District Judge, dissenting.

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

Proceeding by the United States against Oscar Ernst Moritz Salomon to cancel a certificate of citizenship. From a decree dismissing the proceedings (231 Fed. 461), the United States appeals. Affirmed.

Walter Guion, U. S. Atty., of New Orleans, La.

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

WALKER, Circuit Judge. This is an appeal from a decree dismissing a proceeding instituted on February 3, 1915, by the district attorney under the statute which provides that:

"It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." 2 U. S. Comp. Stat. 1913, § 4374.

Neither the petition nor the affidavit upon which it was based charged the commission of any fraud. The sole charge was that the naturalization sought to be set aside and canceled was made by an order of the court on July 21, 1914, the same day on which the petition for naturalization was filed, in disregard of the provision of the statute that:

"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." U. S. Comp. Stat. 1913, § 4354.

The facts stated in the naturalization petition showed that the petitioner was entitled to be naturalized, and this was shown by the sworn answer filed in this case. This is not controverted by the government. In the opinion rendered by the District Judge it was stated:

"It is admitted by the government that the petition was filed in good faith, that the applicant was guilty of no fraud, and was entitled to be naturalized under the provisions of the act of 1910."

Such an admission is not otherwise shown by the record, but there has been no suggestion of the existence of a ground for contesting the appellee's naturalization if the proceedings on his application therefor shall conform to the requirements of the statute. It may be assumed that the last-quoted provision of the statute is a mandatory one, and that a court in which an application for naturalization is filed is not vested with a discretionary power to dispense with the observance of it. But we are not of opinion that it follows from this conclusion that a certificate of citizenship must be canceled and set aside when the facts are such as are disclosed by the record in this case.

The remedy given by the statute is the means provided for protecting the right of the government to contest applications for naturalization and for excluding from citizenship those who, under the law, are not entitled to the privilege. The statute does not indicate a purpose to give the remedy when there has been no injury. The district attorneys are authorized to institute the proceedings only "upon affidavit showing good cause therefor." The affidavit upon which this suit was instituted amounted to nothing more than an assignment of error of law apparent upon the face of the naturalization proceedings. It states no fact from which it may be inferred that a ground for contesting the application existed, or that the result might have been different if all the requirements of the statute had been complied with in the naturalization proceedings. It cannot be supposed that it was in

the contemplation of the lawmakers that an affidavit would be sufficient to put upon the district attorney the duty of instituting the proceeding provided for if it showed no more than this one discloses. We think it is manifest that it was intended that the required affidavit should state facts constituting "good cause" for instituting the proceeding, and should do more than point out errors of law in the procedure which led up to the naturalization. The conclusion is that the statutory remedy would be perverted from its obvious purpose of safeguarding things of substance, if it is permitted to be successfully resorted to without any showing that the issue of the attacked certificate of citizenship might properly have been denied at the time it was granted, if the procedure had been a strict compliance with all statutory requirements.

The decree appealed from is affirmed.

MAXEY, District Judge, dissents.

WELTY v. REED.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1916.)

No. 4057.

INDIANS ⊂=15(1)—ALLOTMENTS—RESTRICTIONS ON ALIENATION—PATENTS TO HEIRS.

Where an allotment was made to a Creek Indian in his lifetime, but he died before the patent was issued, and before the effective date of the Original Agreement, his heirs, under the patent issued to them, took only a provisional surface right, which they could convey, and the allottee had not received an allotment, as contemplated by the Original Creek Agreement (Act March 1, 1901, c. 676, § 7, 31 Stat. 863) or Act June 30, 1902, c. 1323, § 16, 32 Stat. 503, so as to be subject to the restrictions on alienation imposed by those sections.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 37; Dec. Dig. ⊂=15(1).]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by Andrew Reed against Edwin A. Welty to quiet title. Decree for complainant, and defendant appeals. Affirmed.

See, also, 219 Fed. 864, 135 C. C. A. 534.

George S. Ramsey, Edgar A. De Meules, Malcolm E. Rosser, and S. H. Lattimore, all of Muskogee, Okl., for appellant.

Lewis C. Lawson, of Holdenville, Okl., and Joseph C. Stone, of Muskogee, Okl., for appellee.

A. N. Frost, of Lawrence, Mass., and Robert Hardison, Sp. Asst. Attys. Gen., amici curiæ.

Before ADAMS and CARLAND, Circuit Judges, and TRIEBER, District Judge.

ADAMS, Circuit Judge. This was a suit in equity, brought by the appellee, Reed, against Welty, appellant, to quiet title to certain de-

scribed land situated in Okjuskee county, Okl. On July 26, 1904, Reed purchased the interest of London Knight and Ramsey Knight in and to the land in controversy. These grantors were full-blood Creek Indians, and constituted two of the heirs of Thomas Knight, deceased, who was likewise a full-blood Creek Indian and a member of the Creek Tribe of Indians, to whom in his lifetime, on May 18, 1900, an allotment of land had been made by the Commission to the Five Civilized Tribes. Afterwards, on April 6, 1901, Thomas Knight died. This was prior to the effective date of the Original Creek Agreement, June 25, 1901 (32 Stat. 1971). Thereafter a patent was duly issued to his heirs, who were his three children, London, Ramsey, and Robert Knight.

The interest of Robert Knight, who is an infant, is not involved in this controversy. On July 28, 1908, London Knight and his wife executed a deed purporting to convey an undivided one-third interest in the land to the defendant, Welty. This deed received the approval of the county court of Okjuskee county as provided by section 9 of the act of May 27, 1908 (35 Stat. 312, c. 199), and was duly recorded in the office of the registrar of deeds for that county; and this is the deed which Reed seeks to cancel as a cloud upon his title acquired by his deed, dated July 26, 1904, from London and Ramsey Knight.

Counsel for appellant, Welty, contend that the land was allotted on May 18, 1900, to a living citizen of the Creek Nation, Thomas Knight, within the meaning of section 7 of the Original Creek Agreement (Act March 1, 1901, c. 676, 31 Stat. 861) or section 16 of the Supplemental Creek Agreement (Act June 30, 1902, c. 1323, 32 Stat. 500). Section 7 of the Act of March 1, 1901, and section 16 of the Act of June 30, 1902, contain similar restrictions against alienation. They provide, in effect, that lands allotted to living citizens should be inalienable by the allottee or his heirs for a period of five years from the ratification of the Creek Agreement, except with the approval of the Secretary of the Interior.

Appellee Reed's contention is that notwithstanding the provisions of section 7 of the Original Creek Agreement, or section 16 of the Supplemental Creek Agreement, restricting the alienation for a period of five years from the ratification of the Creek Agreement in case an allotment is made to a living citizen, and notwithstanding the fact that Reed acquired his title before the restrictive period of five years had elapsed without securing the approval of the Secretary of the Interior thereto, nevertheless his title was good as against the subsequently acquired title of Welty, for the reason that the allotment made to Thomas Knight, the ancestor, was only a temporary or provisional allotment, conferring upon the ancestor merely the tribal title to the surface of the ground for and during his life only, and that upon his death his title, by virtue of that allotment, died with him; that the subsequent allotment and patent of the land to the heirs of Thomas Knight conferred upon them all the equitable title in and to the land, and that as a result the provisions of sections 7 and 16 of the Original and Supplemental Creek Agreements had no

application and constituted no restrictions upon the sale of their land by them; that, in point of law, Thomas Knight had not received an allotment in his own interest within the meaning of the Original and Supplemental Creek Agreements; that, although the conveyance by London Knight and his wife to Welty in 1908 received the approval of the county court of Okjuskee county, it conveyed nothing that had not already been conveyed by the grantor's (London Knight's) deed of July 26, 1904, to Reed, and therefore constituted a cloud upon Reed's title.

The one and only question involved in the present case is whether the heirs of Thomas Knight had power to alienate the allotment originally made in the name of their father (who died prior to the taking effect of the Original Creek Agreement), but which was subsequently confirmed by patent in them prior to August 8, 1907, which is the date of the expiration of the five-year period of restriction imposed by the Original and Supplemental Creek Agreements. In other words, do the restrictions of those agreements apply to a case where an allotment was made in the name of a father, who died prior to the Original Creek Agreement and before a patent was issued to him, whose heirs afterwards received the patent directly therefor?

This case was heard by this court at its December term, 1914, and a decision was reached reversing the judgment of the District Court and sustaining the contention of the defendant Welty. Welty v. Reed, 219 Fed. 864, 135 C. C. A. 534. Afterwards, the attention of the court being called to the decision of the Supreme Court in the case of Woodward v. De Graffenried, 238 U. S. 284, 35 Sup. Ct. 764, 59 L. Ed. 1310, which had not appeared prior to the decision of the present case by this court, we sustained a motion for a rehearing. The Woodward Case has now been carefully and critically considered, and in our opinion it presents a case altogether similar in its facts to the case now before us. In it the points now relied upon by opposing counsel in support of their respective contentions in this case were given exhaustive consideration by the Supreme Court, and that court held with the contention of the appellee that an allotment made to a Creek Indian in his lifetime, who died before the patent was issued, and whose heirs afterwards received a patent for the land, took only a provisional surface right, and that such allottee had not been placed in possession of an allotment, or had not "received an allotment," as contemplated by section 7 of the Original Creek Agreement, or section 16 of the Supplemental Creek Agreement, and that as a result the final allotment and patent made to the heirs of such allottee did not subject them to any of the restrictions against conveyance of their land found in these sections.

That case controls this one, and on its authority of the judgment of the District Court, granting the relief prayed for by Reed, must be affirmed.

SOUTHERN RY. CO. v. WILDER.

In re JONES BROS. & CO.

(Circuit Court of Appeals, Fifth Circuit. April 13, 1916.)

No. 2868.

BANKRUPTCY ⊂⊃191(1)—LIENS—PRIORITY—LANDLORD.

Under Civ. Code Ga. 1895, § 2787, establishing liens in favor of landlords, section 3124, empowering them to distrain for rent as soon as the same is due, and section 2795, giving them a general lien on the property of the tenant liable to levy and sale, which dates from the levy of the distress warrant to enforce the same, the lien of the landlord for rent prior to distress is inchoate, and covers no specific property, and gives no priority over the lien given to the trustee in bankruptcy by Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557 as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 290; Dec. Dig. ⊂⊃191(1).]

Petition to Revise and Superintend Proceedings of the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

In the matter of Jones Bros. & Co., bankrupt. On petition by the Southern Railway Company against D. P. Wilder, trustee, to revise an order denying the petitioner the preference claimed by it. Petition for revision denied.

Sanders McDaniel and Edgar A. Neely, both of Atlanta, Ga., for petitioners.

Alex W. Smith, Alex W. Smith, Jr., and Curtis N. Anderson, all of Atlanta, Ga., for respondent.

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

PER CURIAM. The case shows that Jones Bros. & Co. was adjudicated a bankrupt the 12th of March, 1915; thereafter, on the 2d day of April, 1915, the petitioner filed a petition in the bankruptcy court claiming that at the time of the adjudication in bankruptcy the bankrupt was indebted to the petitioner in the sum of $3,400 under a certain contract of rent at $200 per month; and thereafter on the 22d day of July, filed an amended petition before the referee, amplifying his petition, so as to claim a preference lien. The referee issued an order on the trustee to show cause, and thereupon the trustee answered, denying the lien and preference claimed by the petitioner.

On the hearing before the referee it was admitted that no distress warrant had ever been issued on the claim for rent, and thereupon it was decided that the preference claimed in behalf of the petitioner should be denied. On the petition for review before the District Court it was ordered and adjudged that the preference claimed by the petitioner should be denied.

In Henderson v. Mayer, 225 U. S. 638, 32 Sup. Ct. 699, 56 L. Ed. 1233, the Supreme Court, in passing upon the validity of the landlord's lien under the Georgia Code, said:

"The Code (section 2787) expressly 'establishes liens in favor of landlords.' It (section 3124) gives them 'power to distrain for rent as soon as the same is due.' It declares (section 2795) that landlords 'shall have a general lien on the property of the tenant liable to levy and sale, * * * which dates from the levy of the distress warrant to enforce the same.' It is true that prior to levy it covers no specific property, and attaches only to what is seized under the distress warrant issued to enforce the lien given by statute. But in this respect it is the full equivalent of a common law distress, the lien of which is held not to be discharged by section 67f. In re West Side Paper Co., 162 Fed. 110 [89 C. C. A. 110, 15 Ann. Cas. 384]; Austin v. O'Reilly [Fed. Cas. No. 665], 2 Wood, 670."

The Bankruptcy Act of 1898 (section 47a, as amended in 1910) provides among other things as follows:

"* * * And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon. * * *"

According to the decision in Henderson v. Mayer, supra, whatever lien the landlord may have in this case is inchoate and covers no specific property. In Elan v. Hamilton, 69 Ga. 736, 737, it is decided that:

"The only difference between the lien of an ordinary common-law judgment, and that arising under an uninterrupted distress warrant, is that the former binds the property of the defendant from its date, and the latter from the time of the levy. They both have the same general lien on the defendant's property, as qualified above."

It clearly follows that in this case the petitioner has no lien entitled to priority over the lien given to the trustee under the amendment of 1910.

The petition for revision is denied.

WUERPEL et al. v. CANAL-LOUISIANA BANK & TRUST CO. et al.

In re SMITH BROS. CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. April 13, 1916.)

No. 2894.

BANKRUPTCY ⊂=455—APPEALABLE DECREE—PARTIAL DISPOSITION OF THE CASE.

Where a bill by trustees in bankruptcy to recover preferences contained five articles, the first two relating to a cash payment, the next two to a transfer of accounts, and the last being the prayer for relief, a decree dismissing the claim for the cash payment is not appealable, since it does not finally dispose of the whole case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916; Dec. Dig. ⊂=455.]

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

Suit by A. C. Wuerpel and others, as trustees of the Smith Bros. Company, Limited, bankrupt, against the Canal-Louisiana Bank &

Trust Company and others. From a decree dismissing complainants' claim for a part of the demand set forth in the bill, complainants appeal. Appeal dismissed.

Charlton R. Beattie, of New Orleans, La., for appellants.

William C. Dufour and H. Generes Dufour, both of New Orleans, La., for appellees.

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

PER CURIAM. The appellants, trustees of the bankrupt estate of Smith Bros. Company, Limited, brought their suit against the Canal-Louisiana Bank & Trust Company to set aside certain alleged preferences. The first article of the bill of complaint is as follows:

"And thereupon your orators complain and say that heretofore, that is, on June 25, 1913, being within four months before the filing of the petition against said Smith Bros. Company, Limited (hereinafter called 'said company'), which was adjudicated bankrupt on August 5, 1913, on a petition of creditors filed August 5, 1913, said company transferred certain of its property, to wit, fourteen thousand dollars ($14,000.00) in cash, to the said Canal-Louisiana Bank & Trust Company (hereinafter called 'said bank'), then an ordinary creditor of said company, in payment of a previously existing or antecedent debt, and that on June 25, 1913, when said transfer was made, said company was insolvent, and said transfer then operated as an illegal preference, under section 60 of the United States Bankrupt Act, as amended, and that the said bank, receiving said transfer, and which was benefited thereby, then and there, when receiving same, had reasonable cause to believe that the enforcement of said transfer would effect a preference, and would enable said bank to obtain a greater percentage of its debts than any other of the creditors of the same class of the said company."

In the second article is set forth the manner in which said preference was effected. In the third article of the bill complaint is made that on the same date, June 25, 1913, the defendants accepted from the bankrupt a preference by the transfer of a number of open accounts, warehouse receipts, etc., aggregating $20,000, in payment of an antecedent debt, and in the fourth the manner in which the alleged preference was effected; and in the concluding article appellants pray for a decree annulling and avoiding the aforesaid preferential payments and transfers, and ordering restoration, with interest from June 25, 1913, and for general relief.

A preliminary motion was made by the appellees to dismiss the whole bill, which was denied, and thereupon appellees answered, setting forth their whole defense to the suit, concluding with the prayer that the bill of complaint be dismissed. Thereafter the case was set down for hearing on the point of law raised in the defendants' answer as to sufficiency of articles I and II of complainants' bill, and thereupon the court entered a decree dismissing complainants' claim and demand for $14,000, as set out in articles I and II in complainants' bill of complaint. From this decree this appeal is prosecuted.

Appellees on motion ask this court to dismiss the appeal on the grounds: (1) The judgment or decree is not final, and therefore not appealable; and (2) that the case cannot be brought up on appeal by piecemeal—citing in support thereof the decisions of this court in

Menge v. Warriner, 120 Fed. 816, 57 C. C. A. 432; Cay v. Vereen, 144 Fed. 839, 75 C. C. A. 667; Hohorst v. Hamburg-American Packet Co., 148 U. S. 262, 13 Sup. Ct. 590, 37 L. Ed. 443; Ex parte National Enameling Co., 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707. Appellants cite no authorities to the contrary.

It is apparent that the decree appealed from does not dispose of the whole case, and it is at least doubtful whether the decree complained of is even final and conclusive in the court below, under the general rule that orders and decrees in chancery may be altered, revised, or revoked during the term at which they were passed, or while the cause remains open for further proceedings. The motion to dismiss must prevail.

The appeal is dismissed.

HILLMAN et al. v. NEW YORK STATE STEEL CO. et al.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 163.

FACTORS ⟸47(5)—LIEN—WAIVER.

Where the factors of a steel company, who had a lien for their advances on the ore mined by the company, sold some of the ore to another company, from which they also bought a different kind of ore, on behalf of the steel company, so that, when receivers were appointed for the steel company, the other company set off its claim for ore sold by it against its liability for the ore purchased, equity will not give the agents a lien on the ore purchased as against general creditors, since their only contractual lien was on the ore mined, and, if they lost that lien by the sale and purchase, it was their own act.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 69; Dec. Dig. ⟸47(5).]

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

Suit by John J. Hillman and others against the New York State Steel Company, of which Alfred L. Becker and another were appointed receivers. From an order of the District Judge awarding to M. A. Hanna & Co. the proceeds of certain ore sold by the receivers, the receivers appeal. Reversed.

Love & Keating, of Buffalo, N. Y. (G. P. Keating, of Buffalo, N. Y., of counsel), for appellants.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y. (J. McC. Mitchell, of Buffalo, N. Y., of counsel), for bondholders' committee.

F. C. Slee, of Buffalo, N. Y., for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. M. A. Hanna & Co. were the exclusive agents for the sale of the output of the New York State Steel Company's mines in Minnesota, and were under an obligation to make ad-

vances to enable the Steel Company to mine and ship its ore. To protect them for these advances it was provided that the ore shipped from the mines was to be shipped to them, and that the ore mined during the winter, when it could not be shipped, was to be piled on ground leased to them, so that they should have title to the whole output of the mines until they had been repaid the amount of their advances.

May 2, 1911, the New York Company, by Hanna & Co., its agents, sold to the Republic Iron & Steel Company 325,000 tons of Kellogg ore, to be delivered at the rate of 65,000 tons per annum, 1911–1915, in about equal monthly installments, to be paid for on the 25th day of each month. September 23, 1912, the Republic Company, by Hanna & Co., their agents, sold 20,000 tons of Bessemer ore to the New York Company, to be delivered in about equal monthly amounts from September, 1912, to April, 1913, and paid for on the 25th day of each month.

April 2, 1913, under a creditors' bill in equity receivers were appointed of the New York Company. At this time the New York Company owed the Republic Company for Bessemer ore, under the contract of September 23, 1912, $27,200.76 and the Republic Company owed the New York Company for Kellogg ore, delivered under the contract of May 2, 1911, $26,541.72. The Republic Company, as it had a right to do, set off against its indebtedness to the New York Company the latter's indebtedness to it, and filed a claim for the balance of $659.04 with the receivers of the New York Company.

At the time the receivers were appointed the New York Company owed Hanna & Co. for advances $24,063.71. There went into the possession of the receivers 4,613 tons of Bessemer ore purchased from the Republic Company, which was sold and its proceeds impounded to await the determination of the claim of M. A. Hanna & Co. now to be considered.

Hanna & Co. contend that, as they had a lien to the extent of their advances to the New York Company upon the Kellogg ore sold to the Republic Company, they should in equity be given a lien upon the Bessemer ore sold by that Company to the New York Company. In other words, if the Republic Company had paid for the Kellogg ore in cash, Hanna & Co. would have collected it, and, as it eventually paid by setting off the price of the Bessemer ore sold by it to the New York Company, Hanna & Co. should be given an equitable lien upon that ore or its proceeds in the hands of the receiver. Adopting this view, the District Judge awarded to Hanna & Co. the proceeds of the Bessemer ore sold by the receiver and a proportionate part of the proceeds of certain steel into which some of the Bessemer ore had gone.

But Hanna & Co. never had any lien upon anything but the Kellogg ore. When they sold that, the lien was discharged, and they never had any lien at all on the Bessemer ore. The Kellogg ore was not sold to be paid for by the Bessemer ore. The sales in each case were perfectly independent, were absolute, and to be paid for on the 25th of the following month. Hanna & Co. made both contracts, and must be taken to have known that upon settlement of accounts between the two companies only the balance due would be paid. If they have not obtained

the full security for their advances to the New York Company, which they intended and expected to get, they can only blame themselves. They sold the Kellogg ore to the Republic Company without collecting the price. Equity will not do anything affirmatively to help them at the expense of general creditors. American Can Co. v. Erie Preserving Co., 183 Fed. 96, 99, 105 C. C. A. 388.

The order is reversed.

TAYLOR et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1916.)

No. 2767.

1. PUBLIC LANDS ⟸38—DISPOSAL BY UNITED STATES—CONDITIONS—VALIDITY.
The government had the right to impose as a condition of the purchase of its timber and stone lands that the intending purchaser should, at the time he made his application, have the intention to appropriate the land to his own use and benefit; and it did impose such condition by Comp. St. 1913, § 4672, providing that the applicant to purchase such lands shall make a verified written statement that he does not apply to purchase the same on speculation, but in good faith to appropriate to his own exclusive use and benefit, and that, if any person shall swear falsely in the premises, he shall forfeit the money paid for the lands and all right thereto.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 82; Dec. Dig. ⟸38.]

2. PUBLIC LANDS ⟸38—DISPOSAL BY UNITED STATES—TIMBER AND STONE LANDS—SPECULATIVE PURPOSE.
A purchase of timber and stone lands, made with no intention on the part of the purchaser to himself use the land, or any of it, or to hold it any longer than may be required to realize an expected or hoped-for profit from resale, is a purchase for speculation, contrary to Comp. St. 1913, § 4672, and entitles the government to have canceled the patent and the deed given by the patentee.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 82; Dec. Dig. ⟸38.]

Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Suit by the United States against James F. Taylor and others to cancel a patent and deed. Decree for the United States, and defendants appeal. Affirmed.

E. H. Randolph, of Shreveport, La., for appellants.

George Whitfield Jack, U. S. Atty., and Robert A. Hunter, Asst. U. S. Atty., both of Shreveport, La.

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

WALKER, Circuit Judge. This is an appeal from a decree canceling a patent issued to the appellant Taylor under the Timber and Stone Act, and annulling a deed made by him to the land described in the patent. In making his application for the purchase of the land,

Taylor made the verified written statement required of the applicant by the statute mentioned (U. S. Comp. Stat. 1913, § 4672), containing, with the other averments required, the averments:

"That he does not apply to purchase the same on speculation, but in good faith to appropriate to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself."

The same section of the statute provides that:

"If any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

The falsity of each of the above-quoted statements was charged. There was evidence, direct and circumstantial, tending to prove the falsity of each of those statements; but, as the evidence of the falsity of the last-quoted statement is less convincing and satisfactory than that showing the falsity of the first-quoted statement, we prefer to rest our conclusion on the latter evidence.

[1] The language of the statute negatives the conclusion that it confers the right to buy the kind of public land it specifies upon one who, when he makes his application, has the purpose of acquiring the land on speculation, and with no intention of appropriating it to his own exclusive use and benefit. The government has the right to grant or withhold the privilege of purchasing the described kind of public land, according as the intending purchaser does or does not have, at the time he makes his application, the intention of appropriating the land applied for to his own exclusive use. The statute shows an unequivocal exercise of this right.

[2] The distinction between a purchase on speculation and a purchase for the purchaser's own exclusive use and benefit is not an obscure or unfamiliar one. The circumstances of a given purchase may be such that it may not with confidence be assigned to either of these two categories. But we are not of opinion that it is fairly open to question that a purchase of such land as the statute mentions, which is made with no intention on the part of the purchaser of himself using the land or anything on it, or of holding it any longer than may be required for the realization of an expected or hoped-for profit on a resale of it, is a purchase on speculation within the meaning of the statute, and is forbidden. And we are of opinion that the evidence in the case fully warranted the conclusions that Taylor's purchase was such a one, and that it was not made to appear that his vendee was a bona fide purchaser.

In this state of the evidence, the decree appealed from was proper; and it is affirmed.

CLEMENT v. WHITTAKER et al.

(Circuit Court of Appeals, Third Circuit. April 4, 1916.)

No. 2052.

1. WILLS ⟸578(3)—CONSTRUCTION—PROPERTY DEVISED.
By a residuary clause in his will a testator disposed of "all the rest, residue and remainder" of his estate. After his death there was paid to his executors a sum which accrued to him as a residuary legatee under the will of a predeceased brother, distribution of whose estate had been deferred until the termination of a life interest therein. *Held*, that decedent did not die intestate as to such sum, but that it passed under the residuary clause of his will.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1260; Dec. Dig. ⟸578(3).]

2. WILLS ⟸456—RULES OF CONSTRUCTION.
In construing a will, the law ascertains the intention of the testator from the words he uses, construed in their common, ordinary meaning.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 974; Dec. Dig. ⟸456.]

3. WILLS ⟸587(1)—CONSTRUCTION—PROPERTY DEVISED—RESIDUARY CLAUSE.
The test of the power of a residuary clause to carry property is whether the property was the testator's, and not whether he knew it was his.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1285–1287; Dec. Dig. ⟸587(1).]

4. WILLS ⟸587(5)—CONSTRUCTION—PROPERTY DEVISED—RESIDUARY CLAUSE.
In the absence of any intention to exclude therefrom, a general residuary clause carries all reversionary interests.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1289, 1290; Dec. Dig. ⟸587(5).]

Appeal from the District Court of the United States for the District of New Jersey; Charles P. Orr, Judge.

Suit in equity by Cornelia E. Clement against Mary Ann Whittaker, executrix, and others. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 225 Fed. 211.

Robert H. McCarter and McCarter & English, all of Newark, N. J. (Gilbert Collins, of Jersey City, N. J., of counsel), for appellant.

Bayard Stockton, of Trenton, N. J. (Peter Backes and Gardner H. Cain, both of Trenton, N. J., of counsel), for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. [1-4] This case involves the question whether $123,801.45, in the hands of the executors of Wesley E. Whittaker, shall pass to the Mercer Hospital of Trenton, N. J., as residuary legatee under his will, or to his next of kin under the intestate law. The facts of the case are fully stated in the opinion of the court below, reported at 225 Fed. 211, and by reference thereto and making it a part of this opinion we avoid needless repetition. As

we agree with its conclusion, we restrict ourselves to a brief statement of grounds in support of such view. These are:

First. The Court of Errors and Appeals of New Jersey, in Clement v. Creveling, 83 N. J. Eq. 318, 91 Atl. 89, have decreed the fund in controversy passed under the will of Albert J. Whittaker and accrued to the estate of Wesley E. Whittaker.

Second. The fund in question, not being required in Wesley E. Whittaker's estate for legacies or specific bequests, forms part of his residuary estate.

Third. Being part of the residuary estate of Wesley E. Whittaker, the words of clause 11 of his will in their ordinary, common meaning include and carry said fund.

Fourth. Such residuary clause is to be construed as carrying said fund:

(a) Because, in construing such clause, the law takes such words as a testator uses, and ascertains what he meant to say from what words he used; or, as said by the Court of Chancery of New Jersey in Bragaw v. Bolles, 51 N. J. Eq. 84, 25 Atl. 947:

"The inquiry is not what the testator meant to say, but rather what the testator meant by what he did say."

(b) The words used are to be construed in their common, ordinary meaning, or, as said by the Court of Chancery of New Jersey, in Woodruff v. White, 78 N. J. Eq. 412, 79 Atl. 304:

"The words used in a will, as I understand it, must be taken in their natural meaning. The court is called upon to construe what the testator has said, and not to supply language, and thereby make him say that which he did not say."

(c) Whether the testator knew that he owned the fund here in question when he made the residuary bequest is immaterial. The test of the power of the residuary clause to carry property is whether the property was the testator's, and not whether he knew it was his. Dalrymple v. Gamble, 68 Md. 523, 13 Atl. 156; Stannard v. Barnum, 51 Md. 451; Ireland v. Foust, 56 N. C. 501; Bland v. Lamb, 5 Maddock, 250; Perry v. Hunter, 2 R. I. 80.

(d) In the absence of any intention to exclude therefrom, a general residuary clause carries all reversionary interests. Floyd v. Carow, 88 N. Y. 560.

(e) In this case the federal court follows and adopts the construction placed by the Court of Errors and Appeals of New Jersey in Clement v. Creveling, 83 N. J. Eq. 318, 91 Atl. 89, on the will of Albert J. Whittaker, when that court held that the devise to Wesley E. Whittaker was a vested legacy.

It follows, therefore, that the decision and decree of the court below carries into effect the result directed by the Court of Errors and Appeals, when it said in the case last quoted:

"The result is that the testator's residuary estate, with the exception of the 60 shares of the capital stock of the railroad company held for the benefit of the niece, should be immediately distributed in equal parts to the respective personal representatives of the testator's brothers and sister, to be finally distributed under their respective wills, or to their respective next of kin, as the case may be."

In reaching our conclusion, we have not overlooked the contention of counsel that, in view of the decision of the Court of Chancery of New Jersey in Whittaker v. Whittaker, 40 N. J. Eq. 33, being unreversed when Wesley E. Whittaker made his will, we should therefore find that he intended to exclude such contingent interest from his residuary estate. We, however, feel that such holding would be based on surmises and uncertainty. The safe rule is as above stated—to construe what the testator has said, and therefrom determine his intention.

The decree below is affirmed.

THE ALLEMANIA.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

Nos. 164, 165.

1. COLLISION ⊜71(2)—MOVING AND MOORED VESSELS.
   A steamship entering a slip in the North River *held* solely in fault for a collision with a car float, which was lying below a pier to which it was made fast by a line, and which was in full view of the moving steamer.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⊜71(2).]

2. COLLISION ⊜70—VESSEL LYING AT END OF PIER—HARBOR REGULATION.
   New York City Charter (Laws 1901, c. 466) § 879, which provides that no vessel lying at the exterior end of a pier in the North or East River "shall be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier," is highly penal, and should be strictly construed. As so construed, it does not apply to a car float which was not actually lying at the end of a pier, but was made fast to one corner of it by a line and hung below the pier.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 91–100; Dec. Dig. ⊜70.]

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

Suits in admiralty for collision by the Erie Railroad Company and by Jerry Petrie, wherein the Erie Railroad Company was impleaded, against the steamship Allemania; the Hamburg-American Line, claimant. Decree for the Erie Railroad Company for half damages, and in favor of Petrie against both the steamship and the Railroad Company, which appeal. Modified and affirmed.

For opinion below, see 224 Fed. 633.

Herbert Green, of New York City, for Erie R. Co.

Haight, Sandford & Smith, of New York City (H. M. Hewitt, of New York City, of counsel), for the Allemania.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. [1] June 30, 1913, on a bright, clear day, with the tide ebb, the tug Nanuet at about 8 a. m. brought the Erie Railroad Company's float No. 18 laden with 10 cars, some loaded and some light, to the south side of the slip between Piers 7 and 8 East

River. As the steamship Allemania was expected to berth there, the float was ordered out and the tug tied her to the lower outer corner of Pier 7 on a line about 8 feet long and then went into the slip to arrange for a berth. The float hung down the river, her lower end resting against the tug Henry D. McCord which was herself lying outside of a steam lighter at the exterior end of Pier 6.

After this was done the steamship Allemania appeared coming upstream under her own steam and attended by at least one tug. She rested her port bow against the upper corner of Pier 7 with the intention of warping into the slip, but her port side came into collision with the car float, which as a result squeezed against the tug McCord. The Erie Railroad Company, owner of the car float, and Jerry Petrie, owner of the McCord, filed libels against the Allemania to recover their damages, and the Hamburg-American Line, claimant of the Allemania, brought in the Erie Railroad Company as a party to the Petrie suit under the fifty-ninth rule.

The charge against the Erie Railroad Company is that Float No. 18 was made fast in a dangerous position relatively to the steamer Allemania, which it was known was to come into the slip between Piers 7 and 8. The District Judge found both the steamer and the car float at fault and ordered a decree of half damages in favor of the Erie Railroad Company and a decree in favor of Petrie, claimant of the tug McCord, which was not at fault, against the Hamburg-American Line and the Erie Railroad Company.

The pleadings of all the parties allege that the Allemania was carried against the car float by the effect of the ebb tide, but some of the witnesses at the trial testified that the car float was drawn against the steamship's port side by the suction caused by her propeller. We think it makes no difference whether one or both of these things caused the injury because, the car float being at rest in full view and the steamer in motion, the latter by the exercise of ordinary care could have avoided the collision.

[2] The real question is as to the effect of section 879 of the city charter, which reads:

"It shall not be lawful for any vessel, canal boat, barge, lighter or tug to obstruct the waters of the harbor by lying at the exterior end of wharves in the waters of the North or East Rivers, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier; any vessel, canal boat, barge, lighter or tug so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier."

We have held that this statute, though not binding upon the federal courts, may yet afford grounds for imputing fault to a vessel violating it. The Chauncey M. Depew, 139 Fed. 236, 71 C. C. A. 362. But the law is highly penal. Literally it prevents a vessel violating its provisions from recovering at all, even if the damage she sustains is solely caused by the fault of the vessel entering the adjacent slip. It should be strictly construed. The Dean Richmond, 107 Fed. 1001, 47 C. C. A. 138.

We do not think that the car float can be considered as lying at the exterior end of Pier 7 within the meaning of the statute. It contem-

plates a vessel actually lying at the exterior end and not hung on to it and lying in the river some distance below. A vessel hung on in this way may improperly and unnecessarily obstruct navigation, but its liability will depend upon the general principles of negligence and not upon any violation of the provision of this statute.

The decree is modified, and the court below directed to enter decree in favor of the Erie Railroad Company and of Jerry Petrie against the steamship Allemania, with costs of both courts, and costs to the Erie Railroad Company in the Petrie Case against the claimant of the Allemania.

O'ROURKE v. PATTISON et al.

(Circuit Court of Appeals. Second Circuit. March 28, 1916.)

No. 228.

TOWAGE ⇐15(2)—LIABILITY FOR LOSS OF TOW—IMPROPER MOORING.

The loss of a canal boat laden with coal, while lying alongside a bulkhead where she had been left by a tug, by settling with the falling tide on a rock, which was a well-known obstruction, *held*, on the evidence, not due to any fault of the tug, but to the fact that after she was left the master of the canal boat moved her along to a position over the rock.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 34–36; Dec. Dig. ⇐15(2).]

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

Suit in admiralty by Patrick C. O'Rourke, owner of the canal boat Grace, against Gardner Pattison and others. Decree for respondents, and libelant appeals. Affirmed.

W. H. K. Davey, of New York City, for appellant.

Park & Mattison, of New York City (H. E. Mattison and N. Zabriskie, both of New York City, of counsel), for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. March 4, 1912, the libelant's canal boat Grace, laden with coal, was landed by the tug Ticeline alongside the bulkhead on the east side of Blackwell's Island at a place known as the Workhouse Dock. There is at one point at this berth a ledge of submerged rock shelving out from the bulkhead, as was well known to the master of the tug and to tug masters generally. The boat was made fast with one line from a post on the lower corner of the bulkhead to a cleat amidships and another line running aft from a cleat on the side of the boat near the stern to a cleat on the bulkhead. The tide was nearly high-water flood. The boat drew 8½ feet, the rock is 6½ feet below the surface at low water, and the tide rises and falls 5 feet. After the tide had turned, and had fallen from 2 to 3 feet, the boat grounded on the rock and became a total loss.

Pattison and Bowns were the charterers of the boat, and employed

the tug Ticeline, which was owned by John Rugge, Jr., and Howard B. Hague. The libelant filed this libel against Pattison & Bowns and against Rugge and Hague to recover his damages, on the ground that the respondents had landed his boat at an unsafe and improper berth, as they well knew. The master and crew of the tug testified that the boat was landed with her bow projecting beyond the bulkhead for the express purpose of leaving the rock a safe distance astern. They are corroborated in this by the master of a boat which was lying at the Metropolitan Hospital dock just above the rock, and the probabilities are all against the tug leaving the boat exposed to a perfectly well-known danger.

On the other hand, the master of the boat says that the tug laid her bow flush with the south end of the bulkhead which would bring her stern over the rock. Nevin, the master of the boat lying just north of the Grace, says that after the tug left the master of the Grace let go the spring line from the post on the lower end of the bulkhead, so that the boat ran astern on the flood tide, which being near high water would be running slowly, and then made fast. This would bring the stern of the boat over the rock.

There are printed in the record some affidavits used upon a motion made before the District Judge for leave to take further proofs, which he denied. We have not read them, because they are not testimony, and the matter was one of discretion, and because we denied a motion to take further proofs in this court on the same subject. Judge Hough dismissed the libel, expressing his entire disbelief in the testimony of the master of the boat. This finding, and the clear weight of the testimony, and the probabilities are all with the respondents; but it is ably argued by the proctor for the libelant that, notwithstanding this, he should have a decree, because respondents' account is contrary to the laws of nature, and therefore cannot be believed. The point made is that, if the master of the boat had permitted her to drift back, as stated, her stern, when the tide began to ebb, would have swung out from the bulkhead, and could not possibly have settled on the rock. This would be so if he did not tauten his stern line after he had let the boat drift back. On this point there is no testimony one way or the other, but it is quite clear that any boatman would have known the necessity of doing this. We prefer to assume that this proper precaution was taken to finding that the story of so many witnesses is false.

The decree is affirmed.

HALL v. REYNOLDS et al.
In re LEWIS PUB. CO.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1916.)

No. 4497.

BANKRUPTCY ⟸482(1)—ATTORNEYS' FEES—APPORTIONMENT.

The allowance of $1,000 as attorney fees in this case *held* to be reasonable, and since the primary object of bankruptcy proceedings is the distribution of the bankrupt's estate to his creditors after the reasonable expenses of administration are paid, the court ought not to be called upon to settle differences between counsel for the petitioning creditors as to what proportion of the total sum allowed them jointly each should receive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. ⟸482(1).]

Appeal from the District Court of the United States for the Eastern District of Missouri.

Bankruptcy proceeding against the Lewis Publishing Company. From an order of the District Court, affirming an order of the referee in bankruptcy, allowing Claud D. Hall and S. H. King a fee jointly for their services as attorneys for petitioning creditors, said Hall appeals. Affirmed.

Homer Hall, of St. Louis, Mo. (Claud D. Hall, of St. Louis, Mo., on the brief), for appellant.

W. C. Marshall and W. W. Henderson, both of St. Louis, Mo., for appellee King.

Stern & Haberman and Eugene H. Angert, all of St. Louis, Mo., for appellee Reynolds.

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

CARLAND, Circuit Judge. This case was before the court at a former term on a petition to revise. 224 Fed. 103, 139 C. C. A. 659. It was there held that an appeal was the proper remedy for reviewing the questions sought to be reviewed. The case is now here on appeal.

The appeal is from an order of the District Court confirming an order of the referee in bankruptcy which allowed Claud D. Hall and S. H. King jointly the sum of $1,000 for legal services rendered by them as attorneys for the petitioning creditors in the matter of the Lewis Publishing Company, a bankrupt, with a further allowance to Mr. Hall of $34.30 for costs advanced by him as such attorney.

We have carefully read the evidence in the record and are of the opinion that the concurring judgment of the referee and the District Court is just and right as to the amount to be allowed to the attorneys named for the services rendered. We are also of the opinion that the court ought not to be called upon to settle differences between counsel as to what proportion of the total amount allowed each should receive. The primary object of bankruptcy proceedings is the distribution of the estate of the bankrupt to his creditors in equal proportions, after the reasonable expenses of administration are paid.

Judgment below affirmed.

In re ARKIN et al.

Appeal of GOIDEL.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 186.

BANKRUPTCY ⇐143(12)—PROPERTY PASSING TO TRUSTEE—LIFE INSURANCE POLICY.

The trustee in bankruptcy cannot compel the surrender of an insurance policy on the life of the bankrupt, which had a cash value, but which he testified was the property of his wife, who was sole beneficiary, and who paid the premiums, even though the bankrupt had power to change the beneficiary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. ⇐143(12).]

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

In the matter of Louis Arkin and J. Lionel Guild, individually and as copartners composing the firm of Arkin & Guild, bankrupts. From an order of the District Court, reversing an order of the referee which directed the surrender of a policy of life insurance upon the life of one of the bankrupts, Harry A. Goidel, as trustee in bankruptcy, appeals. Affirmed.

On appeal by the trustee in bankruptcy from an order of the District Court for the Southern District of New York which reversed an order of the referee which directed the surrender of a policy of insurance issued by the Metropolitan Life Insurance Company upon the life of the bankrupt Guild.

Eugene L. Bondy, of New York City, for appellant.
Benjamin Frindel, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The question here is whether the bankrupt's wife or his trustee in bankruptcy is entitled to a policy of insurance on his life. The referee directed the bankrupt to turn over the policy to his trustee in bankruptcy. The District Judge reversed this decision upon the authority of the Hammel Case, 221 Fed. 56, 137 C. C. A. 80, and Burlingham v. Crouse, 181 Fed. 479, 104 C. C. A. 227, affirmed 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148. The question is an interesting one, but in view of the bankrupt's testimony that the policy was the property of his wife, she being the sole beneficiary and having paid the premiums, we think any doubt should be resolved in her favor.

In principle the case at bar cannot be distinguished from the Hammel Case; in one case the policy had a cash surrender value and in the other a loan value, but the language of the court is equally applicable to the case at bar. At page 58 of 221 Fed., at page 82 of 137 C. C. A., Judge Lacombe says:

"The proposition that he should be constrained against his will, by an order enforceable by imprisonment in the event of disobedience, to deprive his wife of her present interest in the policy, to make himself the beneficiary, to borrow two-thirds of the $3,000 from the company, and turn it over to his creditors, and then to make her again the beneficiary of the remaining third, seems contrary to public policy and to good morals."

The order is affirmed.

CHIN SING QUON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 230.

ALIENS ⟸32(12)—DEPORTATION OF CHINESE—REVIEW—FINDINGS OF FACT.

On appeal by a Chinese person from an order of deportation, the order will not be reversed merely because on the evidence the appellate court would have found the facts differently.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⟸ 32(12).]

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

Proceeding by the United States against Chin Sing Quon for deportation as a Chinese person not entitled to remain in the United States. From an order for deportation (224 Fed. 752), defendant appeals. Affirmed.

Lester W. Bloch, of Albany, N. Y., for appellant.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y. (Harry V. Borst, Asst. U. S. Atty., of Amsterdam, N. Y., of counsel), for the United States.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. This is an appeal from a decision of Judge Ray affirming a decision of the United States commissioner finding that the appellant is a Chinese person not entitled to remain in the United States and ordering his deportation to China. Upon the prima facie case made by the government there is no doubt that the appellant should be deported.

Appellant's claim to remain in this country is based upon his own testimony and that of Mary J. Matthews and two Chinese persons. The testimony introduced was insufficient to satisfy the commissioner and the District Judge that the appellant was entitled to remain in this country. We think we would not be justified in overruling their judgment.

The question was one of fact and even if we might have reached a different conclusion if we had heard the testimony in the first instance, the assumption furnishes no reason for a reversal. We cannot say that the finding of the commissioner and the District Judge is so contrary to the evidence as to justify us in setting it aside.

The order of the District Judge affirming the judgment of deportation is affirmed.

JUNG SEW v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 14, 1916.)

No. 143.

1. ALIENS ⟸31—DEPORTATION OF CHINESE—ENTERING COUNTRY.
A Chinese person, apprehended while in a rowboat on the American side of the Niagara river, admittedly attempting to land contrary to law, has already entered the country, and may be deported.
[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸31.]

2. ALIENS ⟸32(10)—DEPORTATION OF CHINESE—COUNTRY OF RETURN.
One who was born in China, and came directly from there to Canada, whence he attempted to cross into the United States, can be deported to China.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 92; Dec. Dig. ⟸ 32(10).]

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

Habeas corpus by Jung Sew against the United States to secure his discharge from custody under an order for deportation. From an order of the District Court (221 Fed. 500), petitioner appeals. Affirmed.

D. M. Silver, of Buffalo, N. Y., for appellant.

S. T. Lockwood, U. S. Atty., and Donald Bain, Asst. U. S. Atty., both of Buffalo, N. Y.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. It appears without question that the appellant was born in China. He was apprehended while in a row boat on the American side of the Niagara river under circumstances which indicate that he was attempting to land in the United States. There can be no doubt as to his purpose. He frankly admits this. In answer to a question put to him by Inspector Wallace he says:

"I must admit that I was being smuggled into the United States. I was caught in the boat, as you know, so it is no good denying it."

[1] The proposition that he had not actually entered the United States when apprehended cannot be considered as a defense. Those in the boat were, in fact, in the United States as they had crossed the boundary line in the Niagara river between the two countries. There is no doubt as to their intention to land. The appellant was in the United States when apprehended. We are convinced that he was properly ordered deported to China, that being the country from whence he came.

[2] We are not troubled here with the question whether he should be returned to China or Canada. The question decided in United States v. Sisson, 206 Fed. 450, 124 C. C. A. 356, and in several later cases does not arise here, as the petitioner admits that he was born in China, and came directly from Hong Kong to Victoria, B. C.

The order of the District Court dismissing the writ of habeas corpus is affirmed.

KARDO CO. v. ADAMS.

(Circuit Court of Appeals, Sixth Circuit. February 18, 1916.)

No. 2803.

1. COURTS ⟸280—FEDERAL COURTS—DECLINING JURISDICTION.

The provisions of Judicial Code (Act March 3, 1911, c. 231, § 37, 36 Stat. 1098 [Comp. St. 1913, § 1019]), requiring a District Court to dismiss a suit if it appears that it does not really and substantially involve a dispute properly within the court's jurisdiction, or that parties have been improperly or collusively joined for the purpose of creating a case cognizable by that court, apply only where the matters so appearing affect the court's jurisdiction; and where the court has jurisdiction by reason of the subject-matter of the suit, as when it is one arising under the patent laws, jurisdiction of which is given by Judicial Code, § 24(7), being Comp. St. 1913, § 991, regardless of the citizenship of the parties, the court has no power, inherent or statutory, to make an inquiry sua sponte into the complainant's corporate capacity to sue when the defendant by pleading to the merits has waived that question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. ⟸280.]

2. COURTS ⟸37(1)—JURISDICTION—CORPORATE CAPACITY TO SUE—WAIVER.

While jurisdiction cannot be conferred on a federal court by waiver or consent of a defendant, yet, in a case in which the nature of the right asserted confers jurisdiction, the want of complainant's corporate capacity to sue, which is an issuable fact, may be waived by him.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147, 151; Dec. Dig. ⟸37(1).]

3. EQUITY ⟸117—PARTIES—CAPACITY OF PLAINTIFF TO SUE.

The provision of new equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) that "every action shall be prosecuted in the name of the real party in interest," where jurisdiction appears from the nature of the suit, does not impose on a federal court the duty, on its own motion, without pleadings raising the issue, to inquire into the capacity of the plaintiff to sue.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 285–292; Dec. Dig. ⟸117.]

4. CORPORATIONS ⟸28(1)—INCORPORATION—DE FACTO CORPORATIONS.

Under Gen. Code Ohio, § 8627, which provides that, "upon filing articles of incorporation, the persons who subscribed them, their associates, successors and assigns, by the name and style provided therein, shall be a body corporate, with succession, power to sue and be sued," etc., the filing of such articles, followed by the transaction of corporate business creates a corporation, at least de facto, for the purpose of suing or being sued, although the further provisions with respect to the issuance of stock and the election of directors have not been lawfully complied with.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. ⟸28(1).]

5. COURTS ⟸368—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

While the federal courts are required to follow the decisions of the court of last resort in a state in their construction of state laws, where such decisions are conflicting, the court will apply the rule of harmonizing them by attributing the declaration of law in a case to the facts in it, and denying its application to cases involving different situations and requirements.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 951; Dec. Dig. ⟸368.]

6. CORPORATIONS ⊂=377(1) —POWERS—SUBSCRIPTION TO STOCK OF ANOTHER CORPORATION.
Under the law of Ohio, no fraud appearing, the representatives of a corporation may subscribe for it to the capital stock of another corporation caused by it to be formed by them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1531; Dec. Dig. ⊂=377(1).]

7. CORPORATIONS ⊂=282—DIRECTORS—QUALIFICATION.
In the absence of fraud or a dishonest purpose, that a stockholder obtained his stock by gift, or holds it on a trust, does not disqualify him as a director.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1189–1194; Dec. Dig. ⊂=282.]

8. CORPORATIONS ⊂=29(1)—RULE AS TO DISREGARDING CORPORATE FORMS.
The rule that equity may disregard corporate forms cannot be invoked for the benefit of one who has done the corporation a wrong.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77, 79; Dec. Dig. ⊂=29(1).]

9. CORPORATIONS ⊂=29(2)—DE FACTO CORPORATIONS—COLLATERAL ATTACK.
When the fact of the existence of a corporation de facto is established, its existence de jure cannot be attacked collaterally, but only by the state in a direct proceeding.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 78, 79, 2504; Dec. Dig. ⊂=29(2).]

10. CORPORATIONS ⊂=29(2)—DE FACTO CORPORATION—COLLATERAL ATTACK.
Three corporations, each the owner of patents covering parts of automobiles, capable of conjoint use, in order to better protect their rights under the patents, promoted the organization of a fourth corporation to hold title to the patents, to grant licenses, and to prosecute infringers. The incorporators did not intend to become, and did not become, beneficially interested in the corporation; but each subscribed for one share of stock, which was paid for. They elected themselves officers and directors, and afterward resigned, one by one, and elected in their places officers and directors of the promoting corporations, to whom they assigned their certificates of stock. The remaining stock was subscribed and paid for by such three corporations, which also paid for the stock issued to the incorporators and assigned their patents to the new corporation. The organization was in form in compliance with the laws of the state and was in good faith. *Held*, in a suit by the new corporation for infringement, that complainant was a corporation de facto, if not de jure, and that the legality of its organization could not be attacked by defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 78, 79, 2504; Dec. Dig. ⊂=29(2).]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke, Judge.

Suit in equity by the Kardo Company, substituted for the American Ball Bearing Company, against Henry J. Adams, dealing as Reo Motor Sales Company. From a decree dismissing the bill, complainant appeals. Reversed.

For opinion below, see 222 Fed. 967.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio (Edward R. Alexander, of Cleveland, Ohio, Edward Rector, of Chi-

cago, Ill., and Horace Andrews and Paul J. Bickel, both of Cleveland, Ohio, of counsel), for appellants.

Lawrence Maxwell, of Cincinnati, Ohio, and R. A. Parker, of Detroit, Mich., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge. Three corporations, the American Ball Bearing Company, the Packard Motor Car Company, and the Peerless Motor Car Company, were each the owners of separate patents on equipment for the rear axles of automobiles. Their patents were of such nature that apparently, as found by the trial court, they "interlaced or overlapped one another, so that, if one company gave a license under the patent which it owned, complaints of infringements and threatened suits straightway arose from one or another of the other companies."

They thereupon, so that the ownership of all of the patents might be in one company, which, as owner, could grant licenses, thus saving uncertainty in dealing with the patents, and for the purpose of avoiding litigation between themselves, sought to organize a corporation of Ohio under the name of "The Kardo Company," with a capital stock of $1,000,000. Articles of incorporation were signed February 21, 1914, by five men in the employ of the law firm in charge of the organization, not connected otherwise than as attorney with any of the three companies. The articles were filed with the Secretary of State February 24, 1914. On the same day, each of the incorporators subscribed for one share of the capital stock, and one of them subscribed, as trustee for the American Ball Bearing Company for 995 shares, agreeing to pay $9,500 in cash and $90,000 by the transfer of patents by the American Ball Bearing Company to the Kardo Company. Ten thousand dollars, one-tenth of the $100,000 subscribed, were paid on the day of subscription by the American Ball Bearing Company, and the incorporators at no time paid any sum of money. Each of the other corporations paid in $10,000, the Peerless Company about the 1st of March, and the Packard Company about two weeks afterwards, so that each of the corporations paid in equal amounts; the $10,000 paid on subscription by the American Ball Bearing Company being for itself and the other two.

At the first stockholders' meeting, February 24, 1914, the five incorporators being present and voting as stockholders, a code of regulations and by-laws was adopted, in which it was provided that the board of directors should be five stockholders, a majority of whom should be citizens of Ohio. The same parties elected themselves directors, and at their meeting as such, 30 minutes later, four of them were elected officers, and adopted a proposed agreement between the three corporations, providing for the sale and transfer to the Kardo Company of the letters patent owned by each, respectively, for which each was to receive $200,000 of the capital stock, which agreement the incorporators, as stockholders, at a meeting held immediately, ap-

proved. February 27th, the same individuals called a special stockholders' meeting, and the regulations were amended to make the number of directors six, instead of five. On the same day, the directors met, and, as one after another resigned as directors and officers, their places were filled by officers and directors of the three corporations. As each resigned, the certificate for the one share he had subscribed was assigned to his successor, each of whom believed himself to be the owner of the share thus assigned to him, and kept it in his possession. So far as the record discloses, he was the owner. During the pendency of this suit, and after the question as to the propriety of the formation of the Kardo Company had been raised, each director, upon the advice of counsel, actually paid in money for the share thus transferred to him. All of the formal steps, notices, waivers and certificates strictly complied with the law. No salaries have been paid to officers. The bookkeeper of one of the corporations did such bookkeeping for the Kardo Company as was necessary. Its office is in the office of its local patent attorney. It has a seal. The evidence shows that, while it has granted no licenses on its patents, it has, nevertheless, earnestly tried to grant them, and it is fully equipped to carry on its business, and apparently has ample capital with which to carry it on.

The purpose of the incorporation, expressed in the articles of incorporation filed with the Secretary of State, was—

"purchasing, leasing, or otherwise acquiring, and of registering, owning and using inventions, improvements, trade secrets, processes, or interests therein, and applying for and receiving, purchasing, or otherwise acquiring, letters patent, or rights or interests in or under letters patent, for or upon motor and other vehicles, or means of transportation, and traction and propelling machinery, and for or upon the mechanism, parts or equipment of the same, or the tools or machinery for the manufacture of the same; and of selling, assigning, or granting licenses and rights under or in respect of such secrets, processes, inventions, improvements or patents, and otherwise dealing in respect of or with the same, or either of them; and of manufacturing, using and dealing in the vehicles, articles, machinery, equipment and parts covered by or provided for in said inventions, patents or improvements, and of doing all things necessary, proper and incidental to the transaction of said business, or any part thereof."

The bill of complaint was filed, June 25, 1913, by the American Ball Bearing Company, a corporation of Ohio. The defendant answered July 15, 1913, and amended its answer September 25, 1913. The bill was for infringement of a patent, of which the American Ball Bearing Company claimed to be the owner, for an accounting of profits, for treble damages by reason of the aggravated nature of the claimed infringement, and for the destruction of the alleged infringing mechanism in defendant's possession.

On October 20, 1914, the Kardo Company filed a bill in the nature of a supplemental bill alleging its corporate character and the assignment to it of complainant's patents and prayed to be substituted as complainant and for relief as prayed in the original bill. The defendant, January 25, 1915, filed a further amendment to its answer, but did not put in issue the validity of the Kardo Company's corporate existence under the laws of Ohio, nor did it in any way challenge the pro-

priety of its maintaining the suit, except by the "vague suggestions" referred to in the opinion of the trial court. 222 Fed. 967, 969.

[1] On the issues made by the pleadings, proofs were taken, and at the final hearing, the court, without considering the merits of the case, of its own motion, dismissed the bill on the ground that the Kardo Company had no corporate existence de jure or de facto, was not the real party in interest, and that its suit was a fraud on the jurisdiction of the court. The court did so on the theory, apparently, that a District Court of the United States has power, for the purpose of protecting its jurisdiction, to inquire, in all cases, of its own motion, into the steps taken by a complainant, alleging itself to be a corporation, through which it acquired the corporate character claimed by it. The action of the court in making the inquiry was based on his views of section 37 of the Judicial Code, equity rule 37, and of the inherent power in a court of the United States to protect its jurisdiction.

Original jurisdiction has been conferred by Congress by virtue of article 3, § 2, of the Constitution on the District Courts in many classes of cases, of which attention need be called to two:

"Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * is between citizens of different states;" and "Of all suits at law or in equity arising under the patent * * * laws." Judicial Code U. S. § 24, subds. 1, 7.

The provision as to the sum or value of the matter in controversy, does not apply to patent cases. Section 24, subd. 1.

This suit arose under the patent laws, and the jurisdiction of the court to hear and determine the issues raised in it cannot be doubted.

Jurisdiction conferred by reason of diversity of citizenship is a different matter. In Cohens v. Virginia, 6 Wheat. *264, *393 (5 L. Ed. 257), it was said by Chief Justice Marshall:

"In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution—the character of the parties is everything, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution—in these, the nature of the case is everything, the character of the parties nothing."

The court, therefore, had jurisdiction of the subject-matter, and it was immaterial, so far as jurisdiction is concerned, what the citizenship of the parties might be.

In 1875, Congress passed the law, now section 37 of the Judicial Code, providing:

"If in any suit commenced in a district court, or removed from a State Court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court

from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The purpose of the act was to protect the court and the parties against fraud upon its jurisdiction. It was so said in Williams v. Nottawa, 104 U. S. 209, 211 (26 L. Ed. 719):

"Congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction. * * *"

See, also, Morris v. Gilmer, 129 U. S. 315, 326, 9 Sup. Ct. 289, 32 L. Ed. 690, and Mining Co. v. Kelly, 160 U. S. 327, 339, 340, 16 Sup. Ct. 307, 40 L. Ed. 444.

The first part of the section deals with jurisdiction over the subject-matter of the suit—the right asserted in it; the second part with jurisdiction dependent upon diversity of citizenship. Since the jurisdiction invoked in this case did not involve the citizenship of the parties, the court's inquiry could in any event only be directed to the question whether or not a substantial dispute or controversy was involved properly within the jurisdiction of the court. The phrase "within the jurisdiction" has been defined by the Supreme Court:

"It means, within the judicial cognizance—within the capacity to determine the merits of the dispute or controversy and to grant the relief asked for." Rosenbaum v. Bauer, 120 U. S. 450, 459, 7 Sup. Ct. 633, 637 (30 L. Ed. 743).

That this case was within the jurisdiction as thus defined, no doubt can be entertained.

This section has been applied to a number of cases, mostly involving jurisdiction based on diversity of citizenship or the amount in controversy; but we have found no decision in any of the courts of the United States or in any state court which recognizes power in a court to make inquiry, on its own motion, without pleadings, into the capacity of a corporation to sue in a case over which a court had jurisdiction by reason of the nature of the controversy.

Prior to the act of 1875, in cases dependent for jurisdiction on diversity of citizenship, when the proper allegations of citizenship appeared in the pleadings, a plea in abatement was necessary to raise the issue of citizenship. Farmington v. Pillsbury, 114 U. S. 138, 143, 5 Sup. Ct. 807, 29 L. Ed. 114; Little v. Giles, 118 U. S. 596, 604, 7 Sup. Ct. 32, 30 L. Ed. 269; Gilbert v. David, 235 U. S. 561, 567, 35 Sup. Ct. 164, 59 L. Ed. 360. That issue may now be raised by answer, by motion, or by any method appealing to the sound discretion of the court. Gilbert v. David, 235 U. S. 561, 567, 35 Sup. Ct. 164, 59 L. Ed. 360. Power for the court's independent inquiry did not exist under the decisions, even when the jurisdiction depended upon diversity of citizenship until section 37 conferred the power. If, without this section, power is not inherent in the court to protect, on its own motion and without pleadings, its jurisdiction in cases in which diversity of citizenship gave jurisdiction, even when fraudulently invoked,

it cannot be that such extraordinary power can be exercised for the purpose of determining the plaintiff's corporate capacity or the reality of its interest as a corporation in a suit of which the court has jurisdiction by reason of the nature of the right asserted. Jurisdiction of the courts of the United States in such cases does not depend upon the existence of such facts. In addition to the plain language of the statute conferring jurisdiction, a number of considerations are conclusive to the contrary.

It was said in Byers v. McAuley, 149 U. S. 608, 618, 13 Sup. Ct. 906, 910 (37 L. Ed. 867), by Mr. Justice Brewer:

"The jurisdiction of the Federal courts is a limited one, depending upon either the existence of a Federal question or diverse citizenship of the parties. Where these elements of jurisdiction are wanting, it cannot proceed, even with the consent of the parties."

And in Powers v. C. & O. Ry. Co., 169 U. S. 92, 98, 18 Sup. Ct. 264, 266 (42 L. Ed. 673), Mr. Justice Gray said:

"The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party."

And yet it has been held time and again in the courts of the United States that the defendant must specially aver the plaintiff's corporate invalidity, and, if he pleads to the merits without doing so, he is held to admit plaintiff's corporate capacity. Conard v. Insurance Co., 1 Pet. *386, *450, 7 L. Ed. 189; Society, etc., v. Town of Pawlet, 4 Pet. *480, *501, 7 L. Ed. 927; Wickliffe v. Owings, 17 How. *47, *51, 15 L. Ed. 44; Philadelphia, etc., R. R. Co. v. Quigley, 21 How. 202, 214, 16 L. Ed. 73; United States v. Insurance Companies, 22 Wall. 99, 100, 101, 22 L. Ed. 816; Kenton Furnace Co. v. McAlpin, 5 Fed. 737, 741 (C. C.); Emerson v. Nimocks, 88 Fed. 280, 281 (C. C.). Whether or not, since the act of 1875, it is the duty of the district court to inquire of its own motion into the proper organization of a plaintiff corporation when the jurisdiction depends upon diversity of citizenship, we are not called on to decide, for that question does not arise in this case. But we venture to say no suggestion will be found in any of the cases that, when a corporation is a party plaintiff, the court has, irrespective of that act, inherent power, even in cases in which the citizenship of the parties is the test of its jurisdiction, to inquire into and determine the validity of the plaintiff's corporate existence when the defendant has waived the question by pleading to the merits.

It may be said, with certainty, that when the jurisdiction depends upon the nature of the right asserted, as in this case, the court has no power, inherent or statutory, to make an inquiry, sua sponte, into the plaintiff's corporate capacity when the defendant, by pleading to the merits, has waived that question. Pullman v. Upton, 96 U. S. 328, 329, 24 L. Ed. 818, decided October term, 1877, is directly to the point. An assignee in bankruptcy of a corporation sued a stockholder in the Circuit Court of the United States for the Northern District of Illinois to recover the balance remaining unpaid upon his stock. The bankrupt was a corporation of Illinois, and was decreed a bankrupt in the District Court for the Northern District of that state, the

assignee being appointed by that court. Jurisdiction was conferred by the Bankruptcy Act of 1867, and did not depend upon diversity of citizenship. On the trial the assignee offered in evidence and the court admitted, certain papers the object of which was to prove the existence of the corporation and the increase of its capital stock; but this evidence was, in the Supreme Court, held to be immaterial, Mr. Justice Strong saying:

"But the existence of the corporation was admitted by the defendant's plea of *non assumpsit;* and whether the corporate stock had been properly increased was a question the State only could raise. It is well settled, that, in a suit by a corporation, a plea of the general issue admits the competency of the plaintiff to sue as such."

There are many decisions in the courts of the United States and in the state courts holding a defendant estopped to deny the corporate existence of the plaintiff. Some reference to them will be made hereinafter. The principle is found in the language of Mr. Justice Swayne in Casey v. Galli, 94 U. S. 673, 680 (24 L. Ed. 168) a case not depending for jurisdiction on diversity of citizenship:

"Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice."

Is it possible that when plainest principles of justice estop a defendant himself from denying the corporate capacity of the plaintiff to sue, and that, too, when he pleads to that end, the court may, of its own motion, when the subject-matter of the suit is the basis of its jurisdiction, inquire, without pleadings, into the plaintiff's capacity, and, if not satisfied, dismiss the bill?

[2] It is clear that while jurisdiction cannot be conferred by waiver or consent of a defendant, yet, in a case in which the nature of the right asserted confers jurisdiction, the want of corporate capacity to sue may be waived by him. The question is not one of jurisdiction. Jurisdiction is exercised through and upon the issues in the case. Jurisdiction is a matter of power. The issues are determined through the exercise of the power. The jurisdiction of the court and the issues to be tried, are quite distinct. It was said by Vice Chancellor Pitney, in Union Water Co. v. Kean, 52 N. J. Eq. 111, 122, 123, 27 Atl. 1015, 1019, in dealing with collateral attacks on de facto corporate existence in the course of an ordinary suit at law:

"The real ground and reason of the decisions in the line of cases now under consideration, is the lack of a complaint on the part of the proper and only party who has a right to complain, viz., the State, and not the want of capacity or ability in either court to deal with the question involved. In short, the power of this court to deal with any matter brought before it does not depend upon the nature or character of the *issue* to be tried or question to be determined, but it depends upon the *nature of the right* to be administered and enforced, and the *character of the remedy* necessary or appropriate to its enforcement. If the right to be enforced be one properly cognizable by a court of equity, and the remedy necessary to enforce it be such as only a court of equity can administer, then a court of equity has jurisdiction, and the circumstance that, in the course of its administration, it has to deal with

questions of law and fact, of whatever nature they may be, does not stand in its way."

The complainant's corporate capacity was an issuable fact. Issues are brought before a court by the pleadings, and its decrees must be considered in connection with the pleadings. Barnes v. Chicago, etc., Ry. Co., 122 U. S. 1, 14, 7 Sup. Ct. 1043, 30 L. Ed. 1128; Graham v. La Crosse Railroad Co., 3 Wall. 704, 710, 711, 712, 18 L. Ed. 247; Reynolds v. Stockton, 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305; Munday v. Vail, 34 N. J. Law, 418, 423, 424; Carter v. Gibson, 47 Neb. 655, 66 N. W. 631; Maddox v. Summerlin, 92 Tex. 483, 488, 49 S. W. 1033, 50 S. W. 567; Spoors v. Coen, 44 Ohio St. 497, 502, 503, 9 N. E. 132. This is elementary. Waldron v. Harvey, 54 W. Va. 608, 613, 46 S. E. 603, 102 Am. St. Rep. 959.

Under the pleadings in this case, the questions of the corporate invalidity of the Kardo Company and of the reality of its interest, were not issues to be tried.

[3] While that part of equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) taking effect February 1, 1913, providing that "every action shall be prosecuted in the name of the real party in interest," is not found in any previous equity rules made by the Supreme Court for the guidance of courts in equity cases, yet it is but the declaration of a rule in equity cases in the courts of the United States, which by statute of Ohio and generally in states which have adopted a code of civil procedure, prevails, and which, in cases at law, the courts of the United States follow. It is clear, therefore, that when the nature of the suit is such as to show that it really and substantially involves a controversy within the capacity of the court to determine and grant the relief asked, and no question of citizenship, upon which jurisdiction is based, exists, the case presents no peculiar feature imposing on a court of the United States the duty, on its own motion, without pleadings, of inquiring into the question of the capacity of the plaintiff to sue. Under such circumstances, the case is no different from any other case in any court having jurisdiction of the subject-matter under the practice prevailing in the United States.[1]

In Ohio this provision is found in section 25 of the Code of Civil Procedure, taking effect January 1, 1853 (Section 11241, Gen. Code Ohio):

"An action must be prosecuted in the name of the real party in interest. * * *"

Nevertheless, it is the rule in that state that a corporation commencing an action need not state that it is a corporation, and if it does so, it will not, even upon a general denial, be required to prove that it is a corporation. If the defendant desires to raise that issue he must plead it. Methodist Episcopal Church v. Wood, 5 Ohio, *283, *286; Smith v. Weed Sewing Machine Co., 26 Ohio St. 562, 565; Brady v. National Supply Co., 64 Ohio St. 267, 60 N. E. 218, 83 Am. St. Rep. 753.

[1] The same conclusion will be found in Editorial Notes, Columbia Law Review, vol. XV, No. 8, December, 1915, pp. 706, 707, 708.

The right asserted in the bill properly invoking jurisdiction of the court, there is no reason why the issue of the capacity of plaintiff to sue should not be raised by defendant's answer, if a defendant desires to raise the question, and, when raised, tried in the usual way.

We think the court was in error in making the inquiry and in dismissing the bill. Assuming, however, that since the facts have appeared the defendant may amend his answer, if he desires to do so, or, if he does not, that the court has power to direct him to do so, under the liberal provisions of section 1591, 1 U. S. Comp. Stat. 1913, p. 675, we proceed to determine the question, whether or not the Kardo Company was clothed with sufficient corporate capacity to permit it to maintain against an alleged wrongdoer an action relative to a subject-matter within the jurisdiction of the court. The motives of the incorporators were legitimate; their purposes and the purposes of the three corporations for whom they were acting, were laudable, and it cannot be denied that the purposes expressed in the articles of incorporation were, in all respects, lawful.

No injury or fraud was perpetrated, or sought to be perpetrated, and the claimed invalidity of the incorporation rests upon the facts that three corporations promoted the formation of another corporation; that the incorporators did not intend themselves to become, and did not become, beneficially interested in the stock or in the corporation to be formed; that they, not being actual owners of stock, could not be directors; and that the directors substituted for them were not legally elected, paid nothing for their stock and were not, therefore, bona fide holders.

From these the deduction is drawn that the Kardo Company was a "dummy" company, its directors "dummy" directors, and that, therefore, a court of equity would look through the form of things to their substance and declare nonexistent that which appeared to exist, whatever the consequences might be, and regardless of the wrongdoing of the defendant as alleged in the bill.

[4] Section 8627, Gen. Code Ohio, provides:

"Upon filing articles of incorporation, the persons who subscribed them, their associates, successors, and assigns, by the name and style provided therein, shall be a body corporate, with succession, power to sue and be sued. * * *"

In Ashtabula, etc., R. R. Co. v. Smith, 15 Ohio St. 328, 334, the statute was construed, and it was there held, Judge White writing the opinion, that the general powers conferred—

"fall into two classes: such as may be exercised before, and such as can not be until after, the election of directors. Among the former is the right to receive subscriptions to the capital stock, and, when ten per centum of the amount shall be subscribed, to elect directors. * * * After the election of directors all the business of the corporation is to be transacted by them, or under their authority; but, the existence of the body corporate does not depend upon the election of, or the right to elect, directors."

In Powers v. Hazelton, etc., Ry. Co., 33 Ohio St. 429, 432, a suit by a railroad company to condemn land for the construction of its road, the court followed the decision in the other case on this point,

and held, however, that the condemnation of land was a power which could only be exercised by the corporation through its directors. It was said by Judge Day:

"It was therefore incumbent on the company to show, in addition to the fact of its incorporation, that it had brought itself into a condition to exercise its powers for the construction of the road, by a full organization in the election of directors."

See, also, State ex rel. v. Robinson, 9 Ohio Dec. 383, 12 Wkly. Law Bul. 269.

In Union Water Co. v. Kean, 52 N. J. Eq. 111, 141, 27 Atl. 1015, 1026. Pitney, V. C., quoted with emphasis from Judge Bennett's opinion in Railroad v. Clayes, 21 Vt. *30:

"It is the statute which creates the subscribers for stock a corporation and not their organizing under it."

In Wells Co. v. Gastonia, etc., Co., 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003, it appeared that the charter of a corporation of Mississippi provided that the incorporators "are hereby created a body politic and corporate," and also that "as soon as ten thousand dollars of stock is subscribed and paid for said corporation shall have power to commence business." The $10,000 were not paid, but the corporation after doing business, sued a citizen of North Carolina in the Circuit Court for that state for goods sold. It was held that the subscription and payment of the required amount of capital stock were not such conditions precedent that the corporation did not exist until payment of subscription; that the corporation was created when its charter was approved and the great seal of the state affixed to it and was entitled to sue as a citizen of Mississippi. To the same effect, Frost v. Coal Co., 24 How. 278, 16 L. Ed. 637.

In Ohio, after the decisions referred to, it seemed settled that the filing of the articles of incorporation creates a body corporate as the statute says, but in State ex rel. v. Insurance Co., 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573, the fifth headnote (in Ohio the law of the case) says:

"The making and filing, for the purpose of profit, of articles of incorporation in the office of the secretary of state, do not make an incorporated company; such articles are simply authority to do so. No company exists within the meaning of the statute, until the requisite stock has been subscribed and paid in, and the directors chosen."

This was taken bodily from the opinion of Judge Minshall. That he and the court did not intend to overrule the previous decisions is clear, from the fact that they were not referred to in the opinion, and the subject-matter of the case did not require so broad a declaration. The statute referred to reads:

"When by the laws of any other state or nation, any taxes, fines, penalties, license fees, deposits of money or of securities or other obligations or prohibitions are imposed on *insurance companies of this state doing business in such state* or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state or nation doing busi-

ness within this state, and upon their agents here." (Italics in the opinion.) 49 Ohio St. 444, 31 N. E. 659, 16 L. R. A. 611, 34 Am. St. Rep. 573.

To proceedings in quo warranto, the respondent, a corporation of New York with authority to deal in four lines of insurance, answered, when charged that by the laws of New York no Ohio insurance company could transact business in that state in more than one line of insurance, that it had power in New York to deal in four lines of insurance and that an Ohio company could legally be formed with power to do the same, but that no such company had been formed and hence no application could be made in New York to do the four lines of insurance there. The relator replied that the requisite number of persons subscribed and acknowledged articles of incorporation to do the four kinds of insurance in Ohio; that the articles had been approved by the Attorney General and were recorded in the office of the Secretary of State of Ohio, "whereby," it was averred (49 Ohio St. 443, 31 N. E. 659, 16 L. R. A. 611, 34 Am. St. Rep. 573), "an Ohio corporation was duly and legally formed for the purpose of doing the lines of insurance mentioned in the articles of incorporation."

Of course, such a corporation was not doing business in Ohio, and, as a company doing business, had no existence. The headnotes are not to be given general application, but are to be read in connection with the facts appearing in the report. Witte v. Lockwood, 39 Ohio St. 141, 145; Sherard v. Lindsay, Treas., 13 Ohio Cir. Ct. R. 315, 321; Adelbert College v. Wabash R. R. Co., 171 Fed. 805, 812, 96 C. C. A. 465, 17 Ann. Cas. 1204 (C. C. A. 6); Ohio Tax Cases, 232 U. S. 576, 577, 589, 34 Sup. Ct. 372, 58 L. Ed. 737.

It is quite clear that as late as 1905 (Telephone Co. v. Cincinnati, 73 Ohio St. 64, 76 N. E. 392), the Supreme Court of Ohio regarded Powers v. Railway Co., 33 Ohio St. 429, as still the law. See first headnote, and the opinion of Judge Spear, 73 Ohio St. at page 77.

The opinion of Judge Johnson in the recent case of Parkside Cemetery Ass'n v. C. B. & G. L. Traction Co., 112 N. E. 596 (decided by the Supreme Court of Ohio, December 7, 1915), would seem to indicate that he intended to leave no doubt that in Ohio the filing of articles of incorporation does not create a corporation. The action was for the appropriation of private property for construction of a railroad, and the existence of the plaintiff corporation was directly in issue under the statute providing for the exercise by a railroad of the right of eminent domain. Section 11046, defining the duty of the court, provides:

"* * * The probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon all these questions the burden of proof shall be upon the corporation, and any interested person shall be heard."

The facts are set out in the opinion of the court:

"In this case the formal details such as the preparation and filing of the articles of incorporation, the signing of waivers of notice, the opening of books of subscription, the filing of a certificate of subscription with the secretary of state and the waiver of notice of stockholders' meeting, election of directors,

are all set out in the minute book. But it is shown by the testimony of directors themselves and the secretary and treasurer that the company never kept any books of account, never had any bank account, there was no certificate book, or other books, except the minute book, the shares were written on blanks, which were unnumbered and unidentified and there was no statement on them of the authorized capital stock. One of the incorporators, who was a director, testified that after the certificate of incorporation was received, he paid in the sum of $1,000, which was ten per cent. of the authorized capital stock of the company, but the treasurer testified that there were no books or papers which showed that the director referred to had paid the money to the company for this stock and that he had nothing to show for that. The other directors admit that they never paid for any shares of stock and some say that after they received them they indorsed them in blank and handed them back to the party from whom they received them. With the exception of the bare statement of Mr. Smartt that he had paid the $1,000 referred to, no payment on any stock is shown and it is not shown what was done with the $1,000 referred to, nor to whom it was paid. The only stock that was ever subscribed for was that originally made by the five incorporators, who each subscribed for two shares of $100 each. These steps and the original resolution of necessity were taken in 1906, and no further action is shown until the filing of the petition in this case in May, 1911.

"The original directors resigned, one after another, as directors and officers and their places were filled by others, who likewise admit that the same stock was given to them without any payment being made by them."

It was held, among other things, that the plaintiff was a "dummy" corporation, and that testimony offered by the defendant which tended to show that the plaintiff company was endeavoring to acquire the right of way for the sole use and benefit of the Northern Ohio Traction & Light Company, and that the latter company had furnished considerable of the money, and, as it was claimed, all of the money that the plaintiff ever had, ought to have been admitted.

We might agree, for the purposes of this case, that on those facts and that evidence there was no proper subscription to the capital stock and no proper qualification of directors; that the plaintiff was a "dummy" corporation acting for another and had no power to appropriate private property; that it had no existence as a corporation with power to appropriate another's land, and that all corporate forms, including the filing of the articles of incorporation, might be disregarded to protect the land owner from an unlawful and unauthorized appropriation of his land. It was not necessary in that case for the court to go further than that, and it is not probable they intended to do so; but the third headnote in the case reads:

"The statutory requirements provided by section 8632 et seq., General Code, for the creation of a corporation are mandatory and must be complied with before the corporation can be in existence."

These sections have to do with the subscriptions to the capital stock and the initial payments thereon, the election of directors, etc., and, if the language of the headnote is restrained to the nature of the action and the facts, and the theretofore declaration of the court of the necessity of compliance with the statutory requirements in those behalfs as a condition precedent to the exercise of the power of eminent domain, we are in hearty accord. But the case did not call for the sweeping language of the headnote, and would have been satisfied if

the words "for the purpose of appropriating private property," or words of like import, had been added.

By the Ohio decisions the "existence" of a corporation under general laws, and the "existence" of a corporation with special power to appropriate private property, are not the same. The Supreme Court of Ohio had before it, in the recent case, the meaning of the word as used in the latter class of cases.

[5] Required, as we are, to follow the decisions of the court of last resort in a state in their construction of the laws of that state, the Constitution, laws and treaties of the United States not being involved (Secombe v. Railroad Co., 23 Wall. 108, 117, 23 L. Ed. 67; Flash v. Conn., 109 U. S. 371, 379, 3 Sup. Ct. 263, 27 L. Ed. 966; Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 12, 13, 20 Sup. Ct. 559, 44 L. Ed. 647), and finding language in the later cases irreconcilable with former decisions, we are relieved from embarrassment by applying the rule established by the Supreme Court of Ohio of harmonizing the decisions, attributing the declaration of law in a case to the facts in it and to the kind of case it is, and denying the application of such declaration to cases involving different situations and requirements.

That the Supreme Court of Ohio did not intend the declaration in the third headnote of Cemetery Co. v. Traction Co. to be a hard and fast rule covering all cases and circumstances, is shown, not only by their failure to refer to the express declaration of the statute as to when a corporation is formed with power to sue, and to their former decisions; but also by omitting any reference to de facto corporations. The doctrine relative to these and their power to maintain a suit, their inviolability from attack except by the state creating them, and then only in a direct proceeding, is established by a wealth of authority. It will be sufficient to refer to a few cases in the courts of the United States. Lessee of Frost v. Frostburg Coal Co., 24 How. 278, 16 L. Ed. 637; Baltimore, etc., R. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 571, 11 Sup. Ct. 185, 34 L. Ed. 784; Shapleigh v. San Angelo, 167 U. S. 646, 656, 17 Sup. Ct. 957, 42 L. Ed. 310; Miller v. Perris Irrigation Dist., 85 Fed. 693, 698 (C. C.); Id., 99 Fed. 143, 150 (C. C.); Herring v. Modesto Irr. Dist., 95 Fed. 705, 717, et seq. (C. C.); Telegraph Co. v. Railroad Co., 114 Fed. 787 (C. C.); and in this circuit: Farmers', etc., Co. v. Toledo, etc., Ry. Co., 67 Fed. 49, 55 (C. C.); Continental Trust Co. v. Toledo, etc., R. Co., 82 Fed. 642, 649 (C. C.).

If, in Ohio, a corporation with general powers has no existence at all unless the laws relative to subscription and payment for stock and the election and qualification of directors are strictly complied with, the doctrine of de facto corporations universally recognized in the United States, and, for justice' sake, frequently applied, has no further place in the Ohio law. It is inconceivable that Judge Johnson, who wrote the opinion in Cemetery Co. v. Traction Co., and the court concurring in the headnotes of it, intended to overthrow that just and salutary doctrine, particularly as they did not even refer to the leading case of Society Perun v. Cleveland, 43 Ohio St. 481, 490, 3 N. E. 357, 360, in which it was said by Judge Owen:

"The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, *a corporation.*"

The infirmity in that case lay in the very articles themselves; and before the case was decided a judgment of ouster was rendered against the corporation in quo warranto proceedings.

While we might agree that in Ohio three corporations cannot form a corporation in the sense that they may become the incorporators, yet no reason appears why three corporations, or one corporation, may not, for legitimate purposes, cause a corporation to be formed under the laws of that state through agents selected for the purpose. The theory of separate entity of a corporation is not disturbed by the ownership of all of its stock by another corporation. Peterson v. Chicago, etc., Ry. Co., 205 U. S. 364, 391, 27 Sup. Ct. 513, 51 L. Ed. 841; Richmond, etc., Co. v. Richmond, etc., Co., 68 Fed. 105, 108, 15 C. C. A. 289, 34 L. R. A. 625 (C. C. A. 6th Cir.); Commonwealth v. Monongahela Bridge Co., 216 Pa. 108, 114, 64 Atl. 909, 8 Ann. Cas. 1073; Louisville Gas Co. v. Kaufman, 105 Ky. 131, 158, 48 S. W. 434 et seq. There is no requirement in the law, nor any inference to be drawn from it, that the incorporators of an Ohio corporation must have any financial interest or benefit of any kind in the incorporation sought. The general understanding in Ohio on the subject is found in 1 Couse's Ohio Private Corporations, § 16. In some jurisdictions, incorporators are directly held to be mere instruments of the law for purposes of preliminary organization. Densmore Oil Co. v. Densmore, 64 Pa. 43, 54; Chase v. Lord, 77 N. Y. 1, 11; Bristol Bank v. Jonesboro, etc., Co., 101 Tenn. 545, 553, 48 S. W. 228; 1 Clark & Marshall on Private Corporations, § 45.

Incorporators, after filing the articles, open books for subscription. When 10 per cent. of the capital stock has been subscribed and 10 per cent. of the subscription paid in, and they have so certified, their duties come to an end. There is no requirement that they shall subscribe to the capital stock, though if they do so, they make themselves personally liable to the corporation (Henkle v. Salem Mfg. Co., 39 Ohio St. 547, 552; Trust Co. v. Floyd, 47 Ohio St. 525, 541, 26 N. E. 110 et seq.; Pullman v. Upton, 96 U. S. 328, 330, 24 L. Ed. 818); and if there is any deficiency in the amount of the actual payment of 10 per cent. on the stock subscribed at the time they have certified the fact, they are liable to any person affected thereby (section 8634, Gen. Code Ohio).

[6] Permission is now given to private corporations in Ohio to "purchase, or otherwise acquire, and hold shares of stock in other kindred but not competing private corporations." Section 8683, Gen. Code Ohio. Whether or not under such permission a corporation could itself become a subscriber, it is not necessary to decide; but under authority elsewhere (Oregon, etc., R. Co. v. Postal Tel. Cab. Co., 111

Fed. 842, 49 C. C. A. 663 [C. C. A. 9]; National Docks Ry. Co. v. Cent. R. Co., 32 N. J. Eq. 755, overruling 31 N. J. Eq. 475, 478, wherein the facts appear; Lower v. C., B. & Q. R. Co., 59 Iowa, 563, 13 N. W. 718; Postal Tel. Cab. Co. v. Railway Co., 23 Utah, 474, 481, 65 Pac. 735, 90 Am. St. Rep. 705) and from the views expressed in Cemetery Co. v. Traction Co., we hold, for the purpose of this case, that in Ohio, no fraud appearing, the representatives of a corporation may subscribe for it to the capital stock of another corporation caused by it to be formed through them. It was there said by Judge Johnson:

"* * * It is no objection that the organization of a plaintiff corporation was promoted or procured by another corporation, or its stockholders, which is specially interested in the enterprise for which the plaintiff was formed and which could not condemn property in furtherance of such enterprise and such matters cannot be set up in answer to the plaintiff's petition to condemn."

Also:

"One who has subscribed and paid for or who has purchased stock in a corporation has of course the right to make a bona fide gift of it, and in such case the donee's title is perfect. And doubtless the originator of a corporation organized in good faith to carry out the purposes stated in its articles, may properly procure the requisite number of signatures to all of the preliminary instruments, including the necessary ten per cent. stock subscription, by making an executed bona fide gift to each of the amount necessary to pay the required portion of the subscriptions into the treasury. * * *"

The "preliminary instruments" are necessarily the articles.

[7] That a director may obtain his stock by gift, or hold it upon a trust, and be legally qualified, is not open to question. People v. Lihme, 269 Ill. 351, 109 N. E. 1051, 1054; Gas Co. v. Kaufman, 105 Ky. 131, 159, 48 S. W. 434. If it were on a secret agreement with the company without consideration as a qualification to be a director, the stock to be surrendered on demand, as in Dueber Watch Case Mfg. Co. v. Daugherty, 62 Ohio St. 589, 57 N. E. 455; or for a dishonest purpose, or as a shield for wrongdoing, then, of course, the title of a director may be impeached. In the matter of St. Lawrence Steamboat Co., 44 N. J. Law, 529, 541; Louisville Gas Co. v. Kaufman, etc., Co., 105 Ky. 131, 159, 48 S. W. 434; In re Leslie, 58 N. J. Law, 609, 33 Atl. 954; Bartholomew v. Bentley, 1 Ohio St. 37; De Ruvigney's Case, 5 Ch. 307, 322.

If there was a want of compliance with the law in the organization of the Kardo Company, it lay in the fact that while the subscriptions of the five agents, who were the incorporators, were paid to the corporation, yet the subscribers were not, nor were they intended to be, the owners of the stock; and in the resulting claim that, since directors must be elected by stockholders, their election as directors had not sufficient foundation. Necessarily, the substitution for each of these of other representatives of the three corporations could not be regarded as a proper election of directors. If the five shares subscribed by the original agents of the promoters had been given to them, a different situation would be presented; but we see no reason why they cannot be regarded, in this subscription, as agents

for the promoters, their 10 per cent. subscriptions being actually paid in money.

Theoretically, no doubt, a corporation, a creature of the state, has only complete existence when the laws giving it being are complied with. But that theory, carried to its logical conclusion, would, in many cases, result in such injustice that the courts, established for the purpose of doing justice, have found a way by which the justice of the particular case may be worked out without really doing violence to logic. This they do by denying to a party to a suit the right to raise the question of corporate capacity of the plaintiff to sue when injustice would result and when considerations of public policy are involved; so that the Kardo Company, while it may not be strictly a corporation de jure, may nevertheless have a status in the law sufficient to enable it to protect itself from a wrongdoer who seeks to escape his wrongdoing on the ground of its failure to comply with every detail of the law under which it was sought to be organized and because the method of its formation could not be recognized by the state as a compliance with the law on the subject. This is a matter with which one who has done it a wrong has no concern. To so hold is not judicial legislation. The court makes no attempt to create the plaintiff a corporation. The courts, in the interests of justice, will not permit one who ought not to deny the plaintiff's corporate existence, to do so.

So far as the conduct and purposes of the promoters, the incorporators, or the directors of the Kardo Company, are concerned, every step taken, both by intention and by results, was marked by absolute good faith. This is a vital fact. The case has no resemblance to Bank v. Trebein, 59 Ohio St. 316, 52 N. E. 834, in which the formation of the corporation necessarily resulted in fraud of creditors not in the scheme; nor to Andres v. Morgan, 62 Ohio St. 236, 245, 56 N. E. 875, 78 Am. St. Rep. 712, in which it was held that the mere transfer of partnership interests into the same proportional shares of stock in a corporation formed by partners, would be a fraud on creditors of the partnership. Here nobody was injured, or could be injured, by what was done, or by the failure to follow the law in detail. The wrong done, if any, was to the state, which has not seen fit to interfere.

Nor does the case present facts appropriate for the application of the rule that equity will look through the forms of things to their substance. It is an ancient doctrine, applied in recent years to corporations. The cases are numerous. It will be sufficient to refer to some in the courts of the United States, and in the Supreme Court of Ohio: McCaskill v. United States, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; B. & O. Tel. Co. v. Interstate Tel. Co., 54 Fed. 50, 4 C. C. A. 184 (C. C. A. 4th Cir.); In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530 (C. C. A. 2d Cir.); Gay v. Hudson River, etc., Co., 187 Fed. 12, 109 C. C. A. 66 (C. C. A. 2d Cir.); Hunter v. Baker, 190 Fed. 665 (C. C.); Hunnewell v. N. Y. Cent. & H. R. R. Co., 196 Fed. 543 (C. C.); Smith v. Moore, 199 Fed. 689, 118 C. C. A. 127 (C. C. A. 9th Cir.); Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707; Andres v. Morgan, 62 Ohio St. 236, 56 N. E. 875, 78 Am. St. Rep. 712; Park-

side Cemetery Ass'n v. Traction Co., 112 N. E. 596, decided by the Supreme Court of Ohio, December 7, 1915. The general subject is comprehended within the short statement of Judge Sater in the case of In re Rieger, 157 Fed. 609, 613 (D. C.):

"The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."

To this might be added: In actions to appropriate private property in Ohio under the power of eminent domain, when the existence of the corporation for such purpose is in issue, as in Cemetery Co. v. Traction Co., the court will look through corporate forms to ascertain the real party in interest, when that also is made an issue in the case; for it would be unjust to invade the right of private property for public use unless the corporation, seeking to exercise the power, had the power and was the real party in interest. To prevent injustice the rule has been applied also in cases in which one corporation is a mere adjunct or agency of another. In re Watertown Paper Co., 169 Fed. 252, 256, 94 C. C. A. 528 (C. C. A. 2d Cir.); In re Muncie Pulp Co., 139 Fed. 546, 548, 71 C. C. A. 530 (C. C. A. 2d Cir.); B. & O. Tel. Co. v. Interstate Tel. Co., 54 Fed. 50, 54, 4 C. C. A. 184 (C. C. A. 4th Cir.); Hunter v. Baker, 190 Fed. 665, 668 (C. C.); In re Rieger, 157 Fed. 609, 613 (C. C.).

[8] Courts of equity will not permit corporate forms to be used as a shield for injustice and wrongdoing, or to illegally appropriate private property; but we have found no case, and we think none exists, in which a court has brushed aside corporate forms at the instance and for the benefit of one who has done the corporation a wrong. To such a case the rule has no application.

It appearing that the three corporations could promote the formation of another corporation; that the purpose of incorporation was legitimate; that proper articles were filed with the Secretary of State; that 10 per cent. of the capital stock was subscribed, and one-tenth of that paid in, and $20,000 more; that the corporation for eight months attempted to license its patents and to protect them had brought this and two other suits; that it had a seal and was equipped to carry on its business; that no wrong has been perpetrated, or sought to be perpetrated, we think the various elements of a corporation de facto are present, as defined by the courts of the United States. In Tulare Irrigation District v. Shepard, 185 U. S. 1, 13, 22 Sup. Ct. 531, 536 (46 L. Ed. 773), it was said by Mr. Justice Peckham:

"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."

In Toledo, etc., R. Co. v. Continental Trust Co., 95 Fed. 497, 508, 36 C. C. A. 155, 167, it was said by Judge Lurton, speaking for this court:

"The test of a de facto corporation is this: Was there a law under which there might have been a de jure corporation of the kind, character, and class to which the organization in question apparently belongs? It is the apparent legality of the organization which gives it its de facto character."

Judge Taft, in Continental Trust Co. v. Toledo, etc., R. Co., 82 Fed. 642, 650 (C. C.), said:

"* * * it may be safely stated as the rule that when persons assume to act as a body, and are permitted by acquiescence of the public and the state to act, as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is express recognition by general law, such body of persons is a corporation de facto, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to do so."

[9] When the fact of the existence of a corporation de facto is established, it is the settled law that its existence de jure cannot be collaterally attacked; that is, by any other than the state under whose laws its formation was sought, and only then in a direct proceeding. The cases are legion. 1 Thompson on Corporations (2d Ed.) § 248. A number in the courts of the United States may be cited: Frost v. Frostburg Coal Co., 24 How. 278, 283, 284, 16 L. Ed. 637; Smith v. Sheeley, 12 Wall. 358, 361, 20 L. Ed. 430; Commissioner v. Bolles, 94 U. S. 104, 106, 24 L. Ed. 46; Pullman v. Upton, 96 U. S. 328, 329, 24 L. Ed. 818; Bank v. Matthews, 98 U. S. 621, 628, 25 L. Ed. 188; Close v. Glenwood Cemetery, 107 U. S. 466, 477, 2 Sup. Ct. 267, 27 L. Ed. 408; Removal Cases, 115 U. S. 1, 15, 16, 5 Sup. Ct. 1113, 29 L. Ed. 319; Railroad v. Baptist Church, 137 U. S. 568, 571, 572, 11 Sup. Ct. 185, 34 L. Ed. 784; Dallas County v. Huidekoper, 154 U. S. 654, 14 Sup. Ct. 1190, 25 L. Ed. 974; Shapleigh v. San Angelo, 167 U. S. 646, 655, 656, 17 Sup. Ct. 967, 42 L. Ed. 310; Ashley v. Supervisors, 60 Fed. 55, 63, 8 C. C. A. 455 (C. C. A. 6th Cir.); American, etc., Ry. Co. v. Mayor (C. C.) 68 Fed. 227, 228; Andrews v. National, etc., Works, 77 Fed. 774, 778, 23 C. C. A. 454, 36 L. R. A. 153 (C. C. A. 7th Cir.); Deitch v. Staub, 115 Fed. 309, 315, 53 C. C. A. 137 (C. C. A. 6th Cir.).

The decisions withholding permission from a party other than the state to deny corporate existence and capacity to sue, rest upon different grounds depending upon the nature of the case. One such ground is estoppel. The cases are numerous. A few illustrations may be taken from decisions of the United States courts. One dealing, or contracting, with a corporation, as such, may not deny its existence (Close v. Glenwood Cemetery, 107 U. S. 466, 2 Sup. Ct. 267, 27 L. Ed. 408; Andes v. Ely, 158 U. S. 312, 322, 15 Sup. Ct. 954, 39 L. Ed. 996; New Orleans, etc., Co. v. Louisiana, 180 U. S. 320, 328, 21 Sup. Ct. 378, 45 L. Ed. 550; Toledo, etc., Co. v. Trust Co., 95 Fed. 497, 507, 36 C. C. A. 155 [C. C. A. 6th Cir.]); a debtor may not (Harris v. Runnels, 12 How. *79, 13 L. Ed. 901); a subscriber to the capital stock may not (Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523; Dallas County v. Huidekoper, 154 U. S. 654, 14 Sup. Ct. 1190, 25 L. Ed. 974); but the cases also show that the doctrine does not by any means rest only upon estoppel. The Supreme Court of Ohio in Society Perun v. Hay, 43 Ohio St. 481, 498, 3 N. E. 357, 364, repudiated the claim that when

estoppel cannot be invoked, there can be no de facto corporation, and say, with respect to that corporation:

"The highest considerations of public policy and fair dealing protest against treating such an organization as a nullity and all of its transactions void."

Many other decisions are expressly based on "public policy" and "principles of plain justice." These may undoubtedly blend into each other, if, indeed, estoppel does not also partake of their characteristics. It is difficult to define public policy. It will be sufficient to say that the public policy of a state will be found in the Constitution, statutes, and the decisions of its highest courts. Vidal v. Girrard, Executors, 2 How. 126, 197, 198, 11 L. Ed. 205; Insurance Co. v. Railway, 175 U. S. 91, 100, 20 Sup. Ct. 33, 44 L. Ed. 84; License Tax Cases, 5 Wall. 462, 469, 18 L. Ed. 497.

The courts have declined in innumerable instances to enforce contracts which are against public welfare, as, for instance, contracts in restraint of trade, and contracts contra bonos mores. The common law "prohibits everything which is unjust or *contra bonos mores.*" Mr. Justice Wayne in Harris v. Runnels, 12 How. *79, *83, 13 L. Ed. 901. That term may be difficult of definition applicable to all cases; but there can be no doubt that when conduct is of such character as to offend the average conscience, as involving injustice according to commonly accepted standards, it is contra bonos mores. This must be true, not only when parties are contractually dealing with each other, but also when a stranger, having wronged a corporation de facto, seeks to escape the penalty invoked in a court of justice by denying the right of such corporation to maintain the suit because of informalities in its organization. To such conduct, a court of justice will not give its sanction, and it is quite immaterial whether the denial is placed on grounds of public policy or upon principles of plain justice, or upon both of these.

We are not, however, left in doubt as to the public policy of the United States on this subject, as declared by the Supreme Court. Baltimore, etc., R. R. Co. v. Fifth Baptist Church, and another case of the same title, 137 U. S. 568, 571, 572, 11 Sup. Ct. 185, 186 (34 L. Ed. 784), were in their nature actions on the case for damages for the continuance of a nuisance to the church's use and enjoyment of its house of public worship by the noise, smoke, cinders, ashes and vapors from the railroad's adjoining engine house, repair shops and locomotives, and by the obstruction of access to its building by the railroad's unlawful use of a sidetrack in front of it. It was held, Mr. Justice Gray speaking for the court—

"that the plaintiff had in good faith legally organized as a corporation and had long acted as such and was at least a corporation *de facto*, which is all that is necessary to enable it to maintain an action against any one, other than the state, who has contracted with the corporation or who has done it a wrong."

The case did not rest upon any rule of estoppel, but upon the ground that the defendant was a wrongdoer and as such could not raise the question of the injured party's corporate capacity.

Other decisions may be found directly to the point, in some of which there is an express declaration that the decision does not rest upon estoppel, but upon public policy and principles of plain justice. Trustees, etc., v. Froslie, 37 Minn. 447, 451, 35 N. W. 260, 262, was an action in ejectment. It was there said:

"And in an action by it (the corporation) to recover such property, no private person will be allowed to inquire collaterally into the regularity of its organization. This rule is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broader principles of common justice and public policy. It would be unjust and intolerable if, under such circumstances, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization."

In Stockton, etc., Road Co. v. Stockton, etc., Railroad Co., 45 Cal. 680, the defendant was a trespasser. Persse, etc., Works v. Willett, 1 Robertson (24 N. Y. Super. Ct.) 131, was an action for damages for conversion. Denver v. Mullen, 7 Colo. 345, 3 Pac. 693, was a suit for injunction against interference with the plaintiff's water rights. In Turnpike Co. v. Cutler, 6 Vt. *315, *323, an action on the case for trespass, it was said by Judge Phelps:

"The existence of a corporation *de facto* is always sufficient for the ordinary purpose of protecting the corporate rights against a stranger."

A bill in equity lies against a stranger seeking to interfere with the property of a de facto corporation. Railroad Co. v. Railway Co., 75 Ill. 113, 117.

The rule was applied to patent cases in Young, etc., Co. v. Young, etc., Co., 72 Fed. 62 (C. C.), a decision by Judge Acheson, and American Cable Ry. Co. v. Mayor, 68 Fed. 227 (C. C.), the complainants in each claiming to be corporations and seeking to restrain the infringement of a patent, the defendant denying the complainant's capacity to sue. In the latter case it was said by Judge Wheeler (68 Fed. 228):

"The corporation was organized, and took the title to this patent, which seems to be within the scope of its corporate powers. No proceedings have been taken to terminate it. Under these circumstances, it seems to exist, so far at least as to be able to maintain this suit against wrongdoers for trespassing upon this corporate property."

[10] From these authorities, and upon principle, the rule may be deduced that a wrongdoer will not be permitted to deny the capacity of a de facto corporation suing him to redress the wrong. The de facto corporation exists de jure as to him, and in such suit it is the real party in interest. So far as the defendant is concerned, there can be no party in interest but the Kardo Company. Even in cases in which all the stock of a corporation is owned by one person or another corporation, the corporate rights are distinct from the rights of stockholders, as hereinbefore shown. And when the cause of action relates to property and property rights, of which the corporation is vested with the legal title, the corporation is the real party in interest. Railroad Co. v. Railroad Co., 23 Minn. 359.

The assignment of a patent must be acknowledged before an officer, and, to be valid as against subsequent purchasers or mortgagees for a valuable consideration without notice, must be recorded in the patent

office within three months from its date. 4 U. S. Comp. Stat. 1913, p. 4297, § 9444. The record shows the assignment of the patent owned by the American Ball Bearing Company to the Kardo Company, but does not seem to disclose assignments from the other two corporations of their patents to the Kardo Company. Those assignments may, for present purposes, be assumed to have been executed with the formalities required by the statute and recorded in the patent office. The title to the patents would, no doubt, pass as completely by the written and recorded assignments as would real estate by deed, and, by analogy, the effect of such assignment would be the same as conveyances of real estate. It is an established principle that even when a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void but only voidable, and its validity can be assailed only by the state creating it in a direct proceeding instituted for the purpose. Bank v. Matthews, 98 U. S. 621, 628, 25 L. Ed. 188. One who has made a sale of real estate to a de facto corporation, consideration being paid, is not in a position to question the corporation's capacity to take the title (Smith v. Sheeley, 12 Wall. 361, 20 L. Ed. 430); and such conveyance is valid and binding as against all parties but the state (Doyle v. San Diego, etc., Co., 46 Fed. 709, 711 [C. C.]). Since the three corporations, as stockholders and as assignors, and since the Kardo Company, as assignee, could not be heard to deny the title of the Kardo Company to the patent in suit, there is no other party in interest, and the defendant could not be subjected to any other suit to restrain the infringement, if he has infringed; and he is in no position to deny the reality of the Kardo Company's interest in the suit.

The discussion should not, however, end without reference to Zanesville v. Gaslight Co., 47 Ohio St. 1, 23 N. E. 55, in which the second headnote reads:

"Whenever an incorporated company, in any action, asserts a right against another person based upon an assumed franchise or power, the person against whom the right is so asserted may, as a defense, deny the existence of such franchise or power."

The basis of the Gas Company's action was its assumed power to fix rates. Its special charter was silent on the subject. The power was denied because it was not expressly granted and not necessarily incidental to the exercise of expressed powers. It will be seen at once that the principle underlying the case has no resemblance to the principle here involved. One has to do with the subject ultra vires, and the other with the doctrine of de facto corporations. The Gas Company was a corporation de jure, seeking to exercise powers it did not have. The Kardo Company is a corporation at least de facto, seeking to exercise powers which it would have if a corporation de jure. There is no similitude between an attempt by a de jure corporation to exercise a corporate franchise it never had, and an attempt by a de facto corporation to protect itself against a wrongdoer when the corporation would be de jure with ample power were it not for irregularities and informalities in its organization. It is said in 4 Thompson on Corporations (1st Ed.) § 5651:

"If a corporation exists *de facto* * * * then the law will ascribe to it all the powers which it would have possessed if it had been regularly organized. And this will include all those powers which are ascribed, by implication of law, to corporations generally; such as the power to make and take contracts, acquire and transmit property, sue and be sued, etc."

This principle is illustrated by its application to contractual relations, concerning which it was said by Mr. Justice Gray in Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 60, 11 Sup. Ct. 478, 488 (35 L. Ed. 55):

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

Corporations acting ultra vires may not defend on that ground against a tort committed by its agents. 5 Thompson on Corporations (1st Ed.) § 5993. And even against such corporations, one whose rights are not injuriously affected will not be permitted to complain. Of such an one it was said by Mr. Justice Matthews, in Railroad v. Ellerman, 105 U. S. 166, 174 (26 L. Ed. 1015):

"The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. * * * If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed."

In Zaneszille v. Gaslight Co., since the business of furnishing gas to a city was impressed with a public use, and, therefore, subject to regulation of rates by the city through ordinances to that end, sanctioned by the Legislature, the suit of the Gas Company was an effort under power which did not exist to deprive the city of legal rights. Of course, the city could defend against such usurpation of power. The case has no application here.

The conclusion is that this case is not one for the independent inquiry by a trial judge, on his own motion, and without the issues being raised by the pleadings, into the complainant's corporate capacity, or the reality of its interest, and that, if those issues are made by amendment, the defendant cannot be heard to defend, on those grounds, the Kardo Company's action for the infringement of its patent.

The decree below will be reversed, at defendant's costs, and the cause remanded for further proceedings not inconsistent with this opinion.

HUTTEN et al. v. FRANK KREMENTZ CO.

(Circuit Court of Appeals, Third Circuit. April 4, 1916. Rehearing Denied May 25, 1916.)

No. 2070.

1. PATENTS ⊂=328—INVENTION—FOLDING EYEGLASSES.
The Hutten & McDougall patent, No. 1,016,153, for folding eyeglasses, which, although having projecting or offset nose clips, are so constructed that by means of a spring pivotally connected at its ends with the lens frames such clips will pass each other when the glasses are folded, *held* void for lack of invention, in view of the prior art, in which all the elements are found.

2. WORDS AND PHRASES—"BRIDGE SPRING"—"PIVOTAL BRIDGE SPRING."
As applied to eyeglass frames, a "bridge spring" is a flexible strip of resilient metal used to connect the lens frames and hold them in position on the nose. A "pivotal bridge spring" is such a metal strip with its terminals connected with the lens frames by engagement with pivots seated in the upper part of the frames. It is capable of three movements, two from the pivot and one from the pliant or yielding quality of the metal strip, and is known in the art as a French double spring.

Appeal from the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Suit in equity by Edwin P. Hutten and Karl A. Zimmerman, known as E. P. Hutten & Co., against the Frank Krementz Company. Decree for defendant, and complainants appeal. Affirmed.

The following is the opinion of Haight, District Judge, on final hearing:

Patent No. 1,016,153, upon which this suit is based, was issued to Edwin P. Hutten and John McDougall January 30, 1912, on an application filed May 18, 1911, and was subsequently assigned to the plaintiffs. It relates to a form of folding eyeglasses, the distinctive feature of which is an "offset" or "angular" nose guard or clip. Infringement is not denied, but the validity of the patent is challenged. In support of this defense it is urged by the defendant that the eyeglasses of the patent were "on sale" for more than two years prior to the application for the patent. The patentees were employés of Geoffroy & Co., who were manufacturing jewelers in New York City. There is no doubt that some of these glasses were sold by Geoffroy & Co. as early as May 22, 1909. This, however, was not two years prior to the application for the patent. But the defendant contends that at least one pair were sold on May 14, 1909. The only evidence to support this contention is a memorandum made on a bill head or order blank of Geoffroy & Co. and dated May 14, 1909. It contains this statement, viz.: "Deliver the article specified, for inspection of Mr. Paul A. Meyrowitz and with the express understanding that the value thereof or the goods are to be returned upon demand." Then follows a specification of the article, as follows: "One gold Oxford offset guards—*left to show*." This, as well as the date and name "Paul A. Meyrowitz," is admittedly in the handwriting of the patentee, Hutten. The other parts of the memorandum, except as hereinafter noted, are printed. Hutten professes to have no recollection of this transaction other than that he identifies his handwriting. No other witness was called to explain it.

It is quite true, as the plaintiff contends, that the memorandum does not show that the glasses there referred to were of the folding type; but, without attempting to review the evidence, I think it is clearly demonstrated that they were of such type and were those covered by the patent. The only evidence, however, to show that they were sold either absolutely or condition-

ally is that supplied by the memorandum. Geoffroy & Co. had been manufacturing and selling what was known as a "straight guard folding Oxford" eyeglass, for about two years previously. Meyrowitz, among other customers, had suggested to Hutten, the salesman of the company, that there would be a more extensive demand for and sale of these folding Oxfords if they could be supplied with "offset" guards or nose clips, instead of the "straight" guards. Hutten and McDougall had thereupon, and shortly before the date of the memorandum, set to work to make this change, and devised the glasses of the patent. A sample was completed a few days before the 14th of May, 1909. Shortly after this date a number of these glasses were sold and delivered to Meyrowitz and others. These facts, taken in connection with the additional fact that no price was named in the memorandum, and that the glasses were subsequently returned to Geoffroy & Co., and the words "left to show" on the memorandum, lead me to the conclusion that these glasses were merely left with Meyrowitz as a sample, so that he might examine them, and, if found satisfactory, Geoffroy & Co. might secure orders from him for that kind of glasses. Thus they were not sold to Meyrowitz, nor left with him to sell for Geoffroy & Co., nor were they offered to him for sale; no title ever passed, either absolutely or conditionally; and there is nothing to show that they were left with Meyrowitz to buy if he approved of them. He did not subsequently buy them but returned them. Under these circumstances this pair of glasses were not, within the meaning of the statute, "on sale." Mershon & Company v. Bay City Box & Lumber Company (C. C.) 189 Fed. 741; National Cash Register Company v. American Cash Register Company, 178 Fed. 80, 101 C. C. A. 569; Covert v. Covert (C. C.) 106 Fed. 183; Craig v. Michigan Lubricator Company, 72 Fed. 173; Campbell v. New York (C. C.) 36 Fed. 260. The defendant having failed to show that the patented eyeglasses were "on sale" earlier than two years before the patent was applied for, the defense based on this ground fails.

But it is further contended by the defendant that, in view of the prior art, the plaintiff's patent does not involve invention. Broadly stated, the invention is claimed to consist in applying to a folding eyeglass "offset" or "angular" nose guards or clips and so arranged as to permit of folding one lens over the other without hindrance by the projecting clips, and without unduly straining the spring connecting the lens frames with each other. The patent contains four claims, none of which define the shape of the lenses, although in the drawings they are shown as circular. The "offset" guard, in one form or another, is an element of each claim. The first three claims do not contain as an element, or mention the means by which the lenses are to be held in folded position, but the fourth claim does, viz., "a handle on each of the lens frames and having a guideway for receiving the other lens frame, and a spring catch on the said handle for engagement with the entering lens frame to lock the lens frames in folded position." Each of the claims called for "posts" on the lens frames, on which the nose guards are fastened. In the first claim the guards are designated as "on said posts" and in the others as "integral on said posts." In claim 2 the "terminals of the nose clips" are stated as "being free of the lens frames and projecting inwardly." In claim 3 this feature is stated thus: "The inner edges of the nose clips being inclined and the lower terminals of the clips being adjacent to the lens frames." It is not disputed that as early as the spring of 1907, Geoffroy & Co. were manufacturing and selling an eyeglass embodying all of the elements of all of the claims of the patent, with the exception of those relating to the "offset" guards. They were fitted with what is known as a "straight" nose guard; that is, one located in the same plane as the lens. But even in these the edges of the guards protruded slightly beyond the sides of the lens frames. Long before the patent in suit was applied for, many forms of eyeglasses having "offset" nose guards and which could be folded were on the market, and were shown in patents both domestic and foreign. In none of these, however, was there the guideway of claim 4, but the familiar hook and post was used to retain them in folded position. In all but two the spring connecting the lenses was not pivotally connected with the lens frame, as called for in each of the claims of the patent in suit. This latter feature ap-

pears in the Dorn patent of 1868 and in the eyeglasses illustrated in the French catalogue of the "Société des Lunetiers," published in 1887.

It had for years been the custom of opticians to change the type, shape, and position of nose guards on glasses to suit purchasers, and very frequently "offset" nose guards were attached to the folding eyeglasses of the prior art. The latter, however, do not appear, so far as the evidence shows, to have been attached to the Geoffroy folding Oxfords of the 1907 type; but at least one optician did, on several occasions, bend the "straight" guards of these glasses into "offset" position, so as to fit the nose of customers, without interfering with the folding and automatic opening of the glasses. The type or shape of the "offset" guards shown in the patent were also old in the art. Glasses made in accordance with those shown as Figure 55 on page 54 of the English edition of the French catalogue were sold and used in this country between 1887 and 1909 quite extensively. On some of these the nose guards were "offset." They were designed to fold and were held in folded position by the usual hook and pin. The "offset" guards on these did not have posts separate and distinct from the guards, but a loop was made in the upper part of the guards, the end of which was fastened to the upper part of the lens frame, and the lower end was, without any loop, fastened to the lower part of the lens frame, in the same manner as on one style of glasses manufactured by the plaintiffs under their patent. The inner edges of the nose guards were inclined. It thus appears that "offset" guards on folding eyeglasses with pivotally connected springs were not new when the patent in suit was applied for. The loop of the French glass might readily be said to be the post of the patent; but, assuming that it is not, the question at once arises whether it constituted invention to substitute posts for the means by which the guards of the French glasses were fastened to the lens frames, or to use a guard, the terminals of which were free of the lens frame, instead of one whose terminals were fastened to the lens frame. I cannot conclude that it did. I think that it falls within the well-settled rule that it was at the best merely the substitution of an equivalent. It therefore follows that there is no invention in the combinations of claims 1, 2 and 3.

The remaining question is whether the combining of these elements with the guideway of claim 4 involves invention. As before stated, all of the elements of claim 4 with the exception of the "offset" nose guards were present in the eyeglass made and sold by Geoffroy & Co. as early as the spring of 1907. As "offset" guards on folding eyeglasses with pivotally connected springs were old, it required, in order to apply the "offset" guards to the Geoffroy glass of 1907, merely an adjustment of the location and shape of the guards. The evidence, I think, demonstrates quite conclusively (without referring to the opinions expressed by witnesses as to whether they could have done it if they had been called upon) that this was within the skill of any ordinary optician. No new idea was involved. In fact, the suggestion that such a change in the 1907 glasses would be advisable was not original with the patentees. I appreciate that courts have in many cases decided that slight variations from the prior art constituted invention, but I think the improvements of this patent fall within that class of cases discussed in Mr. Justice Bradley's classic opinion in Atlantic Works v. Brady, 107 U. S., 192 at 199, 2 Sup. Ct. 225, 27 L. Ed. 438, et seq. It follows, therefore, that all of the claims of the patent are void for want of invention, and that the bill must accordingly be dismissed.

One other matter requires mention. The plaintiff has moved to strike out the evidence given by witnesses who were examined in Southbridge, Mass., and Chicago, Ill. This motion seems to be based upon the ground that it was assumed by counsel before these witnesses were examined that they would testify regarding the prior use, knowledge and sale of the patented eyeglasses by two optical companies, located respectively at Southbridge and Chicago. Their testimony actually related to the prior state of the art and the practice of opticians in changing and adjusting nose guards. The testimony in Chicago was taken pursuant to section 863 of the Revised Statutes (Comp. St. 1913, § 1472), and the testimony in Southbridge pursuant to an order of this court which did not limit the character of the testimony.

I know of no principle that would make the testimony, if otherwise relevant and material, incompetent because counsel misapprehended the purpose for which the witnesses were to be sworn. As above shown, the decisive question in the case was whether the patent involved invention. This necessitated the ascertainment of the prior state of the art and evidence tending to show it was of course admissible. The defense of want of invention, including the right to introduce evidence of the prior art is always open and it is not necessary to set it up in the answer. Dunbar v. Myers, 94 U. S. 187, 198, 24 L. Ed. 34; Slawson v. Railway Company, 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576; Eachus v. Broomall, 115 U. S. 429, 6 Sup. Ct. 229, 29 L. Ed. 419; Baldwin v. Kresl, 76 Fed. 823, 22 C. C. A. 593 (C. C. A. 7th Cir.).

Munn & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for appellants.

Harry L. Duncan, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree holding invalid the claims of Letters Patent No. 1,016,153, for folding eyeglasses, issued to Edwin P. Hutten and John McDougall, January 30, 1912, and subsequently assigned to the plaintiffs. The bill charges infringement. Infringement is not denied. The sole issue is the validity of the patent, which is challenged upon the grounds, first, that eyeglasses containing the alleged invention were sold more than two years before the date of the application for the patent; and second, that patentable invention is not involved.

The defense of prior sale is discussed in the opinion of the District Court, above set out. It is clear that the defendant not only failed to sustain the burden of proving the alleged prior sale beyond a reasonable doubt, Coffin v. Ogden, 85 U. S. (18 Wall.) 120, 21 L. Ed. 821; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; but failed to show it even by a preponderance of evidence. Mershon & Co. v. Bay City Box and Lumber Co. (C. C.) 189 Fed. 741, 748. This defense must fall.

The patent is for folding eyeglasses, illustrated by the kind known to the trade as Oxford folding eyeglasses. Eyeglasses of this general type contain straight or flat nose guards attached to the inner curves of the lens frames, seated within the plane of the lenses, and are easily folded. The invention of the patent consists in the use of projecting nose guards or nose guards offset beyond the plane of the lenses, so shaped and placed as to permit the lenses to be as readily folded as in Oxford glasses with non-projecting guards. The patentees say:

"The object of the invention is to provide new and improved folding eyeglasses provided with angular nose clips and arranged to permit folding of one lens over the other without hindrance by the projecting clips and without unduly straining the spring, pivotally connecting the lens frames with each other.

"For the purpose mentioned, use is made of the lens frames pivotally connected with each other by a spring, and provided with rigid posts carrying angular nose clips adapted to pass each other on swinging one frame toward the other, and to allow of turning the frames on their pivots to pass one frame over the other."

The specifications fairly state the subject matter of the claims, the features of which, when assembled, are,

(1) A pair of eyeglasses, comprising lenses;

(2) Frames for holding the lenses;

(3) A spring *pivotally* connected at its ends with the said frames at the top thereof;

(4) Posts on the said lens frames and projecting towards each other;

(5) Nose clips on said posts and projecting in the same direction and being outside of the plane of the frames;

(6) The spring being of such length and it and the clips being so arranged relatively one to the other that the clips pass one another by swinging one lens frame toward the other to fold the said frames one upon the other;

(7) A handle on one of the lens frames, having a guideway for receiving the other lens frame, and a spring catch for engagement with the entering lens frame to lock the lens frames in folded position.

Every element of this construction is old, and the function of each element, as employed in the combination, is not varied or distinguished from the function which each would separately exert, if employed alone. Lenses and lens frames are as old as eyeglasses themselves. The pivotal bridge spring has been in use for fifty years (Letters Patent No. 76,420 to Dorn, 1868). Posts to connect the frames with nose guards have been in use since 1884 (Letters Patent No. 292,479 to Fox). Projecting nose clips or nose guards are as old as Letters Patent No. 343,876 to Wells, 1886; Letters Patent No. 346,713 to Boker, 1886; and Letters Patent No. 549,991 to Bilhoefer, 1895. A handle on a lens containing a spring catch used to hold the folded lenses is a standard lorgnette spring catch, certainly as old in the art as the Geoffroy Oxford eyeglasses of 1907. Folding eyeglasses appear in Letters Patent No. 76,420 to Dorn as long ago as 1868. Therefore, if invention is to be found in the eyeglasses of the patent in suit, it must reside in the remaining element of the claims, which consists of the arrangement of these old elements in a manner to permit projecting nose guards to pass each other without interference when the lenses are folded one upon the other.

If the patent related merely to folding eyeglasses with projecting nose guards, it would be anticipated by folding eyeglasses with offset nose guards made by the American Optical Company in 1898. These eyeglasses contained a bridge spring *rigidly* connected with posts projecting from the lens frames. The claims of the patent, however, are not broad enough to cover glasses with any kind of bridge spring. They restrict the patent to eyeglasses comprising "a spring *pivotally* connected at its ends with the said frames." This limitation appears in each claim. While the patentees disclaim "the special construction of the pivotal connection" as a part of the patent, and while they do not limit themselves "to the particular construction shown and described," nevertheless as each claim provides a construction with a bridge spring "pivotally connected" with the frames, and discloses no other construction, we are constrained to limit the claims, for the pur-

pose of our consideration, to a structure including a bridge spring pivotally connected with the frames.

A bridge spring is a flexible strip of resilient metal used to connect the lens frames and hold them in position on the nose. A pivotal bridge spring is such a metal strip with its terminals connected with the lens frames by engagement with pivots seated in the upper part of the frames. These pivots are, in turn, actuated by spiral springs. A pivotal bridge spring is capable of three movements, two from the pivots and one from the pliant or yielding quality of the metal strip.

A pivotal bridge spring is known in the art as a French double spring. It appeared as early as Letters Patent No. 76,420 to Dorn in 1868, and is described in the Catalogue of Société des Lunetiers of 1887. While there is dispute as to whether the eyeglasses of the Dorn patent of 1868 and of the French publication of 1887 contained offset nose guards, there is no dispute that they were folding glasses and that they contained a bridge spring pivotally connected with the lens frames. Resolving the controversy on this point in favor of the patentees, we are inclined to comply with their request, that we accept the Geoffroy straight nose guard folding Oxford of 1907 as the state of the art prior to the patent, and consider the single question whether invention is involved in substituting upon such a structure offset nose guards for straight nose guards in such a manner as to enable the lenses to fold freely.

The patentees claim that they were the first to find a way for one offset nose guard to pass the other when lenses are being folded, and that the way found and the means disclosed by them constitute invention. We are not at all satisfied that they were the first to point out such a way, but, assuming for the purpose of this discussion that in this they are correct, we must inquire what was the way they disclosed and whether it amounted to invention.

The prior art shows that when the lens frames of glasses are connected by a bridge spring, the terminals of which are *rigidly* connected with the frames, the lenses will not close smoothly and in some constructions will not close at all, when the glasses are equipped with offset nose guards. But bridge springs of this fixed character were not used upon Oxford glasses, nor were bridge springs with fixed terminals used upon folding glasses of other types, excepting at a very early period. The art discloses that at a period beginning about 1870, pivotal bridge springs were used both in this country and abroad upon glasses that were intended to fold, and the reason for the use of such springs upon folding glasses is perfectly obvious to anyone manipulating the lenses of such glasses.

A bridge spring pivotally connected, being capable of three separate and successive movements, causes the moving lens to move or swing in three directions during the folding operation. When glasses are firmly held by the handle on the right lens frame, with the plane of the lenses vertical, a depression of the left or moving lens causes it to move in a downward and vertical direction, the right pivot of the bridge spring being used as an axis. With this movement of the left lens, the left nose guard, whether it be straight or projecting, is car-

ried directly below the right nose guard. Further pressure upon the left lens produces an axial movement of the left pivot, effecting a change in the direction of the movement of the left lens from vertical to horizontal, and toward the right lens, and causing the left nose guard to be carried beyond and to the right of the right nose guard. Continued pressure upon the left lens brings into action for the first time the resilience of the metal spring, causing the left lens to move over the right one until its motion is arrested by engagement with a sprig or catch and the folding movement is completed.

It thus appears that it is the *pivotally* connected bridge spring with its three clearance motions, that makes possible the free passage of nose guards in the movement of folding. Such a spring is old, very old. The patentees neither invented it nor discovered its function in folding eyeglasses. What the patentees did, and all that they did, was to so locate the offset nose guards upon the lens frames and to so shape them that, in the normal movements of lens frames connected by a pivotal bridge spring, one nose guard would clear the other, and upon completion of the movements, the two would nest. The idea of doing this did not originate with the patentees. It was suggested by the demand of the trade for offset instead of straight nose guards on Oxford glasses. That demand the patentees immediately met. To make such a substitution permitting such a result required nothing more than a little patience and some skill. It meant that the mechanic should select from the great variety of nose guards of the art, two of an appropriate design, alter their shape, if necessary, and by experiment find for them a proper location on the lens frames, so that upon being folded, the projecting guards would pass one another. The tripartite movement of the pivotally connected bridge spring made the accomplishment of this task obvious, the mechanical performance of which did not call for the exercise of invention and involved nothing more than mechanical skill. If the conception of the patentees amounted to an advance in the art, it was such as would spontaneously occur to a skilled mechanic or operator in the ordinary progress of manufacture, and does not merit the reward of a patent monopoly, which under the policy of the law is awarded exclusively to those who make some substantial discovery or invention which adds to human knowledge and makes a step in advance in the useful arts. Atlantic Works v. Brady, 107 U. S. 192, 199, 2 Sup. Ct. 225, 27 L. Ed. 438. We find no error in the decree of the District Court in adjudging invalid, for want of invention, all of the claims of the patent in suit.

The decree below is affirmed.

LOCOMOBILE CO. OF AMERICA v. PARKIN.*

(Circuit Court of Appeals, Third Circuit. January 31, 1916. On Petition for Reargument, April 14, 1916.)

No. 2060.

PATENTS ⊂328—INVENTION—CARBURETER.

The Parkin patents, No. 968,597, for a carbureter, and No. 1,082,762, for an improvement thereon, *held* void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit in equity by Joseph W. Parkin against the Locomobile Company of America. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 226 Fed. 800.

Fraley & Paul, of Philadelphia, Pa. (Emery, Booth, Janney, & Varney, Frederick L. Emery and Edward G. Curtis, all of Boston, Mass., of counsel), for appellant.

Synnestvedt, Bradley, Lechner & Fowkes, of Philadelphia, Pa. (Paul Synnestvedt and Harvey L. Lechner, both of Pittsburgh, Pa., of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Joseph W. Parkin, the grantee of patent No. 968,597, dated August 20, 1910, for a carbureter, and of No. 1,082,762, issued to him December 30, 1913, also for a carbureter, filed a bill and charged the Locomobile Company of America with infringement thereof. On final hearing the court, in an opinion reported at 226 Fed. 800, held infringement was sustained. On entry of decree, the Locomobile Company took this appeal.

The motive power of an automobile is an engine actuated by an explosive mixture of air and gasoline drawn into, compressed, and ignited in a cylinder. A carbureter regulates the proportions of air and gasoline constituting such mixture. These proportions vary under changing operative conditions. In the carbureter is a mixing chamber, with both air and gasoline inlets. The gasoline enters the chamber through the small inlet nozzle, and is kept substantially at the level of the nozzle by a float valve. As the engine operates, it causes a suction which draws air through the air inlet and past the gasoline nozzle. This passing air raises the gasoline from the nozzle into the mixing chamber in the same way a throat or nasal atomizer sprays liquid when its bulb is pressed. This mixture is rich in gasoline, and is suitable

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

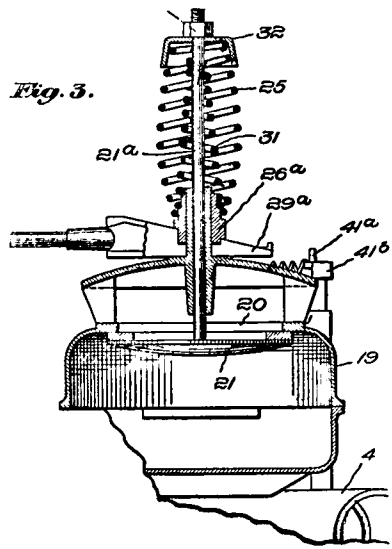
* Rehearing denied.

for starting an engine. But, when the engine is at high sustained speed and its parts heated, less gasoline is needed, for it has been found that, after the engine has been started with the gasoline-rich mixture, higher speed and less deposit of carbon result from an air-rich, gasoline-lean mixture. In other words, under sustained speed conditions it is desirable to reduce gasoline and increase air in the mixture. To provide this additional air, a carbureter has an auxiliary intake provided with a spring-controlled, normally closed valve. As the engine gets under way, this valve opens under the increased suction caused by the rapidly reciprocating pistons, more air is drawn into the mixture, and its gasoline richness is reduced. As the engine speeds up, the air valve opens wider, owing to the valve-controlling springs being so proportioned and adjusted that the valve automatically maintains a proper feeding capacity, due to the balance between engine suction and spring resistance. But not only does the speed of the engine call for change in the mixture, but varying atmospheric conditions as well—cold or damp weather requiring gasoline richness, while warm or dry weather calls for air richness. These and various other conditions, such as different types of engine and their valves, create varying conditions which necessitate varying mixtures.

Turning to the art prior to the patents in suit, we take the Packard carbureter, shown in the accompanying figure, to show how this auxiliary air inlet apparatus was automatically regulated. In this figure *21* is the valve and *21a* is its stem. Surrounding that stem is the light-tensioned exterior spring *25* which is seated at its lower end on the collar *26a*, which latter is adapted to slide on stem *21a*.

The upper end of the spring normally rests against stem cap *32*, and its fixed tension can be changed by the nut on the head of the stem. The low-tensioned spring *25* is initially adjusted so as to properly control the valve when the engine is started. When the machine is running at its lower speed, this spring controls valve *21*, and as speed is gradually developed the increasing cylinder suction draws the valve *21* down and puts more air in the mixture. The valve thus dropping and pulling down stem *21a* through collar *26a*, causes light-tension spring *25* to tighten, and as it tightens its tension tends to pull up the valve. It will thus be seen that the outer or light-tensioned spring *25* can be initially and pre-operatively shop-adjusted by the stem nut, when such pre-operative adjustment is desired,

Fig. 3.



and it will also be noted that during operative conditions, and when the engine is starting, idling, or running at lower speed, this light-tension spring, by the action of the engine, is automatically adjusted to such higher or lower tension as properly regulates the valve to pass the needed proportion of air. It will likewise be observed that the device also contains means for operatively adjusting the tension of this spring. This is done by inserting or withdrawing the wedge-shaped member *29a*, whose mechanical operation, it will be observed, is precisely that caused by the movement of the valve, viz., if pushed in it lessens the distance between cap *32* and collar *26a*, and tenses light-tension spring *25*. It is the same thing that is done by valve *21*, when it is drawn down by suction. It will thus be seen that the Packard wedge serves during the original starting, idling, and low speeding of the engine to adjust and regulate the light-tension spring *25*, and that during those times that spring, in connection with suction, controls and regulates the movement of valve *21*. We here call attention to this fact, viz., the complete, independent, operative control of light-tension spring *25* by the thinner end of the Packard wedge, as one of special significance with relation to the operation of Parkin's device.

Turning from this operative low speed period, when the light-tension spring dominates the valve, we pass on to an operative condition when the engine's speed increases. Nested within the light-tension spring *25* and encircling stem *21a*, is the high-tension spring *31*. This spring is normally under no pressure, and it only comes under pressure when the high speed of the engine draws down valve *21* and stem cap *32*, so that cap *32* engages the upper end of spring *31*. It will thus be seen its function is to dominate valve *21* when the engine is running at high speed. When such dominating function comes into play by the cap and spring top engaging, the tension of such high-tension spring may be still further increased by the use of the thicker end of the Packard wedge. When that end of the wedge is used under such high speed conditions, it is apparent that the wedge effects a dual and conjoint adjustment of both light and heavy tension springs, instead of the single, independent, light-tension spring adjustment when the engine was running at low speed. But, even so, such increase of tension as the light spring is given must in the nature of things be of relatively small moment, since the like stem shortening to which both springs are subjected must necessarily impart more tension proportionately to the stronger than to the weaker spring. Be that as it may, it necessarily follows that, as the high-tension inner spring dominates the valve at high engine speed, and the low-tension spring's effect is negligible, it would seem that a wedge action, which further increases such dominating power in the high-tension spring, may for practical and operative purpose be regarded as effecting an actual independent adjustment of the low-tension spring under low speed operative conditions, and a practically independent adjustment of the high-tension spring under high speed operative conditions.

In this state of the art, Parkin devised the spring adjustment shown in the accompanying figures:

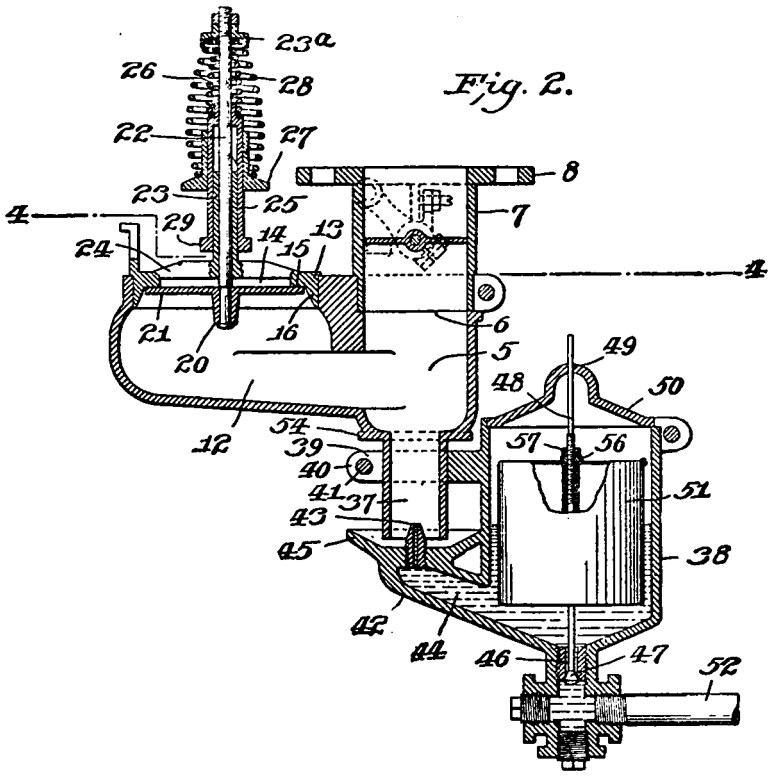


Fig. 2.

When the machine is in use the outer or light-tension spring *28* and the inner or high-tension spring *26* of Parkin's device operate in precisely the same way as the same two springs in the Packard device, to automatically control the air valve. The outer or light-tension spring dominates during low speed, and the inner or high-tension dominates high speed operation. Thus the specification says:

"During the operation of the engine, the greater the speed thereof, the greater is the tendency of the piston to create a vacuum in the cylinder in drawing in the explosive charge, and therefore, in order to preserve as nearly as possible the proper proportion of mixture of vaporized oil and air, the two springs *26* and *28* are provided, which may be adjusted to vary the spring pressure acting upon the valve *20* to hold it against its seat. That is to say, if it be desired to run the engine at a *slow speed*, the arm *29* will be adjusted to the low part of the cam *30* to move the spring *26* out of engagement with the head *23*, and the arm *29* will be adjusted upon the cam *32* to a position in which it will cause the *spring 28* to exert the proper amount of pressure upon the valve *20* to produce the proper explosive mixture for the desired speed of the engine. When, however, it is desired to run the engine at high speed, the arm *29* is adjusted in respect to the cam *30* not only to bring the spring *26* into engagement with the head *23a* but also to bring it into engagement with the head with sufficient pressure which, *in conjunction with the pressure of the*

spring 28, will resist the tendency to open the valve *20* sufficiently to prevent the engine at high speed from drawing an excess amount of air into the explosive mixture through the valve opening *14*. It will thus be seen that by the employment of the springs *26* and *28*, and their coacting parts, a wide range of adjustment of the pressure against the valve *20* is obtained, and that the arm *29* may be adjusted upon the cam *30* to provide the required pressure for the desired high speed, and the arm *31* is adjusted in respect to the cam *32* to produce the required pressure for the desired low speed."

It will thus be seen that the only difference consists in Parkin's adjustment cam *29*, which adjusts low-tension spring *28*, and arm *29*, which adjusts high-tension spring *26*. These arms do adjust the springs separately and independently, and such independent adjustment is the only element in combination which differentiates Parkin's device from Packard's. The case, therefore, narrows down to the question whether this difference constitutes invention. We are satisfied it does not. As we have already seen, when the engine is run at low speed Packard, by the use of the forward end of his wedge, adjusted his low tension spring independently by pushing the inclined plane of the spring so as to force the spring top against the stem ahead, and thus increase tension. In the same way, by withdrawing the wedge, he lowered tension. By use of similar mechanical means, to wit, the inclined surface of a cam, Parkin lessened or increased the tension of his low-tension spring, while his engine was running at low speed, as will be seen by the extract quoted above. It is manifest, therefore, that no invention was involved in the slight mechanical change incident to this change, or in installing a similar cam and arm to increase or lessen the tension of the high-tension spring. Whatever advantage accrued from the change, we are of opinion that it did not involve invention and the claims in issue, 1, 2, 3, 4, and 5, are invalid. Such being the case, it follows that patent No. 1,082,762 which was an improvement based and dependent on the first patent, and which simply consisted in controlling the adjustment from the operator's seat, is equally lacking in invention.

The decree below is therefore reversed, and the cause will be remanded, with instructions to dismiss the bill.

On Petition for Reargument.

PER CURIAM. We have carefully re-examined this case, and are satisfied the court thoroughly grasped the pertinent and controlling facts, and that the decision was right. We are further of opinion no different conclusion would have been reached, had the alleged newly discovered evidence been before us.

The petition for reargument, as well as the petition for leave to apply to the District Court for leave to take further testimony, are therefore denied.

AUTOMATIC RECORDING SAFE CO. v. BURNS CO.

(Circuit Court of Appeals, Second Circuit. February 15, 1916. On Rehearing, March 31, 1916.)

No. 210.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—SAVINGS BANK.
The Fisher patent, No. 793,779, for a portable savings bank, discloses patentable novelty and invention, and is valid. Claims 1, 5, 6, 7, and 8 also *held* infringed, and claims 2, 3, and 4 not infringed.

2. PATENTS ⊂=170—CONSTRUCTION OF CLAIMS.
A construction which would make two verbally different claims in a patent identical is not to be followed, when there is nothing in the prior art which constrains to any such construction.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 245; Dec. Dig. ⊂=170.]

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

Suit in equity by the Automatic Recording Safe Company against the Burns Company. From the decree (224 Fed. 513), complainant appeals. Modified and affirmed.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York. Several patents were involved, but the only questions argued before us are concerned with the patent to Charles Fisher, No. 793,779, issued July 4, 1905, for a savings bank. The District Court found validity in all the claims of this patent, and that claims 6, 7, and 8 were infringed. Complainant has appealed from so much of the decree as holds that claims 1 to 5, inclusive, are not infringed. Defendant has not appealed. The opinion of Judge Sanborn will be found in 224 Fed. 513.

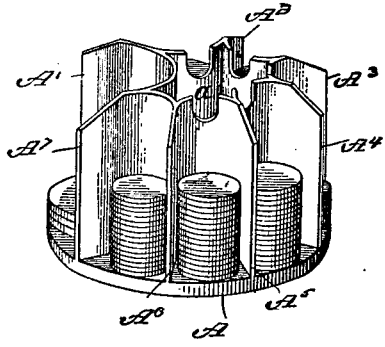
Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill. (John H. Lee and P. C. Dyrenforth, both of Chicago, Ill., and Hillary C. Messimer, of New York City, of counsel), for appellant.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

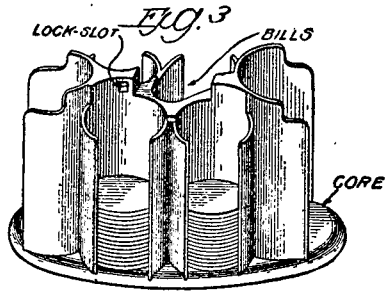
LACOMBE, Circuit Judge. The patents all relate to what are known as portable savings banks. Such a bank consists of a case to hold the coins which are to be placed in it, and an outer case to be slipped over the coin container. The two cases are locked together and the coins slipped in through slits in the outer case. When the bank is full, the cases may be unlocked and the coins removed. Originally the coin case was a single compartment, in which coins of various denominations were mingled together. Thereafter the coin container was provided with a series of tubes or compartments, so arranged that coins of one denomination are separated from those of another denomination. With banks thus constructed the container had to be turned upside down in order to remove the coins from their

several containers; the result was that they would frequently become commingled when discharged and had to be sorted before counting. This patent, 793,779, undertook to remedy that defect, so that, when the outer case was removed, the coins in the several compartments could be readily counted. The devices to accomplish this were held to involve patentable novelty, and we see no reason to dissent from that conclusion. The following drawing will sufficiently indicate the arrangement of the coin containers. When the outer case or cover is slipped over the coin case its interior combines with the flanges *A1, A2, A3,* etc., to form separate compartments for coins of different denominations.

Fig 3.



It is apparent that, when the outer cover is removed, the coins may be counted, and the separate piles be separately removed, either by drawing each pile out, or by lifting it up. Defendant's device, or rather its coin-containing part, is shown below:



The five claims which complainant contends are infringed as well as Nos. 6, 7, and 8, read as follows:

"1. In a portable savings bank, a core comprising a plurality of rigid vertical flanges spaced apart to form compartments to receive coins, the distance between the flanges of each compartment being greater than the diameter of the coins to be received by such compartment, the adjacent flanges being united at corresponding ends by walls adapted to partially surround the coins.

"2. In a portable savings bank, a core comprising a base, a plurality of rigid radially projecting flanges spaced apart to form compartments to receive coins, the distance between the outer edges of the radial flanges at each side of each compartment being greater than the diameter of the coins to be received by such compartment.

"3. In a portable savings bank, a core comprising a horizontal base, a plurality of rigid vertical radially projecting flanges spaced different distances apart to form compartments to receive coins of different denominations, the distance between the outer edges of the radial flanges at each side of each compartment being greater than the diameter of the coins to be received by such compartment.

"4. In a portable savings bank, a core comprising a circular horizontal base and a plurality of rigid vertical radially projecting flanges spaced different distances apart to form compartments to receive coins of different denominations, the inner edges of adjacent flanges being united by curved walls conforming to the peripheries of the coins, and the outer edges of adjacent flanges being spaced apart a distance greater than the diameters of the coins to be received by the compartment between such flanges.

"5. In a savings bank, the combination with a base, of a plurality of rigid vertical flanges supported above the base and spaced apart to form compartments for the coins, the distance between the flanges of each compartment being greater than the diameter of the coins to be received by such compartment, a cover comprising a surrounding side wall and top wall united thereto, said cover adapted to inclose the base and the flanges thereon, and means for detachably securing said cover to the base."

The patent being a meritorious one, infringement should not be avoided merely by modifying a Chinese copy by so curving the flanges which separate the piles of coins that the distance between their outer edges is less than the diameter of the coin—unless such limitation of the claim clearly appears. Such limitation does appear in claims 2, 3, and 4, which expressly provide that the "distance between the outer edges of the radial flanges" shall be greater than the diameter of the coin. But in claims 1 and 5 the limitation is different; there are a plurality of "radial vertical flanges," "spaced apart to form compartments to receive coins," concededly defendant has these. If the definition of the element stopped there the claim would cover coin receptacles in which the coins might enter but would not lie flat—standing on edge with part of the coin projecting beyond the flanges. But the patentee contemplated having the coins lie flat; therefore he provided that "the distance between the flanges of each compartment should be greater than the diameter of the coins to be received by such compartment." This qualification would cover a compartment in which so much was cut away that the stack of coins could be pulled out through the opening between the flanges, and also a compartment in which the cut away portion (or opening between the flanges) would not allow this to be done and therefore the stack of coins would have to be lifted up.

[2] It seems to us entirely clear that claim 5 has no words which can be construed to restrict the distance between the outer edges of the flanges to less than the diameter of the coins. Certainly in common speech the phrases "between the flanges" and "between the outer edges of the flanges" do not mean the same thing. And since the first phrase is used in some claims and the second phrase in other claims it would seem that the patentee appreciated the distinction. To give both phrases the same meaning would make two verbally different claims identical, which is a construction not to be followed when there is nothing in the prior art which constrains to any such construction.

Claim 1 concludes with the words "the adjacent flanges being united at corresponding ends by walls adapted to partially surround the coins." The rear ends of two adjacent flanges are "corresponding"; so are their front ends. But this concluding phrase cannot possibly refer to the front ends, because, if they were united, the coins would be wholly, not partially, surrounded, and could not be removed at all without dumping.

We are satisfied that claims 1 and 5 are infringed, and to that extent the decree of the District Court is modified, with costs to appellant. In all other respects the decree is affirmed.

On Rehearing.

PER CURIAM. The opinion makes perfectly clear what was and what was not decided by this court and a rehearing as to these questions is denied. Regarding the other claims referred to in the petition as to which the defendant has not appeared, we see no reason why a pro forma judgment of reversal should not be entered.

E. E. JOHNSON CO. v. GRINNELL WASHING MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1916. Rehearing Denied March 29, 1916.)

No. 2285.

1. PATENTS ⊂=328—VALIDITY—GEARING FOR WASHING MACHINE.
The Phillips patent, No. 950,402, for a gearing device especially adapted to the operation by power of washing machines and wringers, by means of which the washing parts of the wringer may, when desired, be operated at the same time by the same power shaft, *held* void as merely an aggregation of old elements.

2. PATENTS ⊂=26(1)—"INVENTION"—COMBINATION OF OLD ELEMENTS.
It is not "invention" to combine old devices into a new machine or manufacture, without producing any new mode of operation.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⊂=26(1).
For other definitions, see Words and Phrases, First and Second Series, Invention.]

3. PATENTS ⊂=26(1)—INVENTION—COMBINATION OR AGGREGATION.
To constitute a patentable combination, it is essential that there should be some joint operation performed by its elements producing a result due to their joint and co-operating action.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⊂=26(1).]

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Suit in equity by the Grinnell Washing Machine Company against the E. E. Johnson Company. Decree for complainant, and defendant appeals. Reversed.

The District Court found claims 5, 6, 7, and 8 of patent No. 950,402, granted February 22, 1910, to W. F. Phillips for a gearing device especially adapted to the operation by power of washing machines and wringers to be valid and infringed by appellant. In the proceedings, claim 6 was conceded to best set out the invention, and will be herein taken as typical of the subject-matter of this suit. It reads as follows, viz.:

"A gearing device of the class described comprising a support, a power shaft mounted on the support, means for imparting a continuous rotary motion to the power shaft, an upright shaft *45* mounted in the support, a driving device for the upright shaft operatively connected with the power shaft and capable of imparting an alternating rotary motion to the upright shaft, a horizontal shaft *39*, a driving mechanism for the said shaft *39* connected with the power shaft and capable of imparting a rotary motion to the shaft *39*, and a controlling means applied to the driving device for the shaft *39*, for reversing the

movement thereof and also for operatively disconnecting the shaft *39* from the driving shaft."

Figs, 1, 2, and 7 of the drawings are as follows, viz.:

Fig. 1.

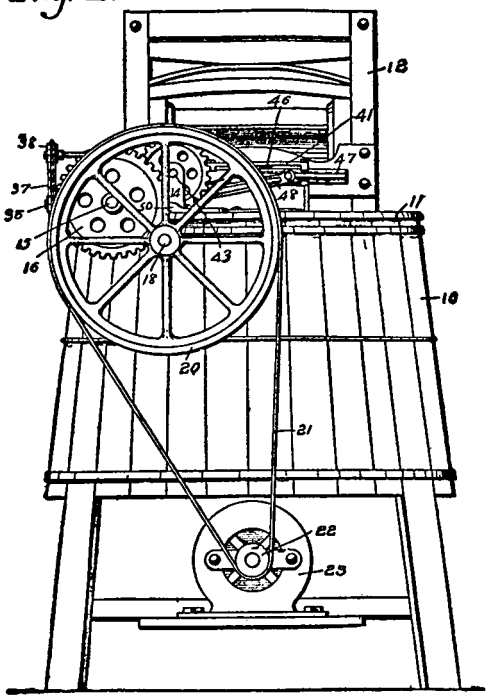


Fig. 2.

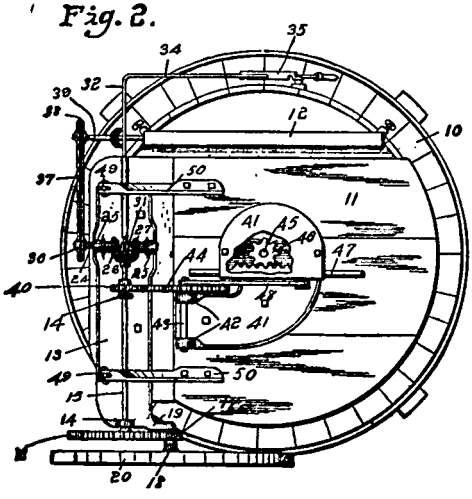


Fig. 7.

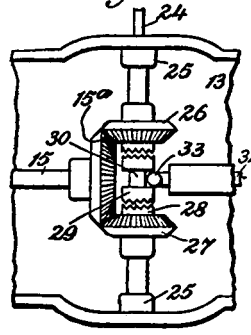


Fig. 1 shows a side elevation of the device mounted on a tub, Fig. 2 shows a top plain view thereof, and Fig. 7 shows a detail plan of the actuating device of the wringer. The body portion of the washing machine *10* carries a cover *11*. A wringer *12* is placed on the body portion. The washer and wringer are not elements of the patent. The greater part of the device of the patent is connected with and supported by the base *13*, bolted to the body portion of the washing machine, on which base are the bearings *14* to receive the rotatably mounted power shaft *15*. At its outer end shaft *15* carries a gear-wheel *16* meshing with small gear *17* on the shaft which carries the flywheel. The application of power from the motor *23* through the pulley *22*, belt *21*, and flywheel *20* will be readily understood. Mounted on the base *13* is a rotatable shaft *24*, supported in bearings *25*, having rotatably mounted thereon pinions *26* and *27* spaced apart and provided with ratchet clutch members *28* on their adjacent faces. Between pinions *26* and *27* is a hub *29* slidingly and nonrotatably mounted on the shaft *24* and having an annular groove *30*, and on its outer faces ratchet clutch members or teeth *31*, designed to coact with the teeth on the beveled pinions *26* and *27*. The clutch member *29*, by means of its connection with the lever *34*, can be manually manipulated so as to reverse the movement of the wringer cylinders by throwing the clutch cam first into moving contact with the gear wheel *26* and then back to *27*, or, when desired, the operator can throw the clutch into an inoperative position by throwing the arm *34* into the center notch provided for controlling the operation of the direction mechanisms. Even when the cam is at its inoperative position, the beveled pinions are in mesh with the beveled pinion *15a* which is at the inner end of the power shaft *15* and furnishes power to the wringer device. The device for imparting this power to the wringer shaft *39*—the sprocket wheels *36* and *38* and the sprocket chain *37*—will be readily understood without further description thereof. The power shaft *15* carries a small gear wheel *40* for operating the washing machine. This part of the claimed patented device is operated by one of the well-known methods whereby the stirrer shaft or dolly is given an oscillating motion by means, not here in question, applied to the vertical shaft *45* on the support. The support, or lid, carrying the washing machine, is hinged and may be lifted up so as to release it from contact with the power shaft. In such case the wringer will be operated, if desired alone. Without its being so out of mesh with the pinion on the power shaft, there is no way of operating the wringer without at the same time operating the washing machine, though, by means of the cam clutch device, the wringer may be at rest when the washing machine is in action. The power shaft is located above the longitudinal central portion of the base *13*. The clothes constituting the wash may be removed by lifting the lid carrying the washing device which rests thereon. Then the contents of the tub can be removed manually and fed to the wringer, and back again if desired. There is no operative connection between the clothes in the tub and the wringer.

The defenses set up are invalidity, because of an unpatentable combination, also want of novelty in view of the prior art, and noninfringement. The patent was twice sustained by the District Court for the Southern District of Iowa and by the Eighth Circuit Court of Appeals in Newton Washing Machine Co. v. Grinnell Washing Machine Co., 222 Fed. 512, 138 C. C. A. 112. The decision of the District Court in this present cause was held to await the decision of the cause in the Eighth circuit. Thereafter the order sustaining the patent and decreeing infringement and accounting was entered.

The errors assigned are: (1) That the court erred in holding validity and ordering an accounting; (2) that the court erred in not holding the patent invalid, because (a) of aggregation, (b) of anticipation, and (c) of nonpatentable subject-matter; (3) that the court erred in not so limiting the scope of the patent as to differentiate it from appellant's device, and in not dismissing the bill for want of equity.

Taylor E. Brown and Clarence E. Mehlhope, both of Chicago, Ill., for appellant.

Ralph Orwig, of Des Moines, Iowa, for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] The most important question presented is: Do the facts disclose a combination or a mere aggregation? It is conceded that the washing gear, the wringing gear, and the operating gear are all old. Efforts of appellant's counsel to ascertain just what the combination claimed by appellee was, were not entirely satisfactory. Appellee's expert witness was asked:

"Is there any coaction whatever between the washing machine as such and the wringing machine as such, or any co-operation between them?"

To which he replied:

"I think there is. You can use both at the same time. You can be washing one batch of clothes while you are wringing out another batch in the course of the same operation of doing *a family washing.*"

In reply to the question,

"What new result is performed by this gearing described in the Phillips patent and claimed in the claims in issue?"

—the same witness replied:

"As nearly as I can recall the prior art, the Phillips patent was the first to disclose a power-driven dolly type of machine, in which the user could use the machine for washing clothes and wringing them into one tub and out of another as occasion demanded, in the course of doing, say, *a family washing.*"

When asked by appellant's counsel,

"Suppose you have one blanket to wash—you put it in the washing machine and wash it. Then that day or the next you wring it. Will you state in what way there is any co-operation between the action of these two machines, speaking, as I have been, of the Phillips machine?"

—appellee's expert, after some colloquy, replied:

"There is the structural co-operation or coaction that I explained before, inasmuch as you have one common support for them and a common power shaft and a common motor."

When further asked as to whether there is not the same coaction between machines driven by a line shaft on the machine shop bench as there is between the washing machine and the wringer, the same expert again, after colloquy, replied:

"Considered purely as a drive shaft and the first element of the train of gearing, yes; but when you come to consider the action on the ultimate elements of the gears, that would be very different. In one case you have the final action on the clothing. In the other case, if I recall your illustration correctly, the final action is on the wood that is being put in shape."

The same witness conceded that to drive one shaft from another shaft and to drive a reverse mechanism, so that a shaft may be driven in either direction or stop it, was old. When asked:

"The sum and substance of your position with regard to the claims in issue here would then appear to be this—and please state yes or no—whether I have

correctly stated your position; if one take a dolly washing machine of the generally well-known type that has been on the market and was on the market long prior to Phillips—if he placed on the tub of that washing machine a wringer in any of the usual places where a wringer is placed most conveniently, if he takes any kind of familiar mechanism for operating that dolly, all well known prior to Phillips, if he provides means for driving his wringer by power, with a reverse mechanism so the wringer may be driven in either direction, and couples the wringer drive mechanism, no matter what kind it may be, provided it includes a reverse mechanism, and the dolly driving mechanism, with a common drive shaft, he will infringe the claims involved in this suit?"

—this witness replied:

"I think your statement is a little bit broad in some particulars. As far as it goes, it is probably correct; but I would like to add that one claim, for instance, the sixth, provides that your reversing gearing must be of such a character that the controlling mechanism will allow the wringer rolls to be at rest in spite of the fact that the power shaft is running. Possibly your statement is rather broad with reference to claim 7 for instance, because I do not think you included the limitation of 'a hand lever for adjusting said controlling means' in your statement. Then, too, you omitted from your statement the limitation as to there being 'a prime mover carried by the support for imparting a continuous rotary motion to the power shaft.' Furthermore, as I understood your statement, you did not include any limitations as to the two trains of gearing leading from the wringer rolls and the dolly shaft to the common drive shaft, being properly designed on the one hand to rotate the wringer rolls at a practical speed, and on the other hand, being properly designed to swing the dolly shaft through the proper angle and at a proper speed. It seems to me that with the additions I have made by way of my answer, that the statement would be correct, but as it stood in your question, it is decidedly too broad."

In his brief, page 15, appellee's counsel say:

"He further realized that, in order to make his machine of the greatest possible value to the housewife, he must greatly reduce the time required for an ordinary family washing, by contriving a structure that would both wash and wring at the same time, not, of course, on the same garment, but upon different batches of the same washing."

At page 23 it is said:

"Applying this well-settled rule to the instant case, it is only necessary for the court to find that the Phillips washing machine accomplishes the old result—i. e., rubbing and squeezing the clothes, in a more convenient, facile, and economical manner than was capable by the use of any prior art device."

Speaking of a so-called Shedlock device, on page 64 of the brief, the same counsel say:

"* * * But he [Shedlock] never had any notion of providing a unitary gearing to do all of the washing," etc.

Again, at page 73 of the brief:

"Clearly, then, the reason why this Shedlock device does not belong to the same class of inventions as the Phillips device, and the reason why it cannot be seriously considered as being a complete anticipation of the Phillips device, is that Shedlock never even considered the problem of providing a single unitary washing machine device that was capable of doing all of the work inci-

dent to a washing. He only contemplated doing the rubbing part of the washing process and contented himself with a mechanism for that purpose."

Again, at page 101 of their brief, appellee's counsel say:

"Not a single prior art machine for doing the work of a family washing by power has remained on the market since the appearance of the Phillips machine."

The only reference to the point now under consideration, contained in the said opinion of the Eighth Circuit Court of Appeals, reads as follows:

"There is no new element in the combination. Therefore, in order to be patentable, the combined action must produce some new result, or an old result in a more efficient and economical manner. The new result in this instance is the washing and wringing of clothes at the same time in a safe and convenient way. This does not mean that the garment is washed and immediately thereafter passed through the wringer. It means that, while some garments are going through the wringer, other garments are being washed and that the two operations go on simultaneously. The wringer is made subject to perfect control by a lever easily and safely manipulated by the operator. The device possesses elements of utility, novelty and invention. The washing machine and wringer are, by the gearing device, made to act jointly, and a new and useful result is produced. The device is therefore patentable."

Thus we have assigned as grounds for holding the device to be a valid combination, first, the structural co-operation based upon the facts of a common support, a common power shaft, and a common motor; and, second, a new result or an old result attained in a more efficient and economical manner, viz.: (a) Doing a *family washing;* (b) the wringer and washing device are made to act jointly—i. e., to operate at the same time, when desired. There is no pretense that the operation of the one affects that of the other. The operator must stop the washing machine by lifting up the tub lid before the clothes of that washing can be inserted in the wringer. The tub mechanism does not feed to the wringer. Its ultimate mission is ended when the lid is lifted. The work of feeding the wringer is exactly the same as it would be, were the wringer located on some other support equally convenient, although driven by some independent source of power. The two machines severally produce the identical result in the alleged combination which they produce when used independently. There is no relative motion of the two which contributes to or constitutes a new result. As before stated, the actuating mechanism is old and produces no new result. The fact that the two devices have the same support does not tend to show combination. The earth is the common support of all supported things. That fact suggests no thought of relation. Nor do we think that *doing the family washing* can be claimed as an improved result. Else one might add to the device of the patent an old dry kiln, ironing board, and heated flat iron, and have a patented family laundry. The only advantage obtained is one of convenience. The two machines could both be operated on the same support by different actuating means attached to the same tub, running at the same time,

and requiring no more regulating and protecting features than those of the patent. We do not find one element of coaction or co-operation between the washer and the wringer, or one patentable or improved result from their association on the tub. The action of the washwoman in taking the clothes from the tub and feeding them to the wringer results in nothing new. No unitary result is produced.

In the so-called capstan case (Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 218, 28 L. Ed. 702) it was held that no invention was involved in merely operating by steam what was theretofore operated by other agencies. So that there is no more invention in the patent in suit than there would be were each machine operated by hand. What constitutes a patentable combination has frequently been before the courts. Mr. Justice Curtis, in Forbush v. Cook, 2 Fisher, 669, Fed. Cas. No. 4,931 (1859) says:

"To make a valid claim for a combination, it is not necessary that the several elementary parts of the combination should act simultaneously. If those elementary parts are so arranged that the successive action of each contributes to produce some one practical result, which result, when attained, is the product of the simultaneous or successive action of all the elementary parts, viewed as one entire whole, a valid claim for thus combining those elementary parts may be made."

In San Francisco Bridge Co. v. Keating, 68 Fed. 353, 15 C. C. A. 476, the Circuit Court of Appeals for the Ninth Circuit approved an instruction which reads:

"Invention is that which brings out of the realms of the mind something that never existed before. It may consist in the combination of old elements, the invention being in the combination. To make it so, there must be a joint action or operation of the elements—i. e., the elements must co-operate or act jointly to produce the result or object of the combination—or else the assembled elements [constitute] a mere aggregation, and is not patentable. It is not necessary, however, that their action should be simultaneous. They may be successive."

[2] The Supreme Court, in Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647, says it is not invention to combine old devices into a new machine or manufacture, without producing any new mode of operation. To the same effect are Florsheim v. Schilling, 137 U. S. 77, 11 Sup. Ct. 20, 34 L. Ed. 574, Morgan Envelope Co. v. Albany Paper Co. (C. C.) 40 Fed. 582, and Mahon v. MaGuire Mfg. Co. (C. C.) 51 Fed. 684.

[3] The argument supporting a combination in the present case is fully met by the Supreme Court in the so-called lead pencil case. Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719. The element of convenience, here so much asserted, was in that case given no consideration. The Circuit Court of Appeals for the Second Circuit, in American Chocolate Machinery Co. v. Helm Stetter Co., 142 Fed. 978, 980, 74 C. C. A. 240, held that:

"The distinction between a combination and an aggregation lies in the presence or absence of mutuality of action. To constitute a combination it is

essential that there should be some joint operation performed by its elements, producing a result due to their joint and co-operating action."

There has been some disposition shown by the courts to soften the rule laid down by Justice Matthews in Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749. It is now conceded that the opinion taken as a whole did not justify the construction at first placed upon it. Fairly read, its true meaning is well stated by Mr. Merwin, in his book entitled "Patentability of Inventions," as follows:

"It may be gathered from this case that in a patentable combination there must be a new inter-reaction of some sort between the several elements. * * * It is not sufficient that one element is ineffective without the others —that its function is useless except in combination with other functions—but the function of one must be modified in some way by the function of another, so that the function of one element is not the same in combination that it was in the place whence it was taken; a peculiar function must be developed in the combination. This need not be true of every element in the combination, but it must be true of some one element, or of several elements, and the virtue of the combination must inhere in this peculiarity of function developed by it."

The opinion was cited in Palmer v. Corning, 156 U. S. 343, 15 Sup. Ct. 381, 39 L. Ed. 445, and in many other cases. In Spear Stove & Heating Co. v. Kelsey Heating Co., 158 Fed. 622, 85 C. C. A. 444 (C. C. A. 3d Cir.), it was held that, where the elements relied on merely brought to the alleged combination their own several functions, the patent was not valid. The assembly of a damper in the middle flue of a three-flue stove and a portable base plan did not involve invention. Bussey v. Excelsior Mfg. Co., 110 U. S. 131, 4 Sup. Ct. 38, 28 L. Ed. 95. Merely bringing of the devices into juxtaposition where each could work out its own result was held not to be invention. Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241; Palmer v. Corning, supra. So, also, Heald v. Rice, 104 U. S. 737, 26 L. Ed. 910; Hendy v. Iron Works, 127 U. S. 370, 8 Sup. Ct. 1275, 32 L. Ed. 207; McCarty v. Lehigh Valley R. R. Co., 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358; Union Edge Setter Co. v. Keith, 139 U. S. 530, 539, 11 Sup. Ct. 621, 35 L. Ed. 261.

In Thatcher Heating Co. v. Burtis, 121 U. S. 286, 7 Sup. Ct. 1034, 30 L. Ed. 942, it is said:

"There is no specific quality of the result [of the association of the elements] which cannot be definitely assigned to the independent action of a single element. There is, therefore, no patentable novelty in the aggregation of the several elements, considered in itself."

To the same effect are Fond du Lac County v. May, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714; Brinkerhoff v. Aloe, 146 U. S. 515, 13 Sup. Ct. 221, 36 L. Ed. 1068; Double Pointed Tack Co. v. Two Rivers Mfg. Co., 109 U. S. 117, 3 Sup. Ct. 105, 27 L. Ed. 877; Wright v. Yuengling, 155 U. S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64; Mosler Safe Co. v. Mosler, 127 U. S. 354, 8 Sup. Ct. 1148, 32 L. Ed. 182; Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co., 174 U. S. 492, 498,

19 Sup. Ct. 641, 43 L. Ed. 1058; Warner Instrument Co. v. Stewart & Clark Mfg. Co., 185 Fed. 507, 107 C. C. A. 607; Alexander v. De Moulin Bros. & Co., 199 Fed. 145, 117 C. C. A. 627. This court has given this question careful consideration in Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 C. C. A. 23, where the defense of aggregation was overruled. "Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well known function, the result is not a patentable combination, but an aggregation of elements," says the court in Richards v. Chase Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991.

The presumption of validity growing out of the grant is strongly relied upon by appellee to sustain the patent. In Palmer v. Corning, supra, the court says:

> "There is no doubt that in this as in all similar cases the letters patent are prima facie evidence that the device was patentable. Still we are always required, with this presumption in mind, to examine the question of invention vel non upon its merits in each particular case."

In the present case we have no hesitancy in holding that the presumption of validity has been overcome. While we have great respect for the opinion of the Eighth Circuit Court of Appeals, the decision of that court herein does not convince us that the device of the patent constitutes a valid combination. Had this phase of the case been as thoroughly presented to the District Court as it has been here, we think the decision must have been otherwise.

In view of our conclusion as to aggregation, we do not deem it necessary to consider the other questions raised in the record.

The decree of the District Court is reversed, with the direction to dismiss the bill for want of equity.

RICE v. PALISADES REALTY & AMUSEMENT CO. et al.

(Circuit Court of Appeals, Third Circuit. April 4, 1916.)

No. 2082.

PATENTS ⊂=328—INVENTION—AMUSEMENT VEHICLE.

The Rice patent, No. 822,302, for an amusement vehicle, consisting of the old car of such railways, running on an endless track, but made in the form of an auto touring car, and carrying on brackets auto wheels, which perform no function, but are engaged and rotated by a short rail when passing the station, is 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 Robert F. Rice (Walter Ottel, as administrator, substituted) against the Palisades Realty & Amusement Company and another. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 231 Fed. 763.

Samuel E. Darby, of New York City, for appellant.

Wakelee, Thornall & Wright and Edwin J. Prindle, all of New York City, for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Robert F. Rice filed a bill charging the Palisades Realty & Amusement Company with infringing patent No. 822,302, granted to him June 5, 1906, for an amusement vehicle. On final hearing that court, in an opinion reported at 231 Fed. 763, directed the bill be dismissed. From a decree so adjudging, this appeal was taken.

The devices of both parties and the general art are set forth at length in the foregoing opinion, reference to which saves present restatement. Full argument of the case in this court and due examination of the proofs satisfy us the court below committed no error in dismissing this bill. In the final analysis the case narrows to the question of whether it involved invention to put a pair of idler wheels on an automobile frame mounted on a wheeled truck of an amusement railroad car. The invention is embodied in claim 1, which reads:

"In an amusement vehicle, the combination, with a car mounted upon a wheeled truck, of an extra set of idler wheels carried by the car, and means for engaging said idler wheels at certain times to insure their rotation."

In other words, Rice took the wheel truck in common use on amusement railways, and on the passenger body of it, which in this case was an imitation of an auto touring car, attached four side brackets, on which he placed four automobile wheels. These wheels were idlers, and performed no function in supporting the car. In fact, they did not revolve until the truck reached the station where passengers got on and off. At such station were placed spring-supported tread rails which engaged the idler auto wheels and caused them to revolve as

the truck reached and left the station. Amusement railways were old, trucks to support bodies for carrying passengers were old, and the case narrows down to the question whether it involved invention to use idler wheels on an automobile frame on an amusement railway.

To us it is clear it did not. The wheels have no mechanical relation to the car or its operation. They are simply attached to four brackets fastened on the side of the vehicle. The use of illusory moving idler wheels was known before, and while the putting of such idlers on an auto amusement frame was a bright, clever idea and a happy thought, it did not rise to the level of inventive originality. To give a monopoly for 17 years to every one who lit on a bright and clever novelty would be to throttle, instead of encourage, genuine inventive originality.

The decree below is affirmed, on the ground that Rice's patent was invalid.

GENNERT v. BURKE & JAMES, Inc.

(District Court, S. D. New York. April 17, 1916.)

PATENTS ⊂=292—SUITS FOR INFRINGEMENT—DISCOVERY.

In a suit for the infringement of a patent, where plaintiff has pointed out the parts of defendant's machine which he claims to be an infringement, he cannot be compelled to point out the elements in his own claim which he charges are infringed, at least not without a showing by defendant that he was in honest doubt as to plaintiff's meaning.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446; Dec. Dig. ⊂=292.]

In Equity. Suit by Gustav C. Gennert against Burke & James, Incorporated. On motion by the defendant to compel the plaintiff to answer certain interrogatories, which would require plaintiff to state what elements in the defendant's machine he asserts correspond with the several elements in the claim sued on. Motion denied.

Goepel & Goepel, of New York City, for plaintiff.
Clifford E. Dunn, of New York City, for defendant.

LEARNED HAND, District Judge. This is a new question, raised by the effort to establish a practice for the trial of patents in open court which shall sufficiently advise each side of the position of the other. The plaintiff has already pointed out to the defendant what parts of the defendant's machine infringe; but he has not pointed out what part corresponds to each element of each claim, and he now urges in excuse that to do so may be fatal to his success, for, he says, the judge might give him relief and yet upon an interpretation of the claims different from that on which he will go to trial.

Strictly speaking, the motion is wrong in any event, for it does not ask the plaintiff to disclose any evidence in the case, but his own interpretation of the facts. It would more properly, therefore, arise on a motion for a bill of particulars, in which the party is asked to make more definite his position; but I do not wish to dispose of the

motion upon so narrow a ground. The substantive question is whether the plaintiff should be compelled so narrowly to disclose what his position will be.

Theoretically, perhaps, there is no good reason why a party should not be compelled to disclose the rationale of his position in the utmost detail, or at least of the alternative positions which he means to take before the court. Practically such a requirement would involve more friction and annoyance than it would be worth in the usual case. After a plaintiff has told what part of the machine he claims to be an infringement, there ought to be usually no difficulty in understanding what he means, without pointing out in what particular part each element is embodied. There may be cases in which the difficulties are so great of knowing the plaintiff's position that such relief would be proper, but that could only be in a case where the defendant showed satisfactorily that he was in honest doubt as to what the plaintiff could mean. No such showing is made in this case.

Motion denied.

CRAWFORD v. NEW SOUTH FARM & HOME CO.

(District Court, S. D. Florida. October 7, 1915.)

1. INTERNAL REVENUE ⟸19(1)—STAMP TAX—JUDICIAL SALES.

Under Revenue Act Oct. 22, 1914, c. 331, § 22, Schedule A, 38 Stat. 762, imposing a stamp tax on all conveyances, deeds, instruments, or writings whereby lands are conveyed, revenue stamps of the proper amount must be attached to a deed executed by a master in chancery or other court officer empowered by a federal court to make a sale of land and execute a conveyance, as a master appointed for such purpose performs no judicial function, and the tax is not imposed on a proceeding by the court but on the litigants.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸19(1).]

2. COSTS ⟸193—DISBURSEMENTS—STAMP TAX.

The cost of internal revenue stamps attached to a deed executed by a master in chancery empowered to make a sale of land and execute a conveyance will be taxed as a part of the costs of the case.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 656; Dec. Dig. ⟸193.]

In Equity. Suit by William Crawford, as trustee, against the New South Farm & Home Company. On master's request for instructions. Master instructed in accordance with the opinion.

Rushmore, Bisbee & Stern, of New York City, and Bisbee & Bedell, of Jacksonville, Fla., for complainant.

H. L. Anderson, of Jacksonville, Fla., for defendant.

CALL, District Judge. This matter comes before me upon the report of the special master heretofore appointed herein, asking for instructions as to whether: (1) Documentary revenue stamps should be attached to the master's deed made pursuant to decree of this court; and (2) if such stamps should be attached, then what amount?

[1] Schedule A of the Revenue Act of 1914 (Act Oct. 22, 1914, c. 331, § 22, 38 Stat. 762) contains the following:

"*Conveyance.* Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, * * * when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or incumbrance thereon, exceeds $100.00 and does not exceed $500.00, 50 cents; and for each additional $500.00 or fractional part thereof in excess of $500.00, 50 cents," etc.

This language is amply broad enough to cover master's deeds, or in fact any deed to land made pursuant to an order of court by an officer duly authorized, unless there is some reason inherent in the office of a special master in chancery or other court officer empowered to make the sale and sign the conveyance, which prevents the operation of the act.

I have been referred to the case of Stirneman v. Smith, 100 Fed. 602, 40 C. C. A. 581, as shedding some light on this subject. In that case (the certificate of a notary public as to depositions) the court does use language comparing a notary public performing such duties to a "referee," "examiner," or "master in chancery," "whose functions are clearly judicial."

I have also been referred to Farmers' Loan & Trust Co. v. Council Bluffs Gas & Electric Light Co. (C. C.) 90 Fed. 806, where the very point now before me was adjudicated.

The language of the act of 1914, in so far as the question now being considered, is identical with the act before the court in the last-mentioned case. And the court there held that such deed required the proper stamps to be affixed.

As I read the various cases deciding questions relating to the taxing acts passed by the Congress, the test seems to be whether the act involves the performance of a judicial duty, such as the certificate of the notary to the depositions, etc., or is a mere ministerial act. Now it does not appear that a special master appointed to make a sale of property and execute a conveyance to same is performing any judicial function under order of the court. But, it is said, it is the court making the sale and conveying the property through its master. Would Congress have a right to tax a proceeding by this court? Is this such taxation, or is it not a taxation on the litigants? The title sold and conveyed is the title of the defendant, in the action, not the title held by the court or its officer. By the master's deed only the title possessed by the defendant is conveyed. Instead of the defendant actually making the deed (in which case stamps would clearly have to be affixed), his title is conveyed through the master to the purchaser at the foreclosure sale. On principle I cannot see that this should make the stamps requirement of the act inapplicable to master's deeds.

[2] The amount of such stamps is 50 cents for the first $500, and 50 cents for each additional $500 of the consideration, and can be readily arrived at by a computation. The cost of said stamps will be taxed as a part of the costs of this case.

Reference was made in argument to a decision on this question by the state court. I presume the ground of decision in that case was

that it was in effect taxing the proceedings of the state court, and to that extent an invasion of the state sovereignty. That question cannot arise as to the proceedings of this court.

The master will attach the proper amount of stamps to the deed in question, and include such amount in his report to the court.

In re PRICE.

Ex parte WYOMING APARTMENT CO.

(District Court, S. D. New York. April 4, 1916.)

BANKRUPTCY ⇐14—JURISDICTION OF PROCEEDINGS—"PLACE OF BUSINESS."

A traveling salesman, whose only compensation was commissions on sales, has no "place of business," so as to give jurisdiction of his petition for voluntary bankrupts to the District Court of a district in which he did not reside, but to which he returned from his trips, and where he spent almost half his time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⇐14.

For other definitions, see Words and Phrases, First and Second Series, Place of Business.]

In Bankruptcy. In the matter of Joseph J. Price, bankrupt. On motion of the Wyoming Apartment Company to dismiss the voluntary petition in bankruptcy for lack of jurisdiction. Motion granted.

In this case the bankrupt is a traveling salesman for one Glass, of White street, in the city of New York. His only compensation consists of commission on sales, which average about $700 a year. The territory in which he does business is throughout the United States. He is concededly a resident of New Jersey. His only business consists of being a salesman, and he spends more than half his time upon the road. Although not stated in the papers, it was stated at the bar, and not disputed, that he spends about one month in New York and six weeks on the road, thus alternating during the year. The question is whether his voluntary petition is within the jurisdiction of this court, upon the ground that his principal place of business is in the Southern district of New York.

Alison M. Lederer, of New York City, for petitioner.
Otto Greenberger, of New York City, for bankrupt.
Edward W. Drucker, of New York City, for a creditor.

LEARNED HAND, District Judge (after stating the facts as above). If the bankrupt has any place of business whatever, there can be no doubt that New York is the principal one. Here he returns, and here he spends most of his time. I am disposed to interpret the phrase "place of business" in accordance with In re Lipphart (D. C.) 201 Fed. 103, a decision rendered in this district. Remington in his second edition, § 35 (volume 1, page 63), criticizes this decision, and his is a high authority, yet it seems to me somewhat to force the natural use of language to say that "a clerk, even, is a business man," though it is true that he "has a place where he does his business," which may be quite another matter.

I should hardly think that any one except possibly the clerk or salesman himself would be likely to speak of him as "a business man." The phrase can certainly not include every place where a man earns his living, unless we are prepared to violate the natural use of language in the interests of consistency. A journeyman plumber, a textile operator, a janitor, or a bookkeeper has a fixed place where he earns his living and does such business as he has, yet I think we should feel it an inapt expression to say that he had a "place of business," as those words are commonly used. Moreover, as Judge Mayer points out in Re Lipphart, supra, the phrase was not improbably used with design for convenience in administration. The probable residence of creditors is one consideration; the situs of property is another. Neither property nor creditors are much to be expected where a man works for another upon a salary or a commission.

The case is certainly not free from doubt, and upon doubtful questions it is generally our custom in this district to follow former decisions for uniformity's sake until the matter can be authoritatively settled in the Circuit Court of Appeals.

The motion will therefore be granted, and the proceedings dismissed for lack of jurisdiction; no costs.

THE LEONARD F. RICHARDS.

(District Court, E. D. New York. March 14, 1916.)

MARITIME LIENS ⊂=37—PRIORITY—FORTY-DAY HARBOR RULE.

The 40-day rule regulating priority of liens on tugs and other vessels engaged in harbor navigation, even though extended backward in 40-day periods, will not be applied to give priority between claims all of which are so old that the rule of reasonable diligence and laches controls.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 58–70; Dec. Dig. ⊂=37.]

In Admiralty. Suit by Edgar F. Luckenbach and others against the steam tug Leonard F. Richards. Decree for libelants.

Carter & Carter, of New York City, for libelant Luckenbach.

Alexander & Ash, of New York City, for libelant Schuyler & Caddell.

Foley & Martin, of New York City, for libelants Guinan, Shewan, and Sullivan.

CHATFIELD, District Judge. This case must be considered with regard to the express language of the rule adopted March 27, 1915, in this district:

"Proper respect for the opinion of the Circuit Court of Appeals, in the case of Smith et al. v. Samuel Little et al., 221 Fed. 308, 137 C. C. A. 136, decided February 9, 1915, requires adoption or promulgation and application of the '40-day rule' in this district.

"Harmony of rule with the Southern district of New York is thus secured and is of course desirable. As no opposition is made the motion might be granted without further statement, but a formal recognition of the 40-day

rule will avoid further argument and is hereby made as a basis for future procedure in this district. March 27, 1915."

Upon the direct statement of the Court of Appeals that such a rule should be adopted, the court acted accordingly. The Samuel Little, 221 Fed. 308, 137 C. C. A. 136. Whether that rule is to be held applicable to the facts, whether the rule approved of also in the case of The Samuel Little, supra (that as a matter of principle the time should be divided backward from the *date of process,* into 40-day periods), whether the season or voyage rule should be invoked, or whether the other claims are so old that the rule of reasonable diligence and laches controls, the libelant Sullivan should recover in full, as his claim is the only one within the first and second 40-day period, within the time of a voyage, or even of a season.

The other claims go back from 19 to 26 months. To hold that the least stale of four claims so stale that they have not been sued upon for 19 months, and then have been brought into court only because of the action of another claimant who is diligent, should be allowed to apply a rule which governs only claims less than 40 days old, or to do more than to share equally in whatever has not been lost by their delay, would seem contrary to principle as well as practice.

The claim of Sullivan is allowed in full, and the other claims should be prorated.

AMERICAN STEEL FOUNDRIES v. CHICAGO, R. I. & P. RY. CO.

In re HIDDEN et al.

(District Court, S. D. New York. November 24, 1915.)

RECEIVERS ⟸206—ANCILLARY RECEIVER—ORDER APPOINTING—INJUNCTION.

An order appointing an ancillary receiver, which contained the usual clause restraining the defendant and other persons from interfering with, attaching, levying on, or in any manner disturbing the claims, choses in action, and causes of action of the defendant, or from taking possession of, or in any way assuming control of, said claims, choses in action, or causes of action, does not prevent the prosecution of a suit theretofore instituted by stockholders of the defendant corporation against it and others.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 410; Dec. Dig. ⟸206.]

In Equity. Suit by the American Steel Foundries against the Chicago, Rock Island & Pacific Railway Company. On petition of Frances E. Hidden and another for a modification of the order previously entered appointing an ancillary receiver. Petition denied.

On April 20, 1915, the District Court of the United States for the Northern District of Illinois, Eastern Division, made its order appointing receivers of defendant company, and on April 24, 1915, made another order appointing one of the receivers as sole receiver of certain claims and choses in action. Thereafter an application in ancillary proceedings was made to the District Court for the Southern District of New York, and this court, on September 18, 1915, made the usual ancillary order. In that order was the usual injunction clause enjoining the railway company, its officers, etc., "and all other persons whomsoever, * * * from interfering with, attaching, levying upon,

or in any manner whatsoever disturbing the claims, choses in action, and causes of action of the said defendant railway company, * * * or any of the property and premises of the defendant railway company, * * * or from taking possession of, or in any way assuming a control of, or from interfering with, the said claims, choses in action, causes of action, or any other property or premises, or any part thereof."

The petition of Frances E. Hidden and Sadie E. Hidden sets forth that each of said persons is the holder of certain shares of stock of defendant company, and that in November and December, 1914, actions were commenced by said Hiddens, respectively, against defendant and others; and petitioners ask that the order appointing the ancillary receiver be modified, by striking out from the same so much as purports to confer upon the ancillary receiver exclusive authority to prosecute certain claims, and by striking out so much of the order as purports to enjoin all persons except the railway company, its officers, etc., and by striking out so much as enjoins petitioners.

Roger Foster, of New York City, for the motion.

Spooner & Cotton and Lewis L. Delafield, all of New York City, opposed.

MAYER, District Judge (after stating the facts as above). The application is to modify an order appointing an ancillary receiver of the Chicago, Rock Island & Pacific Railway Company. The order was made by another judge, but this application has been referred by him to me.

The order is not to be construed as preventing the prosecution of the Hidden actions in the New York Supreme Court and the obtaining of such relief therein as may be lawful and proper, and I need not now speculate as to the effect of possible judgments on property in the possession of a receiver appointed by this court. The original order herein made was properly made, and I see no cause for or need of modification.

Motion denied, and settle order on one day's notice.

WILLIS v. O'CONNELL.

(District Court, S. D. Alabama, S. D., at Mobile. April 24, 1916.)

No. 22.

1. INJUNCTION ⟸98(2)—SUBJECTS OF PROTECTION—INJUNCTION AGAINST LIBEL.

Equity will not restrain by injunction the publication in the public press of a libel, even though its effect will be to injure complainant in reputation, property, or business.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 170; Dec. Dig. ⟸98(2).]

2. INJUNCTION ⟸118(4)—SUBJECTS OF PROTECTION—INJUNCTION AGAINST LIBEL.

Allegations in a bill that libelous charges made by defendant in his newspaper against customers of complainant who have signed testimonials to the merit of the article he sells will prevent other customers from giving like testimonials, and thus injure complainant's business, and that a

judgment against defendant could not be collected, do not warrant the granting of an injunction by a court of equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 236–238; Dec. Dig. ⟸118(4).]

3. JURY ⟸12(1), 21(1)—LIBEL AND SLANDER ⟸68—FORM OF REMEDY—RIGHT TO JURY TRIAL.

Under the Constitution of the United States the only remedy of one injured by a libelous publication is by criminal prosecution or an action at law, in which the defendant is entitled to a trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 27, 28, 34, 82, 99, 101, 103, 134, 136, 137, 141; Dec. Dig. ⟸12(1), 21(1); Libel and Slander, Cent. Dig. §§ 169, 170; Dec. Dig. ⟸68.]

4. EQUITY ⟸46—JURISDICTION—ADEQUATE REMEDY AT LAW—"IRREPARABLE INJURY."

The mere fact that a defendant cannot be compelled to pay a judgment at law cannot make the plaintiff's remedy there inadequate, or his injury irreparable, in such sense as to give a federal court of equity jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159–163; Dec. Dig. ⟸46.

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

5. LIBEL AND SLANDER ⟸48(1)—PRIVILEGE—COMMENTS ON PROPRIETARY MEDICINES.

It is within the rights of the publisher of a newspaper to question the efficacy of a proprietary medicine offered to the public, and to advise the public against it, within the limits of the law, which prescribes penalties, civil and criminal, for libelous publications.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 144, 147; Dec. Dig. ⟸48(1).]

In Equity. Suit by G. F. Willis against John C. O'Connell. On motion for preliminary injunction, and on motion by defendant to dismiss. Injunction denied, and bill dismissed.

Armbrecht, McMillan & Caffey, of Mobile, Ala., for plaintiff.

Gaillard & Mahorner and Bestor & Young, all of Mobile, Ala., for defendant.

HENRY D. CLAYTON, District Judge. This bill is brought by Willis, a citizen of Georgia, against O'Connell, a citizen of Alabama, for injunction to restrain him from publishing in his newspaper comments and criticisms reflecting upon the plaintiff, upon a proprietary medicine and the business of plaintiff in selling the same, upon the testimonials commending the efficacy of the medicine, and upon the authors of such testimonials.

The plaintiff has the exclusive distributing agency in Alabama and five other Southern states of the Cooper Medicine Company, an Ohio corporation, engaged in the manufacture of a proprietary medicine known as and sold under the name of "Tan-lac." The medicine is shipped to the plaintiff at a certain fixed price and then resold by him at an enhanced price.

Under the agency contract, the plaintiff has a pecuniary interest in the prospective increased sales of the commodity in his allotted territory, and he avers that:

"Anything which will injure the reputation of Tan-lac, or which will adversely affect the sale thereof in said six states, or to destroy or injure or impair the popularity of Tan-lac, will seriously affect the profits and revenues of the plaintiff."

Further, the plaintiff alleges that Tan-lac has enjoyed a large sale in said six states, and has been held in high esteem by the users of proprietary medicines therein, and has been indorsed by those who have bought and used the same and received benefits therefrom.

It is also stated that the plaintiff, under his contract with the medicine company, has charge of and pays the costs of advertisements of said remedy; that by the use of newspaper advertising and the printing of the testimonials of prominent citizens in such states, who have used the remedy and received its beneficial effects, the plaintiff has built up a large and lucrative business in the sale of Tan-lac; that the compound has enjoyed the good will and esteem of a large part of the population of said states, so much so that the sale of the same in these states has aggregated 500,000 bottles during the past 12 months; and that the gross revenue from such sales during that time was more than $350,000; further, that the plaintiff has established an agency for the sale of the remedy in the city of Mobile, and has appointed an agent there; that plaintiff has recently begun advertising the article in the daily newspapers published at Mobile; that, as part of said advertisement, he has published indorsements and testimonials from a number of prominent people touching the curative properties of the remedy, and that he has done this for the purpose of increasing the popularity and sales of Tan-lac in the Mobile community, but that he has not published any advertisement in the Mobile Tribune (a newspaper published once a week), of which the defendant is editor and publisher.

Again, plaintiff alleges that the medicine company has complied with the federal and state laws regarding the manufacture, distribution, and sale of proprietary medicines; that, notwithstanding plaintiff has proceeded with his business in a lawful manner for the purpose of increasing the sale and popularity of the remedy, "the defendant has willfully, maliciously, and with the intent and purpose of injuring the reputation of Tan-lac, destroying its popularity, preventing the increased sale thereof, and for the purpose of decreasing and hampering the sale of said remedy, thereby injuring plaintiff in the profits to be derived by him from the sale of such remedy, published in said Mobile Tribune certain libelous, defamatory, and scurrilous articles regarding Tan-lac and those who have given testimonials of its curative powers, and that the purpose and intent of the publication of such articles was to hold the said Tan-lac and the plaintiff, and those who have indorsed Tan-lac and testified to its beneficial effects, up to ridicule and contempt and public scorn and derision, for the sole purpose of injuring the sale of said medicine; and that if such publications be continued it would make it difficult, if not impossible, to secure further testimonials, to the great injury of the property and rights of the plaintiff"; that in said articles so published by the defendant in the Mobile Tribune, among other things, it is said:

"Tan-lac is a skyrocket in the pyrotechnics of fakery."

Also:

"Tan-lac is another increasingly popular alcoholic nostrum that presumably fills a much felt want—want, not need—in those parts of the country where Demon Rum has been driven into the tall timbers."

And in another article:

"The medical faker is a contemptible Pharisee with an ungodly gospel. He is a poisonous viper, ambuscaded in the grass, and he should be utterly exterminated."

And then the plaintiff avers:

"That the statement above quoted was intended to apply to plaintiff, and that the object and purpose of said statement was not only to injure plaintiff in his personal reputation, but also to adversely affect, if not to injure and destroy, the sale of Tan-lac in this community."

From one of the several published articles, which are made exhibits to the bill, the following is taken:

"As was shown in the excerpts from the Journal of the American Medical Association exposing 'Tan-lac' which were published in the Tribune last week, the happy hunting grounds of L. T. Cooper and his kindred are in the prohibition states of the South where the patent medicine with the 'kick,' being easily procured, has taken the place of the straight 'red-eye' among a lot of the former topers. One of those 'recommendations' contained in the florid 'Tan-lac' advertisements published this week, was from ———, touted as a former mayor of ———. The published testimonial from Mr. ——— contained this paragraph: 'Since my second dose I have suffered none of those troubles to which I refer, and I really believe I am going to get perfectly well and strong again. Won't that be wonderful at my age? Well, certain it is that Tan-lac is a wonderful medicine, and you know that I am not given to puffing mere experiments. I am rather orthodox as to materia medica.'

"Substitute for the High-Ball.

"With the convivial reputation Mr. ——— established in ———, while he was ——— [a public officer], his statement is easily paraphrased into 'I am not given to quaffing experiments and am rather orthodox as to the brand of firewater I consume.' As an authority on the materia medica which comes from corn through a still Mr. ——— should have a rating of AA1 in the distiller's handbook—if there is such a work published.

"Mr. ——— is a type of that peculiar infliction under which the state of Alabama has long labored, the political prohibitionist. There are prohibitionists in the state—and many in Mobile—to whom the Tribune takes off its hat in respectful obeisance. They are conscientious and consistent in their opposition to the liquor evil and they impress their fellow citizens with their honesty of purpose. But Mr. ——— is not one of these. At the time he first appeared as a prohibitionist in ——— and afterwards in ———, his daily life was the antipodes of the conscientious temperance advocate. It is stated that he was prevented from using his influence with the ——— as a director of that paper to make it an advocate of prohibition by the fact that he was at the time the owner of property in ——— which was being rented for immoral purposes.

"This is the man who thinks that 'Tan-lac' is 'wonderful at my age,' and who gives indorsement to the nostrum. And why shouldn't he get 'well' and 'strong' after a few doses of 'Tan-lac'? Enough of the stuff, with its 16% of alcohol, would make even a cripple want to kick the chief of police. Given a chaser of Tan-lac on Tan-lac, Mr. ——— would probably want to buy a 'flivver' or climb a telegraph pole."

And again the following excerpts are from the published articles which are made a part of the ground of plaintiff's complaint:

"If it is a violation of the corrupt practices act for a politician to print advertising matter in the form of news without clearly stating that it is an ad, why should patent medicine companies be exempt? In the press agent copy supplied the ——— [a newspaper] and the ——— [another newspaper] last Tuesday glorifying 'Tan-lac,' the article ran in the ——— [first newspaper] as straight news. The ——— [second newspaper] added the magic symbols 'Adv.' after it. A mere question of newspaper ethics, but the ——— [second newspaper] was the more honest with its readers."

And again:

"A Recipe That will Save You a Dollar.

"Take alcohol, liquor or plain tiger booze,
And label it 'Tan-lac,' for 'internal use,'
Not forgetting to add in the smallest dimension
Licorice, glycerine, aloes and gentian,
And when you have finished you'll find you've devised
Common old whisky but thinly disguised."

Let me remark in passing that doubtless this doggerel would inflict much pain upon the sensibilities of a teacher of belles lettres, and should not, in his opinion, be allowed to go to print. He would doubtless say that it does not even possess the swing and jingle, the atoning grace, of a limerick. However, I am not to treat it as a poetic effusion, but as a prosy libel, which I shall do in connection with the alleged libelous utterances above and hereafter quoted.

Plaintiff avers:

"That Tan-lac is not an alcoholic nostrum; that it is not intended as a substitute for whisky or alcoholic spirits; that it is not a beverage, but that it is a legitimate remedy, prepared and sold as such, with a statement upon the label of the bottle in which it is contained that it does contain 18 per cent. of alcohol, which is a smaller percentage of alcohol than most proprietary remedies; that alcohol is a solvent and is used in many remedies as a preservative and solvent, and is so used in many remedies prescribed by members of the medical profession, and is by them recognized as a legitimate ingredient in various medicines and remedies."

And then the names of six other proprietary medicines are set out in connection, with the averment that Tan-lac contains a less percentage of alcohol than any of them, and that these other remedies are in common use.

It is averred that articles of the character mentioned have appeared in three issues of the Mobile Tribune, namely, those of March 11, 18, and 25, respectively, 1916; and copies of the articles so published are made exhibits to the bill.

It is also alleged that the defendant intends and proposes to publish another article of a similar, if not more, defamatory nature regarding said Tan-Lac, and that the publication of such an article will work irreparable harm to the plaintiff's business; that the defendant is a man without financial responsibility, and therefore has no means to respond in damages to plaintiff for the injury which plaintiff would sustain by reason of the publication of such article, and that the publication of such an article would cause irreparable injury to plaintiff, for which damages at law would not be an adequate remedy; and again that it is the purpose and intent of defendant to continue, from time to time, to print other articles of a nature similar to, if not more

scurrilous and more defamatory than, the articles mentioned in the bill regarding the said Tan-lac, with the purpose and intent of injuring and destroying plaintiff's business, and that unless such action is restrained by injunction the business of plaintiff will suffer irreparable injury, and plaintiff will suffer irreparable injury, etc.

The prayer is to enjoin and restrain—

"the defendant from publishing in the Mobile Tribune or elsewhere any article of a libelous, defamatory, or scurrilous character regarding or concerning or respecting the proprietary remedy known as Tan-lac, or regarding or concerning plaintiff, or regarding or concerning any person who has given or may give testimonials as to the curative or beneficial effects of Tan-lac."

[1] Of course, if the bill is to restrain a libel of the plaintiff, a court of chancery will not grant an injunction. This is the decided law, too long and too well established to need comment or to require citation of authority. It is also settled law in the United States that a court of chancery will not grant an injunction to restrain libelous utterances injurious to property rights and business. This was decided by Mr. Justice Bradley, sitting on the circuit bench while he was a justice of the Supreme Court of the United States, in Kidd v. Horry, 28 Fed. 773, and the rule stated in that case has been approved in a long line of judicial opinions in cases collated in the various reference books and in digests.

[2] But the plaintiff insists that his bill is not uniphase in character; that is, that the ground of relief is not predicated solely upon a libel of the plaintiff and of his property rights, but that he predicates his right to injunctive relief upon the averment that the newspaper articles published and to be published—

"are and will be libelous, defamatory, and scurrilous articles regarding Tan-lac and *those who have given testimonials regarding its curative powers*, and that the purpose and intent of the defendant in the publication of such articles was, and will be, *to hold* Tan-lac and plaintiff and *those who have indorsed Tan-lac and testified to its beneficial effects up to ridicule, contempt and public scorn and derision* for the sole purpose of injuring the sale of the said medicine, *and that it would make it difficult if not impossible to secure further testimonials*, to the great injury of the property rights of the plaintiff."

It will be observed that the inartificiality of pleading is not considered and because such defect can be cured by amendment without changing the character or purpose of the bill.

[3] This contention, the last above stated, is but an effort to bring this controversy within the class of those rare cases wherein injunction was used to prevent injury to the plaintiff's trade and business where the same was being done by the publication of circulars and other advertisements. Of these the most frequently cited case is Emack v. Kane (C. C.) 34 Fed. 46. In this connection, it must be confessed that the reasoning in some cases whereby the rights enjoyed by a man in respect to property or business is so different and greater than those others enjoyed by him as an individual is intellectual refinement, to be delighted in by metaphysicians rather than to be adopted by the courts in the administration of justice. The good citizen has the right to enjoy and use his reputation free from direct defamation as well as from

vile innuendoes of a skulduddery artist who may employ the picturesque slang of the street for his embroidery. And yet, for the protection or vindication of his good name the citizen must be remitted to his remedy at law—to a civil action, or criminal prosecution, or both. This must be so, for a court of chancery in this country has never had the power to enjoin the commission of such a wrong, and cannot by stretch of authority exercise such power, and besides the Constitution of the United States, and in this jurisdiction the Constitution of Alabama, both alike, positively forbid:

"Congress shall make no law * * * abridging the freedom of speech, or of the press." Const. U. S. Amend. art. 1.

"That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Const. Ala. 1901, § 4.

But, if the law did not inhibit, doubtless courts of chancery would be justified by the argument of ab inconvenienti in refusing the use of its extraordinary powers to censor the public press. It is manifest that the assumption of such duty would impose upon the courts a task of insuperable difficulty.

It is not that a libel or slander is not reprehensible, not that a libel or slander may not cause irreparable injury, but because courts of chancery, in the exercise of their extraordinary powers, have refused to interfere in such cases, leaving the aggrieved party to his remedy at law; and, further, it is not within the authority of any court, or of any other governmental agency, by any sort of censorship to abridge the right belonging to every man to freely speak and publish his sentiments. It is true that this rule has been modified to some extent in England, but by statute. With us in the United States it remains unsubtracted from.

Chancellor Kent—and he lives in the estimation of the legal profession as one of the few very great chancellors—said that:

"It has accordingly become a constitutional principle in this country that every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and that no law can be rightfully passed to restrain or abridge the freedom of speech or of the press."

In Pomeroy's Equity Jurisprudence (1906) vol. 6, § 629, the following excellent statement is made, and it is quoted, though it must be conceded that so elementary a proposition needs no supporting authority:

"Equity will not restrain by injunction the direct publication of a libel as such, however great the injury to property may appear to be. This is the rule in the United States, and was formerly the rule in England. The present rule contra rests on statute."

And again it is said in High on Injunctions (4th Ed.) vol. 2, p. 968:

"Courts of equity will not restrain publication of libels, or works of a libelous nature, even though such publications are calculated to injure the credit, business, or character of the person aggrieved, and he will be left to pursue his remedy at law."

See, also, the case of Cit. Light, H. & P. Co. v. Montgomery L. & W. P. Co. (C. C.) 171 Fed. 553, and authorities there cited. In that case it was said:

"Defendant has a right to have the truth or falsity of the issue determined by a jury trial as at common law. That it cannot get in a court of equity. * * * Neither a court of equity nor any other department of government can set up a censorship in advance over such matters, and prevent a person from exercising his constitutional right. He has the right to publish, if he chooses to take the consequences. After he has spoken or written falsely, the criminal law can punish him, and the civil court amerce him in damages. That such redress may not be adequate in all cases, and in some cannot be, is quite apparent; but the remedies named are all that the Constitution permits a court to employ against slanders upon a man's credit and business standing."

Recurring to the contention of the plaintiff, that it is the intimidation by the publication of derogatory articles against the users who furnish testimonials as to the efficacy of Tan-lac as a specific, or at least as a remedy, for which a court of chancery can use the process of injunction, it is well to consider the cases cited and relied upon in support of that contention.

In the case of Emack v. Kane, supra, the defendant was enjoined from sending out circulars injurious to complainant's trade and business. This is the first case cited by the plaintiff. This case was carefully weighed and analyzed by that distinguished jurist, Chief Justice Parker, in the opinion rendered for the court in Marlin Firearms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310. It is there said:

"Emack v. Kane (C. C.) 34 Fed. 46, which is a decision by a single judge, seems to be the authority and support of plaintiff's contentions. A very careful examination of it, however, leads to the conclusion that its attempt to overthrow the reasoning of Mr. Justice Bradley in Kidd v. Horry, supra, was not successful."

That case is clearly distinguishable from the one made by this plaintiff.

In Farquhar v. National Harrow Co., 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755, defendant was enjoined from sending out letters or notices threatening plaintiff's agents and customers with suit for infringement of a patent, and this was shown to be a fraudulent attack upon the property rights of the plaintiff and *in restraint of trade or in furtherance of unfair competition.* Freedom of speech or of the press was not the question presented. The injunction was against unfair competition or unlawful restraint of trade—the controversy being between two business competitors.

It would be difficult to reconcile the opinions in patent, boycott, and restraint of trade cases. However, in none of such cases as I have examined is there found any conflict as to the general rule that an anticipated libel of person or property cannot be the subject of injunctive process. But if, and if, indeed, this Farquhar Case be a supporting authority for the plaintiff's contentions here, then I think it is balanced by the case of Flint et al. v. Hutchinson Smoke Burner Co. (C. C.) 38 Fed. 546, which is as strong against the plaintiff's position

as the other case is strong in its support. There injunction was sought to restrain the defendant from falsely and maliciously charging infringement of letters patent by notifying plaintiff's prospective customers that they would be held responsible for using such patent. The court stated:

"This is very clearly a bill to restrain the publication of a libel that injuriously affects complainant's business"

—and refused the injunction.

Adriance Platt & Co. v. National Harrow Co., 121 Fed. 827, 829, 58 C. C. A. 163, was another patent case and a contest between competitors. The freedom of the press was not involved, and in that case Emack v. Kane, supra, appears to have been the authority relied upon, instead of the better reasoned out and recognized case of Kidd v. Horry, supra; the question being there, in the Adriance Case, whether defendant should not be enjoined against threatened suits for infringement of a patent. The court said:

"Undoubtedly the owner of the patent is acting within his rights in notifying infringers of his claims and threatening them with this litigation if they continue to disregard them, nor does he transcend his rights when, the infringer being a manufacturer, he sends such notices to the manufacturer's customers, if he does so in good faith, believing his claims to be valid, and in an honest effort to protect them from invasion."

And then, further, the court said that the notices in that case—

"were inspired by a purpose to intimidate the complainant's customers, and coerce the complainant, by injuring its business, into becoming a licensee of the defendant."

So, again, it may be said that the injunction was granted *against acts* in restraint of trade, and threats, coercion, and intimidation. The right of free speech or freedom of the press was not raised.

In Dittgen v. Racine Paper Co. (C. C.) 164 Fed. 84, there was a contest between competitors over patent rights, where the plaintiff sought to enjoin the defendant from circulating by letters and through salesmen "threats of suit and dire consequences unless his claims under his patent are respected." It was held that the defendant had been guilty of unfair competition. The question of libel was not before the court.

Lewin v. Welsbach Light Co. (C. C.) 81 Fed. 904, was another instance of the infringement of a patent, and the court, among other things, said:

"* * * That if, upon the one hand, those circulars should turn out to be such notices as the defendants could rightly give, or if, on the other hand, they shall, when produced, appear to be mere libels, this suit should not be sustained."

With due deference to the plaintiff's learned counsel, I cannot agree with him that this last cited case supports the doctrine in Emack v. Kane, supra, as he construes it.

The case of Palmer v. Travers (C. C.) 20 Fed. 501, is not reported in full, but it appears that the bill there was to enjoin the defendant from threatening suits for an infringement of patent rights. It is

not clearly stated how the case was presented to the court. The bill was dismissed.

Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421, was a boycott case. There an injunction was granted against acts of violence or threats of violence. But it is better to quote the language used by the court, which is:

"It is further ordered, adjudged, and decreed that said injunction shall not be construed as inhibiting said defendants from threatening to boycott, except by violence, or from boycott by peaceful means, or from the distribution of the said boycott circulars, * * * or from threatening to injure, affect, or ruin the business * * * by any effort to compel or induce said customers or others to refrain from business relations with complainant, which effort shall not be accomplished by violence or threat of violence."

Pratt Food Co. v. Bird, 148 Mich. 631, 112 N. W. 701, 118 Am. St. Rep. 601, arose on a statute of the state of Michigan creating a food and dairy commissioner, whose duty it was to prevent deception in the sale of stock food. The bill sought to enjoin the commissioner from sending out bulletins stating that plaintiff's cattle food did not come within the requirements of the act. The court said:

"Nor, as a general proposition, will the court interfere to restrain the publication of libel. But we held in Beck v. Railway Teamsters' Protective Union, supra, that injunction will lie to restrain a combination of persons from acts which tend to ruin complainant's business by bringing to bear upon his customers intimidating and coercive means. The principle which should rule the present case is identical."

In that case the right of a person to express his sentiments in print or by word of mouth was not considered. The injunction was sought to enjoin a ministerial act of a state officer.

Gilly v. Hirsh, 122 La. 966, 48 South. 422, 20 L. R. A. (N. S.) 972, does not overrule or qualify the doctrine in State v. The Judge, etc., 34 La. Ann. 744. In the Gilly Case, besides other acts complained of, the defendant was charged with the effort of preventing customers from dealing with his competitor in a store next door to the plaintiff by placing a sign in his (defendant's) window, worded:

"Don't be misled. This store window and display has no connection with the would-be auction next door. Our entrance is at the corner."

It does not appear that defendant's right to maintain such a sign was directly involved. The plaintiff prayed that the defendant be enjoined from inducing, crowding, or rushing persons from in front of complainant's show window into the adjoining shop, and from representing to persons who stopped at complainant's window that complainant's store was part of said auction shop, and from in any manner interfering with the orderly conduct of complainant's business. The court said that the—

"defendant no doubt, has the right to maintain a sign in his window notifying the public that the window is his and has no connection with the business carried on next door."

The words, "defendant has a right to maintain a sign," found in the above quotation, appear to be all that was said tending to show—

if, indeed, it has such tendency when considered with the context—that the matter of publication was touched upon.

The counsel for plaintiff cited other cases; but they are not, in so far as the present case is concerned, essentially different from those reviewed. Some of the cases cited may resemble, in some nonessential respects, the one here to be determined; but they are not any more like it than those which have been covered by the foregoing comments. "Nullum simile est idem."

I think it not unfair to say that the cases cited and relied upon by the plaintiff, as a general proposition, may be divided into three classes: (1) Where patent rights were infringed; (2) where unlawful violence was threatened and imminent; and (3) where unfair and illegal methods were resorted to by competitors in trade. Of course, this case does not involve the infringement of a patent, or any threatened unlawful violence, or any unfair competition in trade.

[4] The plaintiff's averment that the defendant is financially unable to respond in damages can add no force to the plaintiff's case. Of course, it is a general rule that, where a plaintiff has undoubted rights that are not adequately protected by remedy at law, he may have the aid of equity; but the mere fact that the defendant cannot be compelled to pay a judgment at law cannot make the plaintiff's remedy there inadequate, nor can such fact render the plaintiff's injury irreparable in such sort as to authorize this court to take equitable cognizance of plaintiff's grievance. To be sure, this is so, for considering this case in this aspect, it is resolved into this: The plaintiff's remedy at law is inadequate, and his injury is irreparable, because the defendant is insolvent; and if this be a sound principle we must conclude that a rich man is allowed to freely utter libels, subject only to action for damages and criminal prosecution in a court, where he can have his rights passed upon by a jury; whereas the poor man is deprived of a trial by jury because he is poor, and subject, I may say, to the summary injunctive process of chancery. Such cannot be the law.

There are, it is true, many cases of trespass to realty, involving probable and threatened injury to property and property rights only, where injunction was granted on the ground that the injury would be irreparable. The law governing in such cases is, in Deegan v. Neville, 127 Ala. 471, 478, 29 South. 173, 175 (85 Am. St. Rep. 137) well stated to be:

"What is an irreparable injury is often difficult to determine; but it must in all cases be determined by the particular facts shown in the case under consideration. It is said by Pearson, J., in Gause v. Perkins, 56 N. C. 179 [69 Am. Dec. 728]: 'The injury must be of a peculiar nature, so that compensation in money cannot atone for it; where, from its nature, it may thus be atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable.'"

The case of Deegan v. Neville, supra, and the case of Gause v. Perkins, cited in the quotation, involved trespass to realty. Of course no such case is presented by this plaintiff, and I can find no authority, and no good reason has been suggested, that because a defendant is

insolvent he may, on such account, be enjoined from printing a libel, although the libel may indirectly injure the plaintiff's business.

In this connection it is profitable to read the case of Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873, where the court considered the Seventh Amendment to the Constitution of the United States, declaring that "in suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved," and said:

"That provision would be defeated if an action at law could be tried by a court of equity, as in the latter court a jury can only be summoned, at its discretion, to ascertain special facts for its enlightenment. Lewis v. Cocks, 23 Wall. 466, 470 [23 L. Ed. 70]; Killian v. Ebbinghaus, 110 U. S. 568 [4 Sup. Ct. 232, 28 L. Ed. 246]; Buzard v. Houston, 119 U. S. 347, 351 [7 Sup. Ct. 249, 30 L. Ed. 451]. And so it has been held by this court 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury. Hipp v. Babin, 19 How. 271, 278 [15 L. Ed. 633]."

Of course, the provision of the United States statutes forbidding equity suits in federal courts where there is an adequate remedy at law is declaratory of what was always the law and was intended to emphasize the rule. N. Y. Guaranty Co. v. Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484; Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451. The want of a remedy is entirely distinct from the inability to obtain the fruits of a remedy; and where there is a complete remedy at law, the fact that there is difficulty in its execution will not authorize the court of equity to grant relief. Thompson v. Allen Co., 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472.

In the very able supplemental brief of plaintiff's attorneys it is insisted that although the court may not enjoin a libel of plaintiff personally, or of his property, or a libel of plaintiff's customers, as simply a libel, that yet the court ought to enjoin the defendant from libeling the plaintiff's present and future customers, because such libel "would make it difficult, if not impossible, to secure further testimonials, to the great injury of the plaintiff." In other words, the plaintiff's case, by this apparent concession coupled with this last contention, is reduced to this: injunction is prayed for because plaintiff says that he will have other customers; that such customers, or some of them, out of those who may buy 500,000 bottles of his medicine, or other large number, per annum hereafter, would probably be willing to give testimonials to the efficacy of his medicine; and that probably the publication by defendant of unfriendly comments on such testimonials and wrongful strictures on the authors would curtail the sales of plaintiff's medicine in the community where the defendant's newspaper is circulated.

This is believed to be not an unfair statement of plaintiff's case. If so, I think he goes very far afield. In view of the large number of customers that the plaintiff has, and that he claims he will have hereafter, it is not probable that any considerable number, who may desire

to give testimonials, would be deterred from doing so by the publications made by defendant. It is not probable that defendant would cover, by the circulation of his weekly newspaper, very much of the large territory embraced in the states of Alabama, Mississippi, Florida, Georgia, Tennessee, and Arkansas. Nor is it probable that the defendant will, with any sort of exaggeration or distortion of facts, publish derogatory utterances of any very considerable number of plaintiff's probable customers. Doubtless, if he should attempt to make such extensive publication, he would encounter insuperable difficulties and subject himself to numerous actions and prosecutions for libel. Very likely the difficulty of the task and the prospect of being amerced in damages and punished for criminal offenses will restrain the defendant from abusing his privilege to freely publish his sentiments. However that may be, the probable imposition of damages and punishment is the only deterrent afforded by the law.

[5] Perhaps I may be justified in taking a further view of this case; that is to say: Has not the defendant the right to question the efficacy of plaintiff's remedy—to expose it as a nostrum, if it be a nostrum? The plaintiff, on his side, informs us that he is spending large sums of money for advertising his remedy in the newspapers, and that he intends to continue this method for increasing the sale of the same. This he has a right to do, and the medicine may not be a nostrum; and it may be true that, if properly used in some cases, the medicine will prove of benefit to suffering men and women. In short, the plaintiff may be in every good sense rightfully earning such money; and the defendant may be endeavoring to injure, and may intend to continue to injure, the plaintiff in his right to accumulate a fortune by the sale of the medicine. But the plaintiff has questioned the right of the defendant to criticize the remedy, to make statements as to its therapeutic value; and the plaintiff has also questioned the right of the defendant to criticize the testimonials in laudation of his remedy, and, in connection with the criticisms of such laudations, to say something touching the personal history and habits of those who give such testimonials.

May not a newspaper publisher expose, if he can, the plaintiff's medicine—if it be a quack medicine? May he not in good faith tell the public of the dishonesty and fraud practiced upon the public? Is there anything so sacred about proprietary medicines, or those who cooperate in a plan to further their sales and increase the profits of the vendor, that a newspaper man shall be required to cease publishing what he believes to be the truth, or cease to attack the business methods of medicine vendors, when and where he believes the co-operating testimonials, in furtherance of the scheme to sell such medicine, are sinister and not founded in truth? I think he may do so, but within the limits of the law which prescribes penalties, civil and criminal, for libelous publications.

Again, why may not any man publish his warning to his fellow sufferers not to use what he honestly believes to be a nostrum, but rather, on the other hand, to take the advice of a competent physician

and his medicine also, if any be prescribed? The allegation of the plaintiff that some medicinal compounds are sometimes prescribed by physicians cannot aid the plaintiff in his application for an injunction. It may be conceded that such practice is sometimes followed, but it must not be forgotten that in such cases it is followed, not without the benefit of the learning and discriminating judgment of the man specially taught and skilled in diagnostics and well informed as to the therapeutic value of drugs, and their use or harm when rightly or wrongly compounded or administered in proper or improper cases. Every intelligent layman knows, or ought to know, that the formulas of many standard medicinal compounds are printed in the United States Pharmacopœia (approved by the medical profession and adopted as the standard for the country by Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. 1913, §§ 8717–8728]), and that these compounds are frequently used by good physicians. And every wise layman ought to know that the physician uses his learning, experience and judgment in prescribing any medicine, simple or compounded.

Why may not the newspaper man advise people to consult a doctor rather than take a widely advertised remedy, or why may he not suggest that a man afflicted with an exceeding great thirst ought to confine himself, preferably, to the use of water, milk, and grape juice, or take a "high-ball," or a "whisky straight," or a compound made by himself of "corn," "bourbon," or "rye" and water and sugar, rather than drink a mixture of aloes, glycerine, licorice, and gentian, advertised and sold for whatsoever purpose under whatsoever name.

There is no intimidation of the plaintiff in this case, unless it can be said that a mere newspaper criticism is an intimidation. There is no intimidation or hindrance of any of the customers of the plaintiff in buying the medicine of the plaintiff. The case made by the bill shows that the defendant has animadverted on the testimonial of one man, and the man himself, and that defendant threatens to make other similar strictures upon like testimonials and their authors. The author of the testimonial criticized in this case, and those who may stand in his like place hereafter, if libeled, will have their remedy or remedies as the law provides. The plaintiff here is not their guardian, nor can he make his case one where the court must, at his instance, give such people who are strangers to this suit, any protection by injunction now prayed for against any libelous utterances made or to be made by the defendant against such person or persons. This court cannot restrain the libel of the plaintiff or his medicine; and for greater reason, certainly, the court cannot, at the instance of the plaintiff, restrain a libel of persons not parties to this suit.

In my view, if the defendant's publications, which for present purposes may be conceded to be libelous, should lessen the plaintiff's sales and the profits from his business, this fact would furnish no reason why this court should interpose its injunction against such publications. Again, ought not the question of whether the defendant is, or is not, warranted in making such publications to be determined by a jury? Moreover, under the facts presented by the bill, is not the defendant's

side of this controversy justiciable in a court of law, and only in such a court? I think so.

In the oral argument it was mildly suggested that the references made by defendant's counsel to those fundamental and inalienable rights embraced in the Bill of Rights, and the inheritance of every American citizen, were in the nature of a Fourth of July oration, and ought not to influence the court against plaintiff's theory that probable intimidation of probable customers of the plaintiff, not from buying his medicine, but from furnishing testimonials in regard thereto, should be a ground for injunction. But the suggestion is met by the insuperable fact that in any justiciable cause at least some of these rights are involved and must be respected. We cannot conceive of the administration of a government of laws, and not of men, without recognizing the right of trial by jury; the right of one to be confronted by his accusers; the right to be heard by self or counsel; the right to due process of law; the right to the equal protection of the law; the right not to be discriminated against on account of race or color; the right to worship God according to one's conscience; and the right of the citizen to freely speak and publish his sentiments, subject only to lawful punishment, or damages, or both, for the abuse of this last right—a privilege of inestimable value in a land of free people.

This cause having been submitted upon the application of the plaintiff for injunction, as above stated, and at the same time upon the motion of the defendant to dismiss the bill for a want of equity, I have reached the conclusion that injunction must be denied, and that the motion to dismiss the bill must be granted.

It is accordingly decreed.

MEMORANDUM DECISIONS.

CRAPO et al. v. BLAIR et al. (Circuit Court of Appeals, Sixth Circuit. January 4, 1916.) No. 2725. Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Beaumont, Smith & Harris and Donnelly, Lyster, Brennan & Munro, all of Detroit, Mich., for appellants. John C. Bills and Thos. S. Parker, both of Detroit, Mich., for appellees. Dismissed pursuant to stipulation.

DIAMOND POWER SPECIALTY CO. v. VULCAN SOOT CLEANER CO. (Circuit Court of Appeals, Sixth Circuit. April 5, 1916.) No. 2840. Cross-Appeals from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Barthel & Barthel, of Detroit, Mich., for appellant. Connolly Bros., of Washington, D. C., for appellee. Dismissed pursuant to stipulation.

HERNDON et al. v. SLOAN et al. (Circuit Court of Appeals, Fifth Circuit. April 12, 1916. Rehearing Denied May 20, 1916.) No. 2856. In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Trespass to try title between J. H. Herndon and others and T. S. Sloan and others. From a judgment for Sloan and others, Herndon and others bring error. Affirmed. Ben B. Cain, of Dallas, Tex., and H. E. Lasseter, of Tyler, Tex., for plaintiffs in error. W. D. Gordon and Henry G. Russell, both of Beaumont, Tex., for defendants in error. Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. This is an action of trespass to try title, wherein a mass of documents, letters, reports, receipts, etc., were admitted in evidence over objections of the plaintiff in error, but to the admission of which no sufficient nor specific exceptions were taken. On the evidence admitted, the case seems to have been fairly and clearly submitted to the jury by the trial judge, and no exception was reserved to his charge, or any portion thereof. We find no reversible error assigned, nor patent of record. Judgment affirmed.

HEROLD v. PUBLIC SERVICE ELECTRIC CO. et al. (Circuit Court of Appeals, Third Circuit. April 22, 1916.) No. 2063. In Error to the District Court of the United States for the District of New Jersey; William H. Hunt, Judge. J. Warren Davis, U. S. Atty., of Trenton, N. J., for appellant. Frank Bergen, of Newark, N. J., for defendants in error. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. Excise taxes for the year ending December 31, 1912, were assessed against the Gas & Electric Company of Bergen County, and paid by Public Service Electric Company under protest. This action was brought to recover the amount so paid, upon the ground that the taxes were unlawfully assessed and collected. Judgment was entered for the plaintiffs upon findings by the District Court that prior to the year 1912 the Public Service Electric Company had acquired by lease all the property and franchises of the Gas & Electric Company of Bergen County, except its franchise to be a corporation, and during that year the lessor plaintiff was not "engaged in * * * carrying on or doing business" within the meaning of the Corporation Tax Law (Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [Comp. St. 1913, § 6300]). The

defendant sued out a writ of error, raising one of the questions recently considered and decided by this court in a number of cases in which the defendant and various public service corporations of New Jersey were parties. 229 Fed. 902, — C. C. A. —. Applying to the facts of this case the theory of the law there announced, we are of opinion that the lessor corporation was not "doing business" within the meaning of the act, and that the judgment below should be affirmed.

HEWITT LAND CO. et al. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. May 1, 1916.) Nos. 2779, 2780. Appeal from the District Court of the United States for the District of Oregon. Clarence L. Reames, U. S. Atty., of Portland, Ore., and Frank Hall, Sp. Asst. Atty. Gen., of San Francisco, Cal., for the United States. Dismissed for noncompliance by appellants with rules 23 and 24, 150 Fed. xxxii, xxxiii, 79 Fed. xxxii, xxxiii—failure of appellants to print record under rule 23, and to file a printed brief under rule 24.

J. G. WHITE & CO., Inc., v. THOMAS, District Judge. (Circuit Court of Appeals, Second Circuit. March 7, 1916.) Before COXE and ROGERS, Circuit Judges, and HOUGH, District Judge.

PER CURIAM. This court did not direct that a final judgment be entered; it simply directed that such proceedings be had in the District Court in accordance with the decision of this court "as according to right and justice and the laws of the United States ought to be had." The petition is denied.

In re JOHN A. ROEBLING'S SONS CO. In re NORTH ELECTRIC CO. (Circuit Court of Appeals, Sixth Circuit. March 10, 1916.) No. 2715. Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge. Tolles, Hogsett, Ginn & Morley and A. V. Cannon, all of Cleveland, Ohio, for petitioner. Ford, Snyder & Tilden, of Cleveland, Ohio, for bankrupt. Dismissed pursuant to stipulation.

In re JOHN A. ROEBLING'S SONS CO. In re NORTH ELECTRIC CO. (Circuit Court of Appeals, Sixth Circuit. March 10, 1916.) No. 2646. Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge. A. V. Cannon and Tolles, Hogsett, Ginn & Morley, all of Cleveland, Ohio, for petitioner. Ford, Snyder & Tilden and A. D. Baldwin, all of Cleveland, Ohio, for bankrupt. Dismissed pursuant to stipulation.

In re JOHN A. ROEBLING'S SONS CO. In re TELEPHONE IMPROVEMENT CO. (Circuit Court of Appeals, Sixth Circuit. March 10, 1916.) No. 2716. Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge. Tolles, Hogsett, Ginn & Morley and A. V. Cannon, all of Cleveland, Ohio, for petitioner. Ford, Snyder & Tilden, of Cleveland, Ohio, for bankrupt. Dismissed pursuant to stipulation.

In re JOHN A. ROEBLING'S SONS CO. In re TELEPHONE IMPROVEMENT CO. (Circuit Court of Appeals, Sixth Circuit. March 10, 1916.) No. 2647. Petition for Revision of Proceedings of the District Court of the United

States for the Northern District of Ohio; John M. Killits, Judge. A. V. Cannon and Tolles, Hogsett, Ginn & Morley, all of Cleveland, Ohio, for petitioner. Ford, Snyder & Tilden and A. D. Baldwin, all of Cleveland, Ohio, for bankrupt. Dismissed pursuant to stipulation.

KIMMERLE et al. v. LOWITZ. (Circuit Court of Appeals, Sixth Circuit. January 14, 1916.) No. 2706. In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge. Wm. F. McKnight, of Grand Rapids, Mich., for plaintiffs in error. Wilson & Johnson, of Grand Rapids, Mich., for defendant in error. Dismissed under rule 22 (150 Fed. xxxii, 79 C. C. A. xxxii).

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. SIMON. (Circuit Court of Appeals, Second Circuit. March 14, 1916.) No. 220. Appeal from the District Court of the United States for the Southern District of New York. John W. Griggs, Livingston Gifford, L. F. H. Betts, and James J. Cosgrove, all of New York City, for appellant. Walter H. Pumphrey, of New York City, for appellee. Abraham M. Beitler, of Philadelphia, Pa., and C. V. Edwards, of New York City, amicus curiæ, for William Cramp & Sons Ship & Engine Bldg. Co. Frederick W. Winter, of Pittsburgh, Pa., amicus curiæ, for National Electric Signaling Co. Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The decree of the District Court is affirmed, on the opinion of Judge Hough. 227 Fed. 906.

WARD, Circuit Judge (dissenting). The Navy Department contracted with one Simon to construct radio apparatus for certain vessels of war. Thereupon the Marconi Company filed a bill against Simon, alleging that in so doing he was infringing its patent, and praying for an injunction and accounting. The complainant moved for a preliminary injunction, and the defendant moved that the bill be dismissed. The District Judge denied the motion for a preliminary injunction, and granted the motion to dismiss, on the ground that the act of June 25, 1910 (36 Stat. 851 [Comp. St. 1913, § 9465]), made the government a licensee of the complainant patentee, and that the defendant Simon, in making the patented apparatus for a licensee, was not an infringer. For the purposes of this appeal Simon's apparatus, unless constructed under a license from the complainant, must be considered an infringement. A taking of property by eminent domain is an admission that the government is not the owner of the property taken and a promise to pay the owner is therefore implied. For such a taking by the government a patentee had previous to 1910 a right to recover in the Court of Claims (Rev. Stat. U. S. § 1059) and by the Tucker Act in the Circuit Court of the United States (Act March 3, 1887, c. 359, 24 Stat. 505). But the act of June 25, 1910, provided for an entirely different situation, viz. the government's asserting its right to use the thing or process patented without the consent of the patentee. For this situation there had been no remedy for the patentee against the government. I think Congress did not intend to create the relation of licensor and licensee between the government and the patentee when the government claimed to be acting within its rights, but merely to give the patentee what the title of the act correctly describes as additional protection, viz. a remedy in case of a tortious taking under a claim of right. That is the present case. Nor do I think that Congress intended to take away from patentees the right of suing independent contractors with the government. The case of officers of the government stands on a different ground because suing them is tantamount to suing the sovereign. Courts out of regard for public policy will no doubt refuse to interfere in proper cases with government activities by enjoining

independent contractors as a matter of discretion, just as the District Judge has done, but the bill should not be dismissed even if the injunction be denied. For these reasons I think that the decree, so far as it dismisses the bill, should be reversed.

MOUNTAIN TIMBER CO. v. BURKE et al. (Circuit Court of Appeals, Ninth Circuit. May 1, 1916.) No. 2749. Appeal from the District Court of the United States for the Southern Division of the Western District of Washington. E. C. Strode and Coy Burnett, both of Portland, Or., for appellant. A. E. Clark, of Portland, Or., Gordon & Easterday, of Tacoma, Wash., and I. E. Shrauger, of Mt. Vernon, Wash., for appellees. Dismissed by the clerk, under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi), pursuant to stipulation of counsel for respective parties, without costs to either party. For opinion below, see 224 Fed. 591.

THE ROBERT A. SCOTT. THE CHARLES H. PERKINS. (Circuit Court of Appeals, Second Circuit. March 14, 1916.) Nos. 189, 190. Appeals from the District Court of the United States for the Eastern District of New York. Foley & Martin, of New York City (William J. Martin and G. V. A. McCloskey, both of New York City, of counsel), for appellant. Convers & Kirlin, of New York City (J. P. Kirlin and Robert S. Erskine, both of New York City, of counsel), for appellee. Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed.

In re SLAUGHTER. In re TENNESSEE PACKING & STOCKYARDS CO. In re KENTUCKY OIL REFINING CO. (Circuit Court of Appeals, Sixth Circuit. March 10, 1916.) No. 2713. Petition for Revision of Proceedings of the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge. Keeble & Seay, of Nashville, Tenn., for petitioner. Jordan Stokes, of Nashville, Tenn., for bankrupt. Dismissed by consent of counsel.

In re SLAUGHTER. In re TENNESSEE PACKING & STOCKYARDS CO. In re GOSHORN. (Circuit Court of Appeals, Sixth Circuit. March 10, 1916.) No. 2714. Petition for Revision of Proceedings of the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge. Keeble & Seay, of Nashville, Tenn., for petitioner. W. O. Vertrees and Stokes & Stokes, all of Nashville, Tenn., for bankrupt. Dismissed by consent of counsel.

UNITED STATES v. WILLIAMS et al. (Circuit Court of Appeals, Fifth Circuit. April 14, 1916.) No. 2792. Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge. Action by the United States against Benjamin H. Williams and another to vacate a patent for land. Decree for the defendants, and the United States appeals. Affirmed. George Whitfield Jack, U. S. Atty., and Robert A. Hunter, Asst. U. S. Atty., both of Shreveport, La., James R. Monk, of Leesville, La., and Jas. G. Palmer, of Shreveport, La., for appellees. Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. This is a suit in equity to vacate a patent for land issued to Benjamin H. Williams, and declaring void and of no effect an act of sale of said Williams conveying the patented land to Nona Mills Company, Limit-

ed. From an adverse judgment in the District Court this appeal is taken. The trial judge made no specific findings, only the general finding in the decree "that the demands of the United States, set forth in the bill of complaint filed herein, be and the same are hereby rejected and disallowed, and accordingly that this suit be and the same is hereby dismissed at the plaintiff's costs," so that we are not advised whether he found that the patent was not fraudulently obtained, or that the Nona Mills Company, Limited, was a bona fide purchaser, or both. From our analysis of the evidence, which is decidedly complicated, in the light of the briefs and oral arguments, we find that the government failed to establish that the patent was obtained through fraud and misrepresentation, and that the Nona Mills Company, Limited, was a bona fide purchaser for a valuable consideration. Either finding is sufficient to warrant dismissal of the bill. The decree appealed from is affirmed.

In re WALSH. In re HARRIS MILLINERY CO. (Circuit Court of Appeals, Sixth Circuit. February 14, 1916.) No. 2862. Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Wm. R. Walsh, of Port Huron, Mich., for petitioner. Campbell & Dewey, of Detroit, Mich., for bankrupt. Dismissed pursuant to stipulation.

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